

**REDACTED**

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND GOVERNMENT OF THE REPUBLIC OF POLAND FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, SIGNED ON 7 OCTOBER 1996**

**- and -**

**THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULES OF ARBITRATION, ADOPTED ON 15 DECEMBER 1976**

**- between -**

**FLEMINGO DUTYFREE SHOP PRIVATE LIMITED**

**(“Claimant”)**

**and**

**THE REPUBLIC OF POLAND**

**(“Respondent”, and together with Claimant, the “Parties”)**

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**AWARD**

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**Tribunal:**

Dr. Wolfgang Kühn

Mr. John M. Townsend

Professor Hans van Houtte, Presiding Arbitrator

**Registry:**

Permanent Court of Arbitration

**Date:**

12 August 2016

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## LIST OF DEFINED TERMS

Act on State-Owned Enterprises	Act of 25 September 1981 on State-Owned Enterprises
Administrative Court	Administrative Court in Warsaw
Supreme Administrative Court	Supreme Administrative Court of Poland
Airport Act	Act on Specific Rules Governing the Preparation and Implementation of Investments Concerning Public Airports of 12 February 2009
Base Period	Period used for the calculation of damages for the original lease terms for space in Warsaw Chopin Airport's Terminal 1 and Terminal 2
CEUTP	Centre for EU Transport Projects
CEUTP Agreement	Agreement for the implementation of the project on the "Integration of Terminal 1 with Terminal 2 and modernisation of Terminal 1" between PPL and CEUTP, signed on 24 September 2008
Chopin Airport	Warsaw Chopin Airport
Claimant	Flemingo DutyFree Shop Private Limited
COGS	Costs of goods sold
Comprehensive Analysis of the Capacity	PPL's Comprehensive Analysis of the Capacity of Chopin Airport
Court of Appeal	Warsaw Court of Appeal
Customs Chamber	Customs Chamber of Warsaw
DCF method	Discounted cash flow method
Deloitte Report (also First Deloitte Report)	Expert report of Deloitte dated 30 October 2014
Deloitte Report No. 2	Expert report of Mr. Andrew Flower and Mr. Anthony Charlton of Deloitte dated 20 July 2015
DFZ	Chopin Airport's duty-free zone
DFZ Rules	Rules of Operation of the Duty Free Zone at the Warsaw Chopin Airport
District Court	District Court of Warsaw
Extension Period	Period used for the calculation of damages for the potential extension of lease terms for space in Terminal 1 and Terminal 2
FET	Fair and equitable treatment
First PwC Report	Expert report of Mr. Abdul Sirshar Qureshi of PricewaterhouseCoopers (PwC ) dated 8 August 2014

Fixed Elements	Components of Claimant's calculation of damages that, according to Claimant, Respondent's quantum experts have agreed to, not challenged, or even relied upon
General Lease Conditions	General lease conditions applicable to the Lease Agreements
Gross Margin	The percentage of total sales revenue that BH Travel retained after incurring the direct costs associated with the acquisition of goods sold
HR costs	Employee costs
IBA Rules	International Bar Association Rules of 29 May 2010 on the Taking of Evidence in International Arbitration
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
Lease Agreements	11 lease agreements entered into by PPL and BH Travel for the premises in Terminals 1 and 2 of Chopin Airport
Ministry of Transport	The Polish Ministry responsible for transport and infrastructure at any given time (the Ministry of Transport from May 2006, the Ministry of Infrastructure from November 2007, the Ministry of Transport, Construction and Maritime Economy from November 2011, and the Ministry of Infrastructure and Development from November 2013).
Mirza Report	Expert report of Mr. Abbas Mirza of ICF Limited dated 30 April 2015
Mirza Supplemental Calculation	Supplemental calculation of Mr. Abbas Mirza of ICF Limited dated 6 November 2015
NAFTA	The North America Free Trade Agreement
One-Off Termination Costs	One-off costs incurred by BH Travel in order to end its Chopin Airport operations and vacate the premises in 2012, including staff severance, the costs of liquidating fixed assets, and transportation of inventory costs
Operating Losses	Losses incurred by BH Travel in relation to the Chopin Airport shops that remained in operation between 17 February 2012 and 14 August 2012 (reduced by the revenues generated by the shops during that period)
OPI&E	Operational Programme Infrastructure and Environment (2007-2013)
PAX	The rate of passenger traffic at Chopin Airport
Poland (also Respondent)	The Republic of Poland
Performance Agreement	Performance Agreement of 2010 signed by PPL and the Ministry of Transport (at the time called the Ministry of Infrastructure)
PPL	Polish Airports State Enterprise

PPL Act	Polish Airports State Enterprise Act 1987
Regional Court	Regional Court of Warsaw
Respondent	The Republic of Poland
Requests	Claimant's document production requests nos. 1, 2, 4 and 9 directed to Respondent
Revised Post-Hearing Supplement to Deloitte Report No. 2	Revised post-hearing supplement to Deloitte Report No. 2 dated 30 November 2015
Second PwC Report	Second expert report of Mr. Abdul Sirshar Qureshi of PricewaterhouseCoopers (PwC) dated 4 May 2015
Scenario Calculations	The calculation of damages under different assumptions (described as Scenarios A, B, and C) that the Tribunal requested the Parties' experts to submit after the hearing
SPP	Spend per passenger at Chopin Airport
State Treasury Act	Act on Implementing Power Conferred on the State Treasury of 1996
Supervision Note	Supervision method note issued by the Ministry of Transport (at the time called the Ministry of Infrastructure) in August 2008
Tenancy Pattern Agreement	Draft "framework" lease agreement for the Lease Agreements, as included in the Documentation for the First Stage of the Tender Procedure, 5-8 August 2005
Terminal 1	Chopin Airport's Terminal 1
Terminal 2	Chopin Airport's Terminal 2
Treaty (also India-Poland Treaty)	Agreement between the Government of the Republic of Poland and the Republic of India for the Promotion and Protection of Investments dated 7 October 1996
UNCITRAL Rules	UNCITRAL Arbitration Rules 1976
Valuation Date as determined by the Tribunal	16 February 2012
Variable Elements	Components of Claimant's calculation of damages that, according to Claimant, have been challenged by Respondent's quantum experts
Vienna Convention	Vienna Convention on the Law of the Treaties of 1969
Working Capital	Stream of revenue consisting of the cash that BH Travel would have generated when its shops closed down by selling its unsold stock or inventory

## DRAMATIS PERSONAE

Ahuja, Atul	Founder of Flemingo DutyFree, former President of the Supervisory Board of Baltona and shareholder in Flemingo DutyFree
Ahuja, Viren	A shareholder in Flemingo DutyFree
Alfa-Center	Alfa-Center Sp. Z o.o.
Ashdod	Ashdod Holdings Limited
ATAMB	Poland's Air Traffic and Airport Management Board
Baltona	Przedsiębiorstwo Handlu Zagranicznego Baltona S.A.
Baltona-Heinemann	Gebruder Heinemann and Baltona-Heinemann Sp. z o.o.
Bastion	Bastion Capital Sp. z o.o.
BH Travel	BH Travel Retail Poland Sp. z o.o.
■ Mr. [RB]	Chopin Airport's Deputy Director for the Commercial Department
Charlton, Anthony	Partner at Deloitte Finance SAS, Respondent's expert on the quantum of Claimant's damages
CSI	Commodities Services International
Culex	Culex Sp. z o.o.
Dworniak, Maciej	Co-founder of Bastion and Member of Baltona's Management Board
Fivedex	Fivedex Investments Limited
Flemingo BVI	Flemingo International (BVI) Limited
Flemingo DutyFree (also Claimant)	Flemingo DutyFree Shop Private Limited
Flemingo Group	Group of companies associated with Flemingo DutyFree
Flemingo International	Flemingo International Limited
Flower, Andrew	Partner at Deloitte Finance SAS, Respondent's expert on the quantum of Claimant's damages
Globexxon	Globexxon Investment Limited
Grzybowska, Magda	Former President of Baltona's Management Board
Jarmuziewicz, Tadeusz	Polish Deputy Minister for Transport in February 2012
Jaroń, Tomasz	Former President of the Management Board of Baltona and Director of Bastion
Kazimierski, Piotr	Director of Business Development and Member of the Management Boards of Baltona and BH Travel
Kruk, Wojciech	Member of Baltona's Management Board
Kruszewski, Witold	Member of Baltona's Management Board
■ Ms. [IM]	Assistant to ■ Mr. [PN]

■ Mr. [MM]	General Director of PPL and the Director of Chopin Airport
Minister of Transport	The Polish Minister responsible for the Ministry of Transport ( <i>i.e.</i> , the Ministry responsible for transport and infrastructure at any given time, namely the Ministry of Transport from May 2006, the Ministry of Infrastructure from November 2007, the Ministry of Transport, Construction and Maritime Economy from November 2011, and the Ministry of Infrastructure and Development from November 2013).
Mirza, Abbas	Vice President of ICF International, Claimant's industry expert
■ Mr. [PN]	Chopin Airport's Director of the Commercial Department
Nowak, Sławomir	Polish Minister of Transport in February 2012
Qureshi, Abdul Sirshar	Partner at PricewaterhouseCoopers (PwC), Claimant's expert on the quantum of Claimant's damages
Rynasiewicz, Zbigniew	Polish Secretary of State in the Ministry of Transport
Sapphaire	Sapphaire International Limited
Sobieska, Anna	Project Manager at Baltona
Uryga, Andrzej	Member of Baltona's Management Board

## I. INTRODUCTION

### 1) The Parties

1. Flemingo DutyFree Shop Private Limited, the Claimant in this arbitration (“**Flemingo DutyFree**” or “**Claimant**”), is a company established under the laws of India, with its principal place of business at D 73/1 TTC Industrial Area, MIDC, Turbhe, Navi Mumbai, 400 705 India.
2. Claimant is represented by Mr. John Willems, Ms. Noor Davies, Ms. Hinda Rabkin, Mr. Samy Markbaoui, and Mr. Tom Cameron of White & Case LLP, 19 Place Vendôme, 75001 Paris, France; Mr. Ignacy Janas and Ms. Marta Cichomska of Wolf Theiss P. Daszkowski sp.k., ul. Mokotowska 49, 00-542 Warsaw, Poland; and Mr. Piotr Staroń of Staroń & Partners, Bagno 2 lok. 197, 00-112 Warsaw, Poland.
3. The Republic of Poland is the Respondent in this arbitration (“**Poland**” or “**Respondent**”). For the purposes of these proceedings, Respondent’s address is the State Treasury Solicitor’s Office, (Główny Urząd Prokuraturii Generalnej), Skarbu Państwa, ul. Hoża 76/78, 00-682 Warsaw, Poland.
4. Respondent was represented, until 29 February 2016, by Mr. Bartłomiej Niewczas, Mr. Jakub Ruiz and Ms. Joanna Szumilas-Balicka of Bird & Bird, Maciej Gawroński sp.k., ul. Ks. I. J. Skorupki 5, 00-546 Warsaw, Poland. Respondent was also and continues to be represented by Ms. Elżbieta Buczkowska and Ms. Joanna Jackowska-Majeranowska of Główny Urząd Prokuraturii Generalnej, Skarbu Państwa, ul. Hoża 76/78, 00-682 Warsaw, Poland.

### 2) The Background of the Dispute

5. A dispute has arisen between Claimant and Respondent, in respect of which Claimant commenced arbitration pursuant to the *Agreement between the Government of the Republic of Poland and the Republic of India for the Promotion and Protection of Investments* dated 7 October 1996 (“**Treaty**” or “**India-Poland Treaty**”) and the UNCITRAL Arbitration Rules 1976 (“**UNCITRAL Rules**”).
6. The subject matter of this dispute concerns Claimant’s interest, by way of its indirect shareholding in BH Travel Retail Poland Sp. z o.o. (“**BH Travel**”), in certain lease agreements for retail stores in Warsaw Chopin Airport (“**Chopin Airport**”). Plans to shut down Terminal 1 of Chopin Airport for a modernisation project led first to negotiations between BH Travel and the Polish Airports State Enterprise (“**PPL**”), the State-owned entity managing Chopin Airport, and then led to the eventual termination of BH Travel’s lease agreements by PPL.

## II. PROCEDURAL HISTORY

7. On 24 February 2012, Claimant wrote to Respondent providing formal notification of the dispute and requesting amicable dispute resolution.<sup>1</sup>

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<sup>1</sup> Letter from Counsel for Flemingo DutyFree to the Minister of Transport (S. Nowak) dated 24 February 2012, **Exhibit C-116**.

8. Claimant commenced these proceedings by a Notice of Arbitration dated 6 January 2014.<sup>2</sup>
9. Claimant invoked Article 9 of the Treaty, which provides:

**Settlement of Disputes between an Investor and a Contracting Party [sic]**

1. Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an Investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
2. Any such dispute which has not been amicably settled within a period of six months may, if both parties agree, be submitted:
  - (a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial or administrative bodies; or
  - (b) to international conciliation under the Conciliation Rules of the United Nations Commission for International Trade Law (UNCITRAL).
3. Should the Parties fail to agree on a dispute settlement procedure provided under paragraph 2 of this article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing or a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:
  - (a) If the Contracting Party of the investor and the other Contracting Party are both Parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes such a dispute shall be referred to the Centre; or
  - (b) if both parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings; or
  - (c) to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:
    - (i) The appointing authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.
    - (ii) The Parties shall appoint their respective arbitrators within two months,
    - (iii) The arbitral award shall be made in accordance with the provisions of this Agreement.
    - (iv) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either Party.
10. On 5 March 2014, pursuant to Article 7(1) of the UNCITRAL Rules and Article 9(3)(c)(ii) of the Treaty, Claimant notified Respondent of its appointment of Mr. John M. Townsend, of Hughes Hubbard & Reed LLP, 1775 I Street, N.W., Washington, D.C. 20006-2401, U.S.A., as the first arbitrator.
11. On 7 March 2014, pursuant to Article 7(1) of the UNCITRAL Rules and Article 9(3)(c)(ii) of the

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<sup>2</sup> Including Exhibits C-1 to C-5.

Treaty, Respondent appointed Dr. Wolfgang Kühn, of Heuking Kühn Lüer Wojtek, Georg-Glock-Straße 4, 40474 Düsseldorf, Germany, as the second arbitrator.

12. On 3 April 2014, in accordance with Article 7(1) of the UNCITRAL Rules, the co-arbitrators appointed Professor Hans van Houtte, of Van Houtte Partners BVBA, A. Smetsplein 3D, 3000 Leuven, Belgium, as the presiding arbitrator.
13. On 7 May 2014, following a case management conference held on the same day and having considered the Parties' positions, the Tribunal issued **Procedural Order No. 1**, in which it recorded that the Parties had confirmed the valid constitution of the Tribunal, fixed The Hague as the place of arbitration, and set out procedural rules as well as a schedule for the proceedings.
14. On 8 August 2014, Claimant submitted its **Statement of Claim** and accompanying documents.<sup>3</sup>
15. On 7 November 2014, Respondent submitted its **Statement of Defence** and accompanying documents.<sup>4</sup>
16. On 17 November 2014, the Parties each submitted requests for the production of documents by the other side.
17. On 22 December 2014, the Parties submitted their outstanding document production requests in the form of completed Redfern Schedules, containing their respective requests and the objections and replies thereto, to the Tribunal for determination.<sup>5</sup> On 16 January 2015, the Tribunal issued **Procedural Order No. 2**, in which it ordered the production of certain documents to the other side, subject to the following safeguards for privilege and confidentiality: (i) the Parties shall produce documents which they claim are confidential only to the other side's counsel (marked "for counsel's eyes only"); and (ii) the Parties shall submit privilege logs regarding the documents that they have withheld or redacted on the basis of privilege by 13 February 2015. The Tribunal also granted Claimant the opportunity to reformulate certain of its document production requests by 23 January 2015.
18. On 23 January 2015, in accordance with Procedural Order No. 2, Claimant submitted a supplemental Redfern Schedule including its reformulated document production requests and an application that the Tribunal reconsider its decision on another of Claimant's requests. By letter dated 28 January 2015, Respondent commented on Claimant's supplemental Redfern Schedule. On 29 January 2015, the Tribunal issued **Procedural Order No. 3**, in which it decided on Claimant's reformulated requests and its application for reconsideration.
19. On 13 February 2015, Respondent submitted a privilege log prepared by PPL dated 12 February 2015. By letter dated 24 February 2014, Respondent asserted that it was unable to produce the requested documents covered by the privilege log because they were either in PPL's sole possession and control or their production depended on PPL's consent, and because PPL was not willing to produce or consent to the production of the requested documents. Claimant submitted,

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<sup>3</sup> Exhibits C-6 to C-127, legal authorities, Exhibits CL-1 to CL-61, witness statements, Exhibits CWS-1 to CWS-3, and an expert report of Mr. Abdul Sirshar Qureshi of PricewaterhouseCoopers dated 8 Aug. 2014 ("First PWC Report", Exhibit CER-1).

<sup>4</sup> Exhibits R-1 to R-116, legal authorities Exhibits RL-1 to RL-25, witness statements, Exhibits RWS-1 to RWS-2, and an expert report of Deloitte dated 30 October 2014 ("Deloitte Report", Exhibit RER-1).

<sup>5</sup> Claimant submitted Exhibit C-128 and legal authorities, Exhibits CL-62 to CL-66 together with its Reply to Objections to the Request for Production of Documents dated 22 December 2014.

by letter dated 27 February 2015, that Respondent's non-production of documents was in violation of Procedural Order No. 2 and that Respondent should be ordered to produce the relevant documents immediately, failing which adverse inferences should be drawn against Respondent in respect of the content of the documents not disclosed.

20. Having considered Respondent's submission of 24 February 2015, and Claimant's submission of 27 February 2015, the Tribunal decided on 5 March 2015 that: (i) the Tribunal reserves the right to infer from Respondent's non-production of documents that such documents would be adverse to Respondent's interests; (ii) the Claimant may suggest and justify the inferences that it suggests the Tribunal should draw in its Reply; and (iii) the documents not produced by Respondent for the reasons stated in its letter dated 24 February 2015 may not be produced at a later stage of the proceedings. As an alternative, the Tribunal suggested the involvement of an independent expert, who would be tasked with reviewing the documents and assessing the claims of privilege and confidentiality.
21. On 5 March 2015, Claimant requested the Tribunal to order Respondent to produce a certain document that Claimant believed was being withheld by Respondent in violation of Procedural Order No. 2, and requested the Tribunal to confirm that any documents produced "for counsel's eyes only" could be shared with the Parties' experts. On 12 March 2015, Respondent commented on Claimant's request.
22. On 12 March 2015, the Parties commented on the Tribunal's suggestion to involve an independent expert to resolve the outstanding document production requests. Claimant objected to the Tribunal's suggestion, stating that the proposed independent expert procedure would delay the proceedings and prejudice the preparation of Claimant's Reply. Respondent submitted that PPL had not been cooperating in the past and that it could not ensure that PPL would allow the review of the relevant documents by an independent expert. Having considered the Parties' positions, the Tribunal decided on 14 March 2015 that no independent expert procedure would be commenced.
23. By e-mail dated 17 March 2015, the Tribunal dismissed Claimant's document production request of 5 March 2015, on the grounds that Respondent had stated that the requested document did not exist, and the document which Claimant intended to share with its expert did not fall within the ambit of the expert's report.
24. On 5 May 2015, Claimant submitted its Reply (**Claimant's Reply**) and accompanying documents.<sup>6</sup>
25. On 30 July 2015, Respondent submitted its Rejoinder (**Respondent's Rejoinder**) and accompanying documents.<sup>7</sup>
26. On 20 August 2015, the Parties submitted their respective witness notifications.

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<sup>6</sup> Exhibits C-129 to C-297, legal authorities, Exhibits CL-67 to CL-113, and a second expert report of Mr. Abdul Sirshar Qureshi of PricewaterhouseCoopers dated 4 May 2015 ("**Second PWC Report**"; **Exhibit CER-3**), as well as an expert report of Mr. Abbas Mirza of ICF Limited dated 30 April 2015 ("**Mirza Report**"; **Exhibit CER-2**).

<sup>7</sup> Exhibits R-117 to R-148, legal authorities, Exhibits RL-26 to RL-49, witness statements, Exhibits RWS-3 to RWS-5, and an expert report of Andrew Flower and Anthony Charlton of Deloitte dated 20 July 2015 ("**Deloitte Report No. 2**", **Exhibit RER-2**).

27. By e-mail dated 4 September 2015, Claimant sought the Tribunal's guidance on the question of whether or not the Claimant could call Mr. Abbas Mirza, the Claimant's industry expert, as a witness at the hearing, even though Respondent had chosen not to call Mr. Mirza for cross-examination in its witness notification of 20 August 2015. Taking into account the context of Claimant's request, the Tribunal decided on 7 September 2015 that Claimant was allowed to call Mr. Mirza as a witness at the hearing for a short direct examination in order to be able to rebut evidence submitted with Respondent's Rejoinder, followed by cross and re-direct examination if necessary.
28. On 14 September 2015, the Tribunal held a pre-hearing teleconference with the Parties in order to determine certain issues in preparation of the hearing scheduled for 12-17 October 2015. The Parties had jointly submitted an annotated agenda for the pre-hearing teleconference on 11 September 2015, including their respective positions on disputed issues and their agreement on others. By letter dated 18 September 2015, having considered the Parties' positions, the Tribunal determined the outstanding procedural issues upon which the Parties had not been able to agree and fixed a preliminary hearing schedule.
29. By letter dated 14 September 2015, Claimant requested leave to submit six additional documents into the record of the arbitration pursuant to Section 15.2 of Procedural Order No. 1. On 16 September 2015, Respondent stated its opposition to Claimant's request. By letter dated 19 September 2015, the Tribunal granted Claimant leave to introduce four of the documents into the record, on the basis that these documents were dated after Claimant's last submission and updated figures already in the record; the Tribunal denied the request as to the remaining two documents.
30. Between 12 and 16 October 2015, a hearing was held at the Peace Palace in The Hague. The Parties submitted their views on all pending issues of this arbitration. The Tribunal heard factual witnesses and the Parties' appointed experts on the issue of quantum. At the end of the hearing, the Tribunal invited the Parties' experts to submit their data and calculation of damages under different assumptions (described as Scenarios A, B, and C) on an Excel sheet that is capable of being manipulated ("**Scenario Calculations**").<sup>8</sup>
31. By e-mail on 6 November 2015, Respondent submitted the Post-Hearing Supplement to the Expert Report of Andrew Flower and Anthony Charlton of Deloitte, containing their Scenario Calculations spreadsheets.<sup>9</sup> By e-mail on the same date, Claimant submitted Mr. Abdul Sirshar Qureshi's Scenario Calculations spreadsheets. On 10 November 2015, Claimant requested the Tribunal to strike from the record unauthorised factual exhibits submitted with Respondent's Experts' Scenario Calculations and to direct Respondent to resubmit its Experts' Scenario Calculations within the scope of Tribunal's prior directions.
32. By e-mail dated 12 November 2015, Claimant requested that the Tribunal request the Parties to produce a copy of the Polish legal authorities relied upon in their draft submissions on Polish law as well as full or partial English translations thereof together with the draft submissions due on 27 November 2015. By e-mail dated 16 November 2016, Respondent requested that the Tribunal dismiss Claimant's request.

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<sup>8</sup> Hearing Transcript (16 October 2015), 153:4-10.

<sup>9</sup> Revised Post-Hearing Supplement to Deloitte Report No. 2, **Exhibit RER-2**.

33. On 23 November 2015, the Tribunal issued **Procedural Order No. 4**, in which it denied Claimant's request that Respondent be directed to resubmit its Experts' Scenario Calculations, granted Claimant's request striking Exhibits 7-12 submitted with Respondent's Experts' Scenario Calculations from the record, and denied the request that Respondent be directed to provide English translations of the Polish legal authorities in the preliminary stage of exchange between counsel. Procedural Order No. 4 thus ordered Respondent to resubmit its Experts' Scenario Calculations and Commentary without Exhibits 7-12, having removed all references to, and use of, those Exhibits in the Calculations and Commentary.
34. By e-mail dated 30 November 2015, Respondent resubmitted its Experts' Scenario Calculations in accordance with Procedural Order No. 4 (**Revised Post-Hearing Supplement to Deloitte Report No. 2**).<sup>10</sup>
35. On 22 December 2015, Respondent submitted its Post-Hearing Brief (**Respondent's Post-Hearing Brief**) and supporting materials.<sup>11</sup>
36. On 23 December 2015, Claimant submitted its Post-Hearing Brief (**Claimant's Post-Hearing Brief**) and supporting materials.<sup>12</sup> On 23 December 2015, Respondent noted that Claimant failed to meet its deadline of 22 December 2015 to submit Claimant's Post-Hearing Brief. The Tribunal did not consider this one-day delay substantial enough to ignore the submission.
37. On 15 January 2016, Respondent submitted its Cost Summary (**Respondent's Cost Summary**) and Claimant submitted its Cost Summary (**Claimant's Cost Summary**).
38. On 29 January 2016, Claimant submitted its Comments on Respondent's Cost Summary (**Claimant's Comments on Respondent's Cost Summary**).
39. On 29 January 2016, Respondent submitted its Comments on Claimant's Cost Summary (**Respondent's Comments on Claimant's Cost Summary**).
40. On 19 May 2016, Claimant requested leave to submit a 24 March 2016 judgment of the Regional Court of Warsaw ("**Regional Court**") into the record of the arbitration pursuant to Section 3.3 of Procedural Order No. 4. On 24 May 2016, Respondent stated its opposition to Claimant's request. By letter dated 25 May 2016, the Tribunal granted Claimant leave to introduce the judgment into the record.<sup>13</sup>
41. On 12 August 2016, the Tribunal issued **Procedural Order No. 5**, in which it decided on the final remuneration of each of its members in accordance with paragraph 10.1 of Procedural Order No. 1.

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<sup>10</sup> Post-Hearing Supplement to the Expert Report of Andrew Flower and Anthony Charlton dated 30 November 2015 ("Revised Post-hearing Supplement to Deloitte Report No. 2").

<sup>11</sup> Exhibits R-50 to R-75.

<sup>12</sup> Exhibits C-302 to C-322, legal authorities, Exhibits CL-114 to CL-143, and updated list of the Claimant's Factual Exhibits and Legal Authorities.

<sup>13</sup> Exhibit C-323.

### III. REQUESTS FOR RELIEF

#### *Claimant's Requests for Relief*

42. Claimant requests that the Tribunal issue an Award:
- (a) Declaring that it has jurisdiction over the Claimant's claims;
  - (b) Holding that the Respondent has breached its fair and equitable treatment obligations under Article 3(2) of the BIT;
  - (c) Holding that the Respondent has unlawfully expropriated the Claimant's investment in violation of Article 5 of the BIT;
  - (d) Awarding the Claimant compensation in the total amount of EUR 81,633,810;
  - (e) Awarding the Claimant interest on the above amount running from 17 February 2012 until the date of full payment of the Award at a rate of no less than EURIBOR plus a premium of 2% compounded semi-annually;
  - (f) Ordering the Respondent to pay the costs that the Claimant incurred in relation to this arbitration, including in particular the fees and expenses of the PCA and the Tribunal, and all legal fees and expenses incurred by the Claimant, in an amount to be quantified in the Claimant's Statement of Costs due on 15 January 2016, with interest calculated in accordance with paragraph (e) above; and
  - (g) Ordering such further or other relief as the Tribunal may deem appropriate.<sup>14</sup>

#### *Respondent's Requests for Relief*

43. Respondent "requests that the Arbitral Tribunal dismisses the Claimant's claims in whole".<sup>15</sup>
44. Respondent further "requests that the Arbitral Tribunal awards the costs of the proceedings (including the arbitrators' fees and expenses, the administrative costs, the costs of the Respondent's legal representation and the costs incurred by the Respondent in connection with the present arbitration) to the Respondent from the Claimant, in accordance with the provisions of Articles 38-40 of the UNCITRAL Rules".<sup>16</sup>
45. In addition, Respondent requests the Tribunal to "maintain the confidential character" of the documents indicated as "PPL's enterprise confidential information", in accordance with PPL's reservation.<sup>17</sup> Respondent also requests the Tribunal "not to treat the documents not produced by the Respondent at the document production phase as being adverse to the Respondent's interest".<sup>18</sup>

### IV. FACTUAL BACKGROUND

#### **Corporate entities related to Claimant**

46. In 2003, Mr. Atul Ahuja and his brother Mr. Viren Ahuja partnered with the global retail operator,

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<sup>14</sup> Claimant's Post-Hearing Brief, para. 572 (d).

<sup>15</sup> Statement of Defence, para. 1; Rejoinder, para. 2.

<sup>16</sup> Statement of Defence, para. 2.

<sup>17</sup> Statement of Defence, para. 4.

<sup>18</sup> Respondent's Rejoinder, para. 4, *referring to* the justifications provided by Respondent in section 16 of the Rejoinder.

the Flemingo Group (“**Flemingo Group**”), to establish a duty-free presence in India.<sup>19</sup>

47. To that end, on 5 March 2004, Flemingo DutyFree was incorporated in Mumbai, India to establish and operate duty-free shops in the country.<sup>20</sup>
48. In 2010, the Flemingo Group entered the European duty-free market through its acquisition of a majority stake in Przedsiębiorstwo Handlu Zagranicznego Baltona S.A. (“**Baltona**”), the largest airport retail operator in Poland. The Flemingo Group made the acquisition through Flemingo International Ltd. (“**Flemingo International**”), a company incorporated in the British Virgin Islands, and Ashdod Holdings Limited (“**Ashdod**”), Flemingo International’s wholly-owned subsidiary incorporated in Cyprus. Baltona had duty-free operations at Chopin Airport through its Polish subsidiary, BH Travel.<sup>21</sup>
49. On 31 March 2011, Flemingo DutyFree became the sole owner of Flemingo International. At the time of Claimant’s filing of its Statement of Claim, Flemingo DutyFree held 84.8% of the shares in Flemingo International (because of a further restructuring within the Flemingo Group that occurred on 29 October 2012).<sup>22</sup>

#### **Entities related to Respondent**

50. PPL was established on 23 October 1987 pursuant to the Polish Airports State Enterprise Act 1987 (“**PPL Act**”) in order to develop and operate airports in Poland.<sup>23</sup> PPL is a legal entity, the shares of which wholly belong to the Polish State Treasury.<sup>24</sup> As previously mentioned, PPL manages Chopin Airport.
51. According to Claimant, PPL is managed by its General Director but operates under the supervision and control of the Minister responsible for transport and infrastructure, who appoints and dismisses the General Director.<sup>25</sup> The Ministry responsible for transport and infrastructure (hereinafter referred to as the “**Ministry of Transport**”) has at various times been the Ministry of Transport (from May 2006), the Ministry of Infrastructure (from November 2007), the Ministry of Transport, Construction and Maritime Economy (from November 2011), and the Ministry of Infrastructure and Development (from November 2013).<sup>26</sup>
52. Claimant asserts that the supervision of PPL’s activities by the Ministry of Transport:

includes monitoring the decisions of PPL’s management and their compliance with State policy; evaluating the financial and economic situation of the company; controlling the

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<sup>19</sup> Statement of Claim, para. 11.

<sup>20</sup> Statement of Claim, para. 11.

<sup>21</sup> Statement of Claim, para. 13.

<sup>22</sup> Statement of Claim, para. 14.

<sup>23</sup> Act of 23 October 1987 on the Polish Airports State Enterprise, Article 1(2), **Exhibit C-7**; PPL Annual Report for 2004, p. 7, **Exhibit C-8**.

<sup>24</sup> Respondent’s Rejoinder, para. 94.

<sup>25</sup> Act of 23 October 1987 on the Polish Airports State Enterprise, Article 25(1), **Exhibit C-7**: “The General Director shall be appointed and dismissed by the Minister of Transport, Shipping and Communications upon consultation with the Employee Council”; Act of 23 October 1987 on the Polish Airports State Enterprise, Article 51, **Exhibit C-7**: “[PPL] shall be supervised by the Minister of Transport, Shipping and Communications”; Detailed Mode of Supervision Conducted by the Ministry of Infrastructure over PPL dated 11 August 2008, **Exhibit C-9**. See also Statement of Claim, para. 17.

<sup>26</sup> Statement of Claim, para. 17; Claimant’s Reply, para. 278.

proper implementation of State-funded investment projects; identifying and handling any issues or complaints relating to failures or irregularities in PPL's performance; and submitting periodic reports regarding the Ministry's supervision of PPL's activities<sup>27</sup>

53. Claimant states that the Secretary of State in the Ministry of Transport, Mr. Zbigniew Rynasiewicz, has expressly acknowledged the level of control by Respondent over PPL by saying in the Polish Parliament that:<sup>28</sup>

[PPL] is an enterprise which is functioning within the structure of the Ministry of [Transport];<sup>29</sup>

and

[w]hen it comes to questions on investments [...] the supervision over PPL's action is exercised by the minister responsible for transport and in a way we are also responsible for all issues connected with the functioning of the enterprise [PPL] – at the Chopin Airport in Warsaw.<sup>30</sup>

54. Respondent, however, submits that PPL conducts its business activities “independently of the Polish authorities and on the same principles as any other business entity”. Respondent further submits that, pursuant to Article 9 of the PPL Act, PPL trades on its own account, is liable for its liabilities, and is not responsible for the liabilities of the State Treasury or other legal persons.<sup>31</sup> Respondent also refers to Article 6 of the PPL Act,<sup>32</sup> which provides in relevant part:

1. PPL shall conduct its business operations independently, based on its own plans in line with the objectives of the national socio-economic development plan.
2. PPL's plans shall be determined by the General Director after consulting PPL's Employee Council.
3. PPL's economic activity shall be based on the principles of rational management and economic calculation.
4. PPL shall manage its finances under the terms stipulated in separate regulations.<sup>33</sup>

55. In this context, Respondent submits that PPL's full name “Polish Airports State Enterprise” is “a relic” of Poland's past as a centrally planned economy and derives from formalities pursuant to the Act of 25 September 1981 on State-owned enterprises (“**Act on State-Owned Enterprises**”). Respondent submits that the Act on State-Owned Enterprises provides that a “State-owned enterprise is an independent, self-governing and self-financing entrepreneur with legal personality”.<sup>34</sup>

56. Pursuant to Article 8(1) of the PPL Act, “PPL's property constitutes a separate part of national property”.<sup>35</sup> Under the Act on Implementing Power Conferred on the State Treasury (“**State**

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<sup>27</sup> Statement of Claim, para. 18.

<sup>28</sup> Claimant's Reply, para. 37.

<sup>29</sup> Speech of Mr. Zbigniew Rynasiewicz on 18 November 2011 at the session of the Polish Parliament, p. 2, **Exhibit C-167** (emphasis added by Respondent).

<sup>30</sup> Speech of Mr. Zbigniew Rynasiewicz on 12 December 2013 at the session of the Polish Parliament, p. 1, **Exhibit C-168** (emphasis added by Respondent).

<sup>31</sup> Statement of Defence, paras. 279, 281, and 285.

<sup>32</sup> Statement of Defence, para. 282.

<sup>33</sup> Act of 23 October 1987 on the Polish Airports State Enterprise, Article 6, **Exhibit C-7**.

<sup>34</sup> Statement of Defence, para. 284, *citing* Act of 25 September 1981 on state-owned enterprises, **Exhibit RL-11** (emphasis added by Respondent).

<sup>35</sup> Act of 23 October 1987 on the Polish Airports State Enterprise, Article 8(1) of the Polish Airports State Enterprise Act, **Exhibit C-7**.

**Treasury Act**) PPL is required to obtain the consent of the State Treasury to dispose of intangible assets which exceed EUR 50,000 in value and any legal action carried out without such consent is deemed invalid.<sup>36</sup>

57. Claimant asserts that the State Treasury has actually shown the described level of control in PPL's dealings with Baltona and BH Travel by requiring approvals of the lease agreements that form the subject matter of the present dispute (see below, para. 69), of certain amendments thereto, and of a temporary rent reduction regarding one of the stores operated by BH Travel.<sup>37</sup>
58. The Customs Chamber of Warsaw ("**Customs Chamber**"), organised under the Act on Customs Service and operating under the supervision of the Ministry of Finance, controls the sale of duty-free goods at Chopin Airport.<sup>38</sup>
59. The Governor of Mazovia is appointed by the Prime Minister of Poland as the regional representative of the Polish government in the province of Mazovia, where Chopin Airport is located. The Governor acts as the regional head of governmental institutions, manages central government property within his province, and generally oversees local government.<sup>39</sup>

#### **Negotiation and execution of the Lease Agreements**

60. In May 2004, PPL began the construction of a new Terminal 2 for Chopin Airport ("**Terminal 2**").<sup>40</sup>
61. On 29 July 2005, PPL invited Baltona to participate in a tender process for a concession to lease and operate a number of premises in Chopin Airport's Terminal 1 ("**Terminal 1**") and Chopin Airport's Terminal 2, which was then still under construction.<sup>41</sup> In early August 2005, PPL issued the complete documentation for the first of two stages for the tender process.<sup>42</sup>
62. PPL first invited bidders to submit initial offers, which it would then evaluate based on several criteria, including the proposed store concept, brand equity, and the minimum guaranteed monthly rent per square metre. PPL would then select tenderers to submit their final offers.<sup>43</sup>

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<sup>36</sup> Act of 8 August 1996 on principles of implementing powers conferred on the State Treasury (extract), Article 5a, **Exhibit C-10**: "State legal persons are obliged to obtain the consent of the minister competent for the State Treasury to carry out a legal action in the scope of disposal of fixed assets components within the meaning of the accounting regulations, qualified as intangible and legal values, tangible fixed assets or long-term investments, including commissioning these assets for use by other entities on the basis of civil law contracts or contributing them to a company or a cooperative, if the market value of the subject of disposal exceeds the PLN equivalent of EUR 50,000, calculated on the basis of the average exchange rate announced by the National Bank of Poland as of the date of filing a motion for granting the consent".

<sup>37</sup> Claimant's Reply, paras. 36-37, 41-43.

<sup>38</sup> Statement of Claim, para. 21.

<sup>39</sup> Statement of Claim, para. 22.

<sup>40</sup> Statement of Claim, para. 23.

<sup>41</sup> Statement of Claim, para. 23, *referring to* PPL Annual Report for 2004, p. 4, **Exhibit C-8**. Claimant explains that the designation of the two terminals was changed to Terminal A in 2010 because of their integration into one complex. For ease of reference, this Award refers to the two terminals using the old designations of Terminal 1 and Terminal 2.

<sup>42</sup> Statement of Claim, para. 24, *referring to* Documentation for the First Stage of the Tender Procedure, 5-8 August 2005, **Exhibit C-12**.

<sup>43</sup> Statement of Claim, para. 24, *referring to* Documentation for the First Stage of the Tender Procedure, 5-8 August 2005, **Exhibit C-12**.

63. A draft “framework” lease agreement (“**Tenancy Pattern Agreement**”) was included in the initial tender documentation. The tender documentation also indicated that PPL expected tenderers to propose the duration of the leases but expected the duration to be typically for a period of ten years, with a possible extension of an additional five years.<sup>44</sup>
64. On 30 September 2005, jointly with a German retailer and distributor of duty-free goods, Gebruder Heinemann, and Baltona-Heinemann Sp. z o.o. (collectively with Baltona, “**Baltona-Heinemann**”), Baltona submitted an offer for the lease of commercial space at Chopin Airport.<sup>45</sup>
65. At that time, Baltona’s shareholders included Alfa-Center Sp. z o.o. (“**Alfa-Center**”) (a privately-held Polish company), the State Treasury, and PPL.<sup>46</sup>
66. Upon PPL’s invitation, Baltona-Heinemann submitted its final offer on 27 January 2006. On 25 May 2006, Baltona-Heinemann established BH Travel as a 50/50 joint venture for the sole purpose of operating retail stores at Chopin Airport should their bid be successful.<sup>47</sup>
67. By January 2007, BH Travel and PPL had held a number of meetings and exchanged correspondence regarding the terms of the lease agreements.<sup>48</sup>
68. Between 23 April 2007 and 30 July 2008, PPL notified BH Travel that as a result of the tender process it had been awarded a number of premises in Terminal 1 and Terminal 2 to use for stores on the terms and conditions previously negotiated.<sup>49</sup>
69. Claimant submits that the ultimate conclusion of the intended lease agreements between PPL and BH Travel depended on the approval of the State Treasury, and that this was repeatedly confirmed by PPL to Baltona and BH Travel.<sup>50</sup>
70. However, Respondent describes “the essence” of the process toward the eventual conclusion of lease agreements between PPL and BH Travel as a “civil-law relationship”.<sup>51</sup> Respondent maintains that PPL “handles its own affairs related to everyday commercial business” and that despite formal control, Respondent “does not interfere in these matters”: “[e]ven if the State Treasury needs to approve PPL exercising a certain right, this approval is issued automatically”.<sup>52</sup>
71. PPL sought the approval of the State Treasury for each of the intended lease agreements.<sup>53</sup> The

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<sup>44</sup> Statement of Claim, para. 24, *referring to* Documentation for the First Stage of the Tender Procedure, 5-8 August 2005, **Exhibit C-12**.

<sup>45</sup> Statement of Claim, para. 25.

<sup>46</sup> Statement of Claim, para. 25.

<sup>47</sup> Statement of Claim, para. 25; Statement of Defence, para. 32.

<sup>48</sup> Statement of Claim, para. 26.

<sup>49</sup> Statement of Claim, para. 26.

<sup>50</sup> Claimant’s Reply, paras. 36-43.

<sup>51</sup> Statement of Defence, para. 28.

<sup>52</sup> Respondent’s Rejoinder, para. 97; Hearing Transcript (13 October 2015), 157:6-11.

<sup>53</sup> Letter from PPL to the Ministry of the State Treasury dated 22 March 2007, **Exhibit C-169**; Letter from PPL to the Ministry of the State Treasury dated 12 June 2007, **Exhibit C-170**; First letter from PPL to the Ministry of the State Treasury dated 12 November 2007, **Exhibit C-171**; Second letter from PPL to the Ministry of the State Treasury dated 12 November 2007, **Exhibit C-172**; Letter from PPL to the Ministry of the State Treasury dated 28 July 2008, **Exhibit C-173**; First letter from PPL to the Ministry of the State Treasury dated 30 July 2008, **Exhibit C-174**; Second letter from PPL to the Ministry of the State Treasury dated 30 July 2008,

State Treasury approved each of PPL's applications.<sup>54</sup>

72. After the State Treasury provided its approval, PPL and BH Travel entered into 11 lease agreements (“**Lease Agreements**”) for the following premises in Terminals 1 and 2 of Chopin Airport: (i) “Baltona Arrival”; (ii) “Baltona Jewelry”; (iii) “Baltona Perfumery”; (iv) “Baltona Classic”; (v) “Baltona Esprit”; (vi) “Warehouse”; (vii) “Baltona Airport Shop”; (viii) “Baltona Kid’s World”; (ix) “Baltona Accessories”; (x) “Social Rooms”; and (xi) “Baltona Bestseller”.<sup>55</sup>
73. The Lease Agreements, except those for the “Social Rooms” of BH Travel’s employees and the “Warehouse”, provided for “guaranteed periods of lease” of four to seven years. The Lease Agreements for Baltona Classic and Baltona Perfumery, which Claimant avers were BH Travel’s most profitable stores, envisaged an extension of their seven-year lease terms to ten years.<sup>56</sup>
74. Respondent submits that PPL and BH Travel intended “the Lease Agreements to give rise to the operation of one, organized and coherently managed retail operation at Chopin Airport”. That is why bidders had to propose their “own coherent functional concept” for the use of the retail premises at Chopin Airport and had to “ensure the profitability of the whole project”.<sup>57</sup>
75. According to the documentation of the first stage of the tender process, any offer needed to encompass “at least 60% of the total space intended for commercial purposes in the terminal complex combined from the existing Terminal 1 and the newly built Terminal 2”.<sup>58</sup>

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**Exhibit C-175**; Third letter from PPL to the Ministry of the State Treasury dated 30 July 2008, **Exhibit C-176**; Letter from PPL to the Ministry of the State Treasury dated 26 August 2008, **Exhibit C-177**; Letter from PPL to the Ministry of the State Treasury dated 21 September 2010, **Exhibit C-178**.

<sup>54</sup> Letter from the Ministry of State Treasury to PPL dated 16 April 2007, **Exhibit C-179**; Letter from the Ministry of State Treasury to PPL dated 18 June 2007, **Exhibit C-180**; Letter from the Ministry of State Treasury to PPL dated 10 January 2008, **Exhibit C-181**; Letter from the Ministry of State Treasury to PPL dated 14 January 2008, **Exhibit C-182**; Letter from the Ministry of State Treasury to PPL (ref. MSP/DCI/2758/08) dated 8 August 2008, **Exhibit C-183**; Letter from the Ministry of State Treasury to PPL (ref. MSP/DCI/2759/08) dated 8 August 2008, **Exhibit C-184**; Letter from the Ministry of State Treasury to PPL (ref. MSP/DCI/2760/08) dated 8 August 2008, **Exhibit C-185**; Letter from the Ministry of State Treasury to PPL (ref. MSP/DCI/276108) dated 8 August 2008, **Exhibit C-186**; Letter from the Ministry of State Treasury to PPL dated 15 September 2008, **Exhibit C-187**; Letter from the Ministry of State Treasury to PPL dated 27 September 2010, **Exhibit C-188**.

<sup>55</sup> Statement of Claim, para. 27, *referring to* Lease Agreement between PPL and BH Travel (Arrival Shop) dated 11 May 2007, **Exhibit C-18**; Lease Agreement between PPL and BH Travel (Jewelry) dated 31 December 2007, **Exhibit C-19**; Lease Agreement between PPL and BH Travel (Perfumery) dated 13 March 2008, **Exhibit C-20**; Lease Agreement between PPL and BH Travel (Classic) dated 13 March 2008, **Exhibit C-21**; Lease Agreement between PPL and BH Travel (Esprit) dated 3 September 2008, **Exhibit C-22**; Lease Agreement between PPL and BH Travel (Warehouse) dated 3 September 2008, **Exhibit C-23**; Lease Agreement between PPL and BH Travel (Airport Shop) dated 9 September 2008, **Exhibit C-24**; Lease Agreement between PPL and BH Travel (Kids' Shop) dated 6 October 2008, **Exhibit C-25**; Lease Agreement between PPL and BH Travel (Accessories) dated 24 October 2008, **Exhibit C-26**; Lease Agreement between PPL and BH Travel (Social Rooms) dated 5 March 2009, **Exhibit C-27**; Lease Agreement between PPL and BH Travel (Bestseller) dated 29 September 2010, **Exhibit C-28**.

<sup>56</sup> Statement of Claim, para. 27, *referring to* Lease Agreement between PPL and BH Travel (Perfumery) dated 13 March 2008, **Ex. C-20**; Lease Agreement between PPL and BH Travel (Classic) dated 13 March 2008, **Exhibit C-21**; Lease Agreement between PPL and BH Travel (Esprit) dated 3 September 2008, **Exhibit C-22**; Protocol on Takeover of Premises (Perfumery) dated 1 October 2008, **Exhibit C-29**; Protocol of 1 October 2008 on the Takeover of Premises (Classic), **Exhibit C-30**; Protocol of 5 January 2009 on the Takeover of Premises (Esprit), **Exhibit C-31**.

<sup>57</sup> Statement of Defence, paras. 36, 38-39 and 47.

<sup>58</sup> Documentation for the First Stage of the Tender Process, 5-8 August 2005, Article II(9), **Exhibit C-12**.

76. Respondent maintains that at the time of the tender process and the negotiations, Baltona’s and BH Travel’s representatives were aware of PPL’s expectation to have one coherent store concept implemented by one contractor for both terminals of Chopin Airport. Respondent states that BH Travel’s proposed fit-out for the whole of the retail spaces was therefore incorporated into the Lease Agreements.<sup>59</sup>
77. Claimant submits that while the Lease Agreements were awarded to BH Travel as “part one of a single commercial package”, they contained “individually negotiated terms” and constituted self-contained agreements without any reference to other Lease Agreements or any cross-default provisions.<sup>60</sup>
78. The Lease Agreements were governed by the General Lease Conditions (“**General Lease Conditions**”).<sup>61</sup> Article 13 of the General Lease Conditions provides that:
- The Lessor shall have the right to terminate this Agreement with immediate effect in the case of:
- a) delay with payment of leasing fee for at least two periods by the Lessee,
  - b) delay with payment of maintenance fee for at least two periods,
  - c) failure to submit (non-payment), complete, or renew the bank guarantee (deposit) under the terms specified in the Agreement,
  - d) failure to submit certified true copies of insurance policies, as well as failure to renew the said insurance policies,
  - e) gross violation of the provisions of the Agreement by the Lessee and failure to remove, within 14 days, of the condition contrary to the Agreement, despite of a written reminder by the Lessor.
79. The following BH Travel stores were located in Chopin Airport’s duty-free zone (“**DFZ**”): (i) Baltona Perfumery; (ii) Baltona Classic; (iii) Baltona Esprit; (iv) Baltona Accessories; (v) Baltona Kid’s World; and (vi) Baltona Bestseller.<sup>62</sup> PPL managed the DFZ, which was governed by the Rules of Operation of the Duty Free Zone at the Warsaw Chopin Airport (“**DFZ Rules**”) issued by PPL and appended to the relevant Lease Agreements.<sup>63</sup>
80. Article 7 of the DFZ Rules required BH Travel “to obtain permits from PPL”<sup>64</sup> which automatically expired if there was loss of title to use premises in the DFZ.<sup>65</sup> Additionally,

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<sup>59</sup> Statement of Defence, paras. 42-47.

<sup>60</sup> Claimant’s Reply, paras. 44-46.

<sup>61</sup> Statement of Claim, para. 28, *referring to* General Lease Conditions, Appendix 5, **Exhibit C-32**.

<sup>62</sup> Statement of Claim, para. 29, footnote 39.

<sup>63</sup> Statement of Claim, para. 29; Statement of Defence, paras. 146-147, *referring to* Lease Agreement between PPL and BH Travel (Jewelry) dated 31 December 2007, **Exhibit C-19**; Lease Agreement between PPL and BH Travel (Perfumery) dated 13 March 2008, **Exhibit C-20**; Lease Agreement between PPL and BH Travel (Classic) dated 13 March 2008, **Exhibit C-21**; Lease Agreement between PPL and BH Travel (Esprit) dated 3 September 2008, **Exhibit C-22**; Lease Agreement between PPL and BH Travel (Warehouse) dated 3 September 2008, **Exhibit C-23**; Lease Agreement between PPL and BH Travel (Kids’ Shop) dated 6 October 2008, **Exhibit C-25**; Lease Agreement between PPL and BH Travel (Accessories) dated 24 October 2008, **Exhibit C-26**; Lease Agreement between PPL and BH Travel (Bestseller) dated 29 September 2010, **Exhibit C-28**.

<sup>64</sup> Statement of Claim, para. 29; Statement of Defence, para. 149.

<sup>65</sup> Statement of Defence, para. 151, *referring to* 2009 DFZ Rules, Section 8, Clause 1, **Exhibit C-77**. The relevant provision states: “The permit referred to in § 7, clause 1 expires in the case of: a. the failure to sign the agreement referred to in § 7, clause 2 within 30 days of the date of its issue, b. the loss of the title to use the

Article 5(13) of the Lease Agreements provided as follows with respect to those duty-free permits:

The Lessor approves and allows the Lessee to conduct its business activities referred to in § 1 section 2 in the premises located within the duty-free zone. Permission referred to in the preceding sentence constitutes **Appendix 8** to the Agreement and shall expire or may be revoked in accordance with the provisions of “Regulations for the Operation of Duty Free Zone at the Warsaw Chopin Airport”, a copy of which constitutes **Appendix 9** to the Agreement, resulting in the termination of the Agreement with immediate effect and the return of the premises by the Lessee in accordance with § 8 of the Agreement.<sup>66</sup>

81. The applicable Polish customs legislation also required BH Travel to obtain the Customs Chamber’s approval for the planned type of activity within the DFZ.<sup>67</sup>
82. BH Travel obtained all the required permits and approvals for selling goods within the DFZ, with the permits appended to the relevant Lease Agreements.<sup>68</sup> The Director of the Customs Chamber approved BH Travel’s operations in the DFZ on 24 August 2008; the approval was amended on 1 September 2011.<sup>69</sup>

#### **The acquisition of BH Travel**

83. Through an announcement on its website on 28 January 2010, the State Treasury sought tenders for the acquisition of its minority stake in Baltona.<sup>70</sup>
84. According to Claimant, in early February that year, Mr. Atul Ahuja learned about that call for tenders “and saw the bid for the State Treasury’s stake in Baltona – Poland’s largest airport retailer – as a golden opportunity to enter the European duty-free market ‘given the size of Baltona’s business and its brand equity’”.<sup>71</sup>
85. Mr. Atul Ahuja sought the advice of Messrs. Maciej Dworniak and Tomasz Jaroń of the Polish financial advisory firm Bastion Capital Sp. z o.o. (“**Bastion**”) to prepare tender documentation and to undertake pre-acquisition due diligence.<sup>72</sup>
86. After Bastion informed Mr. Atul Ahuja that Alfa-Center was also seeking to divest its majority stake in Baltona, Mr. Atul Ahuja also engaged Bastion to advise and assist in acquiring that

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premises within the DFZ, c. a motion from the customs authority on the breach of the regulations arising from the Customs Law and the Community Customs Code”.

<sup>66</sup> Statement of Claim, para. 28, *referring to* General Lease Conditions, Appendix 5, **Exhibit C-32** (emphasis in translation omitted).

<sup>67</sup> Statement of Claim, para. 30; Statement of Defence, para. 150, *referring to* Community Customs Code, Article 176 (1).

<sup>68</sup> Statement of Claim, para. 30, *referring to* Lease Agreement between PPL and BH Travel (Classic) dated 13 March 2008, **Exhibit C-21**; Decision of the Customs Chamber in Warsaw dated 24 September 2008, **Exhibit C-33**; Decision of the Customs Chamber in Warsaw dated 1 September 2011, **Exhibit C-34**.

<sup>69</sup> Statement of Defence, para. 150, *referring to* Decision of the Customs Chamber in Warsaw dated 24 September 2008, **Exhibit C-33**; Decision of the Customs Chamber in Warsaw dated 1 September 2011, **Exhibit C-34**.

<sup>70</sup> Statement of Claim, para. 31, *referring to* Statement of the Minister of the State Treasury published on the website of the Ministry of State Treasury dated 28 January 2010, **Exhibit C-35**.

<sup>71</sup> Statement of Claim, para. 32, *referring to* Witness Statement of Atul Ahuja (8 August 2014), **Exhibit CWS-1** (“**Ahuja Witness Statement, Exhibit CWS-1**”), para. 4.

<sup>72</sup> Statement of Claim, para. 33. Mr. Jaroń served as the President of Baltona’s Management Board from April 2010 to May 2011. *See* Statement of Claim, para. 49.

stake.<sup>73</sup>

87. The Flemingo Group and Bastion's formal due diligence on Baltona in February and March 2010 indicated that approximately 40% of Baltona's business in Poland pertained to BH Travel's shops in Chopin Airport.<sup>74</sup>
88. Claimant submits that Mr. Atul Ahuja specifically inquired about the duration of the Lease Agreements and "was satisfied that '[t]he terms of the leases [...] guaranteed Baltona's long-term presence at Chopin Airport,' which was a 'key aspect of [the Flemingo Group's] business plan to improve Baltona's profitability in the following years'". Mr. Jaroń of Bastion considered the guaranteed periods to be "one of the major value drivers in the transaction". He viewed Baltona to be "well-positioned [as the incumbent] to extend its presence at Chopin Airport past the expiry of the guaranteed periods of lease".<sup>75</sup>
89. Swamy & Chhabra, which performed the financial due diligence, concluded that Baltona was in arrears on its rental payments to airport authorities and that "[n]on payment of dues to airport authorities immediately can trigger serious actions including possible termination which could severely affect the [company's] business viability".<sup>76</sup>
90. Swamy & Chhabra further observed that acquiring Baltona "present[ed] exciting opportunities for growth" although it "ha[d] been bleeding for some time".<sup>77</sup> That observation was consistent with the State Treasury's statement in the tender materials in January 2010 where it indicated that despite Baltona's worsening condition, "the increase in air passenger traffic, the expansion of existing airports and the availability of EU financing programs represented 'opportunities' for growth and financial recovery".<sup>78</sup>
91. Mr. Atul Ahuja resolved to proceed with acquiring Alfa-Center's and the State Treasury's shares in Baltona.<sup>79</sup>
92. In February 2010, Mr. Atul Ahuja agreed with the owners of Alfa-Center, in principle, on the acquisition of Alfa-Center's majority stake in Baltona. Mr. Atul Ahuja likewise met with representatives of the Ministry of the Treasury to request an extension of the deadline for submissions of bids for the Ministry's shares in Baltona. That deadline was extended until 15 March 2010.<sup>80</sup>

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<sup>73</sup> Statement of Claim, para. 33, *referring to* Ahuja Witness Statement, paras. 5-6, **Exhibit CWS-1**, Witness Statement of Tomasz Jaroń (8 August 2014); **Exhibit CWS-2** ("**Jaroń Witness Statement, Exhibit CWS- 2**") paras. 5.

<sup>74</sup> Statement of Claim, paras. 35-36, *referring to* Ahuja Witness Statement, para. 9, **Exhibit CWS-1**; Jaroń Witness Statement, para. 10, **Exhibit CWS-2**.

<sup>75</sup> Statement of Claim, para. 36, *referring to* Jaroń Witness Statement, para. 11, **Exhibit CWS-2**.

<sup>76</sup> Statement of Claim, para. 37, *referring to* Preliminary Financial Due Diligence Report, p. 3, **Exhibit C-39** (internal quotations omitted).

<sup>77</sup> Statement of Claim, para. 37, *referring to* Preliminary Financial Due Diligence Report, p. 44, **Exhibit C-39** (internal quotations omitted).

<sup>78</sup> Statement of Claim, para. 38, *referring to* Tender Documentation for Baltona issued by the Ministry of State Treasury dated 8 January 2010, p. 31, **Exhibit C-36**.

<sup>79</sup> Statement of Claim, para. 39.

<sup>80</sup> Statement of Claim, para. 34, *referring to* Ahuja Witness Statement, paras. 7-8, **Exhibit CWS-1**, Jaroń Witness Statement, para. 9, **Exhibit CWS-2**.

93. On 13 March 2010, Bastion acquired Culex Sp. z o.o. (“**Culex**”), a “shelf company” incorporated in Poland, for the sole purpose of participating in the tender; Culex was later transferred to Mr. Atul Ahuja.<sup>81</sup>
94. Two days later, on 15 March 2010, Flemingo International submitted its bid for the State Treasury’s stake in Baltona through Culex.<sup>82</sup>
95. Respondent submits that during the tender proceedings for the State Treasury’s stock in Baltona, the planned modernisation of Terminal 1 was also disclosed to potential investors.<sup>83</sup>
96. On 30 March 2010, Culex signed a share purchase agreement with Alfa-Center for the acquisition of a 59.94% stake in Baltona. Flemingo International and Baltona concluded a loan agreement on the same day in the amount of US\$ 1.35 million for the repayment of Baltona’s debts to various third parties, including suppliers and airport authorities.<sup>84</sup>
97. After winning the State Treasury’s tender process, Culex signed a share purchase agreement with the State Treasury on 22 June 2010 to acquire its 26.83% shareholding in Baltona. Culex then transferred that stake to Ashdod pursuant to three consecutive share purchase agreements.<sup>85</sup>
98. Acting through Mr. Jaroń of Bastion, Ashdod offered to buy PPL’s 12.5% stake in Baltona in late 2010. Ashdod and PPL concluded a conditional share purchase agreement on 16 December 2010 for that stake, subject to the State Treasury’s approval. That approval was granted and the acquisition of PPL’s shares was perfected on 27 January 2011. Ashdod thereafter transferred a portion of those shares to Globexxon Investment Limited (“**Globexxon**”) and Fivedex Investments Limited (“**Fivedex**”), both Cypriot companies owned and controlled by Messrs. Jaroń and Dworniak of Bastion.<sup>86</sup>
99. The shares of Alfa-Center, the State Treasury and PPL in Baltona had a total purchase price in excess of PLN 30 million or EUR 7 million.<sup>87</sup>

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<sup>81</sup> Statement of Claim, para. 40, *referring to* Jaroń Witness Statement, para. 14, **Exhibit CWS-2**.

<sup>82</sup> Statement of Claim, para. 40, *referring to* Jaroń Witness Statement, para. 14, **Exhibit CWS-2**.

<sup>83</sup> Statement of Defence, para. 118, *referring to* Letter from MDA Capital dated 4 March 2010 to the Director of the Corporate Governance and Privatization Department III at the Ministry of the Treasury, **Exhibit R-96**. *See also* Claimant’s Reply, paras. 55-57.

<sup>84</sup> Statement of Claim, para. 41, *referring to* Share Purchase Agreement between Alfa-Center and Culex dated 30 March 2010, **Ex. C-40**; Coup for Flemingo as it takes Majority Share in Baltona, The Moodie Report dated 26 April 2010, **Exhibit C-41**; Loan Agreement between Flemingo International Ltd and Baltona dated 30 March 2010, **Exhibit C-42**.

<sup>85</sup> Statement of Claim, para. 42, *referring to* Share Purchase Agreement between the State Treasury and Culex dated 22 June 2010, **Ex. C-43**; Share Sale Agreement between Culex and Ashdod dated 11 August 2010, **Exhibit C-44**; Share Sale Agreement between Culex and Ashdod dated 25 November 2010, **Exhibit C-45**; Share Sale Agreement between Culex and Ashdod dated 28 February 2011, **Exhibit C-46**.

<sup>86</sup> Statement of Claim, paras. 43, 45, *referring to* Baltona Share Purchase Agreement between Ashdod and PPL dated 16 December 2010, **Exhibit C-47**; Letter from the State Treasury to PPL dated 27 January 2011, **Exhibit C-48**; Jaroń Witness Statement, para. 18, **Exhibit CWS-2**.

<sup>87</sup> Statement of Claim, para. 44, *referring to* Share Purchase Agreement between Alfa-Center and Culex dated 30 March 2010, **Exhibit C-40**; Share Purchase Agreement between the State Treasury and Culex dated 22 June 2010, **Exhibit C-43**; Baltona Share Purchase Agreement between Ashdod and PPL dated 16 December 2010, **Exhibit C-47**.

100. On 31 March 2011, Claimant acquired all of the shares in Flemingo International.<sup>88</sup>
101. The Parties hold differing views as to Claimant's participation in the acquisition of Baltona. Respondent submits that Claimant "did not participate financially in any way in the process of acquiring Baltona's stock". Respondent says that Baltona's stock was instead acquired by Culex, which later transferred its ownership interest to Ashdod. Respondent submits that Claimant's only contribution to the acquisition of Baltona was issuing a bond guarantee in respect of the purchase of Alfa-Center's shares in Baltona by Culex.<sup>89</sup>
102. Claimant contends that it was "heavily involved in the acquisition and management of Baltona and BH Travel" by leading the negotiations and due diligence in the acquisition process, providing financial support for the transaction (mainly two corporate guarantees provided to Alfa-Center and a comfort letter to the State Bank of India regarding a loan to Flemingo International), and being responsible (in the person of Mr. Atul Ahuja) for the final decision on the acquisition, as well as by employing its managerial expertise to the operations of BH Travel after the transaction.<sup>90</sup>
103. Respondent denies that the appointment of directors of Claimant as members of Baltona's or BH Travel's supervisory or management boards evidences that Claimant played an active role in the acquisition and operation of the two companies. Respondent submits that the concerned individuals served multiple functions in the corporate structure of the Flemingo Group, such that their appointment to another office did not indicate their actual involvement.<sup>91</sup>
104. Respondent maintains that Flemingo International, and not Claimant, acted as "the proper investor and owner" of Baltona upon the acquisition of its stock.<sup>92</sup> Respondent submits that Claimant "has not proved in any way that any financial flows took place with the change in the structure of the Flemingo Group" when Claimant acquired all of the shares in Flemingo International.<sup>93</sup>
105. Claimant responds that, while it had held no direct or indirect shareholding in Baltona or BH Travel before March 2011, since the acquisition of Flemingo International (for a total consideration of USD 26,505,000) on 31 March 2011, it has consistently been an indirect controlling shareholder of BH Travel and Baltona. Claimant explains that from this time onward it owned all of the shares in Flemingo International; Flemingo International held all of the shares in Ashdod; Ashdod at all times owned over 80% of Baltona's shares; and Baltona (after April 2011) owned all of the shares in BH Travel.<sup>94</sup>

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<sup>88</sup> Statement of Claim, paras. 42-46, *referring to* Certificate of Incumbency for Flemingo International Ltd dated 30 May 2011, **Exhibit C-5**. After a restructuring within the Flemingo Group in October 2012, Flemingo DutyFree now holds 84.8% of the shares in Flemingo International, *see* Certificate of Incumbency for Flemingo International Ltd. dated 26 November 2013, **Exhibit C-6**.

<sup>89</sup> Statement of Defence, paras. 249-251, 254; Respondent's Rejoinder, paras. 63-77.

<sup>90</sup> Claimant's Reply, paras. 21-25.

<sup>91</sup> Respondent's Rejoinder, paras. 58-61.

<sup>92</sup> Statement of Defence, paras. 246-248, *referring to* Flemingo International Limited's letter dated 31 March 2010, **Exhibit R-12**; E-mail from T. Jaroń to PPL dated 31 March 2010, **Exhibit R-13**; Loan Agreement concluded between Flemingo International Limited and Culex Sp. z o.o. dated 9 March 2010, **Exhibit R-109**; Respondent's Rejoinder, paras. 52-55.

<sup>93</sup> Respondent's Rejoinder, para. 49.

<sup>94</sup> Claimant's Reply, paras. 26-28.

106. It is not disputed that Claimant is not the “ultimate beneficiary” of the Flemingo Group. Claimant explains that after its acquisition of Flemingo International its shares were held by Flemingo International (BVI) Limited (“**Flemingo BVI**”) (45.04%), Mr. Viren Ahuja (24.59%), Mr. Atul Ahuja (24.59%), and two other companies (Symbolic Infra Projects Private Limited (1.93%) and Sites Infra Projects Private Limited (3.85%)). The shares in Flemingo BVI were held by Sapphaire International Limited (“**Sapphaire**”) (78.8%), Commodities Services International (“**CSI**”) (5.73%), and four individuals (Messrs. Rasiklal Thakker (4.45%), Suresh Tulsidas Bhatia (4.45%), Hemchand Chaturbhujdas Gandhi (4.45%), and Mahandra Thakar (2.12%)). Finally, Mr. Atul Ahuja owned 60% of the shares in Sapphaire, while his sons, Arjun and Karan, each owned 20%.<sup>95</sup> 77.28% of the shares of Flemingo International were thus owned directly or indirectly by members of the Ahuja family.
107. By 13 April 2011, BH Travel became a wholly-owned subsidiary of Baltona after Mr. Tomasz Jaroń negotiated Baltona’s acquisition of Gebruder Heinemann’s remaining shares in BH Travel.<sup>96</sup>
108. Baltona became a publicly-listed company on NewConnect, the alternative market of the Warsaw Stock Exchange on 30 June 2011. Because of that public offering and the aforementioned transfer of shares to Globexxon and Fivedex, Ashdod’s stake in Baltona was reduced to 80.68%.<sup>97</sup>

#### **The development of Baltona’s business after its acquisition by the Flemingo Group**

109. According to Claimant, at the time of its acquisition by the Flemingo Group, Baltona did not generate profits, had serious cash-flow issues resulting from high overheads and low sales, and was on the brink of bankruptcy.<sup>98</sup>
110. Respondent submits that after the acquisition of Baltona by the Flemingo Group, BH Travel continued to be “poorly managed” and had not achieved the desired financial profits, as evidenced by a remaining high level of debt, no improvement on margins in the core business areas, and limited effects of cost restructuring attempts.<sup>99</sup>
111. However, Claimant maintains that through a change in management, an influx of capital, and the Flemingo Group’s “longstanding experience in the duty-free industry”, it achieved an economic turnaround of Baltona and BH Travel between early 2010 and late 2011.<sup>100</sup>
112. Claimant explains that the management team of Baltona was almost completely replaced by experienced and accomplished new staff,<sup>101</sup> and that the Flemingo Group injected significant amounts of cash into Baltona through several channels in order to settle its debt and increase its

<sup>95</sup> Claimant’s Reply, paras. 29-30; Statement of Defence, para. 242; Respondent’s Rejoinder, para. 46.

<sup>96</sup> Statement of Claim, para. 49, *referring to* Jaroń Witness Statement, para. 22, **Exhibit CWS-2**.

<sup>97</sup> Statement of Claim, paras. 47-48, *referring to* Baltona shares listed in Warsaw as Flemingo plans ‘aggressive expansion’, The Moodie Report, dated 29 June 2011, **Exhibit C-49**; Ahuja Witness Statement, para. 19, **Exhibit CWS-1**.

<sup>98</sup> Claimant’s Reply, para. 63, *referring to* Tender Documentation for Baltona issued by the Ministry of State Treasury dated 8 January 2010, **Exhibit C-36**; Preliminary Financial Due Diligence Report, **Exhibit C-39**; Statement of Defence, paras. 366-377.

<sup>99</sup> Statement of Defence, paras. 103-104, 369.

<sup>100</sup> Claimant’s Reply, paras. 64-65.

<sup>101</sup> Claimant’s Reply, para. 66-67. Respondent, however, criticises the changes in Baltona’s management as “chaotic and disorganized”. See Respondent’s Rejoinder, paras. 158-163.

financial operability. Claimant adds that the Flemingo Group restructured BH Travel's supply chain away from buying through intermediaries such as Gebruder Heinemann to establishing direct contracts with suppliers, that it negotiated rent reductions, and that it also renovated BH Travel's stores.<sup>102</sup>

113. Based on these changes, Claimant submits that it achieved significant sales growth, as evidenced by an increase in sales in the third quarter of 2011 by over 15% and in the fourth quarter of 2011 by over 30% (as compared to the same respective periods in 2010). Claimant further submits that, while revenues and earnings suffered a significant decrease due to the termination of the Lease Agreements, the positive business trend prevailed in the time following, when revenues increased by 39.6% in the first quarter of 2015 (as compared to the first quarter of 2014), triggered by significant increases in airport passenger traffic and spending per passenger.<sup>103</sup>

### **The planned modernisation of Chopin Airport**

114. PPL's 2007 Annual Report indicated plans for the completion of Terminal 2 of Chopin Airport as well as the modernisation of Terminal 1 and its integration with Terminal 2.<sup>104</sup>
115. On 24 September 2008, PPL and the Centre for EU Transport Projects ("CEUTP") signed an agreement ("CEUTP Agreement") for the implementation of the project on the "Integration of Terminal 1 with Terminal 2 and modernization of Terminal 1".<sup>105</sup>
116. The Polish Ministry of Transport had established CEUTP as the implementing body for funds from the European Union under the Operational Programme Infrastructure and Environment (2007-2013) ("OPI&E") prepared by the Polish Ministry of Regional Development and approved by the European Commission in December 2007.<sup>106</sup> Under the CEUTP Agreement, CEUTP was tasked with providing "institutional supervision [...] to prepare the project for the implementation correctly and on time".<sup>107</sup>
117. PPL's 2009 Annual Report stated that "work was undertaken to prepare an application for [EU] funding of the 'Warsaw Airport – modernization of infrastructure' project", although Claimant notes that the report did not indicate the anticipated schedule of the planned modernisation or its impact on Terminal 1's operations.<sup>108</sup>
118. In August 2010, the deadline for the modernisation project was extended to 2014. The availability of PLN 114.0 million in EU funding was subject to the completion of the project by the agreed

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<sup>102</sup> Claimant's Reply, paras. 68-83. Respondent rather describes the rent reductions as signs for BH Travel's payment arrears. *See* Respondent's Rejoinder, paras. 169-172.

<sup>103</sup> Claimant's Reply, paras. 84-91.

<sup>104</sup> Statement of Claim, para. 51, *referring to* PPL Annual Report for 2007, p. 27, **Exhibit C-50**.

<sup>105</sup> Statement of Claim, para. 52, *referring to* Agreement between PPL and the CEUTP dated 24 September 2008, p. 1, **Exhibit C-51**; Claimant's Reply, para. 48. *See also* Statement of Defence, para. 199.

<sup>106</sup> Statement of Claim, para. 52, *referring to* PPL Annual Report for 2007, **Exhibit C-50**; Claimant's Reply, para. 48. *See also* Statement of Defence, para. 115.

<sup>107</sup> Statement of Claim, para. 53, *referring to* Agreement between PPL and the CEUTP dated 24 September 2008, **Exhibit C-51**; Claimant's Reply, para. 48.

<sup>108</sup> Statement of Claim, para. 55, *referring to* PPL Annual Report for 2009, p. 46; PPL Annual Report for 2009, **Exhibit C-53**.

deadline.<sup>109</sup>

119. In view of PPL’s planned modernisation of Terminal 1, on 12 February 2009, Poland enacted the Act on Specific Rules Governing the Preparation and Implementation of Investments Concerning Public Airports (“**Airport Act**”). The Airport Act is the legislative framework for the “construction, reconstruction, or expansion of a public airport”.<sup>110</sup>
120. The Airport Act required PPL to obtain approval from the Governor of Mazovia for the planned modernisation of Terminal 1.<sup>111</sup> Article 3 of the Airport Act provided that:

The competent governor shall issue a decision approving the investment concerning [the] public airport no later than 3 months from the date of submission of an application by the entity establishing the airport, the entity managing the airport, or the Polish Air Navigation Services Agency.<sup>112</sup>

121. Article 27(2) of the Airport Act also provided that:

If the property intended for the airport owned by the State Treasury or local government units has been leased, let for usufruct, rented or lent, the decision regarding the permit to implement investments concerning public airport shall provide the ground for termination of the lease, usufruct, rental or lending with immediate effect.<sup>113</sup>

122. Further, Article 27(3) of the Airport Act stated:

Loss suffered as a result of termination of agreements referred to in Sec. 2 shall be subject to compensation.<sup>114</sup>

### **The Flemingo Group’s knowledge about the planned modernisation of Terminal 1**

123. Respondent submits that on 5 May 2009 representatives from Baltona and BH Travel met with PPL and the architects from the design office Estudio Lamela to discuss the modernisation of Terminal 1 of Chopin Airport under the then existing preliminary plans. Respondent states that, at this meeting, the attendees confirmed their willingness to conclude appropriate agreements in the future to modify principles for leasing premises in relation to the planned modernisation.<sup>115</sup>

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<sup>109</sup> Statement of Claim, para. 55, *referring to* List of Individual Projects for the Operational Programme Infrastructure and Environment 2007-2013 (extract) dated August 2010, p. 72, **Exhibit C-54**; Witness Statement of Piotr Kazimierski (5 August 2014), **Exhibit CWS-3** (“**Kazimierski Witness Statement, Exhibit CWS-3**”); Letter from PPL (■■■■ Mr. [MM]) to the Governor of Mazovia dated 11 June 2012, **Exhibit C-55**; Claimant’s Reply, para. 49.

<sup>110</sup> Statement of Claim, para. 57, *referring to* Act of 12 February 2009 on Specific Rules Governing the Preparation and Implementation of Investments Concerning Public Airports, **Exhibit C-56**.

<sup>111</sup> Statement of Claim, para. 58, *referring to* Act of 12 February 2009 on Specific Rules Governing the Preparation and Implementation of Investments Concerning Public Airports, **Exhibit C-56**. *See also* Statement of Defence, paras. 176-179.

<sup>112</sup> Act of 12 February 2009 on Specific Rules Governing the Preparation and Implementation of Investments Concerning Public Airports, **Exhibit C-56**.

<sup>113</sup> Statement of Claim, para. 59, *referring to* Act of 12 February 2009 on Specific Rules Governing the Preparation and Implementation of Investments Concerning Public Airports, **Exhibit C-56**.

<sup>114</sup> Statement of Claim, para. 59, *referring to* Act of 12 February 2009 on Specific Rules Governing the Preparation and Implementation of Investments Concerning Public Airports, **Exhibit C-56**.

<sup>115</sup> Statement of Defence, para. 116; Respondent’s Rejoinder, paras. 228-234, *referring to* Witness Statement of ■■■■ Mr. [MM] (7 November 2014), **Exhibit RWS-2** (“■■■■ Mr. [MM] Witness Statement, Exhibit RWS-2”), para. 4; Witness Statement of ■■■■ Ms. [IM] (16 July 2015), **Exhibit RWS-4** (“■■■■ Ms. [IM] Witness

124. Claimant contends that Mr. Jaroń (of Bastion), who Respondent claims was present at the meeting, is “not aware of any meeting with Estudio Lamela in May 2009 and could not locate any record of such meeting at BH Travel or Baltona”. According to Mr. Jaroń, even if any amendment of the Lease Agreements had been discussed, it would have been his understanding that “in the event of any modernization, the lease agreements would be extended for a period equivalent to the duration of the modernization, in order to allow PPL to proceed with the works while protecting BH Travel’s rights under its long-term lease agreements”.<sup>116</sup>
125. The Parties disagree on the level of sophistication of the plans for modernisation of Terminal 1 around the time of the purported meeting in 2009. While Claimant asserts that the planning was still rather undeveloped at the time,<sup>117</sup> Respondent maintains that the “concept of the modernization of Terminal 1 actually emerged in 2009” and that it could be foreseen that the terminal would be “out of service for a long period”.<sup>118</sup>
126. Respondent submits that during a meeting on 2 March 2010, PPL’s Management Board informed Bastion and the Flemingo Group (Mr. Jaroń and Mr. Ahuja) about the planned modernisation of Terminal 1, including its closure during the modernisation.<sup>119</sup>
127. However, Claimant contends that Bastion and the Flemingo Group were not thus informed by PPL at the meeting of 2 March 2010. Claimant submits that it is “commercially nonsensical” to assume that they had been informed as Respondent suggests, since the Flemingo Group would not have pursued the acquisition of Baltona had it known that the business at the stores in Terminal 1 would be “suspended or even liquidated”. Claimant states that, instead, after the meeting, the Flemingo Group had the impression that the modernisation could increase passenger flows and enhance revenue without a significant interruption of the ongoing business.<sup>120</sup>
128. Claimant submits that the Flemingo Group learned about the planned modernisation of Terminal 1 of Chopin Airport during the course of its due diligence prior to the purchase of shares in Baltona in February and March 2010. However, Claimant contends that Respondent did not inform BH Travel, Baltona, or any other member of the Flemingo Group about the schedule of the modernisation or its impact on BH Travel’s operations in Terminal 1 until a meeting between PPL and Baltona’s management on 8 December 2011.<sup>121</sup>
129. On 2 July 2010, PPL (█ Mr. [RB], Chopin Airport’s Deputy Director for the Commercial

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**Statement, Exhibit RWS-4**) paras. 13-14; Supplementary Witness Statement of █ Mr. [PN] (29 June 2015) (“**Second █ Mr. [PN] Witness Statement, Exhibit RWS-3**”), para. 4.

<sup>116</sup> Claimant’s Reply, paras. 52-53, *referring to* Supplementary Witness Statement of Tomasz Jaroń (30 April 2015), **Exhibit CWS-5** (“**Second Jaroń Witness Statement**”), para. 8.

<sup>117</sup> Claimant’s Reply, paras. 52-53 *referring to* Second Jaroń Witness Statement, p. 4, **Exhibit CWS-5**.

<sup>118</sup> Respondent’s Rejoinder, paras. 223, 227, 233-234, *referring to* Excerpts of the Polish court testimonies from the case before the Regional Court in Warsaw, 24th Civil Division, case No. XXIV C 454/13 dated 11 October 2013, 7 May 2014, 27 August 2014, **Exhibit R-121**; Second █ Mr. [PN] Witness Statement, paras. 3-4, **Exhibit RWS-3**; █ Ms. [IM] Witness Statement, para. 13, **Exhibit RWS-4**.

<sup>119</sup> Statement of Defence, para. 117; Respondent’s Rejoinder, paras. 235-241, *referring to* █ Mr. [AW]’s statement dated 16 June 2010, **Exhibit R-132**; █ Mr. [GD]’s statement dated 26 May 2010, **Exhibit R-133**; Supplementary Witness Statement of █ Mr. [MM] (13 July 2015), **Exhibit RWS-5** (“**Second █ Mr. [MM] Witness Statement, Exhibit RWS-5**”).

<sup>120</sup> Claimant’s Reply, paras. 59-61, *referring to* Supplementary Witness Statement of Atul Ahuja (24 April 2015), **Exhibit CWS-4** (“**Second Ahuja Witness Statement, Exhibit CWS-4**”), para. 7.

<sup>121</sup> Claimant’s Reply, para. 50; Respondent’s Rejoinder, para. 218; Statement of Defence, para. 119.

Department) wrote to BH Travel regarding “on-going works related to the preparation of a design for the modernization of Terminal 1 and its full integration with Terminal 2 and the resulting necessity to exclude, in the future, the facilities and areas affected by [this] venture from use”.<sup>122</sup>

130. PPL added that it was “necessary for [PPL] to establish which companies currently renting spaces in Terminal 1 must be transferred to premises within the area of Terminal 2 and which ones may be relocated outside the area of the Terminals”.<sup>123</sup>
131. Respondent asserts that PPL’s letter did not apply to commercial retail spaces but only to the temporary relocation of office premises.<sup>124</sup> Respondent avers that similar letters were sent on 2 July 2010 to all entities that had office premises in Terminal 1, but not to those who only had retail and service activities in the terminal.<sup>125</sup>
132. PPL’s 2 July 2010 letter to BH Travel also: (i) solicited BH Travel’s views on the proposed relocation of rented premises; (ii) asked BH Travel to take into account “PPL’s limited capabilities in terms of ensuring replacement premises within the area of the Terminal for all its users”; and (iii) urged BH Travel to “treat this matter as urgent” and to respond in writing within three business days, which was 7 July 2010.<sup>126</sup>
133. Mr. Jaroń of Bastion explains that the letter was the “first correspondence from PPL about its plans for the modernization of Terminal 1”. Given that BH Travel occupied a “vast majority” of the commercial space in Terminal 1 and had a stake in the planned modernisation, Mr. Jaroń asserts that “[he] expected that PPL would at the very least offer to meet with [BH Travel] to discuss the impact of the planned modernization rather than send what appeared to be a perfunctory letter”.<sup>127</sup>
134. The Baltona and BH Travel Management Boards agreed to inquire regarding the schedule of the modernisation and its full impact on Terminal 1’s operations before expressing any views on PPL’s proposal.<sup>128</sup>
135. On 6 July 2010, BH Travel informed PPL of its inability to provide a “full and substantial position” on the proposed relocation of its stores in Terminal 1 absent any information on “which premises it should concern” as well as the “estimated period of the exclusion”. BH Travel requested “detailed explanations” from PPL.<sup>129</sup>
136. On 13 August 2010, PPL informed BH Travel that it was “unable to define the exact date of

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<sup>122</sup> Statement of Claim, para. 61, *referring to* Letter from PPL to BH Travel (A. Sobieska) dated 2 July 2010, **Exhibit C-58**.

<sup>123</sup> Statement of Claim, para. 61, *referring to* Letter from PPL to BH Travel (A. Sobieska) dated 2 July 2010, **Exhibit C-58** (emphasis by Claimant omitted).

<sup>124</sup> Statement of Defence, para. 113, Respondent’s Rejoinder, paras. 248-255; Claimant’s Reply, para. 62.

<sup>125</sup> Statement of Defence, para. 114; *see also* Claimant’s Reply, para. 62, stating that the concerned letter applied to both office and commercial space.

<sup>126</sup> Statement of Claim, para. 62, *referring to* Letter from PPL to BH Travel (A. Sobieska) dated 2 July 2010, **Exhibit C-58** (internal quotations omitted).

<sup>127</sup> Statement of Claim, paras. 63-64, *referring to* Jaroń Witness Statement, para. 26, **Exhibit CWS-2**; Ahuja Witness Statement, para. 23, **Exhibit CWS-1**.

<sup>128</sup> Statement of claim, para. 64, *referring to* Jaroń Witness Statement, para. 27, **Exhibit CWS-2**.

<sup>129</sup> Statement of Claim, para. 65, *referring to* Letter from BH Travel (█ Mr. [AK]) to PPL (█ Mr. [RB]) dated 6 July 2010, **Exhibit C-59**.

commencement of the works on [the] modernization of Terminal 1 as well as the period of decommissioning”<sup>130</sup>.

137. Baltona and BH Travel did not receive further information from PPL on the planned modernisation of Terminal 1 until the end of the summer of 2011. In September 2011, Baltona’s new Director of Business Development and a member of its Management Board, Mr. Piotr Kazimierski, contacted PPL (■■■ Mr. [PN], Chopin Airport’s Director of the Commercial Department), to arrange a meeting to discuss BH Travel’s business operations in Chopin Airport.<sup>131</sup>
138. On 9 September 2011, a meeting between Baltona and PPL was attended by – for Baltona: Ms. Magda Grzybowska, former President of Baltona’s Management Board, Ms. Anna Sobieska, Project Manager at Baltona, and Mr. Kazimierski; and for PPL: ■■■ Mr. [PN], ■■■ Mr. [RB], and other representatives from PPL. Mr. Kazimierski describes the meeting as, to his knowledge, “the first official meeting between Baltona/BH Travel and PPL in approximately two years”<sup>132</sup>.
139. An e-mail from Baltona dated 9 September 2011 indicates that during the meeting, the attendees discussed the planned modernisation of Terminal 1, among other issues.<sup>133</sup> According to Baltona’s e-mail, ■■■ Mr. [PN] also stated on behalf of PPL that: (i) PPL had not yet finalised preparatory works for the modernisation plan; (ii) PPL could not confirm the schedule or impact of the plan on BH Travel’s operations in Terminal 1; (iii) the Polish parliamentary elections in October 2011 would probably delay or disrupt the planned modernisation; and (iv) he would revert with additional information regarding the architectural design of the new terminal and the schedule for the planned works by the end of 2011.<sup>134</sup> Despite that, PPL did not correspond further with BH Travel regarding the planned modernisation.

#### **Communications and developments in the run-up to the termination of the Lease Agreements**

140. On 8 December 2011, Mr. Andrzej Uryga, Mr. Witold Kruszewski and Mr. Kazimierski, all members of Baltona’s Management Board, met with Messrs. ■■■ [PN] and ■■■ [RB] of PPL.<sup>135</sup> The meeting was to discuss the status of PPL’s planned modernisation of Terminal 1.<sup>136</sup>
141. Respondent adds that during that meeting, PPL stated that the planned modernisation of Terminal 1 would begin in August 2012 and would require PPL to shut down Terminal 1 by 3 July 2012. PPL further explained: (i) that it was at that point “looking to terminate” lease agreements for premises within Terminal 1; (ii) that it was entitled to unilaterally terminate the

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<sup>130</sup> Statement of Claim, para. 66, *referring to* letter from PPL (■■■ Mr. [RB]) to BH Travel (■■■ Mr. [AK]) dated 13 August 2010, **Exhibit C-60**; Respondent’s Rejoinder, paras. 253-255.

<sup>131</sup> Statement of Claim, paras. 68-69.

<sup>132</sup> Statement of Claim, para. 70, *referring to* Kazimierski Witness Statement, para. 10, **Exhibit CWS-3**.

<sup>133</sup> Statement of Claim, para. 71, *referring to* e-mail from P. Kazimierski to Baltona and Bastion dated 18 September 2011, **Exhibit C-61**, Kazimierski Witness Statement, para. 11, **Exhibit CWS-3**; Statement of Defence, para. 120.

<sup>134</sup> Statement of Claim, para. 71, *referring to* e-mail from P. Kazimierski to Baltona and Bastion dated 18 September 2011, **Exhibit C-61**, Kazimierski Witness Statement, para. 11, **Exhibit CWS-3**.

<sup>135</sup> Statement of Claim, para. 72, *referring to* Kazimierski Witness Statement, paras. 12-13, **Exhibit CWS-3**; Respondent’s Rejoinder, para. 257.

<sup>136</sup> Statement of Claim, para. 72; Statement of Defence, para. 123.

relevant Lease Agreements with BH Travel with three months' notice; (iii) its proposal that the parties to the relevant Lease Agreements mutually agree to cancel them; and (iv) that the European Union co-financed the modernisation project and that the availability of that funding was subject to the completion of the project by the end of 2014.<sup>137</sup>

142. Responding to PPL's proposal, Baltona expressed its willingness to negotiate the closure of BH Travel's stores in Terminal 1. According to Claimant, Baltona refrained from commenting on the terms and conditions of any such closures.<sup>138</sup> Respondent insists that Baltona's and BH Travel's representatives "twice agreed" at the meeting to the mutual termination of the Lease Agreements, but Claimant denies having made such an agreement.<sup>139</sup>
143. According to Respondent, during the meeting, the following matters were also discussed: (i) "BH Travel's problems with payments"; (ii) "BH Travel's requests to forgive some of the interest due to PPL"; (iii) "BH Travel's requests to adjust the rent from the commissions payable in connection with the incorrect recording of sales revenues of individual product groups during the period October 2008 – May 2011"; and (iv) BH Travel's "missing bank guarantees".<sup>140</sup>
144. In his witness statement, Mr. Kazimierski of Baltona explains that he "expected that this meeting would be the basis for further negotiations and that both parties would have the opportunity to submit their respective proposals".<sup>141</sup>
145. ■■■ Mr. [PN] testified before the Tribunal that the Airport Act (referred to by him as the "Special Act on the Construction of the Terminal" or "Special Act") was not discussed nor mentioned during the 8 December 2011 meeting.<sup>142</sup>
146. On 9 December 2011, PPL sent a summary of the 8 December meeting to Baltona and BH Travel.<sup>143</sup> In this summary, PPL (i) confirmed that the "hand-over of the commercial space to PPL by the lessees [was] scheduled for 4 July to 31 July 2012 in order to enable the modernization contractor to take-over the construction site on 1 August 2012"; (ii) reiterated its proposal that the parties mutually agree to terminate BH Travel's relevant Lease Agreements in Terminal 1; and (iii) asserted that "BH [had] confirmed its willingness to terminate the lease by mutual agreement on 3 July 2012 and to hand-over the commercial space to PPL by 31 July 2012".<sup>144</sup> ■■■ Mr. [PN] further testified that he took notes during the meeting on 8 December

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<sup>137</sup> Statement of Claim, para. 73, *referring to* Kazimierski Witness Statement, para. 14, **Exhibit CWS-3**.

<sup>138</sup> Statement of Claim, para. 74, *referring to* Kazimierski Witness Statement, para. 16, **Exhibit CWS-3**; Claimant's Reply, para. 109.

<sup>139</sup> Respondent's Rejoinder, para. 258, *referring to* Second ■■■ Mr. [PN] Witness Statement, paras. 8-9, **Exhibit RWS-3**. *See also* Claimant's Reply, paras. 110-111, 119. Mr. Kazimierski testified before the Tribunal that he might have said in the meeting the following: "I am positive that we can reach an agreement". According to him, "we did not say explicitly that we agreed to termination without any condition, without nothing". *See* Hearing Transcript (12 October 2015), 231:3-17, reply to a question posed by Mr. Townsend.

<sup>140</sup> Statement of Defence, para. 122.

<sup>141</sup> Statement of Claim, para. 74, *referring to* e-mails between P. Kazimierski, A. Uryga and W. Kruszewski dated 8-9 December 2012, **Exhibit C-62**; Claimant's Reply, para. 112.

<sup>142</sup> Hearing Transcript (13 October 2015), 159:4-10.

<sup>143</sup> Statement of Claim, para. 75, *referring to* E-mail from PPL (■■■ Mr. [PN]) to Baltona dated 9 December 2011, **Exhibit C-63**; Statement of Defence, para. 128.

<sup>144</sup> Statement of Claim, para. 75, *referring to* E-mail from PPL (■■■ Mr. [PN]) to Baltona dated 9 December 2011, **Exhibit C-63**. *See also* Statement of Defence, paras. 124, 127. ■■■ Mr. [MM] explains that PPL's partners in Warsaw showed that they accepted the solution they offered. PPL did not see any conflicts. He states that PPL "could not offer them any guarantees that if they terminate amicably, they will have certain guarantees of

2011, and that he believed everybody took notes for their own personal use. However, he testified that he no longer had his notes and had not shared them with other PPL employees.<sup>145</sup> The Parties did not sign any written agreement during the meeting on 8 December 2011.

147. According to ■■■ Mr. [PN]'s testimony, some of BH Travel's stores performed poorly financially at that time. He said that the termination of the Lease Agreements would have afforded BH Travel an "opportunity" to win the new tender, to redesign their stores, change their product range and improve their performance. ■■■ Mr. [PN] believed that it was good for BH Travel's business to abandon all of its leases in Terminal 1.<sup>146</sup>
148. Mr. Kazimierski disagreed with PPL's summary of the meeting and expressed to his Baltona colleagues his concern that PPL seemed to have "a different understanding of [the] discussion and statements as to the renovation of Terminal 1". In his e-mail on 9 December 2011 to Messrs. Uryga, Kruszewski, and Dworniak, Mr. Kazimierski explained:

We did not confirm that we agree to terminate the lease by mutual agreement on 3 July 2011. We have certainly not confirmed our will [*sic*] to hand over premises until 31 July 2012. It was [...] PPL that informed us on such plan in relation to the closing of [the] terminal on 3 July. We said that we are interested to reach consensus with regard to the termination of the activity consisting in running shops due to the renovation of the terminal but not to terminate the lease agreement.<sup>147</sup>

149. In his testimony, ■■■ Mr. [PN] denied that there was simply a misunderstanding between the BH Travel and PPL representatives during the 8 December 2011 meeting, stating that "there were so many people in the meeting" but that "everyone understood the same thing".<sup>148</sup>
150. In his witness statement, Mr. Kazimierski describes PPL's account of the 8 December 2011 meeting as "highly misleading" and explains that "it would have made no commercial sense for [Baltona] to abandon the leases without receiving adequate compensation for PPL's early termination and PPL was well aware of that", a view which is repeated by Mr. Atul Ahuja in his witness statement.<sup>149</sup>
151. ■■■ Mr. [MM], General Director of PPL and Director of Chopin Airport, testified that, as far as he could recall, PPL did not pay compensation to any other tenant for giving up its lease.<sup>150</sup> ■■■ Mr. [PN] confirmed that he never spoke with the relevant governor about compensation.<sup>151</sup> ■■■

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receiving space. However, in view of the philosophy that [PPL] followed in [its] business, [PPL's] partners agreed to [its] arrangements, such as HDS or other companies". See Hearing Transcript (13 October 2015), 89:20 to 90:7, reply to questions posed by the President.

<sup>145</sup> Hearing Transcript (14 October 2015), 93:19 to 94:16.

<sup>146</sup> Hearing Transcript (13 October 2015), 151:15 to 152:9.

<sup>147</sup> Statement of Claim, para. 76, referring to E-mail from Mr. Kazimierski to Messrs. Uryga, Kruszewski and Dworniak dated 9 December 2011, **Exhibit C-64** (emphasis by Claimant omitted); Claimant's Reply, para. 113.

<sup>148</sup> Hearing Transcript (14 October 2015), 19:15-17.

<sup>149</sup> Statement of Claim, para. 77, referring to Kazimierski Witness Statement, para. 19, **Exhibit CWS-3**, Ahuja Witness Statement, para. 26, **Exhibit CWS-1**; Claimant's Reply, paras. 114-116, referring to Decision of the Regional Court in Warsaw, 24th Civil Division, case no XXIV C 454/13 – PPL v Maciej Dworniak dated 25 February 2015, p. 13, **Exhibit C-196**.

<sup>150</sup> Hearing Transcript (13 October 2015), 98:15-18, reply to a question posed by Mr. Townsend.

<sup>151</sup> Hearing Transcript (14 October 2015), 84:15-16, reply to a question posed by the President.

Mr. [PN] affirmed that to his knowledge there was no budget for compensation.<sup>152</sup> He also stated that the other tenants vacated the premises voluntarily and no compensation was paid.<sup>153</sup>

152. Claimant submits that, in light of the conflicting summaries of the 8 December 2011 meeting, Mr. Ahuja instructed Baltona's Management Board to undertake every effort to conclude a mutually-agreeable settlement with PPL.<sup>154</sup>

153. On 13 December 2011, PPL wrote to BH Travel, stating:

[W]e would like to put forward our proposal made at the meeting on 8 December this year regarding the termination of the lease agreements with BH Travel Retail Poland Sp. z o.o. [...] by mutual agreement, effective as of 3 July 2012. In submitting this proposal – given your acceptance expressed at the meeting on 8 December regarding the termination of lease agreements by mutual consent with effect from 3 July 2012 – we kindly request that you confirm this decision in writing, in order to enable the preparation of a respective declaration to confirm the accepted arrangements between the Parties as regards terminating the agreements on 3 July 2012 and returning the retail spaces to PPL by 31 July 2012.<sup>155</sup>

154. In his witness statement, Mr. Kazimierski notes with respect to PPL's 13 December 2011 letter that "PPL seemed to be assuming that the issue of termination of the leases had already been resolved, and that all that was left for BH Travel to do was to sign off on the proposed termination and vacate the premises before 31 July".<sup>156</sup>

155. By letter dated 4 January 2012,<sup>157</sup> BH Travel through its counsel Beiten Burkhardt: (i) rejected PPL's proposal regarding the termination of the relevant Lease Agreements and its assertion that the parties had already reached agreement in that regard; (ii) noted that the proposed termination of the relevant Lease Agreements "would generate losses running into [REDACTED] of zlotys for BH Travel on the account of capital expenditures incurred by BH Travel on conversion of the retail spaces as well as damage to the assets of BH Travel on the account of lost profits during the guaranteed term of the Lease Agreements"; and (iii) contended that PPL could not unilaterally terminate the Lease Agreements before the expiration of the guaranteed periods of lease.<sup>158</sup>

156. BH Travel also proposed to meet to renegotiate the terms of the Lease Agreements which it suggested should be pursuant to the following terms, with PPL's 2 July 2010 letter and the provision of alternative retail spaces as starting points, stating:

[T]he manner in which the problem will be resolved must take into account the economic interests of BH Travel, in particular the fact that BH Travel will be denied the opportunity to achieve the planned revenues during the period of modernisation works in Terminal 1. In addition, a solution acceptable to BH Travel must also take into account the fact that some

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<sup>152</sup> Hearing Transcript (13 October 2015), 155:2-15.

<sup>153</sup> Hearing Transcript (14 October 2015), 73:24 to 74:22.

<sup>154</sup> Statement of Claim, para. 77, referring to Ahuja Witness Statement, para. 26; Claimant's Reply, para. 121.

<sup>155</sup> Statement of Claim, para. 78, referring to letter from PPL ([REDACTED] Mr. [PN]) to BH Travel (A. Uryga) dated 13 December 2011, **Exhibit C-65** (emphasis by Claimant omitted). See also Statement of Defence, para. 128.

<sup>156</sup> Kazimierski Witness Statement para. 21, **Exhibit CWS-3**.

<sup>157</sup> See Statement of Defence, paras. 129-131, referring to [REDACTED] Mr. [PN] Witness Statement, para 27, **Exhibit RWS-1**; [REDACTED] Mr. [MM] Witness Statement, para 6, **Exhibit RWS-2**.

<sup>158</sup> Statement of Claim, para. 80, referring to E-mail from Counsel for BH Travel to PPL ([REDACTED] Mr. [PN]) dated 4 January 2012, **Exhibit C-66** and Letter from Counsel for BH Travel to PPL ([REDACTED] Mr. [PN]) dated 4 January 2012, pp. 8-9, **Exhibit C-67**; Claimant's Reply, para. 123-124.

of the Retail Spaces will be unavailable to BH Travel due to the modernisation works for as long as half the guaranteed period of [the] lease.<sup>159</sup>

157. PPL responded by letter dated 13 January 2012, in which it expressed its “astonishment” at BH Travel’s 4 January 2012 letter and requested clarification.<sup>160</sup> PPL reasserted that, during their 8 December 2011 meeting, PPL and BH Travel had mutually agreed to terminate the relevant Lease Agreements and that BH Travel had signalled its willingness to participate in the tender procedure for the lease of new retail spaces in Terminal 1.<sup>161</sup>
158. On 1 February 2012, PPL sent four separate letters to BH Travel regarding various obligations under the Lease Agreements, including on the maintenance of BH Travel’s website<sup>162</sup> and access to BH Travel’s IT registration systems,<sup>163</sup> among other obligations.<sup>164</sup> Claimant avers that PPL had not previously raised those issues with BH Travel.<sup>165</sup>
159. On 3 February 2012, BH Travel applied to the Regional Court for injunctive relief delaying the modernisation works on Chopin Airport’s Terminal 1 until the resolution of the dispute with PPL concerning BH Travel’s stores.<sup>166</sup> Respondent submits that BH Travel also filed two actions to block the modernisation of Terminal 1 on 6 February 2012. Respondent further notes that PPL “found out about one of these motions being filed as late as on 17 February 2012” after the motion had been dismissed and the Lease Agreements had been terminated.<sup>167</sup>
160. Mr. Kazimierski of Baltona asserts that, in light of PPL’s letter dated 1 February 2012, BH Travel became “concerned that PPL appeared to be fishing for any possible violation that it could rely upon as a pretense to invoke the termination provision in the leases and unilaterally cancel BH Travel’s rights”.<sup>168</sup> BH Travel responded by letters of 7 February 2012 and 16 February 2012 expressing its surprise at PPL’s demands and the “intensity of communication” over issues of “slight” or smaller importance. BH Travel also urged PPL to “immediately resume the

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<sup>159</sup> Statement of Claim, paras. 81-82, *referring to* letter from Counsel for BH Travel to PPL (█ Mr. [PN]) dated 4 January 2012, paras. 8-9, **Exhibit C-67**.

<sup>160</sup> Statement of Claim, para. 83, *referring to* letter from PPL (█ Mr. [PN]) to BH Travel (A. Uryga) dated 13 January 2012, p. 1, **Exhibit C-68**; Statement of Defence, para. 133. See also Hearing Transcript (13 October 2015), 167:9-17.

<sup>161</sup> Letter from PPL (█ Mr. [PN]) to BH Travel (A. Uryga) dated 13 January 2012, p. 1, **Exhibit C-68**.

<sup>162</sup> Statement of Claim, para. 88, *referring to* letter from PPL (█ Mr. [PN]) to BH Travel (A. Uryga) dated 1 February 2012, **Exhibit C-70**.

<sup>163</sup> Statement of Claim para. 88, *referring to* Second Letter from PPL (█ Mr. [PN]) to BH Travel (A. Uryga) dated 1 February 2012, **Exhibit C-71**.

<sup>164</sup> Statement of Claim, para. 88, *referring to* First Letter from PPL (█ Mr. [PN]) to BH Travel (A. Uryga) dated 1 February 2012, **Exhibit C-70**; Second Letter from PPL (█ Mr. [PN]) to BH Travel (A. Uryga) dated 1 February 2012, **Exhibit C-71**; Third Letter from PPL (█ Mr. [PN]) to BH Travel (A. Uryga) dated 1 February 2012, **Exhibit C-72** and Fourth Letter from PPL (█ Mr. [PN]) to BH Travel (A. Uryga) dated 1 February 2012, **Exhibit C-73**.

<sup>165</sup> Statement of Claim, para. 89.

<sup>166</sup> Claimant’s Reply, para. 125, *referring to* Second Witness Statement of Piotr Kazimierski (30 April 2015), **Exhibit CWS-6** (“**Second Kazimierski Witness Statement, Exhibit CWS-6**”), para. 10; Statement of Defence, para. 134, *referring to* Schedule of court cases, **Exhibit R-4**, █ Mr. [PN] Witness Statement, **Exhibit RWS-1**.

<sup>167</sup> Statement of Defence, para. 134, *referring to* Schedule of court cases, **Exhibit R-4**, █ Mr. [PN] Witness Statement, **Exhibit RWS-1**.

<sup>168</sup> Statement of Claim, para. 89, *referring to* Kazimierski Witness Statement, paras. 29-30, **Exhibit CWS-6**; Jaroń Witness Statement, para. 33, **Exhibit CWS-2**.

discussions on the key subject for the relationship between PPL and BH Travel”.<sup>169</sup>

161. In a letter dated 8 February 2012 to ■■■ Mr. [MM], BH Travel again proposed renegotiating the terms of the relevant Lease Agreements, asked PPL to submit a proposal to settle the matter, and invited PPL to meet to discuss any settlement.<sup>170</sup> BH Travel also indicated that it “was compelled under the circumstances” to initiate legal action to protect its rights.<sup>171</sup> Finally, BH Travel asserted that “PPL’s unlawful conduct engaged the responsibility of the Polish State”.<sup>172</sup> ■■■ Mr. [MM] did not respond to BH Travel’s letter.<sup>173</sup>
162. By letter dated 10 February 2012, PPL notified BH Travel’s Management Board regarding its approval of a revised set of DFZ Rules, effective as of 20 February 2012. PPL requested BH Travel to return signed appendices to the Lease Agreements incorporating the revised set of DFZ Rules.<sup>174</sup>
163. Under Article 8(2) of the revised DFZ Rules sent to BH Travel, the following was added as a ground for withdrawing the required permit for conducting business activity within the DFZ: commencement by the Operator of “adaptation/modernization works in DFZ affecting the functioning of the DFZ or resulting in an alteration of its borders”.<sup>175</sup> Claimant submits that PPL had thus attempted to introduce “through the back door” a new ground for the unilateral termination of the Lease Agreements on the basis of the modernisation.<sup>176</sup>
164. Respondent submits that it perceived BH Travel’s application for interim measures of 3 February 2012 as an “obvious threat[.]” to block the modernisation of Terminal 1. In response, PPL said that it could no longer tolerate BH Travel’s breaches of contract and “was forced to enforce the performance of the Lease Agreements on BH Travel”.<sup>177</sup>
165. ■■■ Mr. [MM] testified that, from his point of view, it had become difficult to negotiate with BH Travel, because of the nearly 90 lawsuits filed against PPL.<sup>178</sup>

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<sup>169</sup> Statement of Claim, para. 90, *referring to* letter from BH Travel (W. Kruszewski) to PPL (■■■ Mr. [PN]) dated 7 February 2012, **Exhibit C-74** and letter from BH Travel (W. Kruszewski and A. Uryga) to PPL (■■■ Mr. [PN]) dated 16 February 2012, **Exhibit C-75**.

<sup>170</sup> Statement of Claim, para. 85, *referring to* letter from Counsel for BH Travel to PPL (■■■ Mr. [MM]) dated 8 February 2012, pp. 15-16, **Exhibit C-69**; Claimant’s Reply, para. 123.

<sup>171</sup> Statement of Claim, para. 85, *referring to* letter from Counsel for BH Travel to PPL (■■■ Mr. [MM]), dated 8 February 2012, p. 19, **Exhibit C-69**.

<sup>172</sup> Statement of Claim, para. 85, *referring to* letter from Counsel for BH Travel to PPL (■■■ Mr. [MM]), dated 8 February 2012, pp. 21-22, **Exhibit C-69**.

<sup>173</sup> Statement of Claim, para. 86.

<sup>174</sup> Statement of Claim, para. 92, *referring to* Letter from PPL (■■■ Mr. [PN]) to BH Travel (A. Uryga), 10 February 2012, **Exhibit C-76**; Claimant’s Reply, para. 130.

<sup>175</sup> Statement of Claim, para. 93, *referring to* 2009 DFZ Rules (extract), Article 8(2), **Exhibit C-77**, *compared with* 2012 DFZ Rules (extract), Article 8(2), **Exhibit C-78**, Kazimierski Witness Statement paras. 31-33, **Exhibit CWS-6**; Jaroń Witness Statement, para. 33, **Exhibit CWS-2**; Claimant’s Reply, para. 130.

<sup>176</sup> Claimant’s Reply, paras. 130-131, 138.

<sup>177</sup> Statement of Defence, paras. 137-138. *See also* Claimant’s Reply, paras. 126-129.

<sup>178</sup> Hearing Transcript (13 October 2015), 103:7-12, reply to a question posed by Dr. Kühn. Claimant disagrees that the number is as high as 90. *See* Hearing Transcript (16 October 2015), 35:17 to 37:6. One of the lawsuits concerns a claim of damages for wrongful termination of lease agreement. Claimant stated that, at the time of the Hearing, the case was pending before the court of first instance in Warsaw and the amount claimed was nearly EUR 80 million. *See* Hearing Transcript (16 October 2015), 38:17 to 39:1. Despite the existence of a compensation claim before the Polish court, Claimant submits that there is no issue of double payment or

## Termination of the Lease Agreements

166. On 16 February 2012, PPL sent BH Travel 11 separate notices of termination for the Lease Agreements with immediate effect and requested that the leased premises be returned within 30 days.<sup>179</sup> Each of the notices stated as follows:

Acting on the basis of the provisions item 13 subitem 1 letter c) and d) of the General Conditions of Lease, the 'Polish Airports' State Enterprise terminates with immediate effect the lease agreement [...]. Pursuant to §8 of the abovementioned agreement, BH Travel Retail Poland Sp. z o.o. is obliged to return the property leased within 30 days from the day following the termination of the agreement.

167. ■■■ Mr. [PN] testified before the Tribunal that it was he who made the decision to terminate the Lease Agreements with BH Travel. He recommended termination to ■■■ Mr. [MM], who accepted it.<sup>180</sup>
168. PPL based the termination of the Lease Agreements on two grounds: (i) failure to submit, complete or renew bank guarantees under Article 13(1)(c) of the General Lease Conditions; and (ii) failure to renew and submit certified copies of insurance policies under Article 13(1)(d) of the General Lease Conditions.<sup>181</sup> Articles 13(1)(c) and (d) provide:

The Lessor shall have the right to terminate this Agreement with immediate effect in the case of:

[...]

c) failure to submit (non-payment), complete, or renew the bank guarantee (deposit) under the terms specified in the Agreement,

d) failure to submit certified true copies of insurance policies, as well failure to renew the said insurance policies,

[...].<sup>182</sup>

169. Claimant submits that BH Travel did not receive any prior warning about the alleged breaches

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double compensation because the decision will take years to be decided. See Hearing Transcript (16 October 2015), 151:17 to 152:7.

<sup>179</sup> Statement of Claim, para. 94, *referring to* Letters from PPL (■■■ Mr. [PN] and ■■■ Mr. [MM]) to BH Travel (■■■ Mr. [MT]) dated 16 February 2012, **Exhibit C-79**; Statement of Defence, para. 144.

<sup>180</sup> Hearing Transcript (13 October 2015), 180:16-21. ■■■ Mr. [PN] explained that he had “strong suspicion” that BH Travel would “continue doing business until June without paying rent [...]”. He also believed he “would soon be without any guarantees, without any insurance, stuck with a partner that was not performing on its obligations”. See Hearing Transcript (13 October 2015), 182:17-19.

<sup>181</sup> Statement of Claim, para. 98, *referring to* General Lease Conditions, Appendix 5, Article 13(1)(c), **Exhibit C-32**, Letters from PPL (■■■ Mr. [PN] and ■■■ Mr. [MM]) to BH Travel (■■■ Mr. [MT]) dated 16 February 2012, **Exhibit C-79**; para. 99, *referring to* Appendix 5, General Lease Conditions, Article 13(1)(d), **Exhibit C-32**; Letters from PPL (■■■ Mr. [PN] and ■■■ Mr. [MM]) to BH Travel (■■■ Mr. [MT]) dated 16 February 2012, **Exhibit C-79**; Respondent’s Rejoinder, paras. 118, 128. With regard to the reasons to terminate the Lease Agreements, ■■■ Mr. [PN] stated the following: “[...] because the law firm was introduced as our partner for dialogue, we ceased having a partner in the person of BH Travel. So when the conflict became acute, and when we were facing huge damages, and when we saw that there was a process kicking in, an attempt to make a fraud, or that this was [the] kind of game, so we made a decision to terminate our cooperation with BH Travel”. Hearing Transcript (14 October 2015), 10:19 to 11:1.

<sup>182</sup> Letters from PPL (■■■ Mr. [PN] and ■■■ Mr. [MM]) to BH Travel (■■■ Mr. [MT]) dated 16 February 2012, **Exhibit C-79**; General Lease Conditions, Appendix 5, Article 13.1, **Exhibit C-32**.

and was not given an opportunity to cure any breaches.<sup>183</sup>

170. The first ground for terminating the Lease Agreements, failure to complete or renew bank guarantees, was based on the following: under Article 4(1) of the General Lease Conditions, BH Travel had to submit bank guarantees covering the minimum lease fees for a one-year period. Those guarantees had to be renewed by a certain date before the expiry of the existing bank guarantees. Article 6(1)(d) of the General Lease Conditions provided that the guarantees were to be adjusted to a revaluation of the yearly minimum lease fees, as notified by 1 February every year.<sup>184</sup>
171. At the time of the termination of the Lease Agreements by PPL on 16 February 2012, BH Travel had delivered bank guarantees covering the (unadjusted) minimum rent amount to PPL that were valid until 31 March 2012.<sup>185</sup>
172. By notice of 1 February 2012, the minimum lease fees had been increased in accordance with the revaluation procedure by █%, effective from 2 March 2012.<sup>186</sup> Under the General Lease Conditions, BH Travel was obligated to submit bank guarantees adjusted to this increase by 15 February 2012.<sup>187</sup> Article 4.1 of the Lease Agreements provided:

The Lessee undertakes to adjust the amount of bank guarantee accordingly in the event of change in the minimum leasing fee in accordance with § 3 section 2, or in the case of change in the area in accordance with the “Control Quantity Survey Protocol”, within 14 days from the date of change.<sup>188</sup>

173. BH Travel had not submitted adjusted bank guarantees by the time PPL sent its notice of termination on 16 February 2012.<sup>189</sup>
174. The second ground for terminating the Lease Agreements, failure to renew and submit certified copies of insurance policies, had the following basis: Article 11(4) of the General Lease Conditions required BH Travel to present new insurance policies for the upcoming year at least 14 days before the expiration of the existing insurance policies:

Insurance policies shall be valid for a period of at least 12 consecutive months from the date of issue. In each case, at least 14 days before the end of another 12-month period, the Lessee shall submit to the Lessor the certified true copy of the subsequent insurance contract, valid for a further 12 consecutive months period.<sup>190</sup>

175. Respondent argues that because the existing insurance policies expired on 29 February 2012, BH Travel had to submit certified copies of the new insurance policies by 15 February 2012.<sup>191</sup> Claimant argues, however that the existing insurance policies were valid until 29 February 2012,

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<sup>183</sup> Statement of Claim, para. 96; Respondent’s Rejoinder, paras. 118, 128.

<sup>184</sup> Respondent’s Rejoinder, paras. 138-152; Statement of Claim, para. 98.

<sup>185</sup> Statement of Claim, para. 98, *referring to* BNP Paribas Bank Guarantee Certificate dated 7 March 2012, **Exhibit C- 80**.

<sup>186</sup> Statement of Claim, para. 98. See also Hearing Transcript (16 October 2015), 24:4-6.

<sup>187</sup> Respondent’s Rejoinder, para. 128.

<sup>188</sup> Lease Agreement between PPL and BH Travel (Classic) dated 13 March 2008, Section 4.1, **Exhibit C-21**.

<sup>189</sup> Respondent’s Rejoinder, para. 128; Statement of Claim, para. 98.

<sup>190</sup> General Lease Conditions, Appendix 5, Article 14, **Exhibit C-32**.

<sup>191</sup> Respondent’s Rejoinder, para. 129-132; Statement of Claim, para. 99.

and thus expired on 1 March 2012.<sup>192</sup> In Claimant's view the 14-day deadline therefore includes 29 February 2012, meaning that it was required to submit the renewed insurance policies by 16 February 2016.<sup>193</sup>

176. BH Travel had renewed the insurance policies on 14 February 2012 and submitted them to PPL on 16 February 2012.<sup>194</sup> Respondent submits that PPL had sent the notice of termination on 16 February 2012 before it received the renewed insurance policies from BH Travel.<sup>195</sup>
177. Claimant submits that the Warsaw Court of Appeal ("**Court of Appeal**"), in the context of injunction proceedings and on a *prima facie* basis, observed that PPL's termination of the Lease Agreements was invalid.<sup>196</sup>
178. Claimant submits that the Court of Appeal stated that Article 13(1)(c) of the General Lease Conditions did not provide a legal basis for a termination of the Lease Agreements due to a failure to adjust bank guarantees to an increase of the lease fee:<sup>197</sup>

[Article 13(1)(c) of the General Lease Conditions] refers to various forms of violating the lessee's obligations in connection with the provision of security in the form of a bank guarantee, but it does not mention the failure to adjust the bank guarantee to the changed amount of the minimum lease rent.<sup>198</sup>

179. Claimant points out that the Court of Appeal also stated :

The circumstances of the case show that the claimant extremely instrumentally used the right arising from Article 13(1)(d) of the [General Lease Conditions] in the apparent conflict between the Lessor and the Lessee. The parties mutually obey the rules of contractual loyalty, and *in this situation there are no reasons that would prove that [a] one-day delay in presenting the copies of insurance policies by the claimant was so essential a threat for the obliged party that it justified the use by the obliged party of its right to immediately terminate the agreements* in a situation where the provisions of these agreements proved that the parties' will was guaranteeing the validity of the agreements for longer period of time (so called guaranteed periods).<sup>199</sup>

180. Claimant admits that the Court of Appeal later lifted the injunctive relief ordered in favour of BH Travel by the first instance court because BH Travel, having lost possession of its stores, no longer had standing to request injunctive relief.<sup>200</sup>
181. Respondent submits that the injunction proceedings referred to by Claimant were based on *prima*

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<sup>192</sup> Statement of Claim, para. 99; Claimant's Reply, para. 142.

<sup>193</sup> Claimant's Post-Hearing Brief, para. 188.

<sup>194</sup> Statement of Claim, para. 99; Claimant's Reply, para. 142; Respondent's Rejoinder, paras. 134-137.

<sup>195</sup> Respondent's Rejoinder, para. 134. ■■■ Mr. [MM] testified before the Tribunal that he was aware of the fact that BH Travel consistently breached contracts over the years; not only concerning bank guarantees, but also insurance policies and other matters. ■■■ Mr. [MM] also stated that, at the time of the decision to terminate the Lease Agreements, there was no longer a good relationship between PPL and BH Travel. *See* Hearing Transcript (13 October 2015), 94:3-20.

<sup>196</sup> Statement of Claim, para. 100; Claimant's Reply, para. 143.

<sup>197</sup> Statement of Claim, para. 101.

<sup>198</sup> Decision of the Warsaw Court of Appeal, 1<sup>st</sup> Civil Division, case No. I ACz 956/12, dated 28 June 2012, p. 6, **Exhibit C-82**.

<sup>199</sup> Decision of the Warsaw Court of Appeal, 1<sup>st</sup> Civil Division, case No. I ACz 956/12, dated 28 June 2012, p. 5, **Exhibit C-82** (emphasis added by Claimant).

<sup>200</sup> Claimant's Reply, para. 146.

*facie* examinations only and resulted from *ex parte* proceedings.<sup>201</sup> Claimant replies that, while both injunction proceedings were conducted *ex parte* before the first instance court that granted the injunctive relief, on appeal the Court of Appeal made its decisions after hearing both parties.<sup>202</sup> Moreover, the Court of Appeal, in separate injunction proceedings, albeit on a *prima facie* basis, confirmed the invalidity of PPL's termination of the Lease Agreements.<sup>203</sup>

182. Furthermore, Claimant asserts that the Regional Court more recently stated that there was ample evidence "in support of the terminations of the rental agreements being considered defective and unlawful".<sup>204</sup>
183. However, Respondent argues that the only judgment in a lawsuit between BH Travel and PPL rendered to date was handed down by the Regional Court on 3 December 2014 and held that the termination of the Lease Agreements was valid.<sup>205</sup> The judgment of the Regional Court dated 25 February 2015, which Claimant refers to, was rendered in a case between PPL and Mr. Maciej Dworniak over the protection of "PPL's personal rights". Respondent submits that the 25 February 2015 judgment has no binding effect between PPL and BH Travel in respect of the validity of the termination of the Lease Agreements.<sup>206</sup>
184. Respondent adds that, although PPL based the termination of the Lease Agreements on 16 February 2012 solely on the two grounds stated above,<sup>207</sup> Respondent submits that BH Travel had breached the Lease Agreements on multiple occasions in the past and "from the very beginning" of its business relationship with PPL, rendering BH Travel's failure to perform the Lease Agreements a "permanent condition".<sup>208</sup> Respondent contends that, due to BH Travel's continuing breaches, PPL's right of early termination of the Lease Agreements was "repeated" several times throughout the life of these Agreements.<sup>209</sup>
185. Respondent clarifies that BH Travel had already significantly delayed the submission of renewed bank guarantees in 2010 and 2011.<sup>210</sup> Respondent further contends that BH Travel had missed a deadline in December 2009 to submit new insurance policies and had once, in 2011, submitted electronic copies of the insurance policies only and submitted true copies only after the applicable deadline.<sup>211</sup>
186. Respondent also contends that, in the two years preceding the termination of the Lease Agreements on 16 February 2012, BH Travel's debt was "as much as between [REDACTED] and [REDACTED]"

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<sup>201</sup> Statement of Defence, paras. 195-198.

<sup>202</sup> Claimant's Reply, para. 145.

<sup>203</sup> Statement of Claim, paras. 102-103, *citing* Decision of the Warsaw Court of Appeal, 6<sup>th</sup> Civil Division, case No. XX GCo 113/12, dated 30 July 2012, p. 7, **Exhibit C-83**; Claimant's Reply, para. 143.

<sup>204</sup> Claimant's Reply, para. 148, *citing* Decision of the Regional Court in Warsaw, 24<sup>th</sup> Civil Division, case no XXIV C 454/13 – *PPL v Maciej Dworniak* dated 25 February 2015, p. 30, **Exhibit C-196**.

<sup>205</sup> Respondent's Rejoinder, paras. 206-208, *citing* Judgement of the Regional Court in Warsaw, case No. IV.C.871/12 dated 3 December 2014, **Exhibit R-131**.

<sup>206</sup> Respondent's Rejoinder, paras. 209-210.

<sup>207</sup> Respondent's Rejoinder, paras. 118, 128, 191.

<sup>208</sup> Respondent's Rejoinder, paras. 153-194; Statement of Defence, paras. 51-57.

<sup>209</sup> Statement of Defence, para. 55.

<sup>210</sup> Statement of Defence, paras. 58-79; Respondent's Rejoinder, paras. 182-188.

<sup>211</sup> Statement of Defence, paras. 80-82; Respondent's Rejoinder, paras. 189-191.

zlotys” in spite of Claimant’s purportedly efficient management.<sup>212</sup> According to Respondent, the length of time when BH Travel was in arrears varied from several days to several hundred days.<sup>213</sup>

187. Respondent further submits that BH Travel had previously not complied with the requirements of revenue reporting under Paragraph 3(1)(b) of the Lease Agreements and Article 5(12)(a) of the General Lease Conditions.<sup>214</sup> Respondent adds that BH Travel failed to perform certain marketing obligations (such as establishing a website with certain features),<sup>215</sup> failed to supply its shops adequately with merchandise,<sup>216</sup> and failed to perform the necessary adaptation works at the leased premises.<sup>217</sup>
188. Claimant asserts that any purported breaches apart from the grounds for the termination of the Lease Agreements as mentioned in Respondent’s notice of termination dated 16 February 2012 are “entirely irrelevant”. Claimant submits that BH Travel’s payment arrears never exceeded the permissible two-month grace period for payment delays and thus did not reach the threshold to justify a termination of the Lease Agreements under Article 13 of the General Lease Conditions.<sup>218</sup>
189. Claimant also submits that BH Travel’s past failures to timely provide bank guarantees in 2010 were due to problems with cash-flow that had later been resolved. Claimant highlights that BH Travel had furnished the required bank guarantees for all of its premises until 31 March 2012. Moreover, regarding the submission of insurance policies, Claimant emphasises that the insurance policies it had previously provided were valid and in effect at and beyond the date of the termination of the Lease Agreements in February 2012. Claimant states that Respondent’s complaint about having at first received the policies by way of e-mail only was a mere technicality – one that Respondent had never complained of before.<sup>219</sup>
190. In brief, Claimant submits that Respondent’s allegation of accounting failures and other breaches in the course of BH Travel’s business operations do not go beyond minor issues typical of normal business dealings.<sup>220</sup>

#### **The return of BH Travel’s premises to PPL**

191. On 17 February 2012, the customs authorities applied customs seals on BH Travel’s stores, because PPL had notified the Customs Chamber about the termination of the Lease Agreements

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<sup>212</sup> Statement of Defence, para. 83, *referring to* Schedule of payments of invoices by BH Travel dated 12 August 2013, **Exhibit R-52**; Respondent’s Rejoinder, paras. 177-181, 169-172.

<sup>213</sup> Statement of Defence, para. 83, *referring to* Schedule of payments of invoices by BH Travel dated 12 August 2013, **Exhibit R-52**.

<sup>214</sup> Statement of Defence, paras. 88-96; Respondent’s Rejoinder, paras. 192-194.

<sup>215</sup> Statement of Defence, paras. 97-102.

<sup>216</sup> Statement of Defence, paras. 105-110; Respondent’s Rejoinder, paras. 164-167.

<sup>217</sup> Respondent’s Rejoinder, paras. 173-176. In his testimony Mr. Jaroń disagreed with Respondent’s assertion. He stated that BH Travel’s stores were built in 2008 and 2009 and there were several ongoing works “such as fresh paint, music installation, new furniture, new marketing posters”. According to Jaroń, “it was clear that that condition for the extension was met”. *See* Hearing Transcript (12 October 2015), 167:20 to 168:10.

<sup>218</sup> Claimant’s Reply, paras. 93-95.

<sup>219</sup> Claimant’s Reply, paras. 96-102

<sup>220</sup> Claimant’s Reply, paras. 103-105.

and the withdrawal of BH Travel's duty-free permits.<sup>221</sup>

192. By letter dated 22 February 2012, BH Travel (through Mr. Kazimierski as a newly appointed member of its Management Board) informed PPL that BH Travel considered the notices of termination to be "ineffective" and to be lacking any "legal or factual basis," as well as that PPL's actions were "unlawful" in light of the continuing validity of the Lease Agreements.<sup>222</sup>
193. BH Travel called on PPL "to enter into negotiations by 24 February 2012 in order to make the necessary changes to the Lease Agreements, so as to allow PPL to proceed with the venture in accordance with the law". BH Travel further affirmed its willingness to enter into a settlement and to "terminate the court proceedings initiated to enforce the rights of BH Travel".<sup>223</sup>
194. PPL responded by letter on 23 February 2012, averring that the Lease Agreements were lawfully and effectively terminated with immediate effect. PPL further demanded that BH Travel "forthwith close and discontinue" its business activity in Chopin Airport and vacate the premises by the deadlines indicated in the Lease Agreements. In case of delay, PPL maintained "the right to demand from BH Travel [...] the payment of contractual penalties".<sup>224</sup>
195. On 24 February 2012, the District Court of Warsaw ("**District Court**") granted BH Travel's request for an injunction ordering PPL to provide BH Travel's employees access to the stores in the DFZ. The same day, counsel for BH Travel asked PPL to reopen BH Travel's stores in Chopin Airport and to comply with the District Court's order by giving access to their employees so that BH Travel could resume operations in Chopin Airport.<sup>225</sup>
196. On 15 March 2012, the District Court expanded the scope of its injunction and ordered PPL to permit BH Travel to sell goods in its stores at Chopin Airport and to use its information technology systems during its normal course of business.<sup>226</sup>
197. On the next day, BH Travel renewed its request that PPL open all of BH Travel's stores and permit it to sell goods in those stores. BH Travel also reiterated that PPL's failure to do otherwise would violate the District Court's injunction.<sup>227</sup>

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<sup>221</sup> Statement of Claim, para. 104, *referring to* Baltona's Warsaw Airport stores closed over contract dispute, the Moodie Report dated 23 February 2012, **Exhibit C-84**; Customs Law of 19 March 2004 (Journal of Laws No. 68, item 622, as amended), **Exhibit RL-2**; Kazimierski Witness Statement, para. 35, **Exhibit CWS-3**. *See also* Statement of Defence, para. 153.

<sup>222</sup> Statement of Claim, para. 106, *referring to* letter from BH Travel (P. Kazimierski) to PPL (■■■■ Mr. [PN] and ■■■■ Mr. [MM]) dated 22 February 2012, p. 2, **Exhibit C-88**.

<sup>223</sup> Statement of Claim, para. 106, *referring to* letter from BH Travel (P. Kazimierski) to PPL (■■■■ Mr. [PN] and ■■■■ Mr. [MM]) dated 22 February. 2012, p. 2, **Exhibit C-88**.

<sup>224</sup> Statement of Claim, para. 107, *referring to* Letter from PPL (■■■■ Mr. [PN] and ■■■■ Mr. [MM]) to BH Travel (P. Kazimierski and A. Uryga) dated 23 February 2012, **Exhibit C-89**.

<sup>225</sup> Statement of Claim, paras. 108-109, *referring to* Decision of the District Court of Warsaw dated 24 February 2012, **Exhibit C-90**; Letter from Counsel for BH Travel to PPL (Messrs. ■■■■ [MM] and ■■■■ [PN]) dated 24 February 2012, C- 91 and Letter from Counsel for BH Travel to PPL (■■■■ Mr. [MM] and ■■■■ Mr. [PN]) dated 16 March 2012, **Exhibit C-94**. Claimant submits that the Customs Chamber received a copy of this letter with the District Court's decision as an enclosure. *See* Claimant's Reply, para. 151.

<sup>226</sup> Statement of Claim, para. 109, *referring to* Decision of the District Court of Warsaw dated 15 March 2012, **Exhibit C-93**.

<sup>227</sup> Statement of Claim, para. 110, *referring to* Letter from Counsel for BH Travel to PPL (■■■■ Mr. [MM] and ■■■■ Mr. [PN]) dated 16 March 2012, **Exhibit C-94**.

198. Respondent highlights that the Regional Court overruled the District Court’s 24 February 2012 order on 13 September 2012. Respondent also notes that the District Court’s 24 February 2012 order had “refused to secure BH Travel’s claims to prevent PPL from starting the modernization of Terminal 1”.<sup>228</sup> Claimant maintains that the District Court’s order was only set aside because the injunctive relief intended to protect BH Travel’s possession of the stores had become moot after BH Travel’s eviction.<sup>229</sup>
199. On 16 March 2012, BH Travel requested from the Director of the Customs Chamber that the official seals affixed by the customs officers on BH Travel’s stores be removed.<sup>230</sup> The customs authorities then reopened all of BH Travel’s stores on the same day.<sup>231</sup>
200. PPL threatened to draw on BH Travel’s bank guarantees if the leased premises were not returned by 17 March 2012.<sup>232</sup>
201. Thus, on 17 and 18 March 2012, BH Travel relinquished five of the leased premises (Baltona Perfumery, Baltona Bestseller, Baltona Kid’s World, Baltona Esprit, and Baltona Arrival). The handover protocols, signed by Mr. Kazimierski, explain that BH Travel was “forced to release the premises”.<sup>233</sup> Nonetheless, BH Travel decided to remain in possession of Baltona Airport Shop, Baltona Accessories, and Baltona Classic, as well as of its Warehouse and Social Rooms, in order to preserve some leverage in future negotiations with PPL.<sup>234</sup>
202. On 19 and 21 March 2012, BH Travel attempted to deliver goods to its stores Baltona Accessories and Baltona Classic.<sup>235</sup> According to Claimant, the goods passed customs controls, but when BH Travel presented the goods for “routine security checks”, the officers of the Airport Protection Guard refused to inspect the goods because of “direct instructions” from PPL.<sup>236</sup>
203. Respondent contends that refusal to admit the goods concerned only a “single delivery of the same goods” on 19 and 21 March 2012 and that the refusal was caused by BH Travel’s failure to comply with the formalities for delivery (*i.e.*, one day’s advance notification of the delivery).<sup>237</sup> However, Claimant submits that PPL had previously accepted same-day notifications and that its

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<sup>228</sup> Statement of Defence, para. 157 referring to Schedule of court cases prepared by PPL, **Exhibit R-4**.

<sup>229</sup> Claimant’s Reply, para. 154.

<sup>230</sup> Statement of Claim, para. 111, referring to Letter from Counsel for BH Travel to PPL (■■■■ Mr. [MM] and ■■■■ Mr. [PN]) dated 16 March 2012, **Exhibit C-94**. Claimant submits that it had previously requested from the Customs Chamber to remove the customs seals on 28 February 2012 (Claimant’s Reply, paras. 152-153; see also Statement of Defence, paras. 156-157).

<sup>231</sup> Statement of Claim, para. 111. See also Statement of Defence, para. 157 (citation omitted).

<sup>232</sup> Statement of Claim, para. 112, referring to Kazimierski Witness Statement, para. 40, **Exhibit CWS-3**. Claimant states that PPL eventually drew on the bank guarantees for Baltona Airport Shop, Baltona Accessories and Baltona Classic Duty-free Shop (Statement of Claim, para. 118, referring to *e.g.*, Letters from BNP Paribas to BH Travel dated 27 and 28 March 2012, **Exhibit C-99**).

<sup>233</sup> Statement of Claim, para. 113, referring to Kazimierski Witness Statement, para. 42, **Exhibit CWS-3**; Claimant’s Reply, para. 149; Statement of Defence, para. 160.

<sup>234</sup> Statement of Claim, para. 114, referring to Kazimierski Witness Statement, para. 42, **Exhibit CWS-3**.

<sup>235</sup> Statement of Claim, paras. 116-117. Claimant explains that BH Travel was required to first present goods for customs controls by the customs authorities at Chopin Airport and then for security inspections by the Airport Protection Guard, which PPL controlled and supervised. See also Statement of Defence, para. 162.

<sup>236</sup> Statement of Claim, paras. 116-117, referring to Witness Interview Reports of Airport Security Guards, **Exhibit C-97** (confirming that they were instructed by their superiors to prevent Baltona/BH Travel’s goods from proceedings through security controls); Claimant’s Reply, para. 157.

<sup>237</sup> Statement of Defence, paras. 162-167; Respondent’s Rejoinder, paras. 269-278.

goods were not allowed to pass security even after timely notification on 21 March 2012 and on at least one further occasion.<sup>238</sup>

204. A notary public, summoned at the request of BH Travel, witnessed and recorded the incident. He observed that ■■■ Mr. [PN] and his assistant, ■■■ Ms. [IM], were called to the security control area to resolve the dispute. According to Claimant, ■■■ Mr. [PN] declared that the goods only could be delivered if a court enforcement officer intervened.<sup>239</sup> In his testimony before the Tribunal, ■■■ Mr. [PN] disputed the veracity of the notary public's report, and considered that, "written one-sidedly by BH Travel persons and the notary public, the report present[ed] their viewpoints on the events".<sup>240</sup> For Claimant, the refusal to admit BH Travel's goods clearly violated court-ordered injunctions.<sup>241</sup>
205. On 21 March 2012, PPL requested the handover of the premises remaining in BH Travel's possession under an accelerated enforcement, without examination of the merits.<sup>242</sup> On 23 March 2012, BH Travel, unable to operate the store, returned the premises of the Baltona Classic store to PPL "under protest" to mitigate damages.<sup>243</sup> However, on 6 April 2012, the District Court dismissed PPL's motions for accelerated enforcement because the statutory requirements had not been complied with.<sup>244</sup>
206. Thereafter, on 4 May 2012, PPL inspected the "security" at BH Travel's premises upon notice of one business day. It claimed that the inspections revealed defects in BH Travel's electricity installations and requested that those defects be remedied within three days.<sup>245</sup> Respondent submits that the security inspections were regular and of a "routine nature" and fell within PPL's responsibility under the relevant regulations.<sup>246</sup>
207. PPL disconnected electric supply to BH Travel's stores even after the District Court ordered that PPL restore power.<sup>247</sup> Respondent submits that PPL, as an energy company under the Polish energy law, was entitled to cut off electricity since BH Travel was in payment arrears and had been given a two-week deadline to pay for the electricity.<sup>248</sup>

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<sup>238</sup>Claimant's Reply, para. 158-159, *referring to* Second Kazimierski Witness Statement, para. 15, **Exhibit CWS- 6**. *See also* Respondent's Rejoinder, para. 269.

<sup>239</sup> Statement of Claim, paras. 117-118, *referring to* Notarial Deed dated 21 March 2012, **Exhibit C-98**.

<sup>240</sup> Hearing Transcript (14 October 2015), 45:3-5.

<sup>241</sup> Statement of Claim, para. 117.

<sup>242</sup> Statement of Claim, para. 119, *referring to* Kazimierski Witness Statement para. 43, **Exhibit CWS-3**; Handover Protocol of 23 March 2012 between BH Travel and PPL (Classic), p. 2, **Exhibit C-100**.

<sup>243</sup> Statement of Claim, para. 118, *referring to* Kazimierski Witness Statement, para. 43, **Exhibit CWS-3**; Statement of Defence, para. 160.

<sup>244</sup> Statement of Claim, para. 119, *referring to e.g.*, Decision of the District Court of Warsaw dated 6 April 2012, **Exhibit C-101**.

<sup>245</sup> Statement of Claim, para. 120, *referring to* Letter from PPL to BH Travel dated 2 May 2012, **Exhibit C-102**; Letter from PPL to BH Travel dated 8 May 2012, **Exhibit C-103** and Letter from PPL to BH Travel dated 12 May 2012, **Exhibit-104**.

<sup>246</sup> Respondent's Rejoinder, paras. 279-280.

<sup>247</sup> Statement of Claim, para. 120, *referring to* Decision of the District Court of Warsaw dated 1 August 2012, **Exhibit C-105**.

<sup>248</sup> Respondent's Rejoinder, paras. 281-283.

### Administrative proceedings regarding the termination of the Lease Agreements

208. On 14 May 2012, PPL requested the Governor of Mazovia to approve the implementation of the modernisation of Terminal 1 pursuant to the Airport Act. PPL moreover requested the Governor to “declare the immediate enforceability of his decision” pursuant to Article 26 of the Airport Act.<sup>249</sup> This request was submitted without BH Travel’s knowledge, but Respondent submits that BH Travel was not made a party to these proceedings due to a lack of standing: the Lease Agreements conferred only contractual rights, but no property or other perpetual rights upon BH Travel.<sup>250</sup>
209. PPL requested the Governor of Mazovia on 11 June 2012 to approve the modernisation of Terminal 1 “as soon as possible but in any event no later than by the end of June 2012”. PPL requested accelerated proceedings because of “currently held tender proceedings for the selection of the contractor and the terms of the realization of the investment which assume that the preparatory works shall commence on 1 August 2012 and that the investment itself shall be implemented as of 1 September 2012”.<sup>251</sup>
210. On 10 July 2012, the Governor of Mazovia granted PPL permission to execute the proposed modernisation and declared his decision immediately enforceable.<sup>252</sup> However, Claimant notes that the decision did not specify the affected premises or order their immediate surrender, on the basis that PPL had failed to apply for the seizure of those premises.<sup>253</sup>
211. PPL requested the Governor of Mazovia on 19 July 2012 to confirm the immediate enforceability of his 10 July 2012 decision and the legal consequences of that decision, including the obligation to vacate the affected premises. In a decision on 24 July 2012, the Governor of Mazovia ordered the immediate handover of the affected premises, but Claimant notes that, again, the Governor did not specify the affected premises.<sup>254</sup>
212. On 26 July 2012, the Governor of Mazovia notified BH Travel of the 24 July 2012 decision and ordered BH Travel to return the premises for Baltona Accessories and Baltona Airport Shop to PPL within seven business days. The notice further indicated that “enforcement proceedings”

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<sup>249</sup> Statement of Claim, para. 122, *referring to* Motion from PPL to the Governor of Mazovia dated 14 May 2012, **Exhibit C-57**. Article 3 of the Airport Act required the Governor of Mazovia to issue a decision within 3 months of the request, while Article 26(1) empowered the Governor to declare “immediate enforceability” of his decision if there was an “underlying social or economic interest”. Article 26(2) provided that immediate enforceability would entitle the applicant to commence construction, to compel immediate release of affected premises, and to take possession of those premises regardless of any pending appeal. (Statement of Claim, para. 123, *referring to* Act of 12 February 2009 on Specific Rules Governing the Preparation and Implementation of Investments Concerning Public Airports, Article 26(1), **Exhibit C-56**).

<sup>250</sup> Statement of Defence, para. 189.

<sup>251</sup> Statement of Claim, para. 124, *referring to* Letter from PPL (█ Mr. [MM]) to the Governor of Mazovia dated 11 June 2012, **Exhibit C-55**.

<sup>252</sup> Statement of Claim, para. 127, *referring to* Decision of the Governor of Mazovia No. 14/2012 dated 10 July 2012, Section I, **Exhibit C-106**; Statement of Defence, para. 180 (citations omitted).

<sup>253</sup> Statement of Claim, para. 127, *referring to* Decision of the Governor of Mazovia No. 14/2012 dated 10 July 2012, Section II.6, **Exhibit C-106**.

<sup>254</sup> Statement of Claim, para. 128, *referring to* Letter from PPL (█ Mr. [MM]) to the Governor of Mazovia dated 19 July 2012, **Exhibit C-107** and Decision of the Governor of Mazovia dated 24 July 2012, **Exhibit C-108**. *See also* Statement of Defence, para. 183 (citations omitted).

would be initiated if the premises were not vacated by the deadline.<sup>255</sup>

213. By a decision of 7 August 2012, the Governor of Mazovia ordered BH Travel to vacate its remaining premises in Terminal 1 prior to 13 August 2012 or “enforcement measures will be applied in [the] form of forcible taking over of the premises on 14<sup>th</sup> August 2012 at 09:00 AM”. On 13 August 2012, Claimant and BH Travel filed several objections to the scheduled evictions, which were summarily dismissed by the enforcement officers.<sup>256</sup>
214. On 14 August 2012, BH Travel was evicted from the remaining premises in the presence of Messrs. Uryga and Kruszewski, as well as lawyers for BH Travel, PPL, and the Governor of Mazovia.<sup>257</sup> Respondent notes that the Governor also initiated enforcement proceedings against other entities that had premises in Terminal 1, although those entities voluntarily vacated the premises.<sup>258</sup>
215. An appeal from BH Travel against the Governor of Mazovia’s decision with the Minister of Transport was dismissed on 13 November 2012 on the ground that BH Travel, having no vested property rights “to the real property covered by the planned investment”, was not a qualified party to the proceedings.<sup>259</sup>
216. BH Travel appealed the Minister of Transport’s decision to the Administrative Court in Warsaw (“**Administrative Court**”), but the court rejected that appeal on 25 April 2013 and affirmed the Minister of Transport’s findings.<sup>260</sup>
217. BH Travel further appealed to the Supreme Administrative Court of Poland (“**Supreme Administrative Court**”), which denied BH Travel’s appeal on 28 November 2013 and affirmed the findings of the first instance court that BH Travel did not have status as a party to the proceedings before the Governor of Mazovia.<sup>261</sup>

#### **Negotiations after the termination of the Lease Agreements**

218. After PPL terminated the Lease Agreements and before BH Travel’s eviction from Chopin Airport on 14 August 2012, Claimant and its subsidiaries attempted to negotiate with PPL and other relevant government officials to reach an amicable settlement.<sup>262</sup>
219. On 21 February 2012, Baltona (Messrs. Maciej Dworniak and Wojciech Kruk) met with PPL

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<sup>255</sup> Statement of Claim, para. 129, *referring to* Letter from the Governor of Mazovia to BH Travel dated 26 July 2012, **Exhibit C-109**; Statement of Defence, para. 186.

<sup>256</sup> Statement of Claim, para. 130, *referring to* Decision of the Governor of Mazovia dated 7 August 2012, **Exhibit C-110** and Administrative Eviction Protocol of 14 August 2012, **Exhibit C-111**.

<sup>257</sup> Statement of Claim, para. 130. *See also* Statement of Defence, para. 187, *referring to* Administrative Eviction Protocol of 14 August 2012, **Exhibit C-111**.

<sup>258</sup> Statement of Defence, para. 188, *referring to* ■■■ Mr. [MM] Witness Statement, **Exhibit RWS-2**.

<sup>259</sup> Statement of Claim, para. 131, *referring to* Decision of the Supreme Administrative Court dated 28 November 2013, pp. 3-4, **Exhibit C-112**.

<sup>260</sup> Statement of Claim, para. 132, *referring to* Decision of the Supreme Administrative Court dated 28 November 2013, p. 6, **Exhibit C-112**; Statement of Defence, para. 190 (citation omitted).

<sup>261</sup> Statement of Claim, para. 133, *referring to* Decision of the Supreme Administrative Court dated 28 November 2013, pp. 15-16, **Exhibit C-112**.

<sup>262</sup> Statement of Claim, para. 135, *referring to* Jaroń Witness Statement paras. 36, 39-52, **Exhibit CWS-2**; Ahuja Witness Statement paras. 31-36, **Exhibit CWS-1**.

(Messrs. ■■■ [MM] and ■■■ [PN]) to discuss PPL’s termination of the Lease Agreements. After the meeting, Baltona wrote to PPL to: (i) confirm its “good will” in assisting PPL’s expansion and development of Chopin Airport; (ii) commit to “abstain from any action which would hinder the performance of the modernization of Terminal 1”; and (iii) emphasise the urgent need for negotiations.<sup>263</sup>

220. PPL confirmed however on 23 February 2012 that the termination of the Lease Agreements was effective and “categorically refused to engage in any ‘amicable resolution of the existing dispute’”. It moreover cancelled the follow-up meeting scheduled for 24 February 2012 to “avoid insinuation [...] that PPL deemed the claims by BH Travel as justified”.<sup>264</sup>
221. On 24 February 2012, Mr. Dworniak of Baltona and Mr. Tadeusz Jarmuziewicz, the Polish Deputy Minister for Transport, met Mr. Jarmuziewicz and “promised to assist in the resolution of the dispute and to direct PPL to enter into negotiations with Baltona and BH Travel”.<sup>265</sup> Claimant submits that Mr. Jarmuziewicz did not follow up on that promise.<sup>266</sup>
222. However, on 24 February 2012, Claimant also sent a letter to Sławomir Nowak, the Polish Minister of Transport, thereby initiating the dispute settlement procedure under Article 9 of the Treaty.<sup>267</sup>
223. On 27 February 2012, the Baltona Supervisory Board unsuccessfully appealed to various high-ranking Polish officials, including the Minister of Transport, for assistance in resolving the dispute.<sup>268</sup> In letters dated 21 March 2012 and 26 July 2012, BH Travel reiterated its request that the Minister of Transport supervise the PPL General Director, ■■■ Mr. [MM]’s actions pursuant to Articles 51 and 53 of the PPL Act.<sup>269</sup> The Minister of Transport did not respond to that request.<sup>270</sup>
224. ■■■ Mr. [MM] agreed to meet with Mr. Ahuja on 19 July 2012. For Mr. Ahuja, “[t]he purpose of that meeting was to gauge PPL’s approach to the ongoing dispute and to find common grounds

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<sup>263</sup> Statement of Claim, para. 136, *referring to* Letter from Baltona (W. Kruk and M. Dworniak) to PPL (■■■ Mr. [MM] and ■■■ Mr. [PN]) dated 22 February 2012, **Exhibit C-113**.

<sup>264</sup> Statement of Claim, para. 137, *referring to* Letter from PPL (■■■ Mr. [MM]) to Baltona (W. Kruk and M. Dworniak) dated 23 February 2012, **Exhibit C-114** (internal quotations omitted). According to ■■■ Mr. [MM]’s testimony before the Tribunal, “[PPL] was concerned in a justified manner, as [he] thought, that having any talks with BH Travel [...] would be understood by them as challenging the effectiveness of [the] termination letters.” *See* Hearing Transcript (13 October 2015), 99:15-19, reply to a question posed by Dr. Kühn.

<sup>265</sup> Statement of Claim, para. 138, *referring to* Letter from Baltona (M. Dworniak) to Minister of Transport dated 27 February 2012, **Exhibit C-115**.

<sup>266</sup> Statement of Claim, para. 138.

<sup>267</sup> Statement of Claim, para. 139, *referring to* Letter from Counsel for Flemingo DutyFree to the Minister of Transport (S. Nowak) dated 24 February 2012, **Exhibit C-116**.

<sup>268</sup> Statement of Claim, para. 140-141, *referring to* Letter from Baltona (M. Dworniak) to the Prime Minister (D. Tusk) dated 27 February 2012, **Exhibit C-117**; Letter from Baltona (M. Dworniak) to Minister of Transport, dated 27 February 2012, **Exhibit C-115**; Letter from Baltona (M. Dworniak) to State Treasury Commission (A. Szejnfeld) dated 27 February 2012, **Exhibit C-118**.

<sup>269</sup> Statement of Claim, para. 142, *referring to* Letter from Counsel for BH Travel to the Minister of Transport (S. Nowak) dated 21 March 2012, **Exhibit C-119**; Letter from Counsel for BH Travel to the Minister of Transport (S. Nowak) dated 26 July 2012, **Exhibit C-120**.

<sup>270</sup> Statement of Claim, para. 142.

which could form the basis for a constructive settlement”.<sup>271</sup> According to Mr. Ahuja, the parties agreed to discuss the terms of a settlement in further working group meetings because ■■■ Mr. [MM] seemed “open to a negotiated settlement”.<sup>272</sup>

225. The working group first met on 27 July 2012. For BH Travel, a settlement should include an extension of the Lease Agreements for a period equivalent to the duration of Terminal 1’s operational shutdown, as well as the reinstatement of its leases in Terminal 2, which were unaffected by the modernisation. BH Travel also requested that the guaranteed periods be extended as compensation for the closure of the stores. PPL’s position was that the termination of the Lease Agreements was effective and that BH Travel should immediately hand over the remaining premises in Terminal 1. PPL further agreed that the parties should conclude new lease agreements for the same stores.<sup>273</sup>
226. Counsel for BH Travel sent PPL a draft settlement agreement on 1 August 2012 reflecting the terms discussed during the 27 July 2012 meeting. PPL circulated its comments on that draft on 10 August 2012 whereby PPL insisted that the conclusion of new lease agreements could not be part of the settlement. Such agreements could only be concluded after the execution of any settlement, and were further subject to the Minister of the State Treasury’s approval.<sup>274</sup>
227. After another meeting on 21 August 2012, PPL sent a further draft on 28 August 2012 on which BH Travel commented the same day. PPL did not reply to those comments.<sup>275</sup>

## V. JURISDICTION

### 1) Whether Claimant is an ‘Investor’ under the Treaty

228. Article 1(2) of the Treaty provides that:

The term “Investors” refers with regard to either Contracting Party to:

- (a) natural persons having the nationality of the Contracting Party under the law in force of that Contracting Party;
- (b) legal entities, including companies, corporations, firms and business associations incorporated or constituted or established under the law of a Contracting Party.

#### *Respondent’s Position*

229. Respondent submits that Claimant cannot be an ‘investor’ as it has not made an ‘investment’ within the meaning of the Treaty (see paras. 258-263 below).<sup>276</sup> Respondent explains that, under bilateral investment treaties, an entity can only be considered an ‘investor’ if it satisfies the nationality requirement and “at the same time” makes an investment in good faith in the host

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<sup>271</sup> Statement of Claim, para. 143, *referring to* Ahuja Witness Statement para. 33, **Exhibit CWS-1**; Jarón Witness Statement para. 39, **Exhibit CWS-2**; Kazimierski Witness Statement para. 45, **Exhibit CWS-3**.

<sup>272</sup> Statement of Claim, para. 143, *referring to* Ahuja Witness Statement para. 34, **Exhibit CWS-1**.

<sup>273</sup> Statement of Claim, paras. 144-145, *referring to* Jarón Witness Statement, para. 43, **Exhibit CWS-2**; E-mail from Counsel for PPL to Counsel for BH Travel dated 28 July 2012, **Exhibit C-121**.

<sup>274</sup> Statement of Claim, para. 146, *referring to* E-mail from Counsel for BH Travel to Counsel for PPL dated 1 Aug. 2012, **Exhibit C-122**; E-mail from Counsel for PPL to Counsel for BH Travel dated 10 Aug. 2012, p. 28, **Exhibit C-123** (paragraph 42 of PPL’s mark-up of the draft settlement agreement).

<sup>275</sup> Statement of Claim, para. 148, *referring to* Jarón Witness Statement, paras. 50-52, E-mail from Counsel for PPL to Counsel for BH Travel dated 28 August 2012, **Exhibit C-124**, E-mail from Counsel for BH Travel to Counsel for PPL dated 29 August 2012, **Exhibit C-125**.

<sup>276</sup> Statement of Defence, para. 242.

country in the meaning of the treaty. While Respondent does not dispute that Claimant is a company founded under Indian law, Respondent does contest that Claimant's compliance with the condition of 'nationality' is concurrent with its compliance with the condition of making an investment in Poland.<sup>277</sup>

230. Respondent further submits that Claimant cannot be considered to be an 'investor' within the meaning of the Treaty in light of its "intermediate position in the structure of the Flemingo Group, in the case of the activities specified by the Claimant as its investment".<sup>278</sup> In this regard, Respondent states that Claimant has presented an "incomplete and selective structure of its group", meaning that there "are serious and reasonable doubts as to how the holding structure of the Flemingo Group actually looks". In any event, Respondent submits, "it is certain" that Claimant is neither the "ultimate beneficiary of the Flemingo Group [...] nor the direct owner of Baltona's stock", and allowing such an entity to pursue claims under the Treaty would amount to an abuse of the mechanism.<sup>279</sup>
231. Respondent submits that the "ultimate determining factor as to whether someone is an investor is the literal wording of the specific bilateral investment treaty"; however, "in the absence of the detailed premises required to settle the emerging doubts, the tribunal needs to resort to the theory and definition constructed by case law and jurisprudence".<sup>280</sup>
232. In respect of case law and theory, Respondent states that these "are either based on the theory that assumes that only the ultimate owner may be the investor or on the theory that the investor is only the direct owner of the stocks or shares".<sup>281</sup>
233. Respondent refers to the North American Free Trade Agreement ("NAFTA"), which contains a denial-of-benefits clause, excluding NAFTA's substantive protections "if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities [...]". Accordingly, Respondent states, NAFTA only grants protection to the ultimate beneficiary.<sup>282</sup>
234. Respondent claims that arbitral awards have adopted a similar position based on the assumption that the actual investor is the entity which is the ultimate beneficiary of the investment, referring to *SOABI v. Senegal* (where, Respondent states, "the tribunal decided to perform the test of the final beneficiary (beneficial ownership/ultimate beneficiary) and on this basis decided on its jurisdiction"),<sup>283</sup> and to *Sedelmayer v. Russian Federation* and *Société Générale v. The Dominican Republic* (where, Respondent explains, the tribunals pointed to the final beneficiary,

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<sup>277</sup> Statement of Defence, paras. 214-217.

<sup>278</sup> Statement of Defence, para. 241.

<sup>279</sup> Statement of Defence, paras. 225-228, referring to E-mail from PPL (■■■■ Mr. [PN]) to Baltona dated 9 December 2011, **Exhibit C-63**; Printout from Flemingo's website dated 7 November 2014, **Exhibit R-107**; Baltona's current report dated 9 September 2014, **Exhibit R-108**; Article from the Parkiet magazine: *Poles spend more at airports* dated 22 December 2014, **Exhibit R-118**; Respondent's Post-Hearing Brief, para. 24.

<sup>280</sup> Statement of Defence, para. 240.

<sup>281</sup> Statement of Defence, paras. 213, 239.

<sup>282</sup> Statement of Defence, para. 232, Extract from the North American Free Trade Agreement of 1 January 1994, **Exhibit RL-10**.

<sup>283</sup> Statement of Defence, para. 234, referring to *Société Ouest Africaine des Bétons Industriels (Senegalese) v. Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction dated 19 July 1984 ("**Société Ouest Africaine des Bétons Industriels v. Senegal Decision on Jurisdiction**") as discussed in Journal of International Arbitration, Kluwer Law International, p. 7, **Exhibit RL-24**.

rather than the intermediate entity, when assessing who exactly the investor was).<sup>284</sup> Respondent further submits that there have been many occasions where arbitral tribunals have indicated that there is a “cut-off” point where an entity in the holding group is too far removed to be said to have made the investment.<sup>285</sup>

235. Respondent avers that there is also a line of judgments (based on the ICSID Convention) specifying that, when determining ‘nationality’, “attention should be paid only to the direct owner of the investment”, referring to *Tokios Tokelès v. Ukraine* and *Amco v. Indonesia* in support.<sup>286</sup>
236. Respondent asserts that the investment in the present case was “an indirect investment made by Flemingo International (registered in the Virgin Islands, with its headquarters in Dubai)” and not by Claimant, noting that “strictly speaking, it was Culex, which is a subsidiary of Ashdod, which in turn, is owned by Flemingo International, that made investment in Poland”.<sup>287</sup> Respondent describes the course of the transaction of the acquisition of Baltona’s stock as follows:

In the first instance, Culex (a company not directly from the Flemingo Group structure), acquired 26.83% of Baltona’s stock from the State Treasury (of Poland). Next, Culex acquired 59.94% of Baltona’s stock from Alfa Center. Culex transferred Baltona’s stock which it acquired to Ashdod, a Cypriot law company belonging to the Flemingo Group, under three agreements. Finally, in the middle of 2010, Ashdod acquired 12.5% of Baltona’s stocks from PPL, becoming its almost 100% owner.

The Claimant’s only role in the transaction described above of the acquisition of Baltona’s stock was to issue a corporate guarantee for Culex in the transaction on the acquisition of the stock from Alfa Center. The settlements regarding the acquisition of Baltona’s stock by Culex from Alfa Center are the subject of litigation to this day [...].<sup>288</sup>

237. Respondent points out that, for Claimant, “because Ashdod is within the structure of the Flemingo Group, its investment is also an investment of the Claimant, which is also a part of this

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<sup>284</sup> Statement of Defence, para. 235, referring to *Mr. Franz Sedelmayer v. Russian Federation*, SCC Case, Award dated 7 July 1998, (“**Sedelmayer v. Russia Award**”), Section 2.1.5., p. 58, **Exhibit RL-19**, and *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction dated 19 September 2008, (“**Société Générale v. The Dominican Republic Award on Preliminary Objections to Jurisdiction**”), **Exhibit RL-20**.

<sup>285</sup> Respondent’s Post-Hearing Brief, para. 25, 27-31 referring to *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated 14 January 2004 (“**Enron Corporation v. Argentina Decision on Jurisdiction**”), paras. 50, 52, **Exhibit RL-69** (“The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain. (...) there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company”) referring further to *Standard Chartered Bank v. United Republic of Tanzania*, Award dated 2 November 2002, ICSID Case No. ARB/10/12 (“**Standard Chartered Bank v. Tanzania Award**”), para. 228, **Exhibit RL-70** (“It is difficult to see how the treaty’s protections could promote investment by nationals of a Contracting State if the national of the Contracting State had no role in deciding to make the investment, funding the investment, or controlling or managing the investment after it was made”).

<sup>286</sup> Statement of Defence, paras. 236-238, referring to *Tokios Tokelès v. Ukraine*, Decision on Jurisdiction dated 29 April 2004, ICSID Case No. ARB/02/18 (“**Tokio Tokelès v. Ukraine Decision on Jurisdiction**”), **Exhibit RL-21**; *Amco Asia Corporation, Pan American Development Ltd. and PT Amco Indonesia v. The Republic of Indonesia*, Decision on Jurisdiction dated 10 May 1988, ICSID Case No. ARB/81/1 (“**Amco v. Indonesia Decision on Jurisdiction**”), **Exhibit RL- 22**.

<sup>287</sup> Respondent’s Rejoinder, para. 43; Statement of Defence para. 249.

<sup>288</sup> Statement of Defence, paras. 249-250.

group”.<sup>289</sup> Although Respondent acknowledges that this position “in certain cases [...] can prove to be correct”, in the circumstances of the present case, the investment made cannot be construed as being Claimant’s investment.<sup>290</sup>

238. Respondent explains that the acquisition of Baltona shares cannot be Claimant’s investment as it did not participate financially in the process of the acquisition.<sup>291</sup> Although Claimant was within the Flemingo Group structure at the time, “it was neither directly related to Flemingo International, nor was it a parent company of Flemingo International or its owners”. Respondent submits that Claimant has never conducted and does not conduct any business in Poland, and adds that it was not until March 2011 that Claimant acquired the shares in Flemingo International.<sup>292</sup> Respondent asserts that, during the acquisition of Baltona’s stock, another entity from the Flemingo Group, Flemingo International, was operating and presenting itself as the new entity controlling Baltona,<sup>293</sup> for instance by lending funds to Culex to acquire the Baltona stock belonging to Poland.<sup>294</sup> Furthermore, Respondent argues that it was Flemingo International which performed the ownership functions with respect to Baltona.<sup>295</sup>
239. Respondent notes the various grounds on which Claimant bases its contention that it was involved in the acquisition and management of Baltona and BH Travel, namely that: (i) it had seconded its managers to the authorities of BH Travel and Baltona; (ii) it had given Alfa Center a corporate guarantee in connection with the acquisition of Baltona’s shares by Culex; and (iii) it had issued a ‘letter of comfort’ and a guarantee on the loan from the State Bank of India branch in Dubai to Flemingo International in Dubai.<sup>296</sup>
240. In respect of the first ground, Respondent states that the managers in question (Messrs. Atul Ahuja, Mahandra Thakar, and Rasiklal Thakker) are involved as shareholders or directors of several dozen entities, and therefore “it is difficult to justify the argument that they constituted significant personnel resources of precisely Flemingo DutyFree”.<sup>297</sup> Respondent adds that, of the persons who allegedly played an active part on behalf of Claimant in improving BH Travel’s

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<sup>289</sup> Respondent’s Rejoinder, para. 44.

<sup>290</sup> Respondent’s Rejoinder, para. 45.

<sup>291</sup> Statement of Defence, paras. 251, 254, Respondent’s Rejoinder, para. 47.

<sup>292</sup> Statement of Defence, paras. 244-245; Respondent’s Rejoinder, paras. 46-47.

<sup>293</sup> Statement of Defence, paras. 246-247, *referring to* Flemingo International Limited’s letter dated 31 March 2010, **Exhibit R-12**; E-Mail from T. Jarón to PPL dated 31 March 2010, **Exhibit R-13**; Respondent’s Rejoinder, paras. 51-54, *referring to* Flemingo International Limited’s letter dated 31 March 2010, **Exhibit R-12**; Printout from the website <http://flamingo-intl.com/about-us/about-us> dated 22 July 2015, **Exhibit R-119**; Excerpts of the Polish court testimonies from the case before the Regional Court in Warsaw, 24th Civil Division, case No. XXIV C 454/13 dated 11 October 2013, 7 May 2014, 27 August 2014, **Exhibit R-121**.

<sup>294</sup> Statement of Defence, para. 248, *referring to* Loan Agreement concluded between Flemingo International Limited and Culex Sp. z o.o. dated 9 March 2010, **Exhibit R-109**.

<sup>295</sup> Statement of Defence, para. 247, *referring to* Flemingo International Limited’s letter dated 31 March 2010, **Exhibit R-12**.

<sup>296</sup> Respondent’s Rejoinder, para. 57, *referring to* Claimant’s Reply, paras. 21-25 and Schedule L (Form of Guarantee I) to the Share Purchase Agreement between Alfa-Center and Culex dated 30 March 2010, **Exhibit C-132**; Schedule P (Form of Guarantee II) to the Share Purchase Agreement between Alfa-Center and Culex dated 30 March 2010, **Exhibit C-133**; Letter from Flemingo DutyFree to State Bank of India (enclosing Comfort Letter) dated 24 October 2010, **Exhibit C-134**; Letter from the State Bank of India to Flemingo International Limited dated 3 October 2010, **Exhibit C-135**.

<sup>297</sup> Respondent’s Rejoinder, paras. 58-61, *referring to* Extract from the Baltona’s sales prospectus dated 19 December 2012, **Exhibit R-123**.

Baltona's business, only Mr. Mahandra Thakar had been presented to PPL.<sup>298</sup>

241. With respect to the second ground, Respondent points out that that Claimant in all events failed to honor the alleged guarantee to Alpha Center for Culex's acquisition of its Baltona's shares, and denies any liability under the guarantee. Moreover, Respondent argues, even if it were accepted that Claimant effectively guaranteed Culex's obligations to Alfa Center, this does not make Claimant an 'investor' in Poland as the possibility of any spending under the guarantee remains "purely hypothetical".<sup>299</sup>
242. With regard to the third ground, Respondent states that the 'letter of comfort' is no evidence that Claimant is an 'investor'. Respondent submits that this letter had to support the loan granted by the State Bank of India to Flemingo International to finance the purchase of the Polish company; it was Flemingo International who was the investor and borrower. Claimant's guarantee had only a "secondary and supporting role in the investment made by Flemingo International". Besides, Respondent notes that Claimant was only one of numerous guarantors of the loan, and that part of the loan was assigned for the purchase of Baltona.<sup>300</sup> Respondent adds that the internal financial flows within the Flemingo Group cannot make Claimant an investor "because there is a lack of an element of a so-called investment risk which is necessary to be able to consider such an activity an investment".<sup>301</sup>
243. With regard to Claimant's assertions that it allegedly granted loans to Flemingo International in July 2012, Respondent considers this "irrelevant to the present case" because: (i) there is no evidence of the financial flows; and (ii) the alleged loans were granted two and a half years after the Baltona shares were acquired and even after the dispute arose.<sup>302</sup>
244. In the structure of the Flemingo Group, Respondent argues, "a number of other entities are positioned above the Claimant, *inter alia* Flemingo International (BVI), Commodities Services International, and Sapphaire International Limited". It concludes that "[o]nly Flemingo International (and its parent entities or its direct subsidiaries) can be recognized as [...] an investor".<sup>303</sup> For Respondent, within the Flemingo Group, Claimant was only chosen to initiate

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<sup>298</sup> Respondent's Rejoinder, para. 62, referring to Second [REDACTED] Mr. [PN] Witness Statement, para. 6, **Exhibit RWS-3**; [REDACTED] Ms. [IM] Witness Statement, para. 9, **Exhibit RWS-4**.

<sup>299</sup> Respondent's Rejoinder, para. 64-65; 68.

<sup>300</sup> Respondent's Rejoinder, paras. 69-73, referring to Letter from Flemingo DutyFree to State Bank of India (enclosing Comfort Letter) dated 24 October 2010, **Exhibit C-134**; Letter from the State Bank of India to Flemingo International Limited dated 3 October 2010, **Exhibit C-135**; Corporate Guarantee by Flemingo DutyFree in favour of the State Bank of India dated 25 March 2011, **Exhibit C-136**.

<sup>301</sup> Respondent's Rejoinder, paras. 74-76, referring to *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280, 26 November 2009, paras. 228-232, p. 59, **Exhibit RL-33**.

<sup>302</sup> Respondent's Rejoinder, para. 77, referring to Loan Agreement between Flemingo DutyFree Shop Pvt. Ltd. and Flemingo International Limited dated 5 July 2012, **Exhibit C-140**; Loan Agreement between Flemingo Dutyfree Shop Pvt. Ltd. and Flemingo International Limited dated 15 July 2012, **Exhibit C-141**; Loan Agreement between Flemingo Dutyfree Shop Pvt. Ltd. and Flemingo International Limited dated 14 August 2012, **Exhibit C-142**.

<sup>303</sup> Respondent's Rejoinder, paras. 46, 48, referring to a diagram created by Respondent of the Flemingo structure at the time of acquisition of Baltona (Respondent's Rejoinder, p. 17) constructed with reference to Letter from the State Bank of India to Flemingo International Limited dated 3 October 2010, **Exhibit C-135** (evidencing that Claimant provided two securities (out of six) as a condition of the Loan Agreement under which Flemingo International borrowed money from the bank in Dubai for the purpose of the acquisition of Baltona); Schedule L (Form of Guarantee I) to the Share Purchase Agreement between Alfa-Center and Culex dated 30 March 2010, **Exhibit C-132**; Schedule P (Form of Guarantee II) to the Share Purchase Agreement between

the present proceedings as it has been registered in the Republic of India, which has signed a bilateral investment treaty with Poland (see paras. 272-278 below). Respondent notes that another entity in the Flemingo Group (Ashdod), with registered offices in Cyprus (another country with which Poland has signed a bilateral investment treaty) had also submitted a notice of arbitration against Poland.<sup>304</sup>

245. For Respondent, “the subsequent change in the [Flemingo Group’s] structure” should not constitute grounds for admitting Claimant as an ‘investor’ as “Claimant has not proved in any way that any financial flows took place with the change in the structure of the Flemingo Group”.<sup>305</sup>
246. Respondent concludes that the purpose and intention of the signatories is instrumental to the accurate interpretation of the BIT and what constitutes an investor.<sup>306</sup> According to Respondent: (i) the clear wording of the preamble of the Poland-India BIT (“[...] Desiring to create conditions favourable for fostering investment by investors of one State in the territory of another State”); (ii) the fact the India is currently working on a Draft Model BIT that will limit protection to investors who have a substantial business presence in the territory; and (iii) the legal and economic environment of Poland at the signing of the treaty; all evidence that the signatory States did not anticipate that the BIT would be “abused” by “multi-layer tax optimisation structures”.<sup>307</sup>

#### *Claimant’s Position*

247. Claimant submits that under the “broad” definition of ‘investor’ in Article 1(2)(b) of the Treaty, which covers any legal entities and includes companies established or incorporated under the laws of either Contracting Party to the Treaty, Flemingo DutyFree (Claimant) “falls squarely” within the definition of ‘investor’.<sup>308</sup> In this regard, Claimant observes that Respondent does not dispute that Claimant (Flemingo DutyFree) is a company incorporated under Indian law, or that it complied with all of the procedural requirements under Article 9 of the Treaty.<sup>309</sup>
248. Claimant denies Respondent’s contention that the position of Flemingo DutyFree within the

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Alfa-Center and Culex dated 30 March 2010; **Exhibit C-133** (evidencing that Claimant provided two guarantees to Culex, and did not perform its obligations); Loan Agreement between Flemingo International Limited and Culex Sp. z o.o. dated 9 March 2010, **Exhibit C-199**; Loan Agreement between Flemingo International Limited and Culex Sp. z o.o. dated 19 April 2010, **Exhibit C-200**; Loan Agreement between Flemingo International Limited and Culex Sp. z o.o. dated 5 May 2010, **Exhibit C-201**; Loan Agreement between Flemingo International Limited and Culex Sp. z o.o. dated 25 May 2010, **Exhibit C-202**; Loan Agreement between Flemingo International Limited and Culex Sp. z o.o. dated 11 June 2010, **Exhibit C-203**; Loan Agreement between Flemingo International Limited and Culex Sp. z o.o. dated 15 June 2010, **Exhibit C-204**; Loan Agreement between Flemingo International Limited and Culex Sp. z o.o. dated 17 June 2010, **Exhibit C-205**; Loan Agreement between Flemingo International Limited and Culex Sp. z o.o. dated 25 May 2011, **Exhibit C-206** (evidencing that Flemingo International provided loans to Culex for the purpose of the acquisition of Baltona).

<sup>304</sup> Statement of Defence, para. 252; Respondent’s Rejoinder, para. 55.

<sup>305</sup> Respondent’s Rejoinder, paras. 49-50.

<sup>306</sup> Respondent’s Post-Hearing Brief, paras. 34-37 referring to *Mr. Franz Sedelmayer v. the Russian Federation*, Dissenting Opinion of Arbitrator Professor Ivan S. Zykin dated 26 June 1998, p. 4, **Exhibit RL-72** (“Under the circumstances, it is of great importance to properly take into account how the provisions of the Treaty are understood in the signatory states”).

<sup>307</sup> Respondent’s Post-Hearing Brief, paras. 38-39, 44 referring to Respondent’s Rejoinder, para. 92.

<sup>308</sup> Claimant’s Reply, paras. 169-172.

<sup>309</sup> Claimant’s Reply, para. 168; Statement of Claim, paras. 150-151.

Fleming Group structure is relevant to the definition of an ‘investor’ under the Treaty.<sup>310</sup>

249. Claimant argues that it is widely accepted that BIT contracting parties have a great latitude and flexibility to determine the criteria for corporate nationality and notes that Respondent concedes that the “plain wording” of the Treaty is the “ultimate determining factor as to whether someone is an investor”.<sup>311</sup> Accordingly, Claimant asserts, Respondent’s argument fails because the “broad” definition in Article 1(2) of the Treaty does not contain the limitations that Respondent seeks to read into it, *i.e.*, that the investor must be the “first foreign entity in the hierarchy” or the “beneficial owner/ultimate beneficiary”.<sup>312</sup> In addition, Claimant submits that the Treaty contains none of the limitations on the categories of ‘investors’ that could have been included by the Treaty’s Contracting Parties.<sup>313</sup> Rather, the Treaty, like many other investment treaties, defines corporate investors simply by reference to the State of incorporation.<sup>314</sup> Accordingly, the Tribunal cannot be asked to read into the Treaty limitations to which the Contracting Parties did not agree.<sup>315</sup>
250. Claimant argues that Respondent’s “restricted interpretation” cannot be justified in light of the Treaty’s object and purpose to “create conditions favourable for fostering greater investment by investors of one State in the territory of the other” and to ensure “the encouragement and reciprocal protection under international agreement of such investment”.<sup>316</sup> Claimant notes that

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<sup>310</sup> Claimant’s Reply, p. 66, heading 1.

<sup>311</sup> Claimant’s Reply, para. 173, *referring to* Statement of Defence, para. 240; Claimant’s Post-Hearing Brief, para. 5.

<sup>312</sup> Claimant’s Reply, para. 173, *referring to* Statement of Defence para. 230.

<sup>313</sup> Claimant’s Reply, para. 173, *referring to* G. Kaufmann-Kohler, *Multiple Proceedings – New Challenges for the Settlement of Investment Disputes*, Presentation at the 8th Annual Conference on International Arbitration and Mediation Fordham Law School, New York, 11–12, April 2013, p. 12, **Exhibit CL-67**, as support for its contention that the Contracting Parties could have, if they chose, limited the categories of “investors” with whom they consent to arbitrate to “shareholders with a controlling interest”; *referring further to* Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments dated 5 October 1990, p. 2, Article 1(1)(b), **Exhibit CL-68** as an example of a BIT where the definition of investor was limited to “entities with real economic activities” in the contracting state; *referring further to* *Mobil Corporation v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction dated 10 June 2010, ICSID Case No. ARB/07/27, (“**Mobil Corporation v. Venezuela Decision on Jurisdiction**”), p. 19, para. 64, **Exhibit CL-9**; and *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction dated 30 December 2010, ICSID Case No. ARB/08/15 (“**CEMEX v. Venezuela Decision on Jurisdiction**”), p. 16, para. 58, **Exhibit CL-69**, as support for its contention that the Contracting parties could have limited the categories of “investors” to entities with which it has signed investment agreements; *referring further to* R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd ed., 2012, pp. 55–56, **Exhibit CL-70**; Bolivia-US BIT, p. 8, Article XII, **Exhibit CL-71**; and Energy Charter Treaty, pp. 60–61, Article 17, **Exhibit CL-72** as support for, and examples of, investment treaties including a “denial-of-benefits” clause.

<sup>314</sup> Claimant’s Post-Hearing Brief, paras. 6, 8 *referring to* *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, Award dated 22 September 2014, ICSID Case No. ARB(AF)/09/1 (“**Gold Reserve v. Venezuela Award**”), p. 65, **Exhibit CL-87**, as support for its contention that the Tribunal need only look to the Claimant’s Indian nationality as evidenced by the Claimant’s Certification of Incorporation dated 5 March 2004 in order to determine its corporate nationality *referring further to* *Saluka Investments B.V. v. The Czech Republic*, Partial Award dated 17 March 2006, UNCITRAL (“**Saluka v. The Czech Republic Partial Award**”), para. 241, **Exhibit CL-19**, as an example of a BIT where the definition of investor only required that the claimant-investor be constituted under the laws of the home State.

<sup>315</sup> Claimant’s Reply para. 173. Claimant’s Post-Hearing Brief, para. 8, *referring to* *Saluka v. The Czech Republic Partial Award*, para. 241, **Exhibit CL-19** (“...it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add”).

<sup>316</sup> Claimant’s Reply para. 174, *referring to* India-Poland Treaty, Preamble, p. 1, **Exhibit CL-1**.

prior tribunals, including *Tokios Tokelès* and *Société Générale v. Philippines*, have “interpreted virtually identical language in treaty preambles as indicating the parties’ intention to provide broad protection to investors and their investments, and found on this basis that a restrictive reading of jurisdictional requirements could not be justified”.<sup>317</sup> Claimant also submits that prior tribunals, including *Tokios Tokelès* and *Rompetrol v. Romania*, have confirmed that it is inappropriate to impose limitations on the scope of an investment treaty beyond those set out in the text of the treaty itself.<sup>318</sup>

251. Claimant denies Respondent’s assertion that case law is “either based on the theory that assumes that only the ultimate owner may be the investor or on the theory that the investor is the only direct owner of the stocks or shares”.<sup>319</sup> In response, Claimant asserts that “[n]umerous tribunals in investment treaty arbitration have readily accepted that intermediate entities in a holding structure can qualify as investors”, referring to *ConocoPhillips v. Venezuela* and *CEMEX v. Venezuela* as support.<sup>320</sup> Claimant further dismisses Respondent’s reliance on the “denial of benefits” clause in NAFTA as being “wholly misplaced”, because the India-Poland Treaty contains no such clause or comparable limitation.<sup>321</sup>
252. In addition, Claimant submits that none of the cases cited by Respondent support its position that only the “ultimate beneficiary” or the “direct owner” of the shares in a locally-incorporated company can bring treaty claims against the host State.<sup>322</sup> In this regard, Claimant argues that neither *Sedelmayer* nor *Société Générale v. The Dominican Republic* turned on the question of whether the claimants in those cases were the final or ultimate beneficiary as Respondent alleges. Rather, Claimant argues, the claimants in those cases were found to be investors under the relevant treaties by virtue of having the required nationalities.<sup>323</sup>
253. Further, Claimant submits that *SOABI* and *Amco* are “inapposite authorities” for Respondent because they concerned the interpretation of the requirement of “foreign control” under the ICSID Convention, which does not apply to this proceeding.<sup>324</sup> Furthermore, Claimant states that

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<sup>317</sup> Claimant’s Reply, para. 174, referring to *Tokios Tokelès v. Ukraine* Decision on Jurisdiction, pp. 13-14, paras. 31-32, **Exhibit RL-21** and *Société Générale v. Philippines*, Decision on Jurisdiction dated 29 January 2004, ICSID Case No. ARB/02/6 (“*Société Générale v. Philippines Decision on Jurisdiction*”), p. 44, para. 116, **Exhibit CL-73**.

<sup>318</sup> Claimant’s Reply, para. 175, referring to *Tokios Tokelès v. Ukraine* **Decision on Jurisdiction**, p. 15, para. 36, **Exhibit RL-21** and *The Rompetrol Group N.V. v. Romania*, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility dated 18 April 2008, ICSID Case No. ARB/06/3 (“*Rompetrol v. Romania Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility*”), p. 35, paras. 107-108, **Exhibit CL-74**.

<sup>319</sup> Claimant’s Reply, para. 176, referring to Statement of Defence, para. 231.

<sup>320</sup> Claimant’s Reply, para. 177, referring to *ConocoPhillips Petrozuata et. al. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction and the Merits dated 3 September 2013, ICSID Case No. ARB/07/30 (“*ConocoPhillips v. Venezuela Decision on Jurisdiction and the Merits*”), pp.3-4, para. 7, p.84, para. 290(b), **Exhibit CL-75**; *CEMEX v. Venezuela* Decision on Jurisdiction, 39-40, paras 143-144, p. 45, para. 160, **Exhibit CL-69**.

<sup>321</sup> Claimant’s Reply, para. 178, referring to Statement of Defence, para. 232.

<sup>322</sup> Claimant’s Reply, para. 179.

<sup>323</sup> Claimant’s Reply, paras. 180-181, referring to *Sedelmayer v. Russia* Award, p. 56, Section 2.1.5., p. 58, **Exhibit RL-19**; *Société Générale v. The Dominican Republic* Award on Preliminary Objections to Jurisdiction, p. 5 paras. 10-12, p. 33, pp. 38-39, **Exhibit RL-20**.

<sup>324</sup> Claimant’s Reply, para. 182, referring to *Société Ouest Africaine des Bétons Industriels v. Senegal* Decision on Jurisdiction, p. 223, para. 28ff as discussed in *Journal of International Arbitration*, Kluwer Law

neither *Amco* nor *Tokios Tokelès* supports Respondent’s arguments. This is because the tribunal in *Amco* did accept jurisdiction over claims by an intermediate entity,<sup>325</sup> and the tribunal in *Tokios Tokelès* did not even consider the question of whether an intermediate entity could be an ‘investor’. The *Tokios Tokelès* tribunal also held that the treaty’s object and purpose of providing broad protection to investors and investments made it inappropriate to limit the scope of ‘investor’ to the ultimate controlling party.<sup>326</sup>

254. Claimant also disagrees with Respondent’s approach to the two ‘investor’ and ‘investment’ requirements under the Treaty, stating that Respondent “wrongly conflates” these two distinct requirements – “with the result that [...] its analysis fails”.<sup>327</sup> In any event, Claimant submits, it has made an ‘investment’ protected by the Treaty (see paras. 264-271 below).
255. Finally, Claimant dismisses Respondent’s allegation that Flemingo DutyFree has presented an “incomplete and selective structure of its group” and that there are “doubts as to how the holding structure [...] actually looks”, stating that the assertion is wrong and legally irrelevant.<sup>328</sup> Claimant responds that it has “laid bare the structure of its shareholding in BH Travel, as well as that of its own shareholders” and that the only “legally relevant” aspect of its corporate structure is the evidence of its indirect shareholding in BH Travel (for the purposes of determining whether it has made an ‘investment’ protected under the Treaty).<sup>329</sup>
256. Claimant further addresses Respondent’s argument that two entities within the same group (Ashdod and Flemingo DutyFree) could not be in a position to bring treaty claims. Claimant states that this view is contradicted by case law as well as the terms of the Treaty, as confirmed, *inter alia*, by *ConocoPhillips* and *Cemex*. In the latter case, Claimant submits, the tribunal accepted jurisdiction over claims by multiple Dutch companies from the same group.<sup>330</sup> In any event, Claimant states that Ashdod has not launched any arbitration claim against Respondent.<sup>331</sup>

## 2) Whether Claimant had ‘Investments’ under the Treaty

257. Article 1(1) of the Treaty provides that:

The term “investment” means every kind of asset established or acquired in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:

(a) movable and immovable property as well as other rights such as mortgages, liens, pledges;

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International, p. 7, **Exhibit RL- 24**. *Amco v. Indonesia* Decision on Jurisdiction, p. 393, para. 12, **Exhibit RL-22**.

<sup>325</sup> Claimant’s Reply, para. 182, *referring to Amco v. Indonesia* Decision on Jurisdiction, p. 396, para 14, p. 403, para. 33, **Exhibit RL-22**.

<sup>326</sup> Claimant’s Reply, para. 183, *referring to Tokios Tokelès v. Ukraine* Decision on Jurisdiction, p. 11, paras. 27-38, **Exhibit RL- 21**.

<sup>327</sup> Claimant’s Reply, para. 190 *referring to* Statement of Defence, paras. 9-10, 217.

<sup>328</sup> Claimant’s Reply, para. 191, *referring to* Statement of Defence paras. 225, 228.

<sup>329</sup> Claimant’s Reply, para. 191.

<sup>330</sup> Claimant’s Reply, para. 186, *referring to ConocoPhillips v. Venezuela* Decision on Jurisdiction and the Merits, pp. 3-4, para.7, **Exhibit CL-75**; *CEMEX v. Venezuela* Decision on Jurisdiction, p. 39, para. 143-144, **Exhibit CL-69**.

<sup>331</sup> Claimant’s Reply, para. 186.

- (b) shares in and stock and debentures of a company and any other similar forms of participation in a company;
- (c) rights to money or to any performance under contract having a financial value;
- (d) intellectual property rights, goodwill, technical processes and know-how in accordance with the relevant laws of the respective Contracting Party;
- (e) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals.

*Respondent's Position*

258. Respondent denies that Claimant has an 'investment' under the Treaty. Respondent argues that the examples of 'investments' specified by Claimant do not meet the generally accepted additional requirements for an investment to be protected, namely: (i) a substantial commitment; (ii) significance for the host State's development; (iii) regularity of profit and return; and (iv) an element of risk on both sides.<sup>332</sup>
259. Respondent first denies that Claimant has an 'investment' through its acquisition of stock in Baltona (which in turn owned 100% of the shares in BH Travel), on the basis that Claimant is not the ultimate beneficiary in the Flemingo Group and "did not participate in the process of acquiring Baltona's stock (see paras. 229-246 above).<sup>333</sup> Respondent also submits that, even if the purchase of the shares in Baltona was a real investment, "the Flemingo Group still owns shares in Baltona and therefore there was no expropriation".<sup>334</sup>
260. Respondent also denies that Claimant held an 'investment' in the form of a "concession" for operating at Chopin Airport.<sup>335</sup> Specifically, Respondent argues that Baltona never received any concession which could be considered a business concession in the meaning of the Treaty, stating that it was erroneous to view the permit for conducting business in the DFZ of Chopin Airport as a concession.<sup>336</sup> In this regard Respondent submits that a "typical" element of a business concession referred to in the Treaty is that it is granted by the State, and applies to activities in areas that are key to the State's security.<sup>337</sup> Respondent denies that any concession was granted by the State, and stresses that the issuance of a permit to operate within the DFZ from the customs office was "secondary and depended on BH Travel winning the tender" awarded by PPL.<sup>338</sup>
261. Respondent notes that although Claimant does not refer to Article 1(1)(d) of the Treaty, Claimant has used the term "valuable concessions", which "creates the false impression that the Lease Agreements were something more than normal civil-law agreements of a purely contractual nature".<sup>339</sup> Respondent further submits that "Claimant is equating [...] lease agreements as

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<sup>332</sup> Statement of Defence, paras. 219-221, *referring to* K. Yannaca-Small, *Arbitration under International Investment Agreements, A Guide to the Key issues*, 2010, p. 250, **Exhibit RL-13**; *Fedax N.V. v. Republic of Venezuela*, Decision on Objection to Jurisdiction dated 11 June 1997, ICSID Case No. ARB/96/3, **Exhibit RL- 17**.

<sup>333</sup> Statement of Defence, paras. 222, 243-254, *referring to* Statement of Claim, paras. 12-17, 31-50.

<sup>334</sup> Respondent's Rejoinder, paras. 7(ii), 32-35; Statement of Defence, para. 340.

<sup>335</sup> Statement of Defence, paras. 222, 255-261, *referring to* Statement of Claim, paras. 149-154.

<sup>336</sup> Statement of Defence, paras. 257-258, 341.

<sup>337</sup> Statement of Defence, paras. 258, 342.

<sup>338</sup> Statement of Defence para. 259.

<sup>339</sup> Respondent's Rejoinder, paras. 9-10.

concessions for public construction works”.<sup>340</sup> In this regard, Respondent argues that the term “concession” in the Treaty should be interpreted in accordance with the Polish Business Freedom Act, which was already in force at the time that the Treaty was enacted.<sup>341</sup> The procedure for awarding a concession, Respondent submits, is usually formalised and conducted in an administrative procedure which ends with an administrative decision. In the current circumstances, Respondent argues, the Lease Agreements were agreed pursuant to a private tender,<sup>342</sup> which cannot be construed as an administrative procedure or decision.<sup>343</sup> Respondent emphasises that the use of the term “concession” by the Parties in prior documentation and discussion “is of no significance”.<sup>344</sup>

262. Respondent denies further that the Lease Agreements themselves could constitute an ‘investment’ for Claimant, as they were concluded by BH Travel before the acquisition of Baltona by the Flemingo Group, and therefore were “at most, an integral part of BH Travel’s business”.<sup>345</sup> Respondent adds that lease agreements are “not contained within the category of investments specified in Article 1(1)” of the Treaty, and further do not satisfy the additional requirements set forth at paragraph 258 above.<sup>346</sup>
263. Respondent explains its position stating that the Lease Agreements “could not have constituted either a significant or lasting element of Baltona’s property”, since they were “only part of many lease agreements which Baltona concluded directly or through its subsidiaries”.<sup>347</sup> Respondent also observes that, from the time of acquisition of Baltona’s shares to December 2014, Baltona’s operations increased by over two times notwithstanding the termination of the Lease Agreements.<sup>348</sup>

#### *Claimant’s Position*

264. Claimant states that its “investment for the purposes of this arbitration consists of its indirect controlling shareholding in BH Travel and all rights associated therewith”.<sup>349</sup> Claimant submits that Article 1(1) of the Treaty provides an “expansive” definition of the term ‘investment’ as well as a non-exhaustive list of examples.<sup>350</sup> It is “widely accepted” in investment treaty jurisprudence, Claimant avers, that indirect investments such as shares held through intermediary companies are a protected form of investment if there are no limitations in the applicable definition of an ‘investment’.<sup>351</sup> Claimant notes that there is no such limitation in the Treaty in the present case,

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<sup>340</sup> Respondent’s Rejoinder, para. 23.

<sup>341</sup> Respondent’s Rejoinder, para. 24, *referring to C. Kosikowski, Commentary on Article 46 of the Business Activity Freedom Act*, Lexis Nexis 2012, **Exhibit RL-26**.

<sup>342</sup> With regard to the classification of the tender process as a private process (private tender) *see* Hearing Transcript (14 October 2015), 71:12 to 72:13, reply to questions posed by Dr. Kühn.

<sup>343</sup> Respondent’s Rejoinder, paras. 27-28.

<sup>344</sup> Respondent’s Rejoinder, para. 30.

<sup>345</sup> Statement of Defence, paras. 222, 263.

<sup>346</sup> Statement of Defence, para 264.

<sup>347</sup> Respondent’s Rejoinder, para. 38.

<sup>348</sup> Respondent’s Rejoinder, para. 39.

<sup>349</sup> Claimant’s Post-Hearing Brief, para. 16.

<sup>350</sup> Statement of Claim, para. 152.

<sup>351</sup> Statement of Claim, para. 153, *referring to Siemens v. Argentina*, Decision on Jurisdiction dated 3 August 2004, ICSID Case No. ARB/02/8, Decision on Jurisdiction dated 3 August 2004 (“*Siemens v. Argentina, Decision*”).

and accordingly submits that its indirect shareholding in BH Travel (which in turn held rights to a concession for commercial space in Terminals 1 and 2) qualifies as a protected investment under the Treaty.<sup>352</sup>

265. Claimant argues that Respondent's objection that the investment has to satisfy additional premises, is "entirely inappropriate in view of the clear and unambiguous language" of the Treaty.<sup>353</sup> Moreover, Claimant submits that this objection "is based on a flawed application of outdated criteria relating to the interpretation of a different treaty [*i.e.*, the ICSID treaty]".<sup>354</sup>
266. Even if those additional requirements needed to be met (which Claimant denies), Claimant contends that its investment does satisfy these criteria as it made a "substantial investment of capital (and took on a substantial element of risk)" by: (i) investing USD 26,505,000 to acquire its controlling stake in Baltona and BH Travel, which in turn held rights to a concession for duty-free stores in Terminals 1 and 2 of the Chopin Airport; (ii) undertaking to grant two guarantees to support Culex's acquisition of Alfa-Center's stake in Baltona; (iii) providing letters of comfort, guarantees and loans to enable Flemingo International to raise financing to purchase the shares in Baltona; and (iv) committing know-how through directors to ensure BH travel become a "healthy and profitable business" leading to regular profit and return.<sup>355</sup>

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on Jurisdiction"), para. 137, **Exhibit CL-8**; *Mobil Corporation v. Venezuela*, Decision on Jurisdiction, para 165, **Exhibit CL-9**.

<sup>352</sup> Statement of Claim, paras. 153-154; Claimant's Reply, para. 193.

<sup>353</sup> Claimant's Reply, para. 194-196, referring to Statement of Defence, paras. 219-220, 244-248, 258-260, 263-264.

<sup>354</sup> Claimant's Reply, para. 194-198, referring to Statement of Defence, paras. 219-220, 244-248, 258-260, 263-264; *White Industries Australia Limited v. The Republic of India*, Final Award dated 30 November 2011, UNCITRAL ("**White Industries v. India Final Award**"), **Exhibit CL-81**; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, Decision on Jurisdiction dated 2 July 2013, ICSID Case No. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*) ("**Philip Morris v. Uruguay Decision on Jurisdiction**"), **Exhibit CL-77**; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, Decision on the Application for Annulment dated 16 April 2009, ICSID Case No. ARB/05/10 ("**Malaysian Historical Salvors v. Malaysia Decision on the Application for Annulment**"), **Exhibit CL-82**; *Alpha Projektholding GmbH v. Ukraine*, Award dated 8 November 2010, ICSID Case No. ARB/07/16 ("**Alpha Projektholding v. Ukraine Award**"), **Exhibit CL-83**.

<sup>355</sup> Claimant's Reply, para. 199, referring to Second Ahuja Witness Statement, paras. 15, 19, 23, **Exhibit CWS- 4**; First Share Purchase Agreement between Sapphaire International Limited and Flemingo Dutyfree Shop Private Limited dated 27 February 2011, **Exhibit C-147**; Second Share Purchase Agreement between Sapphaire International Limited and Flemingo Dutyfree Shop Private Limited dated 27 February 2011, **Exhibit C-148**; Share Purchase Agreement between Mr. Hemchand Chaturbhujdas Gandhi and Flemingo Dutyfree Shop Private Limited dated 27 February 2011, **Exhibit C-149**; Share Purchase Agreement between Mr. Mahandra Kumar Pershotamdas Thakar and Flemingo Dutyfree Shop Private Limited dated 27 February 2011, **Exhibit C-150**; Share Purchase Agreement between Mr. Rasiklal Rattilal Thakker and Flemingo Dutyfree Shop Private Limited dated 27 February 2011, **Exhibit C-151**; Share Purchase Agreement between Mr. Suresh Tulsidas Bhatia and Flemingo Dutyfree Shop Private Limited dated 27 February 2011, **Exhibit C- 152**; Schedule L (Form of Guarantee I) to the Share Purchase Agreement between Alfa-Center and Culex dated 30 March 2010, **Exhibit C-132**; Schedule P (Form of Guarantee II) to the Share Purchase Agreement between Alfa-Center and Culex dated 30 March 2010, **Exhibit C-133**; Letter from Flemingo DutyFree to State Bank of India (enclosing Comfort Letter) dated 24 October 2010, **Exhibit C-134**; USD Facilities Offer Letter from State Bank of India to Flemingo International Limited dated 13 October 2010, **Exhibit C-243**; Corporate Guarantee by Flemingo DutyFree in favour of the State Bank of India dated 25 March 2011, **Exhibit C-136**; Resolution of the Meeting of Shareholders / Directors of Flemingo DutyFree dated 5 July 2011, **Exhibit C-137**; Indicative Term Sheet for a Facility from Barclays Bank PLC signed by Barclays Bank PLC, Flemingo International and Flemingo DutyFree (among others) dated 7 March 2012,

267. Claimant submits that its “indirect shareholding in BH Travel constitutes an ‘investment’ within the meaning of Article 1(1)(b)” of the Treaty, as it falls within the definition of “shares in and stock and debentures of a company and any other similar forms of participation in a company”.<sup>356</sup> Claimant asserts that investment treaty tribunals have “long recognized that indirect investments such as shares through intermediary companies are protected forms of investment, even absent explicit language in a treaty’s definition of ‘investment’,” citing *Siemens v. Argentina*, *Mobil v. Venezuela*, *Enron v. Argentina*, *Azurix v. Argentina*, and *Société Générale v. The Dominican Republic* as support.<sup>357</sup> Furthermore, Claimant maintains that many tribunals have held that investments acquired by a third party outside the territory of the host State also constitute protected investments.<sup>358</sup>
268. In response to Respondent’s criticism that it was Flemingo International (and not Claimant) that was the initial bidder for the State Treasury’s stock in Baltona, Claimant observes that the Treaty specifically includes “acquired” assets, and so transfers among members of the same group do

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**Exhibit C-138**; Letter from State Bank of India to Flemingo International Limited dated 8 March 2012, **Exhibit C-139**; Loan Agreement between Flemingo Dutyfree Shop Pvt. Ltd. and Flemingo International Limited dated 5 July 2012, **Exhibit C-140**; Loan Agreement between Flemingo Dutyfree Shop Pvt. Ltd. and Flemingo International Limited dated 15 July 2012, **Exhibit C-141**; Loan Agreement between Flemingo Dutyfree Shop Pvt. Ltd. and Flemingo International Limited dated 14 August 2012, **Exhibit C-142**; Second Jaroń Witness Statement II, paras. 20-22, **Exhibit CWS-5**; Jaroń Witness Statement, para. 23, **Exhibit CWS- 2**; Supply Agreement between The Nuance Group and BH Travel & Baltona dated 26 August 2010, **Exhibit C-214**; Claimant’s Post-Hearing Brief, para. 13.

<sup>356</sup> Claimant’s Reply, para. 207.

<sup>357</sup> Claimant’s Reply, paras. 200-201, referring to *Siemens v. Argentina*, para. 137, **Exhibit CL-8**; *Mobil Corporation v. Venezuela* Decision on Jurisdiction, para. 165, **Exhibit CL-9**; referring also to *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, Decision on Jurisdiction dated 21 December 2012, ICSID Case No. ARB/09/1, (“*Teinver et. al. v. Argentina Decision on Jurisdiction*”), paras. 230-231, **Exhibit CL-84**; *CEMEX v. Venezuela* Decision on Jurisdiction, paras. 156-158, **Exhibit CL-69**; Claimant’s Post-Hearing Brief, paras. 35-36 referring to *Enron Corporation v. Argentina* Decision on Jurisdiction, para. 56, **Exhibit CL-127** referring further to *Azurix Corporation v. The Argentina Republic*, Decision on Jurisdiction dated 8 December 2003, ICSID Case No. ARB/01/12 (“*Azurix v. Argentina Decision on Jurisdiction*”), para. 56, **Exhibit CL-125** referring further to *Société Générale v. The Dominican Republic* Award on Preliminary Objections to Jurisdiction, para. 51-52, **Exhibit RL -20**.

<sup>358</sup> Claimant’s Post-Hearing Brief, para. 19 referring to *Gold Reserve v. Venezuela* Award, para. 259, **Exhibit CL-87** (holding that the claimant made an investment when it acquired indirect ownership of a local Venezuelan company through an internal restructuring two years after that local company was awarded the relevant concession by the Venezuelan authorities); referring further to *Aguas del Tunari S.A. v. Republic of Bolivia*, Decision on Respondent’s Objections to Jurisdiction dated 21 October 2005, ICSID Case No. ARB/02/3 (“*Aguas del Tunari v. Bolivia Decision on Respondent’s Objections to Jurisdiction*”), paras. 60, 70, 317, 334, **Exhibit CL-124** (holding that the insertion of a Dutch company in the ownership structure after the local entity had been granted the relevant concession, but before any dispute has arisen, did not give rise to any jurisdictional issues); referring further to *Guaracachi America, Inc. & Rurelec PLC v. The Plurinational State of Bolivia*, Award dated 31 January 2014, PCA Case No. 2011-17 (“*Guaracachi & Rurelec v. Bolivia Award*”), paras. 118-119, **Exhibit CL-86** (holding that Rurelec made a protected investment when it acquired an indirect shareholding in a local Bolivian company eleven years after that company’s initial privatization and three years after a subsequent sale); referring further to *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award dated 19 December 2013 (“*Teco v. Guatemala Award*”), paras. 438-439, **Exhibit CL-85** (finding that the claimant made a protected investment when it acquired indirect ownership of a local company approximately seven years after the initial contribution of capital to acquire an interest in that local company); referring further to *Société Générale v. The Dominican Republic* Award on Preliminary Objections to Jurisdiction, para. 44, **Exhibit RL-20**, noting that the transferability of investments “has become a normal feature of a global economy and the transfers are not as such disqualified from treaty protection”.

not disqualify those investments from protection.<sup>359</sup> Claimant notes that tribunals have afforded treaty protection to investors who acquire shares in an existing company after the initial investment has been made, including the tribunals in *Gold Reserve v. Venezuela*, *Teco v. Guatemala*, and *Guaracachi v. Bolivia*.<sup>360</sup> Claimant similarly dismisses Respondent’s criticism that it does not conduct business in Poland, stating that “[t]ribunals have regularly exercised jurisdiction over claims even where claimants have been passive members of a corporate structure, citing *Phoenix Action v. Czech Republic* and *Quasar de Valores v. Russia* in support.”<sup>361</sup>

269. Claimant further submits that, in any event, it “heavily supported the initial purchases of shares in Baltona” by: (i) providing a team to evaluate the investment; (ii) appointing its directors to Baltona’s Supervisory Board; (iii) establishing the direct contacts with suppliers and distributors; (iv) providing letters of comfort and guarantees for Flemingo International to obtain the necessary funding; and (v) providing loans to Flemingo International.<sup>362</sup>
270. With respect to the Lease Agreements, Claimant maintains that these constitute protected investments under Article 1(1) of the Treaty, because Claimant “is a controlling shareholder of BH Travel [and accordingly] the protection under the BIT extends to the legal and contractual rights of BH Travel including its lease agreements”.<sup>363</sup> This position, Claimant asserts, is supported by investment treaty tribunal decisions such as *Azurix v. Argentina*, *Vivendi I*, and *Pan American v. Argentina*.<sup>364</sup> This protection is not affected, Claimant argues, by Respondent’s objection that the Lease Agreements “were, at most, an integral part of BH Travel’s business” or Respondent’s objection that the Lease Agreements were concluded before the acquisition of Baltona by the Flemingo Group.<sup>365</sup>
271. Finally, Claimant states that “[f]or the avoidance of doubt, the Claimant confirms it is not seeking separately to contend that it has an investment in the form of a ‘business concession’ under Article

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<sup>359</sup> Claimant’s Reply, para. 202, referring to Statement of Defence, paras. 246-248; Claimant’s Post-Hearing Brief, paras. 17-21.

<sup>360</sup> Claimant’s Reply, paras. 203-204, referring to *Gold Reserve v. Venezuela* Award, para. 44, **Exhibit CL-87**, *Teco v. Guatemala* Award, paras. 135-140, **Exhibit CL-85**, and *Guaracachi & Rurelec v. Bolivia* Award, paras. 118-119, **Exhibit CL-86**; referring further to *Société Générale v. The Dominican Republic* Award on Preliminary Objections to Jurisdiction, para. 44, **Exhibit RL- 20**.

<sup>361</sup> Claimant’s Reply, para. 205, referring to *Phoenix Action v. Czech Republic*, Award dated 9 April 2009, ICSID Case No. ARB/06/5 (“**Phoenix Action v. Czech Republic Award**”), para. 121, **Exhibit RL-15**; *Quasar de Valores v. The Russian Federation*, Award dated 20 July 2012, SCC (“**Quasar de Valores v. Russia Award**”), para. 7, **Exhibit CL-88**.

<sup>362</sup> Claimant’s Reply, para. 206, referring to Second Ahuja Witness StatementI, paras. 15-19, **Exhibit CWS-4**; Excerpt of Minutes of Extraordinary General Meeting of Baltona, dated 26 April 2010, p. 1 Resolution Nos. 9-2010 and 10-2010, **Exhibit C-143**; Second Jaroń Witness Statement, paras. 20-22, **Exhibit CWS-5**; Jaroń Witness Statement, para. 23, **Exhibit CWS-2**; Supply Agreement between The Nuance Group and BH travel & Baltona dated 26 August 2010, **Exhibit C-214**.

<sup>363</sup> Claimant’s Reply, paras. 209-211.

<sup>364</sup> Claimant’s Reply, para. 208, referring to *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment dated 1 September 2009, para. 94, **Exhibit CL-91**; *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, Decision on Annulment dated 3 July 2002, ICSID Case No. ARB/97/3, paras. 111-115, **Exhibit CL-93**; *Pan American Energy LLP & BP Argentina Exploration Company v. The Argentine Republic*, Decision on Preliminary Objections dated 27 July 2006, ICSID Case No. ARB/04/8 (“**Pan American Energy v. Argentina Decision on Preliminary Objections**”), paras. 196, 219, **Exhibit CL-92**; referring further to *Mr. Franck Charles Arif v. Republic of Moldova*, Award dated 8 April 2013, ICSID Case No. ARB/11/23 (“**Franck Charles Arif v. Moldova Award**”), paras. 369, 380, **Exhibit CL-90**.

<sup>365</sup> Claimant’s Reply, para. 210.

1(1)(d) of the BIT, as the Respondent has assumed”.<sup>366</sup>

### 3) Whether Claimant has engaged in forum shopping

#### *Respondent’s Position*

272. Respondent argues that Claimant does not deserve protection of the Treaty, as it has engaged in forum shopping in the present case to find “a better plane for asserting its claims and avoiding the local legal route”.<sup>367</sup> Respondent summarises its position as follows:

The circumstance of these arbitration proceedings and, in particular, the submission of notices of arbitration by both Ashdod and the Claimant, the secondary acquisition of the shares in Flemingo International by the Claimant and the changes made in the Flemingo Group’s capital structure after the acquisition of Baltona, unequivocally testify to the fact that the Claimant took advantage of the so-called treaty shopping to artificially improve its procedural position with respect to Respondent.

273. Respondent submits that the negative aspects of forum shopping, whereby entities try to benefit from investment arbitration when they do not in fact have the right to initiate such proceedings, is “widely recognised”, citing *Saluka v. Czech Republic* as support.<sup>368</sup>

274. Respondent states that its allegation of forum shopping is proved by the fact that a notice of arbitration was submitted by two entities from the Flemingo Group (Ashdod and Claimant) both registered in countries (Cyprus and India respectively) that have signed bilateral investment treaties with Poland. The mostly likely explanation for this, Respondent argues, is that the Flemingo Group was using these entities to “transfer the dispute to the international level” and was making the decision as to which will be the ultimate claimant “contingent on the chances of success of each”.<sup>369</sup>

275. Respondent asserts that “only one forum is available in this case, which is the Polish judiciary”. Respondent also indicates that parallel cases have been launched before the competent courts in Poland, brought by PPL against BH Travel, and that they are “of a competitive nature with respect to this arbitration”.<sup>370</sup>

276. Respondent submits that when negotiating the Treaty with Poland, India wanted to protect investments made by entrepreneurs from India in Poland, and therefore protects entrepreneurs who: (i) conduct real activity in India and pay taxes there; and (ii) make actual investments in Poland. However the main financial flows within the Flemingo Group, Respondent argues, are transferred through “tax havens” (Dubai or the British Virgin Islands) with Claimant in India being only an “intermediary company” set up by Flemingo International BVI in 2003/2004 to operate on the Indian market.<sup>371</sup>

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<sup>366</sup> Claimant’s Reply, para. 211, referring to Statement of Defence, paras. 256-260.

<sup>367</sup> Statement of Defence, para. 273.

<sup>368</sup> Statement of Defence, para. 266, referring to *Saluka v. The Czech Republic* Partial Award, p. 49, **Exhibit CL-19**.

<sup>369</sup> Statement of Defence, paras. 268-269.

<sup>370</sup> Statement of Defence, paras. 271-272. Respondent states that damages claims against PPL were initiated in June 2013 before Polish national Courts and explains that they relate to “the two profitable agreements” and not to “all nine unprofitable agreements”. See Hearing Transcript (12 October 2015), 121:20 to 122:4.

<sup>371</sup> Respondent’s Rejoinder, paras. 80 and 82.

277. Respondent argues that Baltona’s shares were acquired via “mailbox companies” with funds from the tax havens, whereby Claimant’s commitment was limited to being one of many guarantors for the funding loan and having some of its people (who worked also at Flemingo International) involved in the transaction. Respondent argues further that Claimant has not provided proof that it bore the cost of acquiring the shares in Flemingo International.<sup>372</sup>
278. Respondent submits that both the EU and India have adopted the same position on the use of “mailbox companies” or “shell companies”, namely that they should not benefit from the protection provided for in investor-State dispute settlements (referring, *inter alia*, to recent EU trade agreement negotiations and the new Draft Indian Model BIT).<sup>373</sup>

*Claimant’s Position*

279. Claimant submits that “Respondent has failed to establish any legal basis for invoking ‘forum shopping’ to object to the Tribunal’s jurisdiction”. Claimant dismisses Respondent’s reliance on *Saluka*, because this decision “provides no support for the Respondent’s jurisdiction objection”. In fact, in that case the Tribunal accepted jurisdiction over a Dutch company against the Czech Republic as the company fell within the express terms of ‘investor’ as defined in the Netherlands-Czech Republic bilateral investment treaty.<sup>374</sup> For Claimant, *Saluka* thus “only reaffirms the rule that the definition of ‘investor’ should be interpreted in line with the BIT’s plain language”.<sup>375</sup>
280. Claimant observes that Respondent’s remark that the parallel proceedings conducted before the Polish courts “are of a competitive nature” is baseless because the Treaty has no provision requiring the exhaustion of local remedies. Claimant submits that parallel domestic proceedings before domestic courts do not affect the jurisdiction of an investment treaty tribunal (unless the treaty contains a fork-in-the-road provision), and observes that “much of the parallel litigation” was initiated by PPL itself.<sup>376</sup>
281. Finally, Claimant denies Respondent’s assertion that it played no role in the acquisition of Baltona, arguing that it had “played a central role in supporting the purchase of shares in Baltona from the start of the due diligence process in February 2010, as confirmed by Mr. Ahuja’s

<sup>372</sup> Respondent’s Rejoinder, para. 85.

<sup>373</sup> Respondent’s Rejoinder, paras. 88-92, referring to Printout from the website: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1303> dated 6 May 2015, **Exhibit R-125**, Printout from the website: [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) dated 22 July 2015, **Exhibit R-126**, Draft Indian Model BIT 2015, **Exhibit RL-34**.

<sup>374</sup> Claimant’s Reply, para. 185, referring to *Saluka v. The Czech Republic* Partial Award, p. 49, para. 241, **Exhibit CL-19**, noting that the tribunal held: “the predominant factor which must guide the Tribunal’s exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal’s jurisdiction. In the present context, that means the terms in which they have agreed upon who an investor who may become a claimant is entitled to invoke the Treaty’s arbitration procedures. The parties had complete freedom of choice in this matter, and they chose to limit entitled ‘investors’ to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of “investor” other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of [...] The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add” (emphasis added by Claimant).

<sup>375</sup> Claimant’s Reply, para. 185.

<sup>376</sup> Claimant’s Reply, para. 187.

testimony at the hearing.<sup>377</sup> The restructuring by which Claimant acquired its indirect shareholding in Baltona, Claimant submits, was conceived in the summer of 2009, was under way as early as October 2010, and was completed by March 2011, before Respondent “began breaching the BIT in February 2012 and thus well before any claim could have been perceived”.<sup>378</sup> The purpose of the restructuring, Claimant maintains, was to consolidate the Flemingo Group’s corporate structure.<sup>379</sup>

#### 4) Whether there is any basis to deny the protection of the Treaty to Claimant

##### *Respondent’s Position*

282. Respondent submits that the “activities of the Flemingo Group were conducted in breach of the fundamental principles of the law – in bad faith” and consequently “Claimant’s actions do not deserve BIT Protection”.<sup>380</sup>
283. Respondent alleges that after acquiring Baltona’s stock, being aware of its poor financial condition, knowing BH Travel’s problems at Chopin Airport, and knowing that the Lease Agreements may be terminated for noncompliance, “the Flemingo Group decided to take advantage of the forthcoming modernization of Terminal 1 to achieve its specific business objectives”. Respondent argues in this regard that the Flemingo Group used the business strategy of initiating disputes to bring the modernisation of Terminal 1 to a stop, thereby forcing PPL to enter into a compromise which would be advantageous for Claimant (for example by means of a settlement) or fight for compensation allegedly owed to it.<sup>381</sup>
284. Respondent emphasises that, under the Treaty, protection only applies to investments “[...] established or acquired, in accordance with the national laws of the Contracting Party in whose territory the investment is made” and “made [...] in accordance with its laws and regulations”.<sup>382</sup> Respondent notes in this respect that under Article 5 of the Polish Civil Code “one may not use

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<sup>377</sup> Claimant’s Reply, para. 188, *referring to* Statement of Defence, para. 244, *referring further to* Second Ahuja Witness StatementI, paras. 13-19, **Exhibit CWS-4**; Schedule L (Form of Guarantee I) to the Share Purchase Agreement between Alfa-Center and Culex dated 30 March 2010, **Exhibit C-132**; Schedule P (Form of Guarantee II) to the Share Purchase Agreement between Alfa-Center and Culex dated 30 March 2010, **Exhibit C-133**; Letter from Flemingo DutyFree to State Bank of India (enclosing Comfort Letter) dated 24 October 2010, **Exhibit C-134**; Letter from the State Bank of India to Flemingo International Limited dated 3 October 2010, **Exhibit C-135**; Corporate Guarantee by Flemingo DutyFree in favour of the State Bank of India dated 25 March 2011, **Exhibit C-136**; Resolution of the Meeting of Shareholders / Directors of Flemingo DutyFree dated 5 July 2011, **Exhibit C-137**; Indicative Term Sheet for a Facility from Barclays Bank PLC dated 7 March 2012, signed by Barclays Bank PLC, Flemingo International and Flemingo DutyFree (among others) dated 7 March 2012, **Exhibit C-138**; Letter from State Bank of India to Flemingo International Limited dated 8 March 2012, **Exhibit C-139**; Loan Agreement between Flemingo Dutyfree Shop Pvt. Ltd. and Flemingo International Limited dated 5 July 2012, **Exhibit C-140**; Loan Agreement between Flemingo Dutyfree Shop Pvt. Ltd. and Flemingo International Limited dated 15 July 2012, **Exhibit C-141**; Loan Agreement between Flemingo Dutyfree Shop Pvt. Ltd. and Flemingo International Limited dated 14 August 2012, **Exhibit C-142**; Excerpt of Minutes of Extraordinary General Meeting of Baltona dated 26 April 2010, **Exhibit C-143**; Claimant’s Post-Hearing Brief, para. 38.

<sup>378</sup> Claimant’s Reply, para. 188, *referring to* Letter from Flemingo DutyFree to State Bank of India (enclosing Comfort Letter) dated 24 October 2010, p. 1, **Exhibit C-134**, Certificate of Incumbency for Flemingo International Ltd. dated 30 May 2011, p. 3, **Exhibit C-5**; Claimant’s Post-Hearing Brief, para. 22.

<sup>379</sup> Claimant’s Reply, para. 188, *referring to* Second Ahuja Witness Statement, paras. 21-25, **Exhibit CWS-4**.

<sup>380</sup> Statement of Defence, para. 211.

<sup>381</sup> Statement of Defence, para. 201.

<sup>382</sup> Statement of Defence, para. 204, *referring to* India-Poland Treaty, **Exhibit CL-1**, Articles 1 and 2.

his right in a manner which would be contrary to its social and economic purpose or to the principles of community coexistence. Any such act or refraining from acting by the entitled person shall not be treated as the exercise of the right and shall not be protected”.<sup>383</sup>

285. Respondent submits that under the “prevailing mainstream case law” investors must meet two requirements in respect of legality of investments: (i) to invest in compliance with domestic laws; and (ii) to comply with general fundamental principles of the law, such as fraud, good faith, or lack of corruption. Respondent further submits that arbitral tribunals, such as *Gustav F Hamester v. Republic of Ghana*, and *Phoenix Action* (citing *Inceysa Vallisoletana v. Republic of El Salvador*), have confirmed that an investment made in breach of fundamental principles, as Respondent maintains occurred in the present circumstances, does not fall under bilateral investment treaty protection.<sup>384</sup>
286. Respondent further argues that there is a real risk of double compensation should Claimant be allowed to institute a claim under the Treaty noting that Ashdod can pursue a claim before an international arbitral tribunal and ongoing civil proceedings before Polish courts.<sup>385</sup>

#### *Claimant’s Position*

287. Claimant does not dispute that an investment procured in serious violation of Polish law is not entitled to the protections of the Treaty.<sup>386</sup> However, Claimant states that prior tribunals, including *Hamester* (which is cited by Respondent) have confirmed that the alleged illegality must relate to the acquisition of the investment,<sup>387</sup> and that the jurisdictional significance of the ‘legality requirement’ is exhausted once the investment has been made.<sup>388</sup>
288. In this regard, Claimant argues that Respondent has not met its burden of proof,<sup>389</sup> in that it has failed to proffer any evidence that Claimant acquired its investments in BH Travel for the purpose of initiating and benefitting from this dispute, in violation of its duty of good faith or any other requirements of Polish law.<sup>390</sup> Claimant also points out that the actions of Claimant that Respondent complains of “are irrelevant” to jurisdiction in this case “as none of these actions

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<sup>383</sup> Statement of Defence, para. 205.

<sup>384</sup> Statement of Defence, para. 206-209 referring to *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, Award dated 18 June 2010, ICSID Case No. ARB/07/24 (“*Gustav F W Hamester v. Ghana Award*”), p.37, para. 127, **Exhibit RL-14**; *Phoenix Action v. Czech Republic Award*, **Exhibit RL-15**; *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, Award dated 2 August 2006, ICSID Case No. ARB/03/26 (“*Inceysa v. El Salvador Award*”), pp. 9-12, 71-72, 75, **Exhibit RL-16**.

<sup>385</sup> Respondent’s Post-Hearing Brief, para. 45, 47-48.

<sup>386</sup> Claimant’s Reply, para. 214.

<sup>387</sup> Claimant’s Reply, para. 214, referring to *Gustav F W Hamester v. Ghana Award*, p. 37, para. 127, **Exhibit RL-14**. Claimant’s Post-Hearing Brief, para. 44 referring to *Teinver et. al. v. Argentina Decision on Jurisdiction*, para. 327, **Exhibit CL-84** (“...the jurisdictional inquiry is whether Claimants *acquired or made* their investment in compliance with” host State law”).

<sup>388</sup> Claimant’s Reply, para. 216, referring to *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, Award dated 16 January 2013, ICSID Case No. ARB(AF)04/6, p. 51, para. 167, **Exhibit CL-94**.

<sup>389</sup> Claimant’s Reply, para. 215, referring to *Rompotrol v. Romania Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility*, p. 24, para. 75, **Exhibit CL-74**; *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award dated 30 June 2009 (“*Saipem v. Bangladesh Award*”), p. 36, para. 113, **Exhibit CL-21**; *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility dated 8 February 2013, ICSID Case No. ARB/08/9 (*formerly Giordano Alpi and others v. Argentine Republic*) para. 312, **Exhibit CL-96**.

<sup>390</sup> Claimant’s Reply, para. 215.

relate to the *acquisition* of the Claimant's investment in BH Travel".<sup>391</sup>

289. Claimant disputes Respondent's assertion that Claimant was seeking to incite and escalate a dispute with PPL, calling it a "far-fetched conspiracy theory" and a "smokescreen to distract from the unlawful expropriation of Claimant's investment at Chopin Airport" noting that Respondent repeatedly rebuffed BH Travel's calls for amicable settlement.<sup>392</sup> Claimant stresses that it viewed its investment in the Polish duty-free market as a "doorway to the European market" and that "a long-term presence at Chopin Airport in Warsaw was and remains far more valuable to the Flemingo Group than any immediate monetary compensation".<sup>393</sup> Claimant submits further that it did not learn about the timing, scope and impact of the planned modernisation until the meeting with PPL on 8 December 2011 – "long after it had acquired an indirect controlling shareholding in BH Travel", and further that "it had no interest in opposing any planned modernization until after PPL sought to compel the termination of BH Travel's Lease Agreements on the basis of the forthcoming modernization".<sup>394</sup>
290. Claimant submits that the cases relied upon by Respondent "are plainly distinguishable from the present case".<sup>395</sup> In *Phoenix Action*, the claimant had acquired two companies that were *already* embroiled in a dispute with the host State (whereas, Claimant asserts, it acquired its indirect shareholding in Baltona in March 2011, before any dispute had arisen concerning the planned modernisation).<sup>396</sup> The issue in *Inceyasa* related to a claimant making fraudulent misrepresentations to obtain a contract (Claimant states, there are no such circumstances in the present case).<sup>397</sup> In addition, Claimant observes that the tribunal in *Hamester* upheld jurisdiction, illustrating the high standard of proof required to establish a successful illegality defence.<sup>398</sup>
291. Claimant submits that Respondent's concerns about double compensation are unavailing, citing Professor Schreuer's assertion that this cannot be construed in a manner that denies the investor standing.<sup>399</sup> Claimant asserts that it is undisputed that Ashdod never pursued arbitration proceedings against Respondent, and therefore Ashdod's notice of dispute is irrelevant to the present arbitration.<sup>400</sup>

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<sup>391</sup> Claimant's Reply, para. 216 (emphasis in original). Claimant's Post-Hearing Brief, para. 23, 46-47.

<sup>392</sup> Claimant's Reply, para. 220. Respondent's Post-Hearing Brief, para. 49.

<sup>393</sup> Claimant's Reply, paras. 217-218, 220, *referring to* Ahuja Witness Statement, paras. 4, 12, **Exhibit CWS-1**.

<sup>394</sup> Claimant's Reply, para. 219, *referring to* Second Jaroń Witness Statement, paras. 5-6, **Exhibit CWS-5**.

<sup>395</sup> Claimant's Reply, para. 222.

<sup>396</sup> Claimant's Reply, paras. 223-224, *referring to Phoenix v. The Czech Republic Award*, pp. 52-53, 56-57, **Exhibit RL-15**; Letter from Flemingo DutyFree to State Bank of India (enclosing Comfort Letter), 24 October 2010, p. 1, **Exhibit C-134**; Certificate of Incumbency for Flemingo International Ltd, 30 May 2011, p. 3, **Exhibit C-5**.

<sup>397</sup> Claimant's Reply, para. 225, *referring to Inceyasa v El Salvador Award*, pp. 9-12, 71-72, 75, **Exhibit RL-16**.

<sup>398</sup> Claimant's Reply, para. 226, *referring to Gustav F W Hamester v. Ghana Award*, pp. 38-41, **Exhibit RL-14**.

<sup>399</sup> Claimant's Post-Hearing Brief, para. 40 *referring to* C. Schreuer, *Shareholder Protection in International Investment Law*, in P. Dupuy, B. Fassbender, M. Shaw and K. Sommermann, *Common Values in International Law* (2006), p. 14.

<sup>400</sup> Claimant's Post-Hearing Brief, paras. 41-42 *referring to Cervin and Rhone v. Costa Rica*, Decision on Jurisdiction dated 15 December 2014, ICSID Case No. ARB/13/2, **Exhibit CL-129**. Claimant states that this is an example of a case in which the fact that the parent company of the claimant had already filed a notice of dispute relating to the dispute in question several years earlier without pursuing arbitration proceedings against the State did not preclude the claimant from pursuing arbitration against the State.

## 5) Tribunal's Analysis

292. The Tribunal has considered the positions of both Parties with regard to its jurisdiction.
293. It will first examine whether the dispute concerns an 'investment' as required by Article 1(1) of the Treaty. It will then discuss whether Claimant is an 'investor' as required by Article 1(2) of the Treaty. Furthermore, it will consider whether Claimant was engaged in forum shopping, and thus could not benefit from the protection under the Treaty. Finally, it will consider whether the activities of the Flemingo Group were conducted in bad faith, so that Claimant would not deserve Treaty protection.

### Whether the Dispute concerns an 'Investment'

294. The Tribunal will first examine whether the dispute – *ratione materiae* – concerns an 'investment' within the scope of the Treaty. Claimant submits that its indirect shareholding in BH Travel and all rights associated therewith constitute its protected investment.<sup>401</sup>
295. In order to address this issue, the Tribunal begins its analysis from the definition of 'investment' within the Treaty. Indeed, as also was decided in *Saluka*: "the Tribunal must always bear in mind the terms of the Treaty under which it operates".<sup>402</sup>
296. Article 1(1) of the Treaty contains a very broad definition of the term 'investment', namely: "the term investment means every kind of asset established or acquired, in accordance with the national laws of the Contracting Party in whose territory the investment is made [...]".
297. Article 9 of the Treaty, on "Settlement of Disputes between the Investor and the Contracting Party", which forms the basis of the Tribunal's jurisdiction, allows the Parties to submit to arbitration "any dispute between the investor of one Contracting party and the other Contracting Party in relation to an investment of the former under this Agreement".
298. Article 9 of the Treaty, and not Article 25 of the ICSID Convention, is the jurisdictional basis of the present arbitration. Consequently, jurisdictional restrictions deriving from the notion of 'investment' in Article 25 of the ICSID Convention, as emphasised by various ICSID tribunals such as the *Salini* panel, do not apply to the present arbitration. Moreover, the present Tribunal is convened under the UNCITRAL Arbitration Rules, which merely refer to any "dispute", without any further qualification.

### *a. The Lease Agreements and Permits as an 'Investment'*

299. The Tribunal finds – contrary to Respondent's submissions – that the Lease Agreements and the related permits for conducting business in the DFZ of Chopin Airport have to be considered 'investments' under the Treaty.
300. Article 1(1) of the Treaty provides that "in particular, though not exclusively", investments include: "(c) rights to any performance under contract having a financial value". Consequently, the Lease Agreements obtained by BH Travel, and the expenses to install and promote the shops, are investments made in Poland falling within the scope of the Treaty.

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<sup>401</sup> Claimant's Post-Hearing Brief, para. 13.

<sup>402</sup> *Saluka v. The Czech Republic* Partial Award, para. 241, **Exhibit CL-19**.

301. In addition, the Tribunal notes that, although this ground of jurisdiction was not pursued by Claimant,<sup>403</sup> Article 1(1) of the Treaty provides that, investments include: “(e) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals”.
302. In this regard the Tribunal is of the view that a business concession does not necessarily need to be a concession for public works or for activities in areas that are key to the State’s security, nor does it need to be granted by the State itself – as Respondent incorrectly alleges. The fact that the Lease Agreements must be obtained through a tender to be considered to be a ‘concession’ under Polish law does not exclude them from being considered ‘investments’ falling within the scope of the Treaty. The Lease Agreements and permits may therefore also fall within the scope of the Treaty as ‘business concessions’, as understood in Article 1(1)(e) of the Treaty.<sup>404</sup>

*b. The Baltona Shares as an ‘Investment’*

303. BH Travel is a Polish company and therefore its investments in Poland are not protected under the Treaty. However, BH Travel is 100% owned by Baltona, another Polish company. Since June 2011, 80.68% of Baltona’s shares are owned by Ashdod, which in turn is 100% owned by Flemingo International. On 31 March 2011, Flemingo DutyFree (Claimant) became the sole owner of Flemingo International.<sup>405</sup> At the time of Claimant’s filing of its Statement of Claim, Flemingo DutyFree held 84.8% percent of the shares in Flemingo International because of a further restructuring within the Flemingo Group on 29 October 2012.<sup>406</sup> The Parties have different views on whether such acquisition of shares falls within the scope of the term ‘investment’ under the Treaty.
304. The Tribunal notes that Article 1(1)(b) of the Treaty provides that ‘investment’ also means: “(b) shares in and stock and debentures of a company and any other similar forms of participation in a company”.
305. Article 1(1) of the Treaty has a very broad definition of ‘investment’. As other investment arbitration tribunals have decided with regard to similarly broad definitions of the term ‘investment’,<sup>407</sup> such definitions do not exclude indirect investments through controlling shareholding via intermediate companies. Consequently, the indirect shareholding in BH Travel, the holder of the Lease Agreements and concessions for the duty-free shops, equally qualifies as a protected investment under the Treaty.
306. The Tribunal observes that Article 1(1) of the Treaty not only covers investments that were

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<sup>403</sup> Claimant’s Reply, para. 211.

<sup>404</sup> The Tribunal notes that the examples given in Article 1(1) are mere illustrations of different types of investments covered by the Treaty (*‘...though not exclusively, includes...’*). Therefore, even if the Lease Agreements were mere civil law agreements of a purely contractual nature, they could be considered to be ‘investments’.

<sup>405</sup> Certificate of Incumbency for Flemingo International Ltd dated 30 May 2011, **Exhibit C-5**.

<sup>406</sup> Statement of Claim, para. 14, *referring to* Certificate of Incumbency for Flemingo International Ltd. dated 26 November 2013, **Exhibit C-6**.

<sup>407</sup> *White Industries v. India*, **Exhibit CL-81**; *Philip Morris v. Uruguay*, **Exhibit CL-77**; *Malaysian Historical Salvors v. Malaysia*, **Exhibit CL-82**; *Alpha Projektholding v. Ukraine*, **Exhibit CL-83**; *Gold Reserve v. Venezuela*, para. 44, **Exhibit CL-87**; *Teco v. Guatemala*, paras. 135-140, **Exhibit CL-85**; and *Guaracachi & Rurelec v. Bolivia*, paras. 118-119, **Exhibit CL- 86**; *Société Générale v. The Dominican Republic* Award on Preliminary Objections to Jurisdiction, para. 44, **Exhibit RL-20**.

“established” but also investments that were “acquired”. This is markedly different, for instance, from the investment treaty between Canada and Venezuela, as applied in *Gold Reserve Inc.* and frequently referred to in this case.<sup>408</sup> As such, the definition of ‘investment’ under the Treaty encompasses the acquisition of shares.

307. Claimant argues that, while it had held no direct or indirect shareholding in Baltona or BH Travel before March 2011, since its acquisition of Flemingo International (for a total consideration of USD 26,505,000) on 31 March 2011 it has consistently been an indirect controlling shareholder of BH Travel and Baltona.<sup>409</sup>
308. Respondent has challenged the Tribunal’s jurisdiction on the basis that Claimant’s acquisition of Flemingo International did not directly concern any Polish entity. Respondent argues that, at most, this acquisition is a transaction within the Flemingo Group and not an investment in Poland. Accordingly, Respondent asserts that Claimant “has never conducted and does not conduct any business in Poland”.<sup>410</sup> Thus, Respondent has argued that the acquisition is not an ‘investment’ under the Treaty since it was not made in Poland as allegedly required by the Treaty. The majority of the Tribunal disagrees. The Tribunal notes that an investment, as defined in Articles 1(1) and 9 of the Treaty, need not be made in the territory of the host State. In this regard, the Tribunal notes that many other tribunals have held that investments, acquired by a third party outside the territory of the host State may also constitute investments.<sup>411</sup> Consequently, the indirect acquisition of Baltona’s shares by Claimant, an Indian company established outside of Poland, is an ‘investment’ under the Treaty.
309. Respondent has also argued that the actual ‘investment’ was the acquisition of the Lease Agreements and concessions as well as the installation of the airport shops by BH Travel, and not the acquisition of shares of Baltona, the holding company of BH Travel. In addition, Respondent has disputed that the acquisition of Baltona shares can be considered as Claimant’s investment as it did not participate financially in the process of the acquisition.<sup>412</sup>
310. In fact under investment treaties, investments can just as well consist of a shareholding in a local company, as of the investments made by a local company, controlled by successive intermediate companies. The investor “steps into the shoes” of the local company and claims for damages suffered by the local company as if it had been inflicted, on a *pro rata* basis, on itself. Those two different aspects of “upstream protection” of investors have clearly been identified by the International Court of Justice.<sup>413</sup> Each type of investment gives rise to specific legal questions: in the case of shares, whether the value of the shareholding is affected; in case of indirect investments, whether the rights of the local company have been violated. Of course both approaches may be combined. The actual investment may be made by a local company, but may

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<sup>408</sup> See Article 1(g) of the investment treaty between Canada and Venezuela in *Gold Reserve v. Venezuela* Award, **Exhibit CL-87**.

<sup>409</sup> Claimant’s Reply, para. 19.

<sup>410</sup> Statement of Defence, para. 245.

<sup>411</sup> See e.g., *Phoenix v. Czech Republic* Award, **Exhibit RL-15**, where the tribunal recognised that the claimant was an investor, but decided that in that case the treaty protection was not available because of the timing of the acquisition. See also *Quasar de Valores v. Russia* Award, **Exhibit CL-88**.

<sup>412</sup> Statement of Defence, paras. 251, 254; Respondent’s Rejoinder, para. 47.

<sup>413</sup> See *Ahmadou Sadio Diallo*, Preliminary Objections (Guinea v. Democratic Republic of Congo), ICJ Reports (2007), paras. 67, 95.

lead to indirect investments through a series of intermediate shareholdings.<sup>414</sup>

311. Consequently, it is the view of the Tribunal that the acquisition of Baltona's shares constitutes an 'investment' for the purposes of the Treaty. In this context, the proportion that the BH Travel shops comprise of Baltona's overall activities is irrelevant in determining the Tribunal's jurisdiction over the investment through the acquisition of Baltona's shares.

Whether Claimant is an 'Investor'

312. The Tribunal next addresses the issue of whether Claimant is an 'investor' that is protected by the Treaty.
313. Both Parties agree that Claimant is a company established under the laws of India. Consequently, since Claimant is "incorporated or established under the laws of a Contracting Party", it fulfils the requirement under Article 1(2) of the Treaty:

The term 'Investors' refers with regard to either Contracting Party to:

- (a) [...];
- (b) legal entities, including companies, corporations, firms and business associations incorporated or constituted or established under the law of a Contracting Party.

314. The Tribunal has already established that an indirect investment through shareholdings in BH Travel, the company that obtained the Lease Agreements and the duty-free concessions, constitutes an investment under Article 1(1) of the Treaty, and that the shares need not be purchased by a company from within the host state.
315. As the tribunal in *Gold Reserve* pointed out:

[T]he Parties have debated at length whether the process leading to the indirect share ownership by Claimant of a local subsidiary and, through the latter, to the holding of title to mining rights and concessions satisfies the condition of "making" an investment in the territory of Venezuela. The dispute is whether the Canadian company can be said to have "made" the investment, given that the mining rights had already been granted to the Venezuelan subsidiary before the restructure through which Gold Reserve Inc., the Canadian company, acquired Gold Reserve Corp., the US company. Venezuela argued that, as the investment already existed before the Canadian company was even incorporated, the Canadian company cannot be said to have made that investment.

According to the ordinary meaning of the words, "making an investment in the territory of Venezuela" does not require that there must be a movement of capital or other values across Venezuelan borders.<sup>415</sup>

316. Likewise, the acquisition of the Baltona shares by Flemingo International after Baltona's 100% subsidiary, BH Travel, had obtained the Lease Agreements and the concessions, is an 'investment' under Article 1(1) of the Treaty. Flemingo International has to be considered as the (indirect) investor in Baltona and, through Baltona, in BH Travel, as Respondent has admitted.<sup>416</sup>
317. Respondent, however, has argued that Claimant's compliance with the condition of 'nationality'

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<sup>414</sup> See e.g., H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Oxford University Press (2013) ("Wheland"), paras. 2.33- 2.53.

<sup>415</sup> *Gold Reserve v. Venezuela Award*, para. 260, **Exhibit CL-87**.

<sup>416</sup> See Respondent Rejoinder, para. 43; see also Statement of Defence, paras 246-249.

must be concurrent with its compliance with the condition of making an investment in Poland.<sup>417</sup> In Respondent's view, Claimant cannot be considered an 'investor' because it has not made an 'investment' within the meaning of Article 1(1) of the Treaty. In making this argument, Respondent has assumed that such investment had to be made in Poland, whereas Claimant acquired the investment indirectly through its acquisition of all the shares of Flemingo International, which, as noted at paragraph 303 above, holds 100% of the shares in Ashdod, which in turn holds 80.68% of Baltona's shares.

318. The Tribunal will now determine whether Claimant became an 'investor' when it became the sole owner of Flemingo International in March 2011.
319. In line with the decisions of other tribunals, the Tribunal interprets the Treaty according to the rules set forth in the Vienna Convention on the Law of Treaties ("**Vienna Convention**"). Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".
320. According to the ordinary meaning of the definition in Article 1(2) of the Treaty, Claimant is an investor if it is "incorporated or constituted or established under the law of" India, which is the case. The definition contains no additional requirements for an entity to qualify as an 'investor'. The acquisition by Claimant of the shares of Flemingo International, therefore, made Claimant an 'investor' entitled to the protection of the Treaty.
321. The Tribunal does not agree with Respondent that the Treaty only protects entities that actually have invested in Poland. Respondent unsuccessfully relies upon the Treaty Preamble, which states that the Treaty is aimed at "fostering investments by investors of one State in the territory of another State", and argues that this statement implies that only entities which actually invest in Poland should be considered 'investors' under the Treaty. However, the Preamble cannot contradict the provisions of the Treaty itself. In fact, in *Tokios Tokelès* and *Société Générale v. Philippines*, the tribunals interpreted virtually identical language in treaty preambles to provide broad protection to investors and their investments.<sup>418</sup>
322. Article 1(1) of the Treaty does not only cover investors that "established" investments in the territory of the other Contracting State, but also those who "acquired" such an investment.
323. In *Standard Chartered Bank v. Tanzania*, a United Kingdom entity brought a claim based on the equity ownership of its Hong Kong subsidiary, to which a loan, initially granted by a Malaysian joint venture, had been assigned. In that case the United Kingdom bank was denied protection under the bilateral investment treaty signed by the United Kingdom and Tanzania ("United Kingdom-Tanzania BIT") because it had not been "doing something as part of the investing process, either directly or through an agent or entity under the investor's direction".<sup>419</sup> In that case, the dispute settlement clause in Article 8(1) of the United Kingdom-Tanzania BIT expressly referred to "investment of a national or company of the other Contracting Party in the territory of the former [Contracting Party]" and 'investment' was defined in Article 1 of that BIT as "every

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<sup>417</sup> Statement of Defence, paras. 214-217.

<sup>418</sup> *Tokios Tokelès v. Ukraine* Decision on Jurisdiction, pp. 13-14, paras. 31-32, **Exhibit RL-21** and *Société Générale v. Philippines* Decision on Jurisdiction, p. 44, para. 116, **Exhibit CL-73**.

<sup>419</sup> *Standard Chartered Bank v. Tanzania* Award, para 198, **Exhibit RL-70**.

kind of asset admitted in accordance with the legislation and regulations in force [in the host State]”. For that tribunal, this meant that the investor had not merely to “hold” the investment, but had to “make” it. Both provisions indicate that the investor was indeed supposed to be directly involved in the host State.

324. In the India-Poland Treaty, however, Article 9 merely refers to disputes with the investor (as defined in Article 1(2)) “in relation to an Investment of the former under this Agreement”. Article 9 does not restrict the dispute resolution clause to disputes about investments “in the territory”. While it is true that Article 2 delimits the scope of the Treaty as applying to “all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations [...]”,<sup>420</sup> Article 1(1) of the Treaty includes as ‘investments’ assets that are “acquired” (as well as “established”) in accordance with the laws of the host state. For the majority of this Tribunal, the definition of ‘investment’ is definitive, as on the plain meaning of these provisions read together, the inclusion of “acquired” assets within the definition allows for investments that have *already been made in Poland* to fall within the scope of the Treaty as soon as they are *acquired* by an Indian investor. Consequently, although *Standard Chartered Bank* may be relevant for bilateral investment treaties which require investments to be made within the territory of the host State, it can be distinguished from cases in which the bilateral investment treaties, such as the India-Poland Treaty, not only concern investments “established” but also those later “acquired”.
325. The Tribunal moreover finds itself unable to agree with Respondent that Claimant cannot be considered as an ‘investor’ for the purposes of the Treaty on the basis that it allegedly only occupies an intermediate position in the structure of the Flemingo Group, and is neither the direct owner of the Baltona shares, nor the ultimate beneficiary of the investment.
326. Respondent’s reliance on NAFTA, which requires that the investor take part in “substantial business activities”, and thus, according to Respondent, does not cover intermediary shareholders such as Claimant, is not convincing. The NAFTA definition and jurisprudential interpretation of the notion ‘investor’ within the NAFTA system has no bearing upon the interpretation of ‘investor’ as applicable in the India-Poland Treaty.
327. By virtue of corporate restructuring, Claimant became the indirect owner of the share capital of BH Travel, which held the Lease Agreements and the concessions to the duty-free shops at Chopin Airport in Poland. The Tribunal agrees with Claimant that Article 1(2) does not require that the investor be the “first foreign entity in the hierarchy” or “the ultimate beneficiary of the investment”.
328. The Tribunal first addresses the argument that the investor needs to be the “first foreign entity in the hierarchy”. In support of its submissions, Respondent refers to precedents that are irrelevant for the point it intends to make. *SOABI v. Senegal*, one of the first ICSID awards, does not concern the scope of bilateral investment treaty protection. Instead it is concerned with the issue of whether an ICSID tribunal should exercise jurisdiction under Article 25(2)(b) of the ICSID Convention when a local investor and the host State had chosen ICSID arbitration in their investment contract, and the shares of the local investor were held by a foreign company. The tribunal in that case held that the local company could only be brought under bilateral investment

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<sup>420</sup> India-Poland Treaty, Article 2, **Exhibit CL-1** (emphasis added).

treaty protection of the State to which its controlling shareholder belonged.<sup>421</sup> In *Amco v. Indonesia*, the tribunal similarly required, again for the jurisdictional purposes of Article 25(2)(b) of the ICSID Convention, that the nationality of the controlling shareholder be one that could bring an entity, established within the host State, within the ambit of ICSID jurisdiction.<sup>422</sup>

329. In *Sedelmayer* the tribunal held that the controlling shareholder of a company that actually made the investment is entitled to bilateral investment treaty protection. The Tribunal here notes that, in the bilateral investment treaty signed by Germany and Russia (“Germany-Russia BIT”) applicable in that case, the definition of ‘investments’ was restricted to “every kind of asset invested by an investor of one Contracting Party in the territory of the other Party”. Because the India-Poland Treaty has a provision similar to the Germany-Russia BIT, the decision in *Sedelmayer* confirms that the direct shareholder of Baltona’s shares can, in all events, be considered an ‘investor’ under the Treaty. However, as the Germany-Russia BIT does not extend investments to shares “acquired”, *Sedelmayer* excluded from the scope of the Germany-Russia BIT companies which, at a later stage, acquired the investments that were made.
330. The award in *Tokios Tokelès*, to which Respondent refers, is equally irrelevant in sustaining Respondent’s point. *Tokios Tokelès* states only that some bilateral investment treaties require the investor to have some business activity within the country of incorporation in order to be protected under the bilateral investment treaty. However, the tribunal in *Tokios Tokelès* decided that such requirements only apply when the investment treaty expressly provided as such, stating: “[i]n our view, it is not for tribunals to impose limits on the scope of [bilateral investment treaties] not found in the text [...]”.<sup>423</sup> The *Tokios Tokelès* tribunal therefore decided that such a requirement, if it were not mentioned in the bilateral investment treaty, cannot be subsequently added to restrict the notion of ‘investors’ in that case. This award thus confirms this Tribunal’s reasoning that, because the India-Poland Treaty does not impose restrictions other than a nationality requirement, it does not exclude investors that are not the first shareholding company in line.<sup>424</sup>
331. With regard to Respondent’s alternative submission that only “the ultimate beneficiary of the investment” would be entitled to the Treaty’s protection, the Tribunal observes that, as between Claimant and the ultimate beneficiary of the investment, there are indeed three layers of companies (see para. 106 above). However, the Tribunal notes again that the Treaty did not expressly provide for the limitation of treaty protection to the ultimate beneficiary of the investment and, therefore, such a restriction cannot be read into it. The decisions of *Sedelmayer* and *Société Générale v. The Dominican Republic*,<sup>425</sup> on which Respondent relies extensively to prove this general principle, in fact do not support Respondent’s view. Those tribunals limited their analyses to the issue of whether the claimants had the proper nationality to be granted treaty

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<sup>421</sup> *Société Ouest Africaine des Bétons Industriels v. Senegal* Decision on Jurisdiction, as discussed in Journal of International Arbitration, Kluwer Law International, p. 7, **Exhibit RL-24**.

<sup>422</sup> *Amco v. Indonesia* Decision on Jurisdiction, **Exhibit RL-22**.

<sup>423</sup> *Tokios Tokelès v. Ukraine* Decision on Jurisdiction, para. 36, **Exhibit RL-21**.

<sup>424</sup> *Tokios Tokelès v. Ukraine* Decision on Jurisdiction, para. 31-36, **Exhibit RL-21**.

<sup>425</sup> The facts in *Société Générale v. The Dominican Republic*, to which Respondent refers, are interesting. Société Générale only had a 25% interest in the investment. Nevertheless, it was considered an investor under the BIT. Paragraphs 44-45 of the award in that case confirm also that ‘complex corporate structures are a normal feature of international business and if lawful and legitimate, do not exclude treaty protection’. *Société Générale v. The Dominican Republic* Award on Preliminary Objections to Jurisdiction, **Exhibit RL-20**.

protection in those cases.

332. In fact, in the present case, there is no obstacle to applying the Treaty provisions as they are and, to the extent that the issue relates to Treaty protection of Claimant as an Indian company that acquired an ‘investment’ within the scope of the Treaty through its shareholding in Flemingo International, various tribunals have already accepted that intermediate entities in a holding structure can qualify as ‘investors’.<sup>426</sup>
333. Respondent has suggested that, for companies in a string of successive shareholders, the possibility of being considered to be an ‘investor’ should be subject to a “cut-off” for indirect shareholders that are too remote, and argues that Claimant is beyond that cut-off point. However, for this Tribunal, the *Enron v. Argentina* and *Standard Chartered Bank* awards, to which Respondent refers as precedents in support of its contention, do not prove this point.
334. In *Enron*, the claimant was a minority shareholder holding only 35% of the initial investor’s shares. Argentina suggested a cut-off in order to avoid “an endless chain of claims” in which several minority shareholders would simultaneously present their individual claims. In the present case, however, Claimant has, by a large percentage, majority control over Baltona, so that the risk of simultaneous actions from different shareholders would be minimal.
335. In *Standard Chartered Bank*, the tribunal had held that the United Kingdom-Tanzania BIT required that the investor would have funded the initial investment, or would control or manage such investment once made. This requirement did not concern the cut-off within a chain of intermediate shareholders, but instead, turned on the notions of ‘investment’ and ‘investor’ itself. The tribunal in *Standard Chartered Bank* only decided whether the claimant in that case actually made and/or managed the initial investment. In the present case, however, the India-Poland Treaty has a broader scope and also includes as an ‘investment’ mere shareholding and the acquisition of investments already made.
336. In fact, to the Tribunal’s knowledge, a cut-off because of remoteness has not yet led any tribunal to deny bilateral investment treaty protection to an indirect controlling shareholder. Moreover, a possible cut-off has only been envisaged for entities that were so remote from the original investment that they could not have been foreseen by the host State. In the present case, Poland could have been aware that Claimant would be affected.<sup>427</sup>

*Whether Claimant is denied protection because of “forum shopping”*

337. The Tribunal does not consider that Claimant has engaged in forum shopping by instigating the present claim.
338. Claimant, a controlling indirect shareholder of Baltona, whose subsidiary, BH Travel, operated the duty-free shops, is in its own right an investor, entitled to protection under the Treaty.
339. The circumstance that Ashdod, the wholly-owned subsidiary of Claimant’s subsidiary, Flemingo International, also submitted a notice of arbitration, this time under the bilateral investment treaty

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<sup>426</sup> See e.g. *ConocoPhillips v. Venezuela*, Decision on Jurisdiction and the Merits, **Ex. CL-75**, pp. 3-4, para. 7, p. 84, para. 290(b), **Exhibit CL-75**; *CEMEX v. Venezuela* Decision on Jurisdiction, **Ex. CL-69**, pp. 39-40, paras. 143-144, p. 45, para. 160, **Exhibit CL-69**.

<sup>427</sup> See e.g., Wehland, para. 2.49.

signed by Cyprus and Poland (“Cyprus-Poland BIT”), does not exclude Claimant from its own protection. International investment law does not exclude several entities, situated at different levels of an investment structure, from claiming investment protection.<sup>428</sup> Besides, Ashdod has not pursued the arbitration proceedings it initially commenced, so that, in the present circumstances, no parallel investment treaty awards will be rendered.

340. In *Saluka*, to which Respondent refers to exclude Claimant from Treaty protection, the tribunal in fact confirmed that it is not necessary for the claimant to actively operate the investment and that a subsequent acquisition of shares does not preclude the claimant from having recourse to arbitration under the applicable treaty – as long as the acquisition was not made after the breach of the investment treaty has occurred.<sup>429</sup> In this case, Claimant’s acquisition of its indirect shareholding in Baltona took place on 31 March 2011 (when Claimant became the sole owner of Flemingo International), which is well before the dispute between BH Travel and PPL arose.
341. Likewise, the fact that the termination of the Lease Agreements was – and is – the subject-matter of many proceedings before the Polish domestic courts is also not an obstacle for the Tribunal to exercise its jurisdiction, as defined by the India-Poland Treaty, which does not restrict tribunals’ jurisdiction in cases where proceedings are underway before domestic courts. Besides, it appears from the record of evidence in this case that much of the litigation before Polish courts has been initiated by PPL.
342. It is also not an impediment for the Tribunal to exercise jurisdiction if Claimant, an Indian company, allegedly does not deploy commercial activities in India and is not involved in the Polish operations of the Flemingo Group.<sup>430</sup> The Treaty does not impose any of these requirements upon Claimant and it is not for the Tribunal to add such restrictions to the definition and scope of the Treaty.

*Whether there is any basis to deny Claimant Treaty Protection*

343. The Tribunal does not agree with Respondent that the Flemingo Group conducted its activities in bad faith and in breach of the fundamental principles of law. As will be explained hereafter (see paras.545-548 below), in the Tribunal’s opinion, termination of the Lease Agreements without compensation because of BH Travel’s non-compliance with their contract terms was not imminent. The respective entities of the Flemingo Group did not initiate proceedings to avoid a termination without compensation and to get an advantageous settlement.
344. The Tribunal similarly does not follow Respondent where it suggests that protection of indirect investments would constitute an abuse of the protection that the India-Poland Treaty grants. As has been demonstrated above, indirect investors are protected by the Treaty and no bad faith from Claimant’s side has been proven. No irregularities or violations of Polish law in the acquisition of the investment, which would take away Treaty protection, have been shown.

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<sup>428</sup> See e.g. *Antoine Goetz et consorts v. République du Burundi*, Award dated 10 February 1999, ICSID Case No. ARB/95/3, para. 89; *Pan American Energy v. Argentina* Decision on Preliminary Objections, paras 212-213; *ConocoPhillips v. Venezuela* Decision on Jurisdiction and the Merits, p. 3, para. 7, p.84, para. 290(b), **Exhibit CL-75**, *CEMEX v. Venezuela* Decision on Jurisdiction, pp. 39-40, paras. 143-144, p. 45, para. 160, **Exhibit CL-69**; see also Wehland, para.2.51.

<sup>429</sup> *Saluka v. The Czech Republic* Partial Award, para. 238, **Exhibit CL-19**.

<sup>430</sup> See *Saluka v. The Czech Republic* Partial Award, **Exhibit CL-19**.

345. Claimant has submitted that BH Travel had invested in the Lease Agreements, and the shares of Baltona had been acquired by Flemingo International in good faith to grant the Flemingo Group entry into the Polish duty-free market “as a doorway to the European market”,<sup>431</sup> well before the termination of the Lease Agreements was ‘in the air’. Respondent has not, in the Tribunal’s view, been able to prove otherwise. Similarly, the restructuring of Flemingo Group, pursuant to which Flemingo International became a subsidiary of Claimant, equally appears to have been conceived for business purposes and in good faith – well before the termination of the Lease Agreements became a matter of concern.
346. The Tribunal thus concludes that the present proceedings do not constitute an abuse of Claimant’s right to treaty protection.
347. As stated above, the possibility of parallel claims, emanating from two different indirect investors at different levels of the investment structure, follows from the investment law itself and has been confirmed by several awards. International investment law contains several mechanisms to avoid parallel proceedings. One of them could be a taking away of treaty protection because of abuse of process – although not yet applied by tribunals.<sup>432</sup> However, it cannot by itself constitute an abuse of proceedings when both a controlling shareholder and a controlling shareholder of the former give notice of separate claims under respective bilateral investment treaties against the same host State for the same subject-matter, when one of them does not pursue its claim – as has occurred in this case. Indeed, at present no two awards are being rendered on the same subject-matter and there is no risk of conflicting or overlapping awards. Besides, even if in the given scenario an abuse of procedure were possible, it could only be committed by Ashdod if it resumed its proceedings – which is not presently the case.
348. For the reasons set out above, the majority of the Tribunal has determined that it has jurisdiction over this dispute pursuant to Articles 1 and 2 of the Treaty.

## VI. MERITS

### A. Attribution

349. Claimant submits that the measures complained of in these proceedings implicate several Polish State authorities, including: (i) PPL; (ii) the Customs Chamber in Warsaw; and (iii) the Governor of Mazovia, as well as several Ministries, including the Ministry of Transport and the Ministry of Treasury. Claimant contends that the conduct of these entities is attributable to Respondent under international law,<sup>433</sup> pursuant to Article 4 and Article 5 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”).<sup>434</sup> The ILC Articles, Claimant argues, are widely accepted and applied by investment treaty tribunals as “a codification of customary international law with regard to the issue of attribution of conduct” of a State.<sup>435</sup>

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<sup>431</sup> Claimant’s Reply, paras. 217-218, 220, referring to Ahuja Witness Statement, paras. 4, 12, **Exhibit CWS-1**.

<sup>432</sup> See e.g. Wehland, pp. 107-226, especially paras. 7.47-7.52.

<sup>433</sup> Statement of Claim, para. 16 and Claimant’s Reply, para. 227.

<sup>434</sup> Claimant’s Reply, para. 230.

<sup>435</sup> Claimant’s Reply, para. 230, referring to *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, Award dated 10 March 2014, ICSID Case No. ARB/11/28 (“**Tulip Real Estate v. Turkey Award**”), para. 281, **Exhibit CL-97**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*,

350. Respondent disputes that the ILC Articles are relevant to this case, although it acknowledges that they are guidelines used by the international community. Respondent also denies that PPL’s activities are attributable to Respondent pursuant to the ILC Articles.<sup>436</sup>

### 1) Whether PPL is a State organ within the meaning of Article 4 of the ILC Articles

#### *Claimant’s Position*

351. Claimant submits that PPL is an organ of the Polish State and thus its conduct is attributable to Respondent under Article 4(1) of the ILC Articles – which provides that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other function, whatever position it holds in the organization of the State”.<sup>437</sup>

352. Specifically, Claimant submits that the acts of PPL are attributable to Respondent because: (i) PPL is a *de facto* State organ within the meaning of Article 4 of the ILC Articles; and (ii) PPL has been operating under the control and supervision of the Ministry of Transport, including during the implementation of the modernisation of Chopin Airport.

353. Claimant argues that the term “State organ” contained in Article 4(1) has a “very broad meaning”.<sup>438</sup> Claimant submits that other investment treaty tribunals have adopted a very broad interpretation of this term and have understood that the term “State organ” in Article 4 of the ILC Articles “can be any ‘part of the centralized or decentralized structure of the State’”.<sup>439</sup>

354. Moreover, Claimant submits that an entity’s status as a “State organ” under Article 4 of the ILC Articles is not determined by its status under national law.<sup>440</sup> Claimant cites the Commentary to Article 4, which provides that “a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law”.<sup>441</sup> In Claimant’s view, this means that the legal status of PPL under domestic Polish law is not determinative.

355. Claimant notes that PPL is the legal successor of a government agency – Poland’s Air Traffic and Airport Management Board (“ATAMB”). Pursuant to the PPL Act, which established PPL as a State-owned company, PPL took over all ATAMB’s property, rights, and liabilities.<sup>442</sup>

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Award dated 27 August 2009, ICSID Case No. ARB/03/29 (“*Bayindir v. Pakistan Award*”), para.113, fn. 13, **Exhibit CL-13**.

<sup>436</sup> Respondent’s Rejoinder, paras. 100, 112-113; Hearing Transcript of 16 October 2015, pp. 100-101.

<sup>437</sup> **Exhibit CL-3**.

<sup>438</sup> Claimant’s Reply, para. 275, referring to ILC Articles on State Responsibility, p. 42, Commentary, para. 11, **Exhibit CL-3**.

<sup>439</sup> Claimant’s Reply, para. 275, referring to *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, Award dated 6 November 2008 (“*Jan de Nul v. Egypt Award*”), para.160, **Exhibit CL-31**.

<sup>440</sup> Claimant’s Reply, paras. 275-277, referring to *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, Award dated 31 October 2012, ICSID Case No. ARB/09/02 (“*Deutsche Bank AG v. Sri Lanka Award*”), para. 405 (b) and (f), **Exhibit CL-103**.

<sup>441</sup> Claimant’s Reply, para. 275, referring to ILC Articles on State Responsibility, p. 42, Commentary, para. 11, **Exhibit CL-3**.

<sup>442</sup> Claimant’s Reply, para. 279, referring to Regulation of the Minister of Transport of 21 July 1966 on the appointment of the Air Traffic and Airport Management Board and definition of its organisation as a State air traffic authority dated 21 July 1966, p. 1, Articles 1, 2(2), **Exhibit C-295**, referring further to Act on the ‘Polish Airports’ State Enterprise dated 23 October 1987, p. 8, Article 55, **Exhibit C-7**.

Claimant submits that the PPL Act provides the regulatory framework through which the Ministry of Transport exercises supervision and control of PPL, together with the detailed supervision method note issued in August 2008 (“**Supervision Note**”).<sup>443</sup>

356. According to Claimant, this regulatory framework “places PPL within the structure of the Ministry of Transport as required to qualify as a *de facto* State organ under ILC Article 4 on the following bases”: (i) the PPL Act grants the Ministry of Transport the power to appoint, suspend, and dismiss the management of PPL, and to audit and assess the General Director’s performance; (ii) the PPL Act grants the Ministry of Transport the power to direct PPL to perform certain tasks, such as the ones necessary to comply with international obligations, and to limit its performance; (iii) the regulatory framework delegates to the Ministry of Transport the duty to audit and assess PPL’s operations and establish a structure to exercise control over PPL’s activities, including over PPL’s finances and staff salaries; (iv) pursuant to the PPL Act, PPL’s General Director has to provide a regular report to the Minister of Transport concerning its activities; and (v) both the PPL Act and the Supervision Note confirm PPL’s role in effecting various Polish State policies and conducting State policies in the Polish interest, particularly in civil aviation and defence.<sup>444</sup> Claimant concludes that the PPL Act thus “placed [PPL] firmly within the structure of the Ministry of Transport” and under its supervision.<sup>445</sup>
357. As support for its conclusion, Claimant points out that the tribunal in *Kardassopoulos v. Georgia* considered two State-owned oil companies to be State organs within the meaning of Article 4 of the ILC Articles, since they were operating “under the auspices” of a ministry and “within the structure” of the State.<sup>446</sup> Similarly, in *Deutsche Bank v. Sri Lanka*, the tribunal found that a State-owned petroleum company was a *de facto* State organ,<sup>447</sup> having noted in particular that the relevant minister exercised significant control over the company’s personnel, finances and decision making. Claimant submits that PPL also operates under the auspices of a State ministry and thus qualifies as a *de facto* State organ.<sup>448</sup>
358. Claimant disputes Respondent’s assertion that PPL had independent operations and liabilities.<sup>449</sup> Claimant also disputes Respondent’s claims that the powers granted to the Ministry of Transport are only “theoretical”<sup>450</sup> and that PPL’s actions do not depend on the approval of Polish authorities.<sup>451</sup> Claimant states that although PPL may have “some limited day-to-day operational

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<sup>443</sup> Claimant’s Reply, para. 279-281, referring to Detailed Mode of Supervision Conducted by the Ministry of Infrastructure over PPL dated 11 Aug. 2008, **Exhibit C-9**.

<sup>444</sup> Claimant’s Reply, paras. 282-292.

<sup>445</sup> Claimant’s Reply, para. 280, referring to Act on the 'Polish Airports' State Enterprise dated 23 October 1987, p. 7, Article 51, **Exhibit C-7**.

<sup>446</sup> Claimant’s Reply, para. 276, referring to *Ioannis Kardassopoulos v. Georgia*, Award dated 3 March 2010, ICSID Case Nos. ARB/05/18 and ARB/07/15, para. 275, **Exhibit CL-101**, referring further to *Mohammad Ammar Al-Bahloul v. Tajikistan*, Partial Award on Jurisdiction dated 2 September 2009, SCC Arbitration No. V (064/2008), para. 169, **Exhibit CL-102**, where, according to Claimant, the tribunal found that a State Committee for Oil & Gas was a State organ, although there was no evidence of such status under the national law.

<sup>447</sup> Claimant’s Reply, para. 277, referring to *Deutsche Bank AG v. Sri Lanka* Award, para. 405 (b) and (f), **Exhibit CL-103**.

<sup>448</sup> Claimant’s Reply, paras. 277-278.

<sup>449</sup> Claimant’s Post-Hearing Brief, para. 64, referring to Hearing Transcript (16 October 2015), 98:17 to 99:22 and 100:6-14. See also Claimant’s Post-Hearing Brief, para. 65.

<sup>450</sup> Claimant’s Reply, para. 283, referring to Statement of Defence, para. 285.

<sup>451</sup> Claimant’s Reply, para. 285, referring to Statement of Defence, para. 279.

independence” it remains subject to a “comprehensive State control structure” which is sufficient for it to be deemed an organ of the State under Article 4 of the ILC Articles.<sup>452</sup> Furthermore, Claimant argues that the Minister continues to exercise his or her powers under the PPL Act.<sup>453</sup>

359. Claimant submits that the project for the modernisation of Chopin Airport was also under the close control and supervision of the Ministry of Transport.<sup>454</sup> In this regard, Claimant points to the Performance Agreement concluded between PPL and the Minister of Transport in 2010 to modernise the Chopin Airport (“**Performance Agreement**”), which, in Claimant’s view, subjected the modernisation to “close control” by the Ministry of Transport. One of the examples of this “control” cited by Claimant was the requirement that PPL keep the Ministry informed about the modernisation. Claimant notes that PPL did report to the Ministry about the dispute with BH Travel, providing the Ministry with an “urgent presentation on PPL’s position regarding the dispute” and exchanged further communications about the matter.<sup>455</sup>
360. Claimant adds that Mr. Zbigniew Rynasiewicz, the Ministry’s Secretary of State specifically charged with the supervision of PPL, made contemporaneous statements that confirmed that the Ministry of Transport exercised close supervision over PPL. In a first speech to the Polish Parliament on 18 November 2011, he stated that “[PPL] is an enterprise which is functioning within the structure of the Ministry of Infrastructure”. In a second speech, in 2013, Mr. Zbigniew Rynasiewicz stated “we are also responsible for all issues connected with the functioning of [PPL] – at the Chopin Airport in Warsaw”.<sup>456</sup>
361. Finally, Claimant notes that Respondent does not dispute that the actions of the Warsaw Chamber of Commerce and the Governor of Mazovia can be considered acts of Poland.<sup>457</sup>

#### *Respondent’s Position*

362. Respondent disputes Claimant’s arguments that PPL is an “emanation of Poland” and that PPL’s activities are attributable to Respondent pursuant to the ILC Articles.
363. Respondent explains that the relationship between PPL and the Polish State Treasury is determined by the PPL Act, according to which PPL is a legal entity. The shares of PPL wholly belong to the State Treasury.<sup>458</sup> Respondent points out that, pursuant to the PPL Act, the State Treasury only exercises ownership control over PPL and its supervision of PPL only applies to

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<sup>452</sup> Claimant’s Post-Hearing Brief, para. 65.

<sup>453</sup> Claimant’s Post-Hearing Brief, para. 66. Claimant notes that ■■■ Mr. [MM] testified that the Minister of Transport had appointed him as General Director of PPL, and dismissed him from this role in February 2014, referring to Hearing Transcript (13 October 2015), 2:25 to 3:8 and Hearing Transcript (13 October 2015), 79:8-25. See also Claimant’s Post-Hearing Brief, para. 66, referring to Claimant’s Post-Hearing Brief, para. 62; Claimant’s Reply, para. 280; Detailed Mode of Supervision Conducted by the Ministry of Infrastructure over PPL of 11 August 2008, p. 1, **Exhibit C-9**; Article entitled ‘Bieńkowska: Airports must operate normally’ of 20 March 2014, p. 1, **Exhibit C-256**.

<sup>454</sup> Claimant’s Reply, paras. 293-295, referring to Performance Agreement between Minister of Infrastructure and PPL dated 15 July 2010, **Exhibit C-261**.

<sup>455</sup> Claimant’s Reply, paras. 294-299, referring to **Exhibits C-260 to C-267**.

<sup>456</sup> Claimant’s Reply, paras. 305-306, referring to **Exhibits C-167 to C-168**.

<sup>457</sup> Claimant’s Reply, para. 228, referring to Statement of Defence, para. 278.

<sup>458</sup> Respondent’s Rejoinder, para. 94, referring to Act on the Polish Airports State Enterprise of 23 October 1987, **Exhibit C-7**.

outsourced tasks.<sup>459</sup> Respondent states that PPL is not privately owned because it “performs strategic functions for the existence of the State”.<sup>460</sup>

364. Respondent emphasises that under the PPL Act, PPL is a State enterprise, and not a State organ.<sup>461</sup> Respondent further explains that the formation of PPL as a State-owned enterprise, a relic of the centrally planned economy, does not mean that it is an emanation of the State. In this regard, Respondent notes that the Act on State-Owned Enterprises provides that “[a] State-owned enterprise is an independent, self-governing and self-financing entrepreneur with legal personality”.<sup>462</sup>
365. In any event, Respondent contends that PPL’s status as an independent company follows from the PPL Act (specifically Articles 6 and 9).<sup>463</sup> Pursuant to those provisions, Respondent submits, PPL’s decisions are not subject to control by Poland.<sup>464</sup> Respondent submits that PPL handles its own business and Poland does not interfere in these matters – the competent minister only supervises PPL and does not influence its commercial policies or relationship with its business partners.<sup>465</sup>
366. Respondent further states that “PPL’s actions do not depend on the approval of the Polish authorities”.<sup>466</sup> Respondent notes that State Treasury’s approval may sometimes be needed, but states that this is because of Poland’s ownership interests in PPL.<sup>467</sup> Respondent claims that even when approval from the State Treasury is required, the approval is issued automatically.<sup>468</sup>
367. Respondent argues that Claimant is aware of the separation between PPL and Respondent because when Claimant applied to Polish courts with regard to the termination of the Lease Agreements,<sup>469</sup> it filed proceedings against PPL only and not against Poland.<sup>470</sup>
368. Respondent disagrees with Claimant’s interpretation of the ILC Articles and its reliance on the decision in *Kardassopoulos*. According to Respondent, “the arguments [...] cited [by Claimant] do not justify and do not prejudice the fact that PPL should be treated as an authority (emanation) of the State”.<sup>471</sup>
369. First, Respondent criticises Claimant’s submission that the status as a “State organ” is not

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<sup>459</sup> Respondent’s Rejoinder, para 96.

<sup>460</sup> Statement of Defence, para. 280.

<sup>461</sup> Respondent’s Post-Hearing Brief, para. 62. Statement of Defence, para. 280.

<sup>462</sup> Statement of Defence, para. 284, *referring to* Act on State-owned enterprises, **Exhibit RL-11**.

<sup>463</sup> Statement of Defence, paras. 280-281, *referring to* **Exhibits C-7; R-111 to R-114**. Respondent’s Rejoinder, para. 96.

<sup>464</sup> Statement of Defence, para. 283.

<sup>465</sup> Statement of Defence, para. 285, *referring to* Letter from Zbigniew Rynasiewicz, Secretary of State in the Ministry of Infrastructure and Development, of 15 April 2014, ref. DL-III-4741-32-SCz/14, **Exhibit R-115**, ■■■ Mr. [MM] WS, **Exhibit RWS-2**, ■■■ Mr. [PN]WS, **Exhibit RWS-1**.

<sup>466</sup> Statement of Defence, para. 279.

<sup>467</sup> Statement of Defence, para. 287. Respondent notes that a similar need for consent is provided in The Code of Commercial Companies of 15 September 2000 (*referring to* Articles 17, paragraph 1, and 220).

<sup>468</sup> Respondent’s Rejoinder, para. 97.

<sup>469</sup> Respondent’s Rejoinder, para. 98, *referring to* Judgement of the Regional Court in Warsaw issued on 3 December 2014, **Exhibit R-131**.

<sup>470</sup> Respondent’s Rejoinder, para. 98.

<sup>471</sup> Respondent’s Rejoinder, paras. 103-104.

determined by the entity's status under national law. Respondent argues that this interpretation is "completely contrary to the letter of the second paragraph of Article 4 of the ILC [Draft] Articles which "clearly provides" that, in order to assess whether or not an entity is a State organ, account must be taken of its national rights. In this regard, Respondent reiterates that PPL is an independent entity under national laws and that it makes independent decisions. Therefore, Respondent concludes that PPL is not a State organ within the meaning of Article 4 of the ILC Articles.<sup>472</sup>

370. Second, Respondent does not agree with Claimant's assumption that an entity may be deemed to be a State organ just because it belongs to the State structure. For Respondent, the awards cited by Claimant concern "other facts and entities, the functioning of which has been governed differently to that of PPL".<sup>473</sup>
371. Respondent concedes that an analysis of PPL's ownership structure may lead to the conclusion that PPL is a State body. However, Respondent submits that the "analysis of the PPL Act proves that this is not actually the case".<sup>474</sup> The PPL Act, Respondent reiterates, "clearly and without any further space for interpretation" provides that PPL is a State enterprise, and not a State organ.<sup>475</sup>
372. Respondent submits that if the Tribunal wishes to determine whether PPL is a State organ, it should conduct "a very diligent and broad test proving that in fact PPL is a State organ". As support for this contention, Respondent refers to *La Générale des Carrières et des Mines v. F.G. Hemisphere Associates LLC (Jersey)* in which the Privy Council stated that it would take "quite extreme circumstances" to displace the presumption that separate corporate status should be respected when an entity has been set up by a State for commercial or industrial purposes.<sup>476</sup>
373. Respondent also refers to the tribunal's ruling in *Maffezini v. Kingdom of Spain*, which, according to Respondent, focused on the functions a private entity performs, and not on its ownership structure, to determine whether it is an emanation of the State.<sup>477</sup> In Respondent's view, this is also determined by whether the functions delegated to the entity are reserved for the State (the sphere of dominium).<sup>478</sup> Applying this analysis, Respondent submits, "leads to the conclusion that PPL cannot be considered to be an emanation of the State" and the lease of retail space cannot be included among the tasks charged to and performed by PPL for and on behalf of the State Treasury.<sup>479</sup>
374. Respondent dismisses Claimant's suggestion that the statements from the Ministry's Secretary of State show that PPL might be within the structure of the Ministry of Transport, noting that

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<sup>472</sup> Respondent's Rejoinder, para. 105.

<sup>473</sup> Respondent's Rejoinder, para. 106.

<sup>474</sup> Respondent's Rejoinder, para. 109.

<sup>475</sup> Respondent's Post-Hearing Brief, para. 62.

<sup>476</sup> Respondent's Post-Hearing Brief, para. 62, referring to Privy Council's decision in *La Generale des Carrieres et des Mines v F.G. Hemisphere Associates LLC (Jersey)* [2012] UKPC 27, para. 29, **Exhibit RL-68**.

<sup>477</sup> Respondent's Rejoinder, para. 107- 108, referring to *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award on Jurisdiction of 25 January 2000 ("**Maffezini v. Spain Award on Jurisdiction**"), paras. 77-80, pp. 28-30, **Exhibit RL-35**.

<sup>478</sup> Respondent's Rejoinder, para. 108.

<sup>479</sup> Respondent's Rejoinder, paras. 107-109.

they are public statements made in a political context, and are not a source of law in Poland.<sup>480</sup>

375. Respondent thus concludes that PPL is not an emanation of Poland,<sup>481</sup> that the termination of the Lease Agreements by PPL cannot be attributed to Poland, and that Respondent cannot be held liable for these actions.<sup>482</sup>
376. With regard to the acts of the Governor of Mazovia and the Customs Chamber, Respondent concedes that they “can be considered as actions of Poland”. However, Respondent asserts that the actions mentioned by Claimant concerning these entities do not constitute breaches of the Treaty.<sup>483</sup>

## 2) Whether PPL exercised delegated governmental authority within the meaning of Article 5 of the ILC Articles

### *Claimant’s Position*

377. Claimant submits that, in case the Tribunal finds that Article 4 of the ILC Articles is not applicable,<sup>484</sup> the acts of PPL are attributable to Respondent because the company acted with delegated governmental authority under Article 5 of the ILC Articles, which provides that the conduct of an entity may be attributed to a State if that entity “is empowered by the law of that State to exercise elements of the governmental authority [...] provided the person or entity is acting in that capacity in the particular instance”.<sup>485</sup> Claimant submits that Respondent does not dispute this test.<sup>486</sup>
378. Claimant contends that the term “entity” encompasses a “wide variety of bodies”, such as, according to the commentary to the ILC Articles, “public corporations, semi-public entities, public agencies or private companies”.<sup>487</sup> In order to determine whether the acts of an entity are attributable to a State under Article 5 of the ILC Articles, prior investment treaty tribunals have applied the test set out in Article 5, by inquiring whether an entity is exercising elements of governmental authority in performing the acts in question.<sup>488</sup>
379. Claimant considers that PPL exercised governmental authority in: (i) terminating BH Travel’s leases over State property; (ii) terminating BH Travel’s leases to pursue the modernisation of Chopin Airport; and (iii) procuring the imposition of customs closures on BH Travel’s stores.

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<sup>480</sup> Hearing Transcript (16 October 2015), 103:15-23.

<sup>481</sup> Statement of Defence, paras. 277-278.

<sup>482</sup> Respondent’s Post-Hearing Brief, para. 56, *referring to* Statement of Defence, point 6.3.1, pp. 59-62; Respondent’s Rejoinder, paras. 99-108, pp. 26-28; Hearing Transcript (16 October 2015), 103:15 to 104:4 and 108:13-20.

<sup>483</sup> Statement of Defence, para. 278.

<sup>484</sup> Hearing Transcript (12 October 2015), 76:22-25, reply to a question posed by the President.

<sup>485</sup> Claimant’s Reply, para. 311, *referring to* ILC Articles on State Responsibility, p. 42, Article 5, **Exhibit CL-3**.

<sup>486</sup> Claimant’s Post-Hearing Brief, para. 74, *referring to* **Respondent’s Closing Statement**, p. 7, Slide 7 and Hearing Transcript (16 October 2015), 101:13-18.

<sup>487</sup> Claimant’s Reply, para. 312, *referring to* ILC Articles on State Responsibility, p. 43, Article 5, Commentary, para. 2, **Exhibit CL-3**.

<sup>488</sup> Claimant’s Reply, para. 313, *referring to* *Jan de Nul v. Egypt Award*, paras. 163-164, **Exhibit CL-31**; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, Award, ICSID Case No. ARB/08/11, (“**Bosh and B&P v. Ukraine Award**”), para. 164, **Exhibit CL-107**, *Tulip Real Estate v. Turkey Award*, para. 292, **Exhibit CL-97**.

380. First, Claimant contends that PPL exercised governmental authority by managing State-owned property, *i.e.*, the land where the Chopin Airport is located.<sup>489</sup> According to Claimant, the decision in *Bosh v. Ukraine* provides precedent that the management of State-owned property constitutes an exercise of governmental authority.<sup>490</sup>
381. Claimant notes that under the State Treasury Act, PPL was frequently required to seek, and did seek, the consent of the State Treasury in relation to the Lease Agreements. Claimant asserts that PPL needed the State Treasury's consent before entering into any lease agreements over State land with BH Travel and "repeatedly informed Baltona of this [consent] requirement".<sup>491</sup> PPL also needed consent from the State Treasury before agreeing to any substantive change to lease agreements over State land.<sup>492</sup> In Claimant's view, since termination constituted a "significant change" to the Lease Agreements, it follows that termination was an act of delegated governmental authority.<sup>493</sup>
382. Claimant disputes Respondent's assertion that PPL sought approval from the State Treasury because of Poland's ownership interest in PPL (and not because of Polish legislation requirements).<sup>494</sup> In Claimant's view, the pattern of authorisation on record indicates that "the obligation to obtain State Treasury approvals arose because PPL acted under delegated governmental authority in managing leases of State land".<sup>495</sup>
383. Claimant also dismisses Respondent's observation that PPL was under no obligation to use a public tender process to grant the Lease Agreements, and submits that this does not affect the nature of the delegated governmental authority which PPL was exercising.<sup>496</sup>
384. Second, Claimant contends that PPL also exercised governmental authority in connection with the modernisation of Chopin Airport. According to Claimant, such authority was delegated to PPL both through various agreements in 2008 and 2010, and through the enactment of the Airport Act in 2009.<sup>497</sup>
385. Claimant explains that the CEUTP Agreement – signed by CEUTP (the entity established by the

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<sup>489</sup> Claimant's Reply, paras. 316-317. *See also* Claimant's Post-Hearing Brief, para. 82, *referring to* Hearing Transcript (12 October 2015), 74:1 to 76:16; Hearing Transcript (16 October 2015), 55:15-21.

<sup>490</sup> Claimant's Reply, para. 316, *referring to* *Bosh and B&P v. Ukraine* Award, paras. 173-174, **Exhibit CL-107**.

<sup>491</sup> Claimant's Reply, para. 319-321, *referring to* **Exhibits R-7; C-169 to C-172; C-174 to C-178**. Claimant submits that PPL also repeatedly acknowledged this requirement in correspondence with BH Travel (*see*, for example, Letter from PPL (█ Mr. [PL]) to BH Travel (█ Mr. [GD]) dated 23 April 2007, p. 1, **Exhibit C-15**; Letter from PPL (█ Mr. [PL]) to BH Travel (█ Mr. [GD]) dated 8 November 2007, p. 2, **Exhibit C-16**; Letter from PPL (█ Mr. [MM]) to BH Travel (█ Mr. [GD]) dated 30 July 2008, p. 1, **Exhibit C-17**).

<sup>492</sup> Claimant's Reply, para. 323, *referring to* Letter from PPL (█ Mr. [PN]) to BH Travel (█ Mr. [MT]) dated 30 August 2010, p. 2, para. 1, **Exhibit R-11**; Letter from PPL (█ Mr. [PN]) to BH Travel (█ Mr. [MT]) (Sept. 2010), p. 2, **Exhibit R-22**; Letter from PPL (█ Mr. [PN]) to BH Travel (M. Grzybowska) (April 2011), p. 3, **Exhibit R-39**; Letter from PPL to the Ministry of the State Treasury dated 28 August 2009, **Exhibit C-189**; Letter from PPL to the Ministry of the State Treasury dated 31 March 2010, **Exhibit C-190**; Letter from PPL to the Ministry of the State Treasury dated 20 October 2010, **Exhibit C-191**.

<sup>493</sup> Claimant's Reply, para. 324.

<sup>494</sup> Claimant's Reply, para. 322, *referring to* Statement of Defence, para. 287.

<sup>495</sup> Claimant's Reply, para. 322.

<sup>496</sup> Claimant's Post-Hearing Brief, para. 85.

<sup>497</sup> Claimant's Reply, paras. 326-327.

Ministry of Transport to effect the allocation funds received from the EU) and PPL in 2008 – granted PPL the authority to prepare the modernisation project “in full scope”. The CEUTP Agreement also set out a framework for CEUTP to supervise the modernisation at Chopin Airport; in addition to the institutional control and supervision from the Ministry of Transport.<sup>498</sup> According to Claimant, the Ministry thus “indirectly delegated” authority to PPL through the CEUTP Agreement.<sup>499</sup>

386. Similarly, Claimant submits that the Performance Agreement – signed by PPL and the Ministry of Transport in 2010 – delegated governmental authority to PPL and granted it “broad powers to plan the modernization of Chopin Airport and to use [the EU funds] for this purpose (under close supervision of the Ministry of Transport)”.<sup>500</sup>
387. Claimant also submits that the Airport Act delegated governmental authority to PPL since it effectively empowered PPL to select properties to be expropriated, which is “a quintessential government prerogative”.<sup>501</sup>
388. According to Claimant, Respondent does not dispute any of the evidence cited by Claimant that PPL exercised delegated governmental authority from the Ministry of Transport and argues only that the Ministry of Transport did not interfere with PPL’s actions.<sup>502</sup> Claimant also maintains that the exercise of delegated governmental authority in question is confirmed by the statements made by the Secretary of State in the Ministry of Transport.<sup>503</sup>
389. In view of the above, Claimant submits that: (i) PPL was exercising governmental authority in managing State-owned leases at Chopin Airport and terminating the Lease Agreements with BH Travel;<sup>504</sup> and (ii) the Airport Act granted PPL the power to select properties for expropriation, which is a “quintessential government prerogative”, to bring about the modernisation.<sup>505</sup> It was these delegated powers that were used by PPL to terminate the Lease Agreements with BH Travel and evict it from Chopin Airport on a pretextual basis to effect the modernisation.<sup>506</sup> Thus, Claimant concludes, the internationally wrongful acts related to the termination of the Lease Agreements are attributable to Respondent pursuant to Article 5 of the ILC Articles.<sup>507</sup>
390. Third, Claimant contends that PPL also exercised delegated governmental authority in procuring customs closures on all of BH Travel’s stores in the DFZ. Claimant submits that this has been

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<sup>498</sup> Claimant’s Reply, paras. 328-331, *referring to* Agreement between PPL and the CEUTP dated 24 September 2008, p. 4, Article 3(2), **Exhibit C-51**.

<sup>499</sup> Hearing Transcript (12 October 2015), 73:1-5.

<sup>500</sup> Claimant’s Reply, para. 333, *referring to* Performance Agreement between Minister of Infrastructure and PPL dated 15 July 2010, p. 3, Article 3(1), **Exhibit C-261**.

<sup>501</sup> Claimant’s Reply, para. 339, *referring to* *Waste Management, Inc. v. United Mexican States Award* dated 30 April 2004, ICSID Case No. ARB(AF)/00/3 (“*Waste Management v. Mexico (“Number 2”) Award*”), p. 66, para. 174, **Exhibit CL-18**.

<sup>502</sup> Claimant’s Post-Hearing Brief, para. 79, *referring to* Respondent’s Rejoinder, paras. 94–113; Hearing Transcript (12 October 2015), 114:2-115:5; Hearing Transcript (16 October 2015), 101:12 to 104:4.

<sup>503</sup> Claimant’s Reply, para. 334, *referring to* Speech of Mr. Zbigniew Rynasiewicz on 12 December 2013 at the session of the Polish Parliament, p. 1, **Exhibit C-168**.

<sup>504</sup> Claimant’s Reply, para. 325.

<sup>505</sup> Claimant’s Reply, para. 340.

<sup>506</sup> Claimant’s Reply, paras. 341-346, *referring to* Claimant’s Reply, Section II.F.

<sup>507</sup> Claimant’s Reply, paras. 325 and 347.

recognised as an act of governmental authority by the Civil Division of the Regional Court.<sup>508</sup> Claimant therefore submits that PPL's procuring of customs closures was also attributable to Respondent under Article 5 of the ILC Articles.<sup>509</sup>

*Respondent's Position*

391. In addition to the arguments that PPL is not an emanation of the Polish State and that it operates as an independent entity,<sup>510</sup> Respondent submits that PPL's activities in managing the retail premises at Chopin Airport do not raise "any question of enforcement of dominion commissioned by the State Treasury". Therefore Respondent challenges Claimant's conclusion with regard to the functional test provided in Article 5 of the ILC Articles.<sup>511</sup>
392. Respondent challenges Claimant's reliance on *Bosh*, arguing that Claimant ignores "important elements of the facts" in the case, which "applied to the management of real property belonging to Ukraine, through the Taras Shevchenko University".<sup>512</sup> In Respondent's view, this differs significantly from this case. In this regard, Respondent contends that by taking care of the buildings at Chopin Airport, PPL is not managing State Treasury property but its own property. Respondent concludes that "there cannot be any question of enforcement of dominion commissioned by the State Treasury" and that PPL's activities cannot be considered to be activities of the State Treasury.<sup>513</sup>
393. Respondent reiterates its position that pursuant to Articles 6 and 9 of the PPL Act, PPL is a State enterprise independently running its business. Respondent contends that Claimant "has not presented any evidence proving that PPL's termination of the Lease Agreements was carried out under the direction of the Polish Government's authority".
394. Referring to the testimony of Messrs. ■■■ [MM], Kazimierski, and ■■■ [PN], Respondent explains that the termination of the Lease Agreements was PPL's independent decision.
395. Respondent also disputes that entering into or terminating commercial civil law contracts, like the Lease Agreements, can be regarded as the execution of governmental authority.<sup>514</sup> Respondent notes in this regard that PPL was not obliged to organise a public tender in order to conclude the Lease Agreements.<sup>515</sup>
396. Respondent relies on the test used in *Československá Obchodní Banka, a. s. v. The Slovak Republic*, as well as in *Maffezini*, to establish whether acts were essentially commercial or governmental in nature, and argues that applying that test shows that the termination of the Lease Agreements "was purely a commercial act with no State imperium or sovereignty involvement

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<sup>508</sup> Claimant's Reply, para. 348- 349, referring to Decision of the Regional Court in Warsaw, 24th Civil Division, case no XXIV C 454/13 –PPL v Maciej Dworniak dated 25 February 2015, p. 32, **Exhibit C-196**.

<sup>509</sup> Claimant's Reply, para. 350.

<sup>510</sup> Statement of Defence, para. 277; Respondent's Rejoinder, para. 98.

<sup>511</sup> Respondent's Rejoinder, para. 111.

<sup>512</sup> Respondent's Rejoinder, para. 110.

<sup>513</sup> Respondent's Rejoinder, paras. 111-112.

<sup>514</sup> Respondent's Post-Hearing Brief, para. 67.

<sup>515</sup> Respondent's Post-Hearing Brief, paras. 67-73, referring to Hearing Transcript (13 October 2015), 82:16-22; 83:4-8; 72:18-21; 180:20-25; Hearing Transcript (12 October 2015), 232:19-25 and 233:1- 2.

whatsoever”.<sup>516</sup>

### 3) Whether the Tribunal should draw adverse inferences from Respondent’s failure to produce documents

#### *Claimant’s Position*

397. With reference to the Parties’ exchanges and the relevant orders from the Tribunal related to document production (see paras. 16-23 above),<sup>517</sup> Claimant submits that Respondent has been “obstructive at every step of the disclosure process” and points particularly to Respondent’s refusal to produce documents responsive to Claimant’s Requests no. 1, 2, 4, and 9 (“**Requests**”).<sup>518</sup> These documents, Claimant alleges, “would demonstrate the extent of the control and supervision [Respondent] exercised over PPL”.<sup>519</sup>
398. To illustrate its allegation that Respondent was “obstructive” Claimant observes that Respondent had initially refused to produce documents responsive to these Requests (and other document production requests) on the basis that the documents were not in Respondent’s possession, custody, and control. However, Claimant points out, Respondent was able to exhibit “over 90 documents from PPL among the 116 fact exhibits to its Statement of Defence” including a considerable quantity of correspondence that had no representatives of any Polish Ministry or other State organs in copy.<sup>520</sup> Claimant concludes from these circumstances that “Respondent [was] picking and choosing when to produce documents from PPL”<sup>521</sup> and that Respondent had “misrepresented” that it did not have certain documents, which it did in fact have.<sup>522</sup>
399. In any event, Claimant states, PPL is a wholly State-owned enterprise within the control of Respondent and as such PPL’s documents would be considered to be within Respondent’s “possession, custody and control” under the International Bar Association Rules of 29 May 2010

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<sup>516</sup> Respondent’s Post-Hearing Brief, para. 75, *referring to Ceskoslovenska Obchodni Banka, A. S. v. the Slovak Republic*, Decision on Objections to Jurisdiction dated May 24, 1999, ICSID Case No. ARB/97/4, ICSID Review—Foreign Investment Law Journal, Vol. 14, 1999, at 250, **Exhibit RL-75**; *Maffezini v. Spain* Award on Jurisdiction, para. 80, **Exhibit RL-35**.

<sup>517</sup> Claimant’s Reply, para. 245.

<sup>518</sup> Claimant’s Reply, para. 236, *which provides* “Request 1, for ‘PPL’s Organizational Rules – Order No. 74/2008 of PPL’s General Director dated 18 July 2008 [...], as well as any subsequent orders issued by PPL’s General Director supplementing or replacing Order No. 74/2008; Request 2, for the ‘Performance Agreement (Porozumienie Wykonawcze) dated 15 July 2010 concluded between PPL and the [Ministry of Transport]’ (the ‘**Performance Agreement**’); Request 4, for the ‘reports on PPL’s activities presented by its General Director to the Ministry of Transport in accordance with Article 23 of the PPL Act (**Exhibit C-7**)’; and Request 9, for ‘Order No. 146 of PPL’s General Director dated 6 October 2003 on the implementation of ‘procedures for the planning, evaluation and control of investments carried out by PPL’ [...], Order No. 11 of PPL’s General Director dated 2 March 2005 on the implementation of construction and modernization projects [...], as well as any subsequent orders issued by PPL’s General Director replacing or supplementing Order No. 146 of 6 October 2003 or Order No. 11 of 2 March 2005” (footnote omitted), *further referring to* Annex 1 to Procedural Order no. 2 – Tribunal’s Decisions on Claimant’s Requests for Production of Documents, pp. 3, 9, 21, 36-37.

<sup>519</sup> Claimant’s Reply, para. 235.

<sup>520</sup> Claimant’s Reply, paras. 237-239.

<sup>521</sup> Claimant’s Reply, para. 239.

<sup>522</sup> Claimant’s Reply, para. 241, citing as an example Claimant’s Request 2 for a copy of the Performance Agreement between the Ministry of Transport (which, Claimant states, Respondent should be in direct possession of given that the Ministry of Transport was the other party to the agreement), and Claimant’s Requests 1 and 4 for reports that, according to Claimant, had been presented to the Ministry of Transport.

on the Taking of Evidence in International Arbitration (“**IBA Rules**”).<sup>523</sup>

400. Claimant also denies that Respondent met the “high burden” under Article 9(2)(e) of the IBA Rules to resist production on the grounds that these documents contained “PPL’s trade and company secrets”.<sup>524</sup> Claimant criticises Respondent for not providing enough detail of the alleged grounds of confidentiality, and for not explaining why the confidentiality obligations set forth by the Tribunal would not provide sufficient protection.<sup>525</sup> In this regard, Claimant alleges again that Respondent had itself exhibited a significant number of documents designated as constituting “PPL’s enterprise confidential information” without requesting additional confidentiality measures.<sup>526</sup> Claimant notes that the Tribunal had dismissed Respondent’s aforementioned objections,<sup>527</sup> and made clear that the Tribunal reserved the option to draw adverse inferences from Respondent’s continued contravention of the production order. Notwithstanding this warning, Respondent continued to defy the Tribunal’s order for disclosure.<sup>528</sup>
401. Claimant contends that the Tribunal must draw adverse inferences from Respondent’s repeated failure to comply with the Tribunal’s orders and directions for document production.<sup>529</sup> The documents requested, Claimant adds, “are [...] clearly relevant to the question [...] under ILC Articles 4 and 5”.<sup>530</sup> Consequently, Claimant requests the Tribunal to draw the adverse inferences that:

[T]he documents which the Respondent has withheld from production would prevent it from maintaining [its defence that the actions of PPL should not be attributable to Respondent], and demonstrate that PPL is an organ of the State within the meaning of ILC Article 4, or that it acted with delegated governmental authority within the meaning of ILC Article 5 in performing the internationally wrongful acts [that form the] subject of this arbitration.<sup>531</sup>

402. Claimant submits that there is “plentiful precedent and clear guidance of eminent commentators” in support of this position.<sup>532</sup> Article 9(5) of the IBA Rules, Claimant avers, is generally accepted as representing common international practice, and provides that if a Party “fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal *may infer that*

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<sup>523</sup> Claimant’s Reply, para. 240, citing V. Hamilton, “Document Production in ICC Arbitration” in Document Production in International Arbitration, ICC International Court of Arbitration Bulletin: 2006 Special Supplement, p. 74, **Exhibit CL-64**, J. Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 864, **Exhibit CL-62**, *Gallo v. Canada*, Procedural Order No. 2 (amended), para. 8, **Exhibit CL-63**, Letter from the Claimant to the Tribunal dated 22 December 2014, p. 2, **Exhibit C-244**.

<sup>524</sup> Claimant’s Reply, para. 243, citing Annex 1 to Procedural Order No. 2, pp. 10, 23, 37.

<sup>525</sup> Claimant’s Reply, para. 243.

<sup>526</sup> Claimant’s Reply, para. 244.

<sup>527</sup> Annex 1 to Procedural Order No. 2 – Tribunal’s Decisions on Claimant’s Requests for Production of Documents, Letter from the Tribunal to the Parties dated 17 February 2015, **Exhibit C-247**, E-mail from the President of the Tribunal to the Parties dated 5 March 2015, **Exhibit C-253**, E-mail from the Tribunal to the Parties dated 14 March 2015, **Exhibit C-255**.

<sup>528</sup> Claimant’s Reply, para. 259-262.

<sup>529</sup> Claimant’s Post-Hearing Brief, para. 88, Tr. (12 October 2015), p. 22, 68:1–70:3; Claimant’s Reply, paras. 235–273 and 297–303.

<sup>530</sup> Claimant’s Post-Hearing Brief, para. 104.

<sup>531</sup> Claimant’s Reply, para. 273.

<sup>532</sup> Claimant’s Reply, para. 271.

*such document would be adverse to the interests of that Party*”.<sup>533</sup> Claimant refers to commentator Gary Born, and the awards rendered in *Europe Cement v. Turkey*, *Metal-Tech v. Uzbekistan*, and *INA Corporation v. Iran*, in support of its contention that violation of a disclosure order without proper reasons, which Claimant maintains has occurred in the present case, warrants the drawing of “determinative adverse inferences”.<sup>534</sup>

403. Claimant highlights that Respondent’s refusal to produce documents took place in spite of the “repeated opportunities to preserve the alleged confidentiality of the documents at issue”.<sup>535</sup> Respondent would not have defied the Tribunal’s orders, Claimant contends, “unless it had serious and well-founded concerns that they would render entirely untenable its defence that the actions of PPL should not be attributable to the Respondent”.<sup>536</sup>
404. Claimant challenges Respondent’s argument that adverse inferences are not justified because the documents requested were under the control of PPL.<sup>537</sup> According to Claimant, PPL is a 100% State-owned entity which had been assisting and providing to Respondent two-thirds of the exhibits submitted in this case.<sup>538</sup> In addition, Claimant states that Respondent argued that production would affect third-party rights without providing justification for that argument.<sup>539</sup>
405. Finally, Claimant notes that Respondent failed to address the issue of drawing adverse inferences at the hearing.<sup>540</sup>

#### *Respondent’s Position*

406. Respondent states that the Tribunal should not draw adverse inferences from its failure to produce documents requested by Claimant because: (i) PPL, an independent entity and not a party to the current proceedings, is the holder of the documents; (ii) PPL has refused to produce the evidence requested because it affects third parties’ rights, including PPL’s business partners and Flemingo’s competitors; (iii) under Polish law, there is no equivalent to discovery proceedings and a party may avoid producing documents if the evidence may breach third parties’ rights; (iv) Respondent does not have legal means to force PPL to produce and submit the evidence requested; (v) the information contained in the evidence requested by Claimant is not relevant or necessary to these proceedings; and (vi) legal literature does not support Claimant’s request because Claimant cannot prove or specify any adverse consequence. These submissions are described in turn below.

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<sup>533</sup> Claimant’s Reply, para. 266, *referring to* IBA Rules of 29 May 2010 on the Taking of Evidence in International Arbitration, p. 20, Article 9(5), **Exhibit CL-98** (emphasis added by Claimant).

<sup>534</sup> Claimant’s Reply, para. 268, *referring to* G. Born, *International Commercial Arbitration* (2nd ed., 2014), p. 2393, **Exhibit CL-99**; *Europe Cement Investment & Trade S.A. v. Turkey*, CSID Case No. ARB(AF)/07/2, Award dated 13 August 2009, paras. 99-103, 152, 185, **Exhibit CL-15**; *Metal-Tech Ltd. v. Republic of Uzbekistan*, Award dated 4 October 2013, ICSID Case No. ARB/10/3 (“**Metal-Tech v. Uzbekistan Award**”), paras. 110(i), 247-265, 372-373, 423(a), **Exhibit CL-22**; *INA Corporation v. The Government of the Islamic Republic of Iran* (Case No. 161), Award, No. 184-161-1 dated 12 August 1985, 8 Iran-US C.T.R. 373 (“**INA Corporation v. Iran Award**”), p. 377, p. 382-383 (reasoning) and 384 (award), **Exhibit CL-100**.

<sup>535</sup> Claimant’s Reply, para. 271.

<sup>536</sup> Claimant’s Reply, para. 272.

<sup>537</sup> Claimant’s Post-Hearing Brief, para. 92, *referring to* Respondent’s Rejoinder, paras. 288-309.

<sup>538</sup> Claimant’s Post-Hearing Brief, paras. 100-101, *referring to* Claimant’s Post-Hearing Brief, para. 94.

<sup>539</sup> Claimant’s Post-Hearing Brief, para. 96, *referring to* Respondent’s Rejoinder, paras. 295-297, 299, and 309.

<sup>540</sup> Claimant’s Post-Hearing Brief, para. 92, *referring to* Respondent’s Rejoinder, paras. 284-326.

407. Respondent concedes that it has not submitted certain documents requested by Claimant,<sup>541</sup> but contends that it has not produced the evidence because of the constraints described in the preceding paragraph.<sup>542</sup>
408. Respondent argues that it was unable to produce the evidence because the holder and party to the documents requested is PPL, and not Respondent.<sup>543</sup> As already mentioned, Respondent takes the position that PPL is an independent business entity over which Respondent has limited influence, and only has influence in the realm of *dominium*,<sup>544</sup> but not in the realm of *imperium*.<sup>545</sup> According to Respondent, the Flemingo Group was informed of PPL's commercial independence in a letter dated 15 April 2014 from Mr. Zbigniew Rynasiewicz.<sup>546</sup> As such, Respondent does not have legal means, pursuant to the PPL Act, to require or to "force" the submission of any document related to PPL's activities.<sup>547</sup>
409. Respondent states that the PPL documents submitted with its Statement of Defence were obtained with the company's consent.<sup>548</sup> Respondent states that these documents did not provide a risk of a breach of third parties' rights.<sup>549</sup> Respondent explains that after the Tribunal's decision in Procedural Order No. 2, it asked the Managing Director of PPL to provide the documents responsive to Claimant's Requests. However, PPL made an independent decision and refused to submit the evidence. Respondent notes in this regard that under Polish law, a party to proceedings may avoid the production of evidence that represents a risk of breaching third parties' rights.<sup>550</sup>
410. In addition, Respondent argues that attention should be paid to the nature and scope of the documents requested and to the consequences that could arise if they were provided to the Flemingo Group.<sup>551</sup> According to Respondent, the documents requested contained information about business activities and business secrets of PPL and PPL's business partners, which are

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<sup>541</sup> Respondent's Rejoinder, para. 288, citing the following documents requested: "(i) PPL's Organisational Rules – Order No. 74/2008 of PPL's General Director dated 18 July 2008 [...], as well as any subsequent orders issued by PPL's General Director supplementing or replacing Order No. 74/2008 (Request 1) (ii) Reports on PPL's activities presented by its General Director to the Ministry of Transport in accordance with Article 23 of the PPL Act (Request 4) (iii) Order No. 146 of PPL's General Director dated 6 October 2003 on the implementation of 'procedures for the planning, evaluation and control of investments carried out by PPL' [...], Order No. 11 of PPL's General Director dated 2 March 2005 on the implementation of construction and modernization projects [...], as well as any subsequent orders issued by PPL's General Director replacing or supplementing Order No. 146 of 6 October 2003 or Order No. 11 of 2 March 2005 (Request 9) (iv) The RFPs and other tender *documentation issued by PPL for the lease of commercial premises at Chopin Airport since 2012, as well as any offers received by PPL for those commercial premises* (Request 13) (v) Any lease agreements for commercial premises at Chopin Airport concluded by PPL since 2012 (Request 15)".

<sup>542</sup> Respondent's Rejoinder, para. 289.

<sup>543</sup> Respondent's Rejoinder, para. 290.

<sup>544</sup> Respondent's Rejoinder, para. 292, *referring to* Statement of Defence, para. 279.

<sup>545</sup> Respondent's Rejoinder, para. 292.

<sup>546</sup> Respondent's Rejoinder, para. 292, *referring to* Letter from Zbigniew Rynasiewicz, Secretary of State in the Ministry of Infrastructure and Development dated 15 April 2014, ref. DL-III-4741-32-SCz/14, **Exhibit R-115**.

<sup>547</sup> Respondent's Rejoinder, paras. 290, 293, and 298.

<sup>548</sup> Respondent's Rejoinder para. 295.

<sup>549</sup> Respondent's Rejoinder, para. 297.

<sup>550</sup> Respondent's Rejoinder, paras. 296, 298-301.

<sup>551</sup> Respondent's Rejoinder, para. 303.

“Flemingo’s largest direct competitors on the Polish duty-free market”.<sup>552</sup> In Respondent’s view, the information contained in the documents requested could give Claimant “competitive advantage” in the Polish duty-free market.<sup>553</sup>

411. Respondent also notes that the same documents were requested by Claimant in the pending proceedings before Polish courts.<sup>554</sup> As such, Respondent does not rule out the possibility that Claimant’s Requests in this arbitration might be aimed at securing the documents for use in Polish domestic proceedings.<sup>555</sup>
412. Furthermore, Respondent disputes that Claimant’s request to the Tribunal to draw adverse inferences is justified by the legal literature and case law. Relying on legal commentary, Respondent argues that a tribunal may only draw adverse inferences in situations where a party “intentionally conceals evidence if, after being obligated, it refuses to produce it, but only in the situation where it does not support its position with a reasonable justification”.<sup>556</sup>
413. Respondent cites the same commentator to claim that arbitral tribunals have refused to draw adverse inferences unless the following premises are met:
  - (i) the party seeking the adverse inference must produce all available evidence corroborating the inference sought
  - (ii) the requested evidence must be accessible to the inference opponent
  - (iii) the inference sought must be reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld
  - (iv) the party seeking the adverse inference must produce *prima facie* evidence and
  - (v) the inference opponent must know or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought.<sup>557</sup>
414. Respondent asserts that its refusal to produce the evidence requested was “exhaustively explained”<sup>558</sup> and based on “actual and rational premises of both factual and legal nature”.<sup>559</sup> In addition, Respondent asserts that arbitral tribunals may refuse to draw adverse inferences in cases where the documents are in the hands of adverse or uncooperative third parties.<sup>560</sup>
415. Respondent also contends that Claimant failed to establish “a logical connection between the likely nature of evidence withheld and the inference sought”.<sup>561</sup> According to Respondent, the

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<sup>552</sup> Respondent’s Rejoinder, para. 304. Respondent refers specifically to the documents requested in Requests Nos. 1, 4 and 9, which, according to Respondent, have content that goes beyond Claimant’s arguments in these proceedings.

<sup>553</sup> Respondent’s Rejoinder, para. 305.

<sup>554</sup> Respondent’s Rejoinder, para. 307, referring to Schedule of court cases prepared by PPL, **Exhibit R-4**.

<sup>555</sup> Respondent’s Rejoinder, para. 307.

<sup>556</sup> Respondent’s Rejoinder, para. 312, referring to Jeremy K. Sharpe, *Drawing Adverse Inferences from the Non-production of evidence*, Arbitration International, Kluwer Law International 2006, Volume 22, Issue 4 (“**Sharpe**”), pp. 549-571, **Exhibit RL-40**.

<sup>557</sup> Respondent’s Rejoinder, para. 313, referring to Sharpe, p. 2, **Exhibit RL-40**.

<sup>558</sup> Respondent’s Rejoinder, para. 314, referring to Respondent’s letter to the Tribunal dated 12 March 2015, **Exhibit R-138**.

<sup>559</sup> Respondent’s Rejoinder, para. 314.

<sup>560</sup> Respondent’s Rejoinder, paras. 314-316, referring to *INA Corporation v. Iran*, p. 381, **Exhibit CL-100**.

<sup>561</sup> Respondent’s Rejoinder, para. 317.

legal literature provides that the requesting party must draw such a logical nexus and Claimant omitted to do so.<sup>562</sup> Respondent further points out that Claimant breached “significant formal requirements set out in Procedural Order No. 2” because it refused to indicate which parts of the requested documents it requires.<sup>563</sup>

416. Respondent also points out that Claimant failed: (i) “to specify both the specific circumstance which it intended to demonstrate through the documents”; and (ii) “to indicate how the absence of these documents affects its ability to prove its thesis.”<sup>564</sup> As a consequence, Respondent argues that Claimant failed to respond to the Tribunal’s guidelines expressed in the e-mail on 5 March 2015.<sup>565</sup>

417. Finally, Respondent submits that Claimant cannot specify or prove any adverse consequences as a result of Respondent’s failure to produce the documents requested.<sup>566</sup>

#### 4) Tribunal’s Analysis

418. The Tribunal has to answer the question whether the acts and omissions complained of by Claimant are imputable to Poland. This issue is important for the purpose of determining the jurisdiction and competence of the Tribunal, because under Article 9 of the Treaty the Tribunal only has jurisdiction to settle disputes between “an investor of one Contracting Party and the other Contracting Party”. Hence, the Tribunal has to verify whether the dispute involves Poland. Moreover, it also bears on the merits of the dispute as Respondent may only be held responsible for acts and omissions which are attributable to it. Both jurisdiction and merits aspects of attribution can be analysed together.<sup>567</sup>

419. In its endeavour to decide whether the acts of PPL, the Governor of Mazovia, the customs authorities, as well as the several Ministries are attributable to Respondent, the Tribunal will be guided by the ILC Articles.

420. Although these Articles expressly cover the obligations a responsible State may owe to another State, to several States, or to the international community as a whole, it “is without prejudice to any right arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State” (Article 33 of the ILC Articles). The ILC Articles have thus been systematically applied, *inter alia*, to decide whether acts of corporations or entities, committed towards a foreign investor or its investment, could be attributed to the host State and give rise to that State’s responsibility. Investment treaty tribunals have had no difficulty in relying on State responsibility principles to decide issues of attribution.<sup>568</sup>

421. Within the ILC Articles, Articles 4 and 5 cover the attribution of conduct of an entity to a State

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<sup>562</sup> Respondent’s Rejoinder, paras. 317-319, *referring to* Sharpe, p. 9, **Exhibit RL-40**.

<sup>563</sup> Respondent’s Rejoinder, paras. 319-320.

<sup>564</sup> Respondent’s Rejoinder, para. 322.

<sup>565</sup> Respondent’s Rejoinder, para. 321, *referring to* E-mail from the President of the Tribunal to the Parties dated 5 March 2015, **Exhibit C-253**.

<sup>566</sup> Respondent’s Rejoinder, para. 324.

<sup>567</sup> *See Maffezini v. Spain* Award on Jurisdiction, para. 46, **Exhibit RL-35**.

<sup>568</sup> *Gustav F W Hamester v. Ghana* Award, para. 171, **Exhibit RL-14**. *See also Jan de Nul v. Egypt* Award, para. 156, **Exhibit CL-31**.

for the purpose of State responsibility.

422. Article 4 provides:

*Article 4*

*Conduct of organs of a State*

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

423. Article 5 provides:

*Article 5*

*Conduct of persons or entities exercising elements of governmental authority*

The conduct of a person or entity which is not an organ of the State under article but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

424. There cannot be any dispute that the Governor of Mazovia, the Polish courts, and the Polish customs authorities are State organs, as Respondent also recognises.<sup>569</sup> Their conduct can trigger Poland's international responsibility under Article 4 of the ILC Articles.

425. Whether PPL is a State organ under the principle, formulated by Article 4 of the ILC Articles, requires a more detailed analysis of PPL's status, structure, and operations.

426. The Tribunal is guided by the decision in *Maffezini*, much relied upon by Respondent, where the tribunal stated:

The fact that an entity is owned by the State gives rise to a rebuttable presumption that it is a State entity. The same result will obtain if an entity is controlled by the State, directly or indirectly. A similar presumption arises if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private business or individuals.

The relevance of these standards is clearer when there is a direct State operation and control, such as by a section or division of a Ministry, but less so when the State chooses to act through a private sector mechanism, such as a corporation [...] or some other corporate structure. [...]

Because of the many forms that State enterprises may take and thus shape the manners of State action, the structural test by itself may not always be a conclusive determination whether an entity is an organ of the State or whether its acts may be attributed to the State. An additional test has been developed, a functional test, which looks to the functions of or role to be performed by the entity

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<sup>569</sup> Statement of Defence, para. 278.

[...]

It is difficult to determine, *a priori*, whether these various tests and standards need necessarily be cumulative. It is likely that there are circumstances when they need not be. Of course, when all or most of the tests result in a finding of State action, the result, while still merely a presumption, comes closer to being conclusive.

The Tribunal is also of the view that a domestic determination, be it legal, judicial or administrative, as to the juridical structure of an entity undertaking functions which may be classified as governmental, while it is to be given considerable weight, is not necessarily binding on an international arbitral tribunal. Whether an entity is to be regarded as an organ of the State and whether this might ultimately engage its responsibility, is a question of fact and law to be determined under the applicable principles of international law.<sup>570</sup>

427. The Tribunal starts from the fact that PPL is owned and controlled by Poland. Indeed, as Respondent itself admits, all shares of PPL are wholly owned by the Polish State Treasury.<sup>571</sup> As outlined above, Claimant asserts that the State Treasury has actually shown a level of control in PPL's dealings with Baltona and BH Travel by requiring PPL to obtain: (i) approval of the Lease Agreements; (ii) approval of certain amendments thereto; and (iii) approval of a temporary rent reduction regarding one of the stores operated by BH Travel (see above, para. 57).<sup>572</sup>
428. Moreover, the operation and management of an international airport is an activity which is not usually carried out by private business, although a State may delegate, through well-defined concessions, part of this management and operation to private business. In the case at hand, however, the management and operation was not delegated to private business but to a State-owned entity, PPL.
429. Furthermore, as Respondent also confirmed, PPL "performs strategic functions for the existence of the State".<sup>573</sup> In explaining why Poland is the overall owner of PPL, Respondent stated that "the transfer of such an important area of functioning of the State to private hands would be too big a threat to internal security and the overall functioning of the State".<sup>574</sup> The PPL Act also recognises that it carries out "tasks under the general defense obligation of the People's Republic of Poland" (Article 5 of the PPL Act).
430. Finally, PPL operates under the auspices of the Ministry of Transport (and its successor the Ministry of Infrastructure and Development) and is undoubtedly controlled by that Ministry— as is evidenced by the PPL Act and the 2008 Supervision Note.<sup>575</sup> Under this framework, PPL reports intensively to the Ministry of Transport. The Minister appoints, suspends, and dismisses the management of PPL and audits and assesses the General Director's performance and PPL's operations (Articles 24 and 53 of the PPL Act). The Minister may direct PPL to perform certain tasks and evaluates PPL's finances and staff salaries (Article 52 of the PPL Act and the Supervision Note). When PPL was modernising the Chopin Airport and terminated the Lease Agreements in that context, it was under the close control of the Ministry of Transport pursuant

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<sup>570</sup> *Maffezini v. Spain* Award on Jurisdiction, paras. 77-82, **Exhibit RL-35**.

<sup>571</sup> Respondent's Rejoinder para. 94.

<sup>572</sup> Claimant's Reply, paras. 36-37, 41-43.

<sup>573</sup> Statement of Defence, para. 280.

<sup>574</sup> Statement of Defence, para. 280.

<sup>575</sup> Act of 23 October 1987 on the Polish Airports State Enterprise, **Exhibit C-7**; Detailed Mode of Supervision Conducted by the Ministry of Infrastructure over PPL dated 11 August 2008, **Exhibit C-9**. See also Statute of PPL dated 19 March 2002, **Exhibit C-257**.

to the Performance Agreement concluded between PPL and the Minister of Transport in 2010 to modernise the Chopin Airport. Furthermore, under the PPL Act the national authorities “may take decisions in respect of the activities of PPL” and PPL is required to carry out tasks commissioned by the Minister”. (Articles 3, and 4(2), and 52 of the PPL Act). It is protected from bankruptcy (Article 7 of the PPL Act). Its property is “part of national property”, which it has to protect (Article 8 of the PPL Act). Contrary to Respondent’s allegations that State control is in fact not exercised in practice, the Ministry’s supervision and control is structural and remains very substantial.

431. On the other hand, the PPL Act, as well as the Polish Act on State-Owned Enterprises, states that PPL is “an independent, self-governing and self-financing organizational unit of the national economy, operating in the scope and on the terms specified in this Act” and that it has “legal personality” (Article 2 of the PPL Act). It conducts “its business operations independently, based on its own plans” – although “in line with the objectives of the national socio-economic development plan” (Article 6 of the PPL Act).
432. However, compared to the many restrictions and forms of government control and interference, the above expressions of quasi-independence and quasi-autonomy do not tip the scales.
433. Respondent erroneously alleges that “account must be taken of [a State’s] national rights to determine whether or not an entity is a State organ”.<sup>576</sup> Article 4(2) of the ILC Articles, however, only provides that entities, which in accordance with the internal law of a State are qualified as State-organs, are State organs for purpose of State responsibility; it does not *per se* exclude entities which are not qualified as State organs under domestic law. In other words, although under Article 4(2), an entity is a State organ when it has such status attributed to it under domestic law, the circumstance that an entity is not considered a State organ under domestic law does not prevent that entity from being considered as such under international law for State responsibility purposes. Besides, under Article 3 of the ILC Articles, “[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”
434. For its assessment of whether PPL may be considered to be a *de facto* State organ whose acts and omissions are attributable to Poland, the Tribunal has attached much importance to the declaration from Mr. Zbigniew Rynasiewicz, the Secretary of State in the Ministry of Transport, who stated before the Polish Parliament in 2011 that “[PPL] is an enterprise which is functioning within the structure of the Ministry of [Transport]”.<sup>577</sup> He moreover confirmed in 2013 that the Ministry of Transport was participating in the modernisation of the Chopin Airport by saying: “[w]hen it comes to questions on investments [...] the supervision over PPL’s action is exercised by the minister responsible for transport and in a way we are also responsible for all issues connected with the functioning of the enterprise [PPL] – at the Chopin Airport in Warsaw”.<sup>578</sup> That the Secretary of State is not a legislator does not alter the fact that the highest Polish authorities confirmed before the Polish Parliament that PPL functioned within the structure of the Ministry of Transport, which itself – through PPL – was participating in the modernisation of

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<sup>576</sup> Respondent’s Rejoinder, para. 105.

<sup>577</sup> Speech of Mr. Zbigniew Rynasiewicz on 18 November 2011 at the session of the Polish Parliament, p. 2, **Exhibit C-167** (emphasis added by Respondent).

<sup>578</sup> Speech of Mr. Zbigniew Rynasiewicz on 12 December 2013 at the session of the Polish Parliament, p. 1, **Exhibit C-168** (emphasis added by Respondent).

the Chopin Airport.

435. Considering all these elements, the Tribunal concludes that PPL is indeed a *de facto* State organ whose acts and omissions are attributable to Respondent.
436. *Ex abundantia*, the Tribunal notes that even if PPL were not considered to be a State organ under Article 4 of the ILC Articles, it was in any event exercising governmental authority. Indeed, as Respondent confirmed, PPL was performing “strategic functions for the existence of the State” and had “general defense obligations”.<sup>579</sup> Moreover, the operation and modernisation of Chopin Airport was carried out by PPL in the exercise of governmental authority. In fact, the PPL Act entrusted PPL expressly with the modernisation of airport terminals (Article 4 of the PPL Act). Consequently, the acts PPL committed in the framework of the modernisation of Terminal 1 of Chopin Airport, including the decision to terminate the Lease Agreements, were carried out in the exercise of the governmental task, delegated by the PPL Act. Besides, the Secretary of State of the Ministry of Transport had confirmed that the modernisation of Terminal 1 was a governmental matter in which his Ministry was involved through PPL, as already noted at paragraphs 360 and 434 above.<sup>580</sup>
437. Consequently, if PPL would not have been a State organ, alternatively for the purpose of Article 5 of the ILC Articles, the Tribunal accepts that PPL is an entity empowered by the law of Poland to exercise elements of governmental authority.
438. Indeed, the ILC Commentary to Article 5 states that the provision extends to “such autonomous institutions as exercise public functions of a legislative or administrative character” and adds that:

[O]f particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purpose for which they are to be exercised, and the extent to which the entity is accountable to government for its exercise.<sup>581</sup>

439. The Ministry of Transport, by statutory provisions, delegated to PPL the task of modernising and operating Polish airports, controlled PPL, and held it accountable for the exercise of its powers. It is thus an entity exercising governmental authority, as envisaged by Article 5 of the ILC Articles.
440. In reaching this conclusion, the Tribunal draws support from the ILC Commentary which state that “entities” may be State organs under Article 5:

The generic term ‘entity’ reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.<sup>582</sup>

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<sup>579</sup> Statement of Defence, para. 280.

<sup>580</sup> Speech of Mr. Zbigniew Rynasiewicz on 12 December 2013 at the session of the Polish Parliament, p. 1, **Exhibit C-168** (emphasis added by Respondent).

<sup>581</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002) (“**Crawford**”), p. 100-101.

<sup>582</sup> Crawford, p. 100.

441. The Tribunal refers also to *Bosh*, in which the tribunal still considered the University of Kiev for the purpose of Article 5 of the ILC Articles as an entity which exercises governmental authority, even though it exercised substantially less of a public function than PPL and – unlike PPL – as an academic institution, had less governmental control and a much more autonomy.<sup>583</sup>
442. Taking into account the public functions, *inter alia*, within the domain of public defence, and other powers which have been conferred upon PPL by legislative act, the scope of governmental control, and the crucial role for international communications and connections of the airport from the Polish capital, the Tribunal concludes that PPL exercised governmental authority implementing the necessary modernisation of Terminal 1, and deciding on the fate of its Lease Agreements in connection therewith.
443. The next issue the Tribunal has to address is whether PPL’s conduct with regard to the modernisation of Terminal 1 and its related conduct with regard to the Lease Agreements relates to the exercise of governmental authority.
444. The Tribunal is aware that in *Bosh*, the tribunal considered that the university did not exercise governmental authority when handling a contract for the renovation and development of the university campus and terminating it. The reason for this was that the university was empowered to act fully independently in this matter and that the handling of this contract was a mere private or commercial activity.<sup>584</sup>
445. The Tribunal, however, notes that the PPL Act included the construction, extension and maintenance of airport terminals in PPL’s scope of activities, and that the Performance Agreement concluded between PPL and the Minister of Transport in 2010 to modernise Chopin Airport subjected the modernisation of Terminal 1 to control by the Ministry.<sup>585</sup> In addition, the Secretary of State of the Ministry of Transport specifically acknowledged in Parliament responsibility for the modernisation of Terminal 1 of the Chopin Airport.<sup>586</sup>
446. Moreover, the Tribunal notes that prior to concluding the Lease Agreements with BH Travel, PPL needed the approval of the State Treasury due to provisions set forth in the State Treasury Act applicable to State-owned entities.<sup>587</sup> The need for the State Treasury’s consent was acknowledged by PPL to BH Travel on a number of occasions.<sup>588</sup> As already mentioned, the State Treasury required PPL to obtain approval for: (i) the Lease Agreements, (ii) certain

<sup>583</sup> *Bosh and B&P v. Ukraine*, paras. 148 ss., 173-174, **Exhibit CL-107**.

<sup>584</sup> *Bosh and B&P v. Ukraine*, para. 177, **Exhibit CL-107**.

<sup>585</sup> Act of 23 October 1987 on the Polish Airports State Enterprise, **Exhibit C-7**; Performance Agreement between Minister of Infrastructure and PPL dated 15 July 2010, **Exhibit C-261**.

<sup>586</sup> Speech of Mr. Zbigniew Rynasiewicz on 12 December 2013 at the session of the Polish Parliament, p. 1, **Exhibit C-168** (emphasis added by Respondent).

<sup>587</sup> Act of 8 August 1996 on principles of implementing powers conferred on the State Treasury (extract), Article 5a, **Exhibit C-10**: “State legal persons are obliged to obtain the consent of the minister competent for the State Treasury to carry out a legal action in the scope of disposal of fixed assets components within the meaning of the accounting regulations, qualified as intangible and legal values, tangible fixed assets or long-term investments, including commissioning these assets for use by other entities on the basis of civil law contracts or contributing them to a company or a cooperative, if the market value of the subject of disposal exceeds the PLN equivalent of EUR 50,000, calculated on the basis of the average exchange rate announced by the National Bank of Poland as of the date of filing a motion for granting the consent”.

<sup>588</sup> Letter from PPL (█ Mr. [PL]) to BH Travel (█ Mr. [GD]) dated 23 April 2007, p. 1, **Exhibit C-1**; Letter from PPL (█ Mr. [PL]) to BH Travel (█ Mr. [GD]) dated 8 November 2007, p. 2, **Exhibit C-16**; Letter from PPL (█ Mr. [MM]) to BH Travel (█ Mr. [GD]) dated 30 July 2008, p. 1, **Exhibit C-17**.

amendments to the Lease Agreements, and (iii) a temporary rent reduction regarding one of the stores operated by BH Travel (see above, para. 57).<sup>589</sup> Consequently, unlike the University of Kiev, PPL acted under governmental authority in respect of the Lease Agreements.

447. Under Article 5 of the ILC Articles, PPL’s conduct with regard to the modernisation of Terminal 1, including the connected termination of the Lease Agreements, should thus be considered an act of State under international law, which may trigger Poland’s international responsibility.
448. The Tribunal has decided that PPL’s acts and omissions with regard to the modernisation of Terminal 1 and the termination of the Lease Agreements are attributable to Respondent on the basis of the documents submitted to the Tribunal. The Tribunal therefore does not need to draw negative inferences to conclude attribution, as Claimant has requested, although Respondent’s persistent refusal to comply with the Tribunal’s document production orders would have justified doing so.

## **B. Fair and Equitable Treatment**

449. Article 3(2) of the Treaty provides that:

Investments and return of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.<sup>590</sup>

### **1) The Standard of ‘Fair and Equitable Treatment’**

#### *Claimant’s Position*

450. Claimant argues that Respondent violated the fair and equitable treatment (“FET”) standard in Article 3(2) of the Treaty by: (i) abusively implementing pretextual measures in violation of its duties of good faith, transparency, and candour; (ii) refusing to negotiate a resolution of the dispute in good faith; (iii) implementing arbitrary and coercive measures in violation of court-ordered injunctions; and (iv) denying BH Travel due process with respect to the Governor of Mazovia’s decision.<sup>591</sup>
451. Claimant submits that the FET standard requires that States treat investors in a just, even-handed, unbiased, and legitimate manner, a standard which is well-established in investment treaty jurisprudence.<sup>592</sup> Further, Claimant explains that the FET standard has evolved to encompass a number of widely-recognised “concrete principles” which oblige States to: (i) act in good faith; (ii) not act in a manner that is arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; (iii) respect procedural propriety and due process; and (iv) respect the investor’s reasonable and legitimate expectations.<sup>593</sup>

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<sup>589</sup> Claimant’s Reply, paras. 36-37, 41-43.

<sup>590</sup> India-Poland Treaty, Article 3(2), **Exhibit CL-1**.

<sup>591</sup> Statement of Claim, paras. 162-190.

<sup>592</sup> Statement of Claim, para. 159, referring to *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 15 March 1963 (“**Azurix v. Argentina Award**”), para. 360, **Exhibit CL-10**.

<sup>593</sup> Statement of Claim, para. 159, referring to *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, Award dated 29 July 2008, ICSID Case No. ARB/05/16 (“**Rumeli v. Kazakhstan Award**”), para. 609, **Exhibit CL-12**.

452. Claimant submits that Flemingo Group acquired BH Travel with the expectation that BH Travel would continue to operate in Terminals 1 and 2 both during and after the modernisation period.<sup>594</sup> Claimant admits that the Flemingo Group was “generally aware” of the modernisation plans of Terminal 1.<sup>595</sup> Nevertheless Claimant asserts that the Flemingo Group’s expectations were reasonable and legitimate in view of the guaranteed periods of lease in the terms of the Lease Agreements and the Flemingo Group’s experience in the duty-free industry.<sup>596</sup>
453. Claimant contends further that a breach of the FET standard can result from “a series of circumstances” and “need not necessarily arise out of individual isolated acts”.<sup>597</sup> Claimant adds that there can be “creeping violations” of the FET standard, which the *El Paso v. Argentina* tribunal described as “a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result”.<sup>598</sup>
454. Claimant disagrees with Respondent’s position that the definition of the FET standard is entirely left to the discretion of individual tribunals. Claimant indicates several “concrete principles” which tribunals have referred to when applying the standard,<sup>599</sup> demonstrating that the FET standard goes further than the obligation to treat investors “in a manner that is predictable”.<sup>600</sup> In *Saluka*, the tribunal specified that “[i]n their ordinary meaning, the terms ‘fair’ and ‘equitable’ mean ‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’” and that a breach of this obligation implies “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective”.<sup>601</sup> Claimant also refers to the definition of the FET standard provided by the tribunal in *Tecmed v. Mexico*:

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. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, *i.e.*, without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually

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<sup>594</sup> Claimant’s Post-Hearing Brief, para. 109, *referring to* Respondent’s Rejoinder, paras. 57-60; Ahuja Witness Statement, paras. 10-12, **Exhibit CWS-1**; Second Ahuja Witness Statement, paras. 7-10, **Exhibit CWS-4**; Second Jaroń Witness Statement, paras. 4-5, **Exhibit CWS-5**.

<sup>595</sup> Claimant’s Post-Hearing Brief, para. 109, *referring to* Claimant’s Reply, paras. 50-60; Ahuja Witness Statement, para. 11, **Exhibit CWS-1**; Second Ahuja Witness Statement, pp. 1-4, paras. 4-10, **Exhibit CWS-4**; Jaroń Witness Statement, para. 24, **Exhibit CWS-2**; Second Jaroń Witness Statement, pp. 1-6, paras. 4-13, **Exhibit CWS-5**; *also* Hearing Transcript (12 October 2015), 131:11-14.

<sup>596</sup> Claimant’s Post-Hearing Brief, para. 119.

<sup>597</sup> Statement of Claim, para. 161, *referring to* *Bayindir v. Pakistan* Award, para. 181, **Exhibit CL-13**.

<sup>598</sup> Statement of Claim, para. 161, *referring to* *El Paso Energy International Company v. The Argentine Republic*, Award dated 31 October 2011, ICSID Case No. ARB/03/15 (“*El Paso v. Argentina* Award”), para. 518, **Exhibit CL-14**.

<sup>599</sup> Claimant’s Reply, para. 353.

<sup>600</sup> Claimant’s Reply, para. 355, *referring to* Statement of Defence, para. 296.

<sup>601</sup> Claimant’s Reply, para. 353, *referring to* *Saluka v. The Czech Republic* Partial Award, para. 297, **Exhibit CL-19**.

assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>602</sup>

455. Claimant further points to the role that tribunals have attached to the duty of good faith in their application of the FET standard, treating it as “a basic obligation of the State”<sup>603</sup> which precludes an abuse of rights.<sup>604</sup> Referring to *Frontier Petroleum v. Czech Republic*, Claimant asserts that “[b]ad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created”.<sup>605</sup> Various tribunals have also held that measures involving arbitrariness or discrimination constitute distinct breaches of the FET standard,<sup>606</sup> specifying that measures are arbitrary when they are implemented “without engaging in a rational decision-making process”.<sup>607</sup> The FET standard further requires the State to refrain from “exercising coercion”<sup>608</sup> and to provide due process.<sup>609</sup>
456. Claimant contends that Article 3(2) of the Treaty sets out an “autonomous” FET standard which does not depend on the treatment given to the nationals of the host State, as Respondent contends. Claimant therefore criticises Respondent for “confound[ing] the [FET] standard under Article 3(2) of the BIT with the national treatment standard under Article 4(1) of the BIT”.<sup>610</sup>

#### *Respondent’s Position*

457. Respondent submits that the FET standard “has never had a uniform definition” and that tribunals have adopted their own definitions for their particular proceedings.<sup>611</sup> Respondent argues that host States are not required under the principle of FET to accord a specific standard of treatment to foreign entities. Instead, FET requires a host State to treat foreign entities in a predictable manner, and in principle, equal to the treatment that national entities receive.<sup>612</sup>
458. Respondent also states that the Flemingo Group was “fully aware” of the planned modernisation

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<sup>602</sup> Claimant’s Reply, para. 354, referring to *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award dated 29 May 2003, ICSID Case No. ARB (AF)/00/2 (“*Tecmed v. Mexico Award*”), para. 154, **Exhibit CL-11**.

<sup>603</sup> Claimant’s Reply, para. 356, referring to *Waste Management v. Mexico* (“*Number 2*”) Award, para. 138, **Exhibit CL-18**.

<sup>604</sup> Claimant’s Reply, para. 357, referring to *Abaclat and Others v. Argentine Republic*, Decision on Jurisdiction dated 4 August 2011, ICSID Case No. ARB/07/5, (“*Abaclat v. Argentina Decision on Jurisdiction*”), para. 646, **Exhibit CL-16**; *Saipem v. Bangladesh Award*, para. 160, **Exhibit CL-21**; *Mobil Corporation v. Venezuela* Decision on Jurisdiction, para. 169, **Exhibit CL-9**; and *Metal-Tech Ltd. v. Uzbekistan Award*, para. 127, **Exhibit CL-22**.

<sup>605</sup> Claimant’s Reply, para. 357, referring to *Frontier Petroleum v. Czech Republic*, Final Award dated 12 November 2010, UNCITRAL (“*Frontier Petroleum v. Czech Republic Final Award*”), para. 300, **Exhibit CL-20**.

<sup>606</sup> Claimant’s Reply, para. 358, referring to *CMS Gas Transmission Company v. The Republic of Argentina*, Award dated 12 May 2005, ICSID Case No. ARB/01/8 (“*CMS v. Argentina Award*”), para. 290, **Exhibit CL-26**.

<sup>607</sup> Claimant’s Reply, para. 358, referring to *LG&E v. Argentina*, Decision on Liability dated 3 October 2006, ICSID Case No. ARB/02/1, (“*LG&E v. Argentina Decision on Liability*”) para. 158, **Exhibit CL-27**.

<sup>608</sup> Claimant’s Reply, para. 358, referring to *Bayindir v. Pakistan Award*, para. 178, **Exhibit CL-13**.

<sup>609</sup> Claimant’s Reply, para. 359, referring to *Waste Management v. Mexico* (“*Number 2*”) Award, para. 98, **Exhibit CL-18**.

<sup>610</sup> Claimant’s Reply, para. 360.

<sup>611</sup> Statement of Defence, para. 295, referring to *LG&E v. Argentine Republic* Decision on Liability, para. 131, **Exhibit RL-23**.

<sup>612</sup> Statement of Defence, para. 296.

of Terminal 1 and its possible consequences even before acquiring the shares in Baltona.<sup>613</sup> Respondent states that PPL implemented actions against other businesses at Chopin Airport similar to those taken against BH Travel. For instance, Claimant states that the Governor of Mazovia initiated enforcement activities against HDS and Keraniss, both direct competitors of BH Travel. However, unlike BH Travel, HDS and Keraniss vacated the premises they occupied. Both companies also regained the leases for those premises through a tender after the modernisation of Terminal 1.<sup>614</sup>

459. In addition, Respondent contends that business entities operating in Poland are only guaranteed those means of protection granted to them by law – and not more. Those protections include the ability to bring claims before independent Polish courts, which, Respondent submits, Claimant had successfully exercised.<sup>615</sup> Respondent adds further that BH Travel not only sent letters to Polish ministries, it also received a number of freezing orders from Polish courts.<sup>616</sup> Respondent also notes that BH Travel filed an action against PPL for compensation with respect to some of the terminated Lease Agreements. As such, Respondent argues that this is a dispute between two private entities, and thus should be decided by the Polish courts.<sup>617</sup>

## **2) Whether Respondent abusively implemented pretextual measures to justify termination of the Lease Agreements in violation of its duties of good faith, transparency, and candour**

### *Claimant's Position*

460. Claimant points out that all duty-free shop leases in Terminal 1 had to be discontinued to allow PPL to proceed with the planned modernisation of Terminal 1 based on the schedule approved by the European Union as a condition for co-financing the project.<sup>618</sup>
461. This discontinuation affected BH Travel's Lease Agreements. In accordance with international and Polish law, Article 27 of the Airport Act provided for the termination of the lease agreements affected by the closure of Terminal 1 for modernisation and for compensation of "any loss resulting from the termination of agreements".
462. According to Claimant, PPL tried to avoid payment of this compensation, by repeatedly attempting to persuade BH Travel to agree to terminate the leases without compensation<sup>619</sup> and

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<sup>613</sup> Respondent's Rejoinder, paras. 216-244, *referring to* Letter from MDA Capital dated 4 March 2010 to the Director of the Corporate Governance and Privatization Department III at the Ministry of the Treasury, **Exhibit R-96**.

<sup>614</sup> Statement of Defence, para. 297.

<sup>615</sup> Statement of Defence, paras. 315, 317.

<sup>616</sup> Statement of Defence, para. 317 *referring to* Decision of the Warsaw Court of Appeal dated 28 June 2012, **Exhibit C-82**; Order of the Court of Appeal dated 30 July 2012, **Exhibit C-83**.

<sup>617</sup> Statement of Defence, paras. 314-315.

<sup>618</sup> Statement of Claim, para. 167, *referring to e.g.* **Exhibits C-20 to C-21**; General Lease Conditions, Appendix 5, **C-32**; *referring further to* **Exhibits C-58 to C-60; C-62; C-63; C-65; C-67 to C-73**; Jaroń Witness Statement, para. 33, **Exhibit CWS-2; Exhibits C-76; C-112**; Statement of Claim, paras. 61-67, 72-103, *comparing* 2009 DFZ Rules (extract), Article 8(2), **Exhibit C-77**; *with* 2012 DFZ Rules (extract), Article 8(2), **Exhibit C-78**.

<sup>619</sup> Claimant submits that PPL never considered offering BH Travel any compensation. *See* Claimant's Post-Hearing Brief, para. 129, *referring to* Hearing Transcript (13 October 2015), 36:10-13; Hearing Transcript (13 October 2015), 97:9-15; Hearing Transcript (13 October 2015), 154:22 to 155:5; Hearing Transcript (14 October 2015), 115:8-10.

guarantees.<sup>620</sup> For instance, Claimant points out that “PPL maintained in bad faith that BH Travel had irrevocably ‘agreed’ at the 8 December 2011 meeting to renounce its rights under the relevant leases without *any* compensation and to vacate the premises by 31 July 2012”.<sup>621</sup> Claimant maintains that PPL refused to engage with BH Travel about the terms of any possible settlement, and furthermore disputes Respondent’s claim that BH Travel frustrated any opportunity for amicable settlement.<sup>622</sup> Claimant adds that PPL’s attempt to revise the DFZ Rules to include the modernisation as a ground for revoking a duty-free permit “further confirms that PPL was desperate to evict BH Travel by any means possible”.<sup>623</sup>

463. Terminal 1 had to be shut down in July 2012 to have the modernisation completed by the end of 2014 in order to retain the funds allocated by the CEUTP. Claimant submits that when it became clear that BH Travel would not accept termination without compensation, PPL started a campaign to uncover a possible violation of the Lease Agreements that it could rely upon to terminate the leases unilaterally without compensation.<sup>624</sup>
464. On 16 February 2012, Respondent issued 11 separate Notices of Termination to terminate the Lease Agreements with immediate effect on the basis of two alleged breaches of contract by BH Travel: failure to adjust the value of bank guarantees, and failure to deliver insurance policies within the 14-day deadline.
465. Claimant argues that these two bases that PPL relied on when it terminated the Lease Agreements were pretextual and were relied on in bad faith to force BH Travel from Chopin Airport without compensation.<sup>625</sup> In addition, the Minister of Transport admitted that BH Travel’s Lease Agreements were terminated due to the anticipated modernisation of Terminal 1.<sup>626</sup>
466. Moreover, Claimant submits that PPL did not have a basis to terminate the Lease Agreements

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<sup>620</sup> Claimant cites to ■■■ Mr. [MM]’s testimony in order to claim that PPL did not offer BH Travel “any guarantees” that if the Lease Agreements were terminated amicably, BH Travel would receive space in the new terminal. See Claimant’s Post-Hearing Brief, para. 131, *referring to* Hearing Transcript (13 October 2015), 90:2-5. Claimant submits that ■■■ Mr. [PN]’s testimony also confirmed that PPL could not provide guarantees that BH Travel would win the tender for premises in the new terminal. See Claimant’s Post-Hearing Brief, para. 131, *referring to* Hearing Transcript (13 October 2015), 150:12-21.

<sup>621</sup> Claimant’s Post-Hearing Brief, para. 126- 127, *referring to* Statement of Claim, paras. 75-86 and Hearing Transcript (12 October 2015), 230:24 to 231:17; also E-mail from PPL (■■■ Mr. [PN]) to Baltona dated 9 December 2011, **Exhibit C-63**; Letter from PPL (■■■ Mr. [PN]) to BH Travel (A. Uryga) dated 13 December 2011, **Exhibit C-65**; Letter from Counsel for BH Travel to PPL (■■■ Mr. [PN]) dated 4 January 2012, **Exhibit C-67**.

<sup>622</sup> Claimant’s Post-Hearing Brief, paras. 137-139, *referring to* Hearing Transcript (12 October 2015), 192:6 to 194:4; Hearing Transcript (12 October 2015), 127:2-8.

<sup>623</sup> Claimant’s Post-Hearing Brief, paras. 155-156, *referring to* 2009 DFZ Rules (extract), Article 8(2), **Exhibit C-77**, compared with 2012 DFZ Rules (extract), Article 8(2), **Exhibit C-78**.

<sup>624</sup> Claimant submits that “all of the Respondent’s witnesses confirmed on cross-examination that following BH Travel’s letter of 4 January 2012, and in view of BH Travel’s refusal to accept a termination by mutual agreement without compensation, PPL launched a careful review of BH Travel’s contractual obligations in an attempt to uncover any excuse to terminate the leases unilaterally”. See Claimant’s Post-Hearing Brief, para. 150, *referring to* Hearing Transcript (13 October 2015), 44:2-4; Hearing Transcript (13 October 2015), 44:6-8; Hearing Transcript (13 October 2015), 171:4-12; Hearing Transcript (14 October 2015), 122:17-23; Hearing Transcript (13 October 2015), 171:4-14.

<sup>625</sup> Statement of Claim, para. 167; Claimant’s Reply, para. 352.

<sup>626</sup> Claimant’s Post-Hearing Brief, para. 162, *referring to* Decision of the Minister of Transport of 13 November 2012, p. 14, **Exhibit C-240**.

under the Treaty, the Lease Agreements,<sup>627</sup> or their governing law (Polish law).<sup>628</sup> Specifically with respect to the Lease Agreements, Claimant contends that they did not provide a basis for termination based on the planned modernisation of Terminal 1. The Lease Agreements did not contain any “demolition clause” that would have entitled Respondent to terminate the agreements due to modernisation.<sup>629</sup>

467. As already noted (see paras. 166-190 above), Claimant also denies that the grounds for termination of the Lease Agreements listed in the Notices of Termination were valid.

468. First, PPL had invoked Article 13(1)(c) of the General Lease Conditions. Article 13(1)(c) provides: “[t]he Lessor shall have the right to terminate this Agreement with immediate effect in the case of: [...] c) failure to submit (non-payment), complete, or renew the bank guarantee (deposit) under the terms specified in the Agreement.”<sup>630</sup>

469. Article 4(1) of the Lease Agreements provides:

The Lessee undertakes to adjust the amount of bank guarantee accordingly in the event of change in the minimum leasing fee in accordance with § 3 section 2, or in the case of change in the area in accordance with the “Control Quantity Survey Protocol”, within 14 days from the date of change.<sup>631</sup>

470. On 1 February 2012, the minimum leasing fees were escalated by ■■■% in accordance with Article 3(2) of the Lease Agreements. As such, BH Travel was required to adjust the value of the bank guarantees by 15 February 2012. On 16 February 2012, the termination notices were issued by PPL. Invoking Polish law principles of contract interpretation, Claimant argues that “failure to ‘adjust’ the bank guarantees to the rent escalation [...] does not constitute a ground for termination under Article 13(1)(c)” which refers only to failures to “submit”, “complete”, and “renew”.<sup>632</sup> Claimant further argues that it would be unreasonable and contrary to the interests of both parties to interpret Article 13(1)(c) in this way.<sup>633</sup>

471. Second, PPL had invoked Article 13(1)(d) of the General Lease Conditions which provides that “[t]he Lessor shall have the right to terminate this Agreement with immediate effect in the case of: [...] d) failure to submit certified true copies of insurance policies, as well failure to renew the

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<sup>627</sup> Statement of Claim, para. 169.

<sup>628</sup> Claimant submits that “[i]t is [...] not necessary for the Tribunal to find that the pretextual termination of BH Travel’s Lease Agreements was unlawful under Polish law in order to conclude that the Respondent failed to accord the Claimant’s investment fair and equitable treatment under the BIT”. See Claimant’s Post-Hearing Brief, para. 164, referring to *El Paso v. Argentina*, para. 135, **Exhibit CL-14**. Furthermore, Claimant states that prior tribunals have confirmed that municipal law “is relevant in assessing the alleged arbitrariness of the State measures at issue”. See Claimant’s Post-Hearing Brief, para. 165, referring to *Siemens A.G. v. The Argentine Republic*, Award dated 6 February 2007, ICSID Case No. ARB/02/8 (“*Siemens v. Argentina Award*”), para. 78, **Exhibit CL-42**; *Malicorp v. Egypt*, Award dated 7 February 2011, ICSID Case No. ARB/08/18 (“*Malicorp v. Egypt Award*”), para. 129, **Exhibit CL-109**; also *Azurix v. Argentina* Award, para. 67, **Exhibit CL- 10**; *Vigotop Limited v. Hungary*, Award dated 1 October 2014, ICSID Case No. ARB/11/22 (“*Vigotop v. Hungary Award*”), para. 327-329 and 583, **Exhibit CL-132**.

<sup>629</sup> Claimant’s Reply, para. 405.

<sup>630</sup> Letters from PPL (■■■ Mr. [PN] and ■■■ Mr. [MM]) to BH Travel (M. Thakar) dated 16 February 2012, **Exhibit C-79**; General Lease Conditions, Appendix 5, Article 13.1, **Exhibit C-32**.

<sup>631</sup> Lease Agreement between PPL and BH Travel (Classic) dated 13 March 2008, Section 4.1, **Exhibit C-21**.

<sup>632</sup> Claimant’s Post-Hearing Brief, para. 169.

<sup>633</sup> Claimant’s Post-Hearing Brief, para. 174.

said insurance policies”.<sup>634</sup>

472. Article 6 of the Lease Agreements provides that “[t]he Lessee shall be obliged to provide the Lessor within 14 days from the date of signing the first ‘Delivery/Acceptance Protocol’ with a certified true copy of the civil liability insurance policy regarding liability for activities carried out in the subject matter of the lease [...]”.
473. Article 11(4) of the General Lease Conditions required BH Travel to present new insurance policies for the upcoming year at least 14 days before the expiration of the existing insurance policies:

Insurance policies shall be valid for a period of at least 12 consecutive months from the date of issue. In each case, at least 14 days before the end of another 12-month period, the Lessee shall submit to the Lessor the certified true copy of the subsequent insurance contract, valid for a further 12 consecutive months period.<sup>635</sup>

474. Claimant argues that Article 13(1)(d) stipulates two separate and independent events of default with respect to BH Travel’s obligations concerning liability and insurance: (i) the failure to submit certified copies of insurance policies; and (ii) the failure to renew insurance policies. In Claimant’s view, the plain terms of Article 13(1)(d) confirm that the Parties did not intend to qualify the failure to submit copies of renewed policies as a ground for termination with immediate effect. Claimant notes that BH Travel had obtained and submitted an insurance policy for all its premises at Chopin Airport valid up to and including 29 February 2012. On 14 February 2012, more than two weeks before the end of the termination of the prior insurance policy, BH Travel had duly renewed its insurance policy for the following 12 month period. As such, it is Claimant’s view that there is no breach that could have triggered Article 13(1)(d) of the General Lease Conditions. Claimant submits that this interpretation is consistent with the leniency shown by PPL in its prior commercial dealings with BH Travel.<sup>636</sup>
475. In addition, Claimant submits that using an alleged one-day delay in the submission of certified copies of the insurance to justify termination is absurd, especially given that the stores were insured. In any event, Claimant states that there was no one-day delay. Claimant explains that because the prior policy was valid until 29 February 2012, expiring on 1 March 2012, the copies submitted by BH Travel on 16 February 2012 were within the 14-day advance deadline (including 29 February in its 14-day count backwards to 16 February).<sup>637</sup>
476. Claimant further submits that under Polish law the termination constitutes a violation of PPL’s duty of good faith under Articles 5 and 58(2) of the Polish Civil Code and is therefore null and void.

Article 5 of the Polish Civil Code provides:

One cannot exercise a right in a manner which would contradict its socioeconomic purpose or the principles of community life. Such an act or omission on the part of the person shall not be considered the exercise of that right and shall not be protected.

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<sup>634</sup> Letters from PPL (■ Mr. [PN] and ■ Mr. [MM]) to BH Travel (M. Thakar) dated 16 February 2012, **Exhibit C-79**; General Lease Conditions, Appendix 5, Article 13.1, **Exhibit C-32**.

<sup>635</sup> General Lease Conditions, Appendix 5, Article 14, **Exhibit C-32**.

<sup>636</sup> Claimant’s Post-Hearing Brief, paras. 178-185.

<sup>637</sup> Claimant’s Post-Hearing Brief, paras. 186-188.

Article 58(2) of the Polish Civil Code Provides that “[a]n act in law [juridical act] which is inconsistent with the principles of community life shall be null and void”.<sup>638</sup>

477. Claimant submits that under Polish law, the breach invoked to terminate the agreement must be sufficiently serious to justify the termination.<sup>639</sup> In Claimant’s view, the termination of the Lease Agreements based on BH Travel’s failure to adjust the value of the bank guarantees to the ■% rent escalation by 15 February 2012 is “entirely disproportionate considering the value of the adjustment in comparison with the aggregate value of the bank guarantees, the length of the delay and the contracting parties’ common intention to conclude long-term agreements”. As such, Claimant submits that PPL’s Notices of Termination did not effectively terminate BH Travel’s Lease Agreements.<sup>640</sup>
478. Claimant submits that the Polish Courts have confirmed that the termination of BH Travel’s Lease Agreements was wrongful under Polish law.<sup>641</sup> Claimant notes that the Court of Appeal observed in two separate injunction proceedings that the terms of the General Lease Conditions did not give PPL the right to terminate the Lease Agreements unilaterally based on a mere failure to adjust the value of the bank guarantees,<sup>642</sup> or on an alleged failure to submit certified copies of its insurance policies by the established deadline.<sup>643</sup> Claimant reiterates its view that PPL could exercise its right to terminate the Lease Agreements during the guaranteed periods of lease only on the basis of a material breach.<sup>644</sup>
479. According to Claimant, “[t]he decisions of the Court of Appeal in the injunctive proceedings [...] confirm that PPL’s Notices of Termination were *on their face* baseless and contrived”.<sup>645</sup> Claimant acknowledges that the Tribunal is not bound by the decisions of local courts, but submits that the decisions of Polish courts “may inform the Tribunal’s understanding of the scope and content of PPL and BH Travel’s contractual obligations, and give the Tribunal comfort in finding that the termination of the Lease Agreements on 16 February 2012 was both ill-grounded and abusive”.<sup>646</sup>
480. Claimant submits that the duty of good faith is a fundamental principle of international law which

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<sup>638</sup> Claimant’s Post-Hearing Brief, paras. 189-193, *referring to* The Polish Civil Code, p. 1, Article 5, **Exhibit C-302**.

<sup>639</sup> Claimant’s Post-Hearing Brief, para. 195.

<sup>640</sup> Claimant’s Post-Hearing Brief, paras. 167-205.

<sup>641</sup> *See* Claimant’s Post-Hearing Brief, paras. 206-221.

<sup>642</sup> Claimant’s Reply, para. 368, *referring to* Decision of the Warsaw Court of Appeal dated 28 June 2012, **Exhibit C-82**.

<sup>643</sup> Statement of Claim, para. 171; Claimant’s Reply, para. 369 *referring to* **Exhibit C-82**. *See also* decision dated 30 July 2012, whereby the Court of Appeal determined that the alleged failure to adjust the value of the bank guarantee does not constitute a ground for immediate termination under Article 13(1)(c) of the General Lease Conditions. *See* Claimant’s Post-Hearing Brief, para. 211, *referring to* Decision of the Warsaw Court of Appeal dated 30 July 2012, p. 6, **Exhibit C-83**.

<sup>644</sup> Claimant’s Reply, para. 373.

<sup>645</sup> Claimant’s Post-Hearing Brief, para. 213 (emphasis in the original).

<sup>646</sup> Claimant’s Post-Hearing Brief, para. 217. According to Claimant, “the tribunal in *Feldman v. Mexico* observed [that] the findings of a municipal court may provide ‘necessary background to the Tribunal’s understanding’ of certain issues ‘as required for a proper application of the [investment treaty] and international law’”. *See* Claimant’s Post-Hearing Brief, para. 206, *referring to* *Marvin Roy Feldman Karpa v. United Mexican States*, Award dated 16 December 2002, ICSID Case No. ARB(AF)/99/1 (“*Marvin Feldman v. Mexico Award*”), para. 84, **Exhibit CL-134**.

is inherent in the FET standard.<sup>647</sup> This duty, Claimant explains, prevents a host State from “exercising a right or using a legal instrument for reasons other than those for which the right or the legal instrument were created”.<sup>648</sup> In addition, Claimant contends that the duty of good faith forbids a host State from “implementing measures for reasons other than those communicated to the investor”.<sup>649</sup> Claimant further points out that a number of tribunals have held that the duty of good faith also manifests itself in the “general prohibition of abuse of rights”.<sup>650</sup>

481. Claimant argues that the duty of good faith inherent in the FET standard “precludes the State from exercising a right or using a legal instrument for reasons other than those for which the right or the legal instrument were created”.<sup>651</sup> The absence of a legitimate contractual basis for termination, and the evidence that the Lease Agreements were terminated for reasons other than the ones listed in the Notices of Termination compels the conclusion that the termination was malicious and abusive, amounting to breach of the FET standard, Claimant argues.<sup>652</sup>
482. Referring to the events and correspondence that took place between 2 July 2010 and 16 February 2012, as well as to the subsequent judicial and administrative decisions,<sup>653</sup> Claimant concludes that Respondent exercised its right to terminate the Lease Agreements “for reasons other than those for which those rights were created, and for reasons other than those communicated to the Claimant”.<sup>654</sup> Central to the assessment of whether Respondent complied with the FET standard – Claimant concludes – is “[t]he legitimacy and reasonableness of PPL’s stated basis for termination [of the Lease Agreements]”.<sup>655</sup> It is Claimant’s view that the grounds invoked by Respondent “were on their face baseless and contrived”.<sup>656</sup>
483. Finally, Claimant dismisses Respondent’s argument that the assessment of fair and equitable treatment should take into account the alleged prior breaches of the Lease Agreements by BH Travel. According to Claimant, these alleged breaches “are entirely irrelevant to the assessment of the legitimacy and reasonableness of the termination in February 2012, as these

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<sup>647</sup> Statement of Claim, para. 162, referring to *Sempra Energy International v. Argentine Republic*, Award dated 28 September 2007, Case No. ARB/02/16 (“*Sempra Energy International v. Argentina Award*”), para. 298, **Exhibit CL-17** (annulled on other grounds); *Waste Management v. Mexico* (“*Number 2*”) Award, para. 138, **Exhibit CL-18**; *Saluka v. The Czech Republic* Partial Award, para. 307, **Exhibit CL-19**.

<sup>648</sup> Statement of Claim, para. 163, referring to *Frontier Petroleum v. Czech Republic* Final Award, para. 300, **Exhibit CL-20**; *Saipem v. Bangladesh* Award, para. 160, **Exhibit CL-21**.

<sup>649</sup> Statement of Claim, paras. 165-166, referring to *Bayindir v. Pakistan* Award, paras. 242-250, **Exhibit CL-23**; *Frontier Petroleum v. Czech Republic* Final Award, para. 300, **Exhibit CL-20**.

<sup>650</sup> Statement of Claim, para. 163, referring to *Mobil Corporation v. Venezuela* Decision on Jurisdiction, para. 169, **Exhibit CL-9**; *Abaclat v. Argentina* Decision on Jurisdiction, para. 646, **Exhibit CL-16**; *Metal-Tech v. Uzbekistan* Award, para. 127, **Exhibit CL-22**.

<sup>651</sup> Claimant’s Post-Hearing Brief, para. 222, referring to *Saipem v. Bangladesh* Award, para. 160, **Exhibit CL-21**; *Frontier Petroleum v. The Czech Republic* Final Award, para. 300, **Exhibit CL-20**; *Mobil Corporation v. Venezuela*, para. 169, **Exhibit CL-9**; *Bayindir v. Pakistan* Award, para. 250, **Exhibit CL-23**. See also Claimant’s Post-Hearing Brief, paras. 223-226, addressing *Vigotop Limited v. Hungary* Award, **Exhibit CL-132**.

<sup>652</sup> Claimant’s Post-Hearing Brief, para 227.

<sup>653</sup> Claimant’s Reply, para. 361 (with accompanying references).

<sup>654</sup> Claimant’s Reply, para. 362.

<sup>655</sup> Claimant’s Reply, para. 366.

<sup>656</sup> Claimant’s Reply, para. 367.

alleged breaches were not invoked as grounds for termination in February 2012”.<sup>657</sup>

*Respondent’s Position*

484. Respondent denies that the reason for PPL’s termination of the Lease Agreements was the planned modernisation of Terminal 1.<sup>658</sup> For Respondent, PPL had every right to terminate the Lease Agreements in light of BH Travel’s breaches.<sup>659</sup> BH Travel was improperly performing its obligations under the Lease Agreements even before it was acquired by the Flemingo Group, after which the situation purportedly did not improve despite assurances from the Flemingo Group that it would.<sup>660</sup>
485. Respondent contends that PPL utilised its right to terminate the Lease Agreements according to their intended purpose and in compliance with the law. For Respondent, “[t]he BIT does not force the host State to maintain legal relations contrary to its economic interests and incurring a loss”. Respondent refers to *Frontier Petroleum*, a case also cited by Claimant, to assert that use of legal instruments in accordance with their intended purpose does not constitute a breach of a bilateral investment treaty.<sup>661</sup>
486. Respondent adds that even if the modernisation of Terminal 1 was the reason for the termination, “the Flemingo Group should have expected the future termination of the Lease Agreements”.<sup>662</sup> Respondent emphasises in this regard that the Flemingo Group was aware of the planned modernisation when it acquired BH Travel, noting that the due diligence report prepared before the purchase of Baltona’s shares mentioned the possibility that the Lease Agreements could be terminated because of that modernisation project.<sup>663</sup>
487. Respondent further emphasises that the Lease Agreements did not provide guaranteed lease terms or ensure that Claimant could conduct business in Terminal 1 until 2018.<sup>664</sup> Indeed, the contractual provisions that Claimant relies on do not provide for guaranteed lease terms but instead “primarily provided for the usual procedure for terminating agreements concluded for an indefinite term – with a notice period of three months”.
488. Respondent admits that the Lease Agreements also stated that PPL could only make use of this general right to terminate the agreements after 84 months (7 years) from the date of signature,<sup>665</sup> but stresses that the General Lease Conditions (which is an appendix to the Lease Agreements) listed five specific instances that allowed PPL to terminate the Lease Agreements immediately.<sup>666</sup> Among others, the General Lease Conditions provided that PPL could immediately terminate the

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<sup>657</sup> This applies *a fortiori* to breaches committed by BH Travel before its acquisition by the Flemingo Group (Claimant’s Reply, paras. 370-371).

<sup>658</sup> Statement of Defence, para. 308.

<sup>659</sup> Statement of Defence, para. 306; Respondent’s Rejoinder, paras. 114-127.

<sup>660</sup> Statement of Defence, para. 306.

<sup>661</sup> Statement of Defence, para. 307.

<sup>662</sup> Statement of Defence, para. 308.

<sup>663</sup> Statement of Defence, para. 308, referring to Preliminary Financial Due Diligence Report, **Exhibit C-39**; Respondent’s Rejoinder, paras. 216-218.

<sup>664</sup> Statement of Defence, para. 301; Respondent’s Rejoinder, paras. 125-127.

<sup>665</sup> Statement of Defence, para. 301.

<sup>666</sup> Statement of Defence, referring to Lease Agreement between PPL and BH Travel (Arrival Shop) dated 11 May 2007, **Exhibit C-18**.

Lease Agreements if BH Travel fails to submit a bank guarantee on the conditions stipulated in the agreements and/or if it fails to submit certified copies of the renewed insurances policies.<sup>667</sup>

489. According to Respondent, these two grounds for termination have occurred and the termination of the Lease Agreements was thus effective as of 16 May 2012 at the latest.<sup>668</sup> In this regard Respondent submits that the provisions of the Lease Agreements on termination did not conflict with those included in the General Lease Conditions because “[t]hey purely regulated the rights of the parties in the event of the emergence of various situations”. Respondent further explains that “[t]he Lease Agreements regulated matters of ordinary termination, while the provisions of the [General Lease Conditions] provided for solutions in the event of an extraordinary situation, such as the improper performance of the Lease Agreements by the lessee”.<sup>669</sup>
490. As already noted (see paras. 166-190 above), Respondent submits that it was entitled to terminate the Lease Agreements under Article 13(1)(c) of the General lease Conditions since BH Travel failed to present bank guarantees taking into account the new minimum rent for the Lease Agreements by 15 February 2016 as required by Article 4(2) of the Lease Agreements. Respondent explains that under Polish banking law, the bank guarantee could only have been effectively adjusted to the revalued rent through the delivery of a new guarantee to PPL. Respondent maintains that “having a bank guarantee for 3 times the current rent throughout the term of the Lease Agreements was the essence of BH Travel’s obligations regarding the securing of the [L]ease Agreements”.<sup>670</sup> Respondent dismisses Claimant’s argument that the word “adjust” does not appear in Article 13(1)(c), arguing that “adjusting” falls under “submitting” or “completing” the bank guarantees.<sup>671</sup>
491. Respondent also submits that it was entitled to terminate the Lease Agreements under Article 13(d) of the General Lease Conditions, as BH travel had failed to present copies of new insurance policies at least 14 days before the end of the period of validity of the old policy (as required by Article 11(4) of the General Lease Conditions). Respondent argues in this regard that the deadline for filing copies of new insurance policies expired on 15 February 2012, explaining that under Polish law, in order to calculate a deadline before an event one starts counting from the day preceding the event.<sup>672</sup>
492. Accordingly, in Respondent’s view, the termination of the Lease Agreements was not pretextual but fully justified by the actions of BH Travel (*i.e.*, failure to provide bank guarantees, insurance policies, report revenues properly, make timely payments, and perform marketing obligations) and the conditions stipulated in the Lease Agreements allowing for termination. Respondent

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<sup>667</sup> Statement of Defence, para. 302.

<sup>668</sup> Respondent’s Post-Hearing Brief, para. 115. Respondent explains its reference to 16 May 2012 as the latest date on which the Lease Agreements would have been valid, by stating that even if there us been no grounds for termination the Lease Agreements, Articles 365 and 673 of the Polish Civil Code would have allowed PPL to cancel on 3 months’ notice. As such, the termination of the Lease Agreements would have been effective as of 16 May 2012 at the latest as a result of the notices of Termination served 3 months before. Respondent, admits, however, that termination on such grounds would have given rise to liability for damages. *See* Rejoinder, para. 125; Respondent’s Post-Hearing Brief, para. 113.

<sup>669</sup> Statement of Defence, para. 303.

<sup>670</sup> Respondent’s Rejoinder, paras. 140-147, referring to Article 81 of the Banking Law of 29 August 1997, **Exhibit RL-37**.

<sup>671</sup> Respondent’s Post-Hearing Brief, para. 131.

<sup>672</sup> Respondent’s Post-Hearing Brief, paras. 201-204, *referring to* Article III of the Polish Civil Code, **Exhibit RL-52**.

maintains that the termination was not an abuse of rights as BH Travel's breach of the Lease Agreements was ongoing. Respondent emphasises that PPL had contractual grounds for termination of the Lease Agreements without compensation and without need for recourse to the provisions of the Airport Act.<sup>673</sup> Respondent adds that under Polish law, the extent or severity of a breach is irrelevant to termination rights.<sup>674</sup>

493. Respondent argues that the Court of Appeal decisions cited by Claimant, which stated that the termination had been abusive, have no bearing in the present proceedings. According to Respondent, they were merely simplified injunction proceedings. In injunction proceedings, Respondent explains, a party only needs to show that there is a risk of loss and the court will decide within a couple of days. Respondent contends that it is impossible for the court to analyse the material correctly as in these cases, no witnesses or experts were heard. Furthermore, Respondent points out that the proceedings Claimant referred to concerned possessory issues and not the termination of the Lease Agreements. Accordingly, they did not look into the legality of termination of the Lease Agreements.<sup>675</sup>
494. Respondent notes that Claimant bases its claim for abusive termination of the Lease Agreements on Article 5 of the Polish Civil Code, but argues that this provision cannot constitute the basis of a claim. According to Respondent, the correct provision would be Article 58(2) of the Polish Civil Code, which provides *inter alia* that a "juridical act that is contrary to the principles of community existence, shall be invalid".<sup>676</sup>
495. Respondent submits that Articles 5 and 58(2) of the Polish Civil Code are both properly treated as *clausula generalis*, have to be interpreted narrowly in Polish law, and can only be applied in exceptional circumstances,<sup>677</sup> namely where the disputed actions are unacceptable due to axiological reasons.<sup>678</sup>
496. In this context, Respondent observes that when assessing the termination of the Lease Agreements, one should also take into account the previous non-performance of contract obligations by BH Travel. Respondent asserts that under Polish law, an entity "which acts against the rules of social conduct cannot effectively claim that the other party to the agreement breached those rules while exercising its rights". Consequently, BH Travel cannot accuse PPL of breaching the rules of social conduct when, for the duration of the Lease Agreements, BH Travel breached this rule and caused harm to PPL's business. Respondent concludes that Claimant's claim under Articles 5 and 58(2) of the Polish Civil Code cannot erase the consequences of BH Travel's "own neglect and non-performance of the Lease Agreements".<sup>679</sup>
497. Respondent finally observes that – even in the event the Termination Notice would be considered unjustified under the contract provisions or under Article 58 of the Polish Civil Code – under

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<sup>673</sup> Respondent's Rejoinder, paras. 197-198.

<sup>674</sup> Respondent's Post-Hearing Brief, paras. 98, 118.

<sup>675</sup> Hearing Transcript (12 October 2015), 122:19 to 123:10, reply to question posed by Mr. Townsend.

<sup>676</sup> Respondent's Post-Hearing Brief, para. 139.

<sup>677</sup> Respondent's Post-Hearing Brief, paras. 173-174.

<sup>678</sup> Respondent's Post-Hearing Brief, para. 141, *referring to* Judgment of the Supreme Court dated 24 April 2014, case file No. III CSK 178/13, p. 4, **Exhibit RL-56**; Judgment of the Supreme Court dated 11 April 2013, case file No. II CSK 438/12, p. 1, **Exhibit RL-57**; Judgment of the Supreme Court dated 21 October 2010, case file No. IV CSK 215/10, p. 6, **Exhibit RL-58**.

<sup>679</sup> Respondent's Post-Hearing Brief, paras. 143, 145, 152, 153.

Polish law the termination notices would still ultimately be effective either: (i) on 16 May 2012 through the operation of Articles 365 and 673 of the Polish Civil Code (which allow for termination on 3 months' notice); or (ii) in July 2012 when the modernisation was approved by the Governor of Mazovia. Respondent notes that in the former instance the lease periods in the Lease Agreements would have been breached, giving rise to liability for damages, while in the latter instance compensation would have been payable under the Airport Act.<sup>680</sup>

### 3) Whether Respondent refused to negotiate a fair resolution of the dispute over the Lease Agreements in good faith

#### *Claimant's Position*

498. Claimant argues that Respondent violated the FET standard by consistently refusing to undertake good faith negotiations with Claimant and its subsidiaries to resolve the dispute.<sup>681</sup> Claimant submits that a number of investment treaty tribunals have held that a host State's refusal to undertake good faith negotiations to resolve a dispute is a breach of the FET standard.<sup>682</sup>
499. Claimant submits that PPL falsely insisted that BH Travel had already accepted PPL's proposal of termination without compensation during the 8 December 2011 meeting. According to Claimant, PPL knew at the time that the terms of its proposal could not have been, and were not, accepted by BH Travel or Baltona.<sup>683</sup>
500. Claimant explains that BH Travel was willing to renegotiate the terms of the Lease Agreements to accommodate PPL's modernisation plans for Terminal 1, but according to Claimant, PPL summarily rebuffed BH Travel's suggestion.<sup>684</sup> In Claimant's view, PPL's subsequent refusal to consider BH Travel's counter-proposal indicated that PPL's offer to terminate the Lease Agreements by mutual agreement was on a "take it or leave it" basis. Claimant thus contends that PPL did not intend to engage with BH Travel in good faith negotiations.<sup>685</sup>
501. Moreover, Claimant avers that the negotiations in July and August 2012 between PPL and Claimant as well as its subsidiaries were conducted in bad faith.<sup>686</sup> PPL had first agreed, in principle, to a settlement agreement under which new leases for premises in Terminals 1 and 2 would be concluded.<sup>687</sup> Despite that, PPL reneged on that agreement when it asked the Governor

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<sup>680</sup> Respondent's Post-Hearing Brief, paras. 179, 187, 200.

<sup>681</sup> Statement of Claim, para. 174; Claimant's Reply, para. 381; Claimant's Post-Hearing Brief, para. 245.

<sup>682</sup> Statement of Claim, para. 173, *referring to Saluka v. The Czech Republic* Partial Award, para. 363, **Exhibit CL-19**; *Frontier Petroleum v. Czech Republic* Final Award, para. 299, **Exhibit CL-20**; *ConocoPhillips v. Venezuela* Decision on Jurisdiction and the Merits, para. 362, **Exhibit CL-24**. See also Claimant's Post-Hearing Brief, paras. 247-248, *referring to PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, Award dated 19 January 2007, ICSID Case No. ARB/02/5, ("**PSEG v. Turkey Award**"), paras. 159-173, 246, 253-256, **Exhibit CL-59**.

<sup>683</sup> Statement of Claim, paras. 175-176, *referring to* Kazimierski Witness Statement, para. 19, **Exhibit CWS-3**; Ahuja Witness Statement, para. 26, **Exhibit CWS-1**.

<sup>684</sup> Statement of Claim, para. 176, *referring to* Letter from Counsel for BH Travel to PPL (█ Mr. [PN]) dated 4 January 2012, **Exhibit C-67**; Claimant's Reply, para. 381.

<sup>685</sup> Statement of Claim, para. 176.

<sup>686</sup> Statement of Claim, para. 177, *referring to* Jaroń Witness Statement, paras. 39-52, **Exhibit CWS-2**; Statement of Claim, paras. 143-148; Claimant's Reply, para. 381.

<sup>687</sup> Statement of Claim, para. 177, *referring to* E-mail from Counsel for BH Travel to Counsel for PPL dated 1 August 2012, p. 2, **Exhibit C-122**.

of Mazovia to order BH Travel to vacate Terminal 1 by 13 August 2012.<sup>688</sup>

502. Furthermore, Respondent did not reply to numerous letters that Claimant and its subsidiaries sent to various ministries, including the Ministry of Transport.<sup>689</sup> Claimant notes that Article 51 of the PPL Act imposes a general obligation on the Minister of Transport to control the decisions of PPL's General Director and that Article 54 obligates the Minister to suspend the execution of a decision by the General Director that is "contrary to law" and to "commit the General Director to change [...] or repeal [his decision]".<sup>690</sup> Claimant avers that the Minister of Transport did not take or even consider remedial action or conduct good faith negotiations.<sup>691</sup>
503. Claimant claims that, at the hearing, ■■■ Mr. [MM] conceded that PPL had not engaged in good faith negotiations in explaining that "it was very difficult to negotiate in good faith with a company which treated us before courts of law in such a way".<sup>692</sup> According to Claimant, BH Travel's exercise of its right to seek protective relief before Polish courts in no way justifies Respondent's failure to entertain good faith negotiations.<sup>693</sup>
504. Claimant disagrees with Respondent's allegation that "if it had agreed to negotiate with the Claimant, then the Claimant would have 'receive[d] a privileged position in comparison with other investors", submitting that the FET standard does not depend on the host State's treatment of other investors. Claimant also submits that it is not relevant for FET purposes that "Respondent does not involve itself in private disputes".<sup>694</sup>

#### *Respondent's Position*

505. Respondent notes that BH Travel's breaches of the Lease Agreements were the subject of extensive correspondence and many meetings between BH Travel and PPL.<sup>695</sup>
506. Respondent denies that it refused to hold negotiations in good faith to settle the dispute. Respondent clarifies that it was PPL (which Respondent argues is not an emanation of Poland) that negotiated with entities of the Flemingo Group. Respondent notes that it did not, for instance, participate in the meeting between Baltona and PPL on 8 December 2011. Because PPL is a private entity, Respondent submits that "Poland does not have any influence on PPL's behaviour" and that therefore it would have served no purpose to participate in the negotiations.<sup>696</sup> Respondent further submits that because no illegal steps were taken by PPL, Respondent was not

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<sup>688</sup> Statement of Claim, para. 177, *referring to* Jaroń Witness Statement, para. 47, **Exhibit CWS-2**; Ahuja Witness Statement, para. 36, **Exhibit CWS-1**.

<sup>689</sup> Statement of Claim, para. 178, *referring to* Letter from Counsel for Flemingo DutyFree to the Minister of Transport (S. Nowak) dated 24 February 2012, **Exhibit C-116**; Letter from Baltona (M. Dworniak) to Minister of Transport dated 27 February 2012, **Exhibit C-115**; Letter from Counsel for BH Travel to the Minister of Transport (S. Nowak) dated 21 March 2012, **Exhibit C-119**; Letter from Counsel for BH Travel to the Minister of Transport (S. Nowak) dated 26 July 2012, **Exhibit C-120**; Letter from Counsel for Flemingo DutyFree to the Minister of Transport dated 6 September 2012, **Exhibit C-126**.

<sup>690</sup> Statement of Claim, para. 178, *referring to* Act of 23 October 1987 on the 'Polish Airports' State Enterprise, Article 54, **Exhibit C-7**.

<sup>691</sup> Statement of Claim, para. 178.

<sup>692</sup> Claimant's Post-Hearing Brief, para. 265, *referring to* Hearing Transcript (13 October 2015), 70:19-23.

<sup>693</sup> Claimant's Post-Hearing Brief, para. 265, *referring to* Claimant's Post-Hearing Brief, paras. 140-146.

<sup>694</sup> Claimant's Reply, para. 387, *referring to* Statement of Defence, para. 313.

<sup>695</sup> Statement of Defence, para. 56.

<sup>696</sup> Statement of Defence, paras. 310 and 314.

obliged to take any action under the Airport Act.

507. Respondent further submits that, if it had negotiated with Claimant, that “would have be[en] a kind of breach of [FET] treatment”. Respondent explains that such negotiations with Claimant would have accorded it a “privileged position” compared to other investors “because Poland does not enter into disputes (except for the provision of institutional capabilities for settling them) between private entities which are independent of it”.<sup>697</sup>
508. In Respondent’s view, it was willing to settle the dispute and engage in dialogue.<sup>698</sup> However, it believes that Claimant in fact did not intend to amicably end the dispute as BH Travel simultaneously initiated legal proceedings.<sup>699</sup> Respondent submits that Claimant launched these proceedings to block the investment in Chopin Airport and used legal proceedings to exert pressure on PPL to force it into a settlement. According to Respondent, these proceedings were inconsistent with fundamental principles of law “in terms of acting in the defence of one’s rights”.<sup>700</sup> Respondent submits that a number of tribunals have held that an “investment made in breach of fundamental principles does not fall under BIT protection”.<sup>701</sup>

#### 4) Whether Respondent implemented arbitrary and coercive measures in violation of court-ordered injunctions

##### *Claimant’s Position*

509. Claimant argues that a number of tribunals have held that the FET standard also prohibits arbitrary and coercive measures.<sup>702</sup> Claimant submits that Respondent breached the FET standard when it embarked on a “campaign of arbitrariness, coercion and harassment [...] to prevent BH Travel from operating its stores at Chopin Airport in violation of court-ordered injunctions”.<sup>703</sup>
510. Claimant notes, for example, that on 17 February 2012, which was the day after the Lease Agreements were terminated, the Customs Chamber sealed all of BH Travel’s stores without official notification or any indication of the legal basis for the closure.<sup>704</sup> Further, on 16 March 2012, customs authorities reopened BH Travel’s stores, again without any official notification or indication of the legal basis for the reopening.<sup>705</sup> Claimant takes issue with Respondent’s

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<sup>697</sup> Statement of Defence, para. 313.

<sup>698</sup> Respondent explains that PPL did not present an offer to Claimant for the Termination of the Lease Agreements because Flemingo/BH Travel agreed to terminate its operations at Chopin Airport amicably. *See* Hearing Transcript (12 October 2015), 125:6 to 127:8, replies to questions posed by the Tribunal.

<sup>699</sup> Statement of Defence paras. 201-204, para. 311, *referring to* ■■■ Mr. [MM] Witness Statement, **Exhibit RWS-2**.

<sup>700</sup> Statement of Defence, para. 207.

<sup>701</sup> Statement of Defence, paras. 208-209, *referring to* *Gustav F. W. Hamester v. Ghana* Award, para. 127, **Exhibit RL-14**; *Phoenix Action v. The Czech Republic* Award, **Exhibit RL-15**; *Inceysa v. El Salvador* Award, **Exhibit RL-16**.

<sup>702</sup> Statement of Claim, para. 179, *referring to* *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, paras. 284, 259 **Exhibit CL-25**; *Bayindir v. Pakistan* Award, para. 178, **Exhibit CL-13**; *CMS v. Argentina* Award, para. 290, **Exhibit CL-26**; *LG&E v. Argentina* Decision on Liability, para. 158, **Exhibit CL-27**; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, Award dated 23 September 2010, ICSID Case No. ARB/07/22, paras. 10.3.7-10.3.9, **Exhibit CL-28**.

<sup>703</sup> Statement of Claim, para. 180.

<sup>704</sup> Statement of Claim, para. 180, *referring to* Kazimierski Witness Statement, para. 35, **Exhibit CWS-3**, Statement of Claim, paras. 104-105.

<sup>705</sup> Statement of Claim, paras. 111, 180.

submission that BH Travel’s deliveries were blocked due to “Claimant’s failure to fulfil the respective formalities”.<sup>706</sup> According to Claimant PPL had ordered the Airport Security Guard “not to let in any goods designated for BH Travel shops”.<sup>707</sup> Claimant adds that the timing of PPL’s “security inspections” was part of “the campaign of intimidation and harassment that the Respondent waged to force BH Travel out of Chopin Airport”.<sup>708</sup>

511. Claimant argues that despite the issuance of a court injunction ordering PPL to permit BH Travel to stock and sell goods in its stores, PPL still stymied BH Travel’s efforts to resume normal operation of its stores.<sup>709</sup>
512. Claimant avers that PPL’s purported failure to comply with the injunctions issued by Polish courts is itself a denial of justice which constitutes a breach of the FET standard.<sup>710</sup> Indeed, Claimant notes that investment treaty tribunals have held that a host State violates the FET standard when it fails to comply with decisions rendered by its own courts.<sup>711</sup>
513. Claimant submits that Respondent’s argument that Claimant “ha[s] not brought any proceedings [...] to find that the termination of the Lease Agreements [was] ineffective” is irrelevant for the determination of whether Respondent has breached the FET standard.<sup>712</sup>

#### *Respondent’s Position*

514. For its part, Respondent submits that the measures PPL undertook against Claimant were not coercive or arbitrary since the Lease Agreements were terminated in accordance with the law. According to Respondent, PPL merely protected its rights as the owner of the premises. Respondent notes that no judgment has established that PPL “broke the law” by terminating those agreements.<sup>713</sup>
515. Respondent explains that the reason for preventing deliveries to BH Travel’s stores on 19 and 21 March 2012 was that BH Travel had failed to comply with the “simple” formal requirements which apply to all businesses at Chopin Airport.<sup>714</sup> BH Travel, so Respondent submits, had not given airport authorities the appropriate notification, which is why airport authorities “had every right and duty to stop the deliver[ies]”.<sup>715</sup>

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<sup>706</sup> Statement of Defence, para. 326.

<sup>707</sup> Claimant’s Reply, para. 378, *referring to* Decision of the Regional Court in Warsaw, 24th Civil Division, dated 25 February 2015, case no XXIV C 454/13 – *PPL v. Maciej Dworniak*, p. 15, **Exhibit C-196**.

<sup>708</sup> Claimant’s Reply, para. 379.

<sup>709</sup> Statement of Claim, para. 181, *referring to* Witness Interview Reports of Airport Security Guards dated 10 December 2012, **Exhibit C-97**; Notarial Deed dated 21 March 2012, p. 13, **Exhibit C-98**; Letter from PPL to BH Travel dated 2 May 2012, **Exhibit C-102**; Letter from PPL to BH Travel dated 8 May 2012, **Exhibit C-103**; Decision of the District Court of Warsaw dated 1 August 2012, **Exhibit C-105**; Statement of Claim, paras. 116-117, 120.

<sup>710</sup> Statement of Claim, para. 182; *see also* Claimant’s Reply, para. 377; Claimant’s Post-Hearing Brief, para. 231.

<sup>711</sup> Statement of Claim, para. 182, *referring to* *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award dated 1 June 2009, ICSID Case No. ARB/05/15, (“*Siag v. Egypt Award*”), para. 455, **Exhibit CL-29**. *See also* Claimant’s Post-Hearing Brief, para. 230.

<sup>712</sup> Claimant’s Reply, para. 376.

<sup>713</sup> Statement of Defence, para. 322.

<sup>714</sup> Statement of Defence, paras. 165-166; Respondent’s Rejoinder, para. 269.

<sup>715</sup> Statement of Defence, paras. 165-166.

516. With respect to access for BH Travel’s employees, Respondent denies that PPL withdrew passes that authorised BH Travel’s employees from gaining access to restricted sections of Chopin Airport.<sup>716</sup> Respondent notes that, after the termination of the Lease Agreements, PPL notified BH Travel that passes would be maintained only for BH Travel employees who were involved in returning BH Travel’s leased premises to PPL. Respondent contends that “[a]ccess of BH Travel’s employees to an extent exceeding the process of returning premises would be inconsistent with the generally applicable laws”, including the Aviation Law of 3 July 2002 and the Regulation of the Council of Ministers of 19 June 2007 on the National Civil Security Programme.<sup>717</sup>
517. Similarly, Respondent submits that the security inspections were of a “routine nature” taken by PPL as manager of Chopin Airport.<sup>718</sup> Respondent also submits that the discontinuation of electricity supply was due to non-payment by BH Travel.<sup>719</sup>
518. Respondent argues that BH Travel could make use of legal protections equal to those found in other democratic States, and had the free choice to use them.<sup>720</sup> In that regard, Respondent notes that BH Travel sought to enforce its rights by initiating approximately 90 different legal proceedings against PPL.<sup>721</sup>
519. Respondent notes further that these legal proceedings were aimed primarily at maintaining possession of the premises at Chopin Airport and putting “economic pressure on PPL to forc[e] PPL to make concessions for BH Travel” by threatening the planned modernisation of Terminal 1. They did not seek a finding that the termination of the Lease Agreements was ineffective.<sup>722</sup>

##### 5) Whether Respondent denied due process to BH Travel with respect to the Governor of Mazovia’s decision

###### *Claimant’s Position*

520. Claimant submits that the FET standard includes the “notion of denial of justice”.<sup>723</sup> A “fair procedure” is a central requirement of the rule of law and a crucial element of the FET standard.<sup>724</sup> Claimant contends that a further breach of the FET standard occurred when PPL – after it had

<sup>716</sup> Statement of Defence, para. 168.

<sup>717</sup> Statement of Defence, paras. 170-173.

<sup>718</sup> Statement of Defence, paras. 328; Respondent’s Rejoinder, paras. 279-280.

<sup>719</sup> Respondent’s Rejoinder, paras. 281-282.

<sup>720</sup> Statement of Defence, para. 319.

<sup>721</sup> Statement of Defence, para. 320.

<sup>722</sup> Statement of Defence, para. 321.

<sup>723</sup> Statement of Claim, para. 185, referring to *Jan de Nul v. Egypt Award*, para. 188, **Exhibit CL-31**; referring also to *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, Excerpts of Award, ICSID Case No. ARB/07/14, para. 268, **Exhibit CL-32**; *Iberdrola Energía S.A. v. The Republic of Guatemala*, Award dated 17 August 2012, ICSID Case No. ARB/09/5, para. 444, **Exhibit CL-34**; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, Award 16 May 2012, ICSID Case Nos. ARB/08/1 and ARB/09/20 (“*Marion Unglaube v. Costa Rica Award*”), para. 272, **Exhibit CL-35**.

<sup>724</sup> Statement of Claim, para. 184, referring to R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., 2012), p. 154, **Exhibit CL-4**; referring also to *Waste Management v. Mexico (“Number 2”)* Award, para. 98, **Exhibit CL-18**, *Metalclad Corporation v. The United Mexican States*, Award dated 30 August 2000, ICSID Case No. ARB(AF)/97/1 (“*Metalclad v. Mexico Award*”), para. 91, **Exhibit CL-30**.

failed “to force BH Travel out of Chopin Airport through the unlawful termination of the Lease Agreements [...] [and] its sustained campaign of harassment and coercive measures”<sup>725</sup> – procured the assistance of the Governor of Mazovia in evicting BH Travel, without affording BH Travel due process or paying it compensation.<sup>726</sup>

521. Claimant recalls that on 14 May 2012, PPL submitted an *ex parte* motion to the Governor of Mazovia requesting that permission be granted for the execution of Terminal 1’s modernisation pursuant to the Airport Act.<sup>727</sup> The Governor of Mazovia granted that request on 10 July 2012, and on 26 July 2012 issued another decision confirming the “immediate enforceability” of his prior decision.<sup>728</sup> On 7 August 2012, the Governor of Mazovia ordered BH Travel to vacate its premises in Chopin Airport,<sup>729</sup> and on 14 August 2012, BH Travel was evicted from the Chopin Airport.<sup>730</sup>
522. Claimant contends that BH Travel was denied the opportunity to contest the Governor of Mazovia’s administrative decision.<sup>731</sup> BH Travel was not given any notice of PPL’s request to the Governor of Mazovia and was not afforded an opportunity to comment on that request before the decision of 10 July 2012.<sup>732</sup> Furthermore, Claimant avers that it was not given the right to challenge the decision within the appeal procedure provided for under the Airport Act.<sup>733</sup> Claimant notes that the Minister of Transport, the Administrative Court, and the Supreme Administrative Court all held that BH Travel had no standing to challenge the Governor of Mazovia’s decision, thus depriving BH Travel of any remedy.<sup>734</sup>
523. It is Claimant’s view that the eviction on 14 August 2012 breached BH Travel’s “right to remain in possession of its stores [...] and to continue to operate [them]” – rights which were protected at the time since on their basis Polish courts had granted BH Travel injunctive relief against PPL.<sup>735</sup>

#### *Respondent’s Position*

524. Respondent argues that the Governor of Mazovia did not deprive BH Travel of any rights by issuing the decision of 10 July 2012, which only the Governor was authorised and obliged to issue. On the contrary, Respondent submits, BH Travel’s refusal to return the premises to PPL was a breach of PPL’s rights.<sup>736</sup>

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<sup>725</sup> Claimant’s Reply, para. 390.

<sup>726</sup> Statement of Claim, para. 184.

<sup>727</sup> Statement of Claim, para. 186; Claimant’s Post-Hearing Brief, para. 234.

<sup>728</sup> Statement of Claim, para. 186, *referring to* Decision of the Governor of Mazovia No. 14/2012 dated 10 July 2012, **Exhibit C-106**; Decision of the Governor of Mazovia dated 26 July 2012, **Exhibit C-108**.

<sup>729</sup> Statement of Claim, para. 186, *referring to* Decision of the Governor of Mazovia, 7 August 2012, **Exhibit C- 110**.

<sup>730</sup> Claimant’s Reply, para. 390; Claimant’s Post-Hearing Brief, para. 236.

<sup>731</sup> Statement of Claim, para. 186, *referring to* Statement of Claim, paras. 122-134.

<sup>732</sup> Statement of Claim, paras. 186-187.

<sup>733</sup> Statement of Claim, para. 187.

<sup>734</sup> Statement of Claim, para. 187, *referring to* Decision of the Supreme Administrative Court dated 28 November 2013, **Exhibit C-112**; Claimant’s Reply, para. 394.

<sup>735</sup> Claimant’s Reply, para. 393.

<sup>736</sup> Statement of Defence, paras. 332-333.

525. Respondent adds that under Polish administrative law BH Travel was not a party to the administrative proceedings before the Governor of Mazovia because the Lease Agreements were no longer in force. As such, BH Travel could not challenge the 10 July 2012 decision.<sup>737</sup> Because BH Travel did not have the right to participate, the Governor of Mazovia, the Minister of Transport, the Voivodship Administrative Court, and the Supreme Administrative Court did not breach Claimant's rights.<sup>738</sup>
526. Respondent considers that, upon PPL's termination of the Lease Agreements, BH Travel's continued possession of the premises was groundless because it no longer had title to the formerly leased premises. Under Polish law, a lease is merely a condition of dependent possession and a right of contractual, not factual, nature. PPL was thus entitled to demand return of the premises.<sup>739</sup>
527. In any event, Respondent avers that Claimant and BH Travel in fact were able to challenge the Governor's decision and to protect their rights, if any. Fair and lawful proceedings were held through a two-instance judicial-administrative procedure. The competent courts concluded, however, that Claimant was not a party and therefore was not entitled to a remedy.<sup>740</sup>
528. Respondent observes, moreover, that Claimant did not initiate any proceedings challenging the legality of the judicial-administrative proceedings leading to the Governor's decision. Respondent suggests that Claimant did not consider that those proceedings violated its rights until the time came for Claimant to invoke alleged breaches under the Treaty.<sup>741</sup>

## **6) Tribunal's Analysis**

529. The Tribunal has to assess the facts of the case in light of Article 3(2) of the Treaty, which provides:

Investments and return of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

530. As stated in Article 31 of the Vienna Convention, the terms 'fair' and 'equitable treatment' provided in the Treaty require interpretation in accordance with their "ordinary meaning". Respondent's statement that these terms have never had a uniform definition is correct in the sense that these terms in their ordinary meaning do not refer to an established body of legal rules which have to be respected. Respondent is equally correct when it remarks that tribunals have applied the standard of "fair and equitable treatment" to the specific facts of each case.
531. However, Respondent is not correct when it argues that 'fair and equitable treatment' boils down to treating foreign investors the same way as domestic and other foreign investors which also operated businesses at Chopin Airport. Equal treatment with domestic and other foreign entities is another specific standard, which is laid down in Article 4(1) of the Treaty: "[e]ach Contracting Party shall accord to investments of Investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third state". It is not because the host State would treat all

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<sup>737</sup> Statement of Defence, para. 332.

<sup>738</sup> Statement of Defence, para. 330.

<sup>739</sup> Statement of Defence, para. 333.

<sup>740</sup> Statement of Defence, para. 334.

<sup>741</sup> Statement of Defence, para. 335.

investors – domestic as well as foreign – in the same way that such treatment could not be unfair or inequitable.

532. Besides, Respondent failed to submit any evidence about the actions undertaken against the other shop-operators at Terminal 1, or about the conditions in which they allegedly resumed operations. Consequently, Respondent did not sustain its argument that Claimant’s competitors had been treated the same way as Claimant was.
533. Respondent puts much weight on the argument that it treated BH Travel in a *predictable* manner. Respondent did not substantiate that BH Travel’s treatment (characterised by Claimant as unfair and inequitable) was predictable when BH Travel entered into the Lease Agreements. More important, however, is the fact that predictability is only one of the elements which contribute to fair and equitable treatment.
534. The Tribunal agrees with Claimant that many values other than predictability have been recognised by investment treaty tribunals to be covered by the terms ‘fair and equitable treatment’. Denial of justice, deficient review of administrative actions and the frustration of legitimate expectations are, for instance, other elements which – as so many tribunals have recognised – also constitute breaches of the ‘fair and equitable treatment’ obligation.<sup>742</sup>
535. As was stated in *Saluka*, ‘fair and equitable’ means “just”, “even-handed”, “unbiased”, “legitimate”. Its assessment requires “a weighing of the [investor’s] legitimate and reasonable expectations on the one hand and the [host State’s] legitimate regulatory interests on the other”. When unjust or arbitrary treatment rises to a level that is unacceptable from the international perspective the ‘fair and equitable treatment’ obligation is breached.<sup>743</sup>
536. The Tribunal observes that Article 3(2) of the Treaty requires fair and equal treatment “at all times”. Claimant, referring to *El Paso*, is thus correct that a succession of acts – whether or not individually significant – can build up to unfair and inequitable treatment until Article 3(2) is breached.
537. Starting with the general context of the dispute, it was a fact that the duty-free shops in Terminal 1 in all events could not continue operations after July 2012 because the modernisation of Terminal 1 had to be finished at the end of 2014.
538. Moreover, the Polish Parliament had enacted a specific Airport Act of 12 February 2009 to address the problems arising from such modernisation. Article 27 of the Airport Act provides that the government permit to modernise provides grounds to terminate with immediate effect the leases of duty-free shops affected by such works. But the Airport Act also provides that “loss suffered as a result of termination of agreements [...] shall be subject to compensation”.<sup>744</sup>
539. In the spring of 2009, plans for the modernisation of Terminal 1 were launched. By the summer of 2010, PPL started to discuss solutions for the duty-free shops which would be affected by the works. No specific proposals, however, could be made, because the exact timing of the works

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<sup>742</sup> See e.g. Overview of Awards in C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration, Substantive Principles* (Oxford University Press, 2007), paras. 7-76 – 7.140.

<sup>743</sup> *Saluka v. The Czech Republic* Partial Award, paras. 297, 306, **Exhibit CL-19**.

<sup>744</sup> Act of 12 February 2009 on Specific Rules Governing the Preparation and Implementation of Investments Concerning Public Airports, **Exhibit C-56**.

was not yet known.

540. By the fall of 2011, it became obvious that modernisation of Terminal 1 would soon start. PPL suggested to BH Travel at a meeting on 8 December 2011 that BH Travel should agree to terminate the Lease Agreements for the Terminal 1 shops without compensation.
541. Although Respondent alleges the contrary, it provided no sustaining evidence to contradict Claimant's witnesses, who testified that BH Travel did not agree with this proposal. In fact, an agreement to give up the shops without any compensation would have been inconsistent with the substantial investments BH Travel had made for the installation and operation of the shops. The facts confirm this lack of agreement.
542. A proposal of 4 January 2012 from BH Travel's legal counsel to discuss the matter was rejected by PPL on 13 January 2012.
543. Thereafter, the relations between PPL and BH Travel deteriorated. PPL inquired about BH Travel's maintenance of its website and about access to its IT system – enquiries PPL had never made before. BH Travel started court actions to delay the start of the works until the dispute about BH Travel's stores was settled. Nevertheless, BH Travel continued to invite PPL to resume discussions by letters dated 7 and 16 February 2012, but to no avail.
544. In the meantime, on 10 February 2012, PPL unsuccessfully tried once more to terminate the Lease Agreements by asking BH Travel to sign a revised set of DFZ Rules, which would have allowed termination because of modernisation works. BH Travel refused to sign.
545. On 16 February 2012, PPL terminated all BH Travel's Lease Agreements with immediate effect and demanded that the leased premises be returned within 30 days. The two grounds given for all these terminations, based upon Articles 13(1)(c) and (d) of the General Lease Conditions, were: (i) a failure to adjust the amounts of the bank guarantees to the increased rent for the Lease Agreements; and (ii) failure to submit a certified copy of the relevant insurance policies in due time. The Tribunal observes that PPL had previously been somewhat flexible with these requirements, but that, as ■■■ Mr. [MM] stated at the hearing, PPL applied these requirements strictly once there was no longer a good relationship between PPL and BH Travel.<sup>745</sup>
546. The Tribunal further notes that these two alleged failures, although listed as grounds for termination in the General Lease Conditions, were not at all crucial for the operation of the shops and were not essential elements of the long term Lease Agreements between BH Travel and PPL.
547. As already mentioned above (see paras. 170-173 above), the adjustment in its bank guarantee that BH Travel failed to make only concerned an increase of ■■■% during a period of ■■■ days. Furthermore, these miniscule adjustments were due to be made on 15 February 2012. PPL did not wait one full day before terminating the Agreements for BH Travel not having made these adjustments *motu proprio*; nor did it warn and invite BH Travel to immediately adjust the amounts. Claimant also raises the question of whether the right to terminate under Article 13(1)(c) should even apply to a failure to "adjust" a bank guarantee, as the wording of Article 13(1)(c) refers to a right to terminate for "failure to *submit* (non-payment), *complete*, or *renew*

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<sup>745</sup> Hearing Transcript (13 October 2015), 94:10-24.

the bank guarantee [...]” but does not use the word “adjust”.<sup>746</sup>

548. With respect to the second ground of termination (see paras. 174-176 above), BH Travel submitted the certified copy of the insurance policies on 16 February 2012, which had been renewed on 14 February 2012 – according to Respondent, they ought to have been submitted on 15 February 2012.<sup>747</sup> The Tribunal doubts whether the copies had indeed to be submitted on 15 February. Article 11(4) of the General Lease Conditions stated that “[i]nsurance policies shall be valid for a period of at least 12 consecutive months from the date of issue” and that “[i]n each case, at least 14 days before the end of another 12-month period, the Lessee shall submit to the Lessor the certified true copy of the subsequent insurance contract, valid for a further 12 consecutive months period”. The existing policies expired on 1 March 2012. As the year 2012 was a leap year with an extra 29 February, the copies had to be submitted on 16 February, as they were.
549. The Tribunal has now to decide whether PPL’s actions constitute an abuse of PPL’s right to terminate, and – as PPL’s actions and omissions are attributable to Respondent – a breach of the FET obligation under Article 3(2) of the Treaty. The Tribunal has to carry out this assessment under international law, as the FET obligation is a treaty obligation.
550. Assuming that PPL would have had the contractual right to terminate the Lease Agreements with immediate effect (which already may be excluded for the alleged failure to submit certified copies of the insurance policies), under international law the exercise of their right should not go “beyond tolerable norms”.<sup>748</sup>
551. As stated in *Saluka*, the investor’s legitimate and reasonable expectations should be weighed against the host State’s legitimate regulatory interests.<sup>749</sup>
552. On the one hand, the Tribunal is aware that BH Travel and PPL were already in the fourth year of an intense business relationship, which was intended to last seven to ten years and which required important financial and operational commitments from BH Travel. Considering this business relationship, the Tribunal would have considered it more than appropriate that PPL would have informed BH Travel about easily remedied failures and invited it to do whatever was required, especially as the alleged failures were of minor importance and would have had no effect for two weeks.
553. On the other hand, even if PPL had the right to terminate, the Tribunal fails to see how in a normal contractual relationship the failure to carry out on a specific day a minor adjustment of guaranteed amounts to take effect two weeks later would lead to termination without advance warning or possibility to remedy. The same goes for the non-submission of certified copies of insurance policies which would enter into operation only two weeks later – if indeed not submitted in time – *quod non*.
554. PPL used the contractual right to terminate for other reasons than those for which this right was

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<sup>746</sup> General Lease Conditions, Appendix 5, Article 13.1, **Exhibit C-32** (emphasis added).

<sup>747</sup> Statement of Claim, para. 99; Claimant’s Reply, para. 142; Respondent’s Rejoinder, paras. 134-137.

<sup>748</sup> See *Himpurna California Energy Ltd. v. Perusahaan Listrik Negara*, Award dated 4 May 1999, UNCITRAL (“*Himpurna v. Perusahaan Listrik Negara* Award”), cited in C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration, Substantive Principles* (Oxford University Press, 2007) p. 330.

<sup>749</sup> *Saluka v. The Czech Republic* Partial Award, paras. 297, 306, **Exhibit CL-19**.

created. Indeed, it is obvious, and confirmed by PPL's previous attempts, that PPL intended to terminate the Lease Agreements without compensation because of the impending start of the modernisation works – as was also admitted by the Minister of Transport. To that end, it invoked in bad faith alleged contractual grounds to terminate the Lease Agreements with immediate effect and without compensation. The Airport Act also provided for immediate termination, but with compensation. PPL abused alleged contractual grounds to terminate the Lease Agreements without compensation in order to avoid paying the compensation for which the Airport Act had provided.

555. The Tribunal applies standards of international law to conclude that PPL abused its rights. However, it is comforted by the fact that courts in Warsaw, including the Court of Appeal, have decided in two separate injunction proceedings that PPL's terminations were *prima facie* an abuse of right under Polish law. The Tribunal is aware that injunction proceedings under Polish law are only *prima facie* decisions and do not involve a final determination of the merits. Nevertheless, the Polish decisions indicate that, also under Polish law, the terminations were – *prima facie* – an abuse of right.
556. Respondent has objected that BH Travel did not obtain a court judgment specifically declaring that the terminations were illegal and thus ineffective. The Tribunal, however, does not consider such a declaration from a Polish court decisive – or even relevant – for its assessment whether Claimant, through PPL, had abused rights and thus breached the FET obligation as a matter of international law.
557. PPL could have remedied the effects of its illegal terminations by entering into negotiations and reaching a settlement with BH Travel. However, it refused to do so, because, as a precautionary measure, BH Travel had commenced court proceedings to try to safeguard under Polish law and in the Polish courts what PPL had denied. The Tribunal notes again that PPL refused to engage in good faith settlement discussions.
558. PPL further aggravated the terminations without compensation by refusing to comply with the injunction orders given by the Court of Appeal to reinstall BH Travel in its Lease Agreements. On the contrary, it blocked deliveries to the shops on a formalistic pretext, which some communication with BH Travel would easily have addressed. Likewise, PPL blocked BH Travel employees from access to its shops and further implemented a policy to expel BH Travel from Chopin Airport.
559. For the Tribunal, the action of the Customs Chamber to seal all of the BH Travel stores, the intervention of the Governor of Mazovia to order BH Travel to vacate the premises, and the later unsuccessful appeal to the Polish courts against the Governor's orders, are all consequences of PPL's abusive termination of the Lease Agreements. Indeed, once PPL claimed that BH Travel's Lease Agreements were effectively terminated with immediate effect, the Customs Chamber and the Governor merely implemented that result. Similarly, for the courts, BH Travel, having had its leases terminated, was no longer a party entitled to act against the eviction.
560. For the foregoing reasons, the Tribunal finds that PPL's actions in terminating the Lease Agreements – which are attributable to Respondent – constitute a breach of the FET obligation under Article 3(2) of the Treaty.

### C. Expropriation

561. Article 5 of the Treaty provides as follows:

- (1) Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation. Such compensation [...] shall be made without unreasonable delay, be effectively realizable and freely transferable.
- (2) The Investor affected shall have a right under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. The Contracting Party making the expropriation shall make every endeavor to ensure that such review is carried out promptly.
- (3) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure the provisions of paragraph 1 of this Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares.<sup>750</sup>

#### 1) The subject of Claimant’s expropriation claim

##### *Claimant’s Position*

562. Claimant submits that PPL’s unlawful actions substantially deprived Claimant of the economic value, use, and enjoyment of its investment in BH Travel in violation of Article 5 of the Treaty. Claimant bases its expropriation claim on the unlawful termination of the Lease Agreements, which it considers to be “valuable concessions”.<sup>751</sup> For Claimant, they were indeed “more than a simple landlord/tenant relationship”. They are “similar to other concessions for the development and operation of public purpose infrastructure projects” and were acquired pursuant to single tender procedure”.<sup>752</sup>

563. In response to Respondent’s comments that Claimant still owns its shares in Baltona, Claimant clarifies that its expropriation claim relates to Claimant’s indirect shareholding in BH Travel, and not to its shareholding in Baltona.<sup>753</sup>

##### *Respondent’s Position*

564. Respondent first reiterates its view that “no investment in Poland can be attributed to the Claimant” for the purposes of the Treaty.<sup>754</sup> Respondent also submits that Claimant’s claims of expropriation cannot be based on purported expropriation of its stock in Baltona, which is still the property of the Flemingo Group.<sup>755</sup>

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<sup>750</sup> India-Poland Treaty, Article 5, **Exhibit CL-1**.

<sup>751</sup> Statement of Claim, para. 197.

<sup>752</sup> Claimant’s Reply, para. 399, *referring to* Statement of Defence, paras. 36-49.

<sup>753</sup> Claimant’s Reply, para. 400 and Claimant’s Post-Hearing Brief, para. 273.

<sup>754</sup> Statement of Defence, para. 338.

<sup>755</sup> Statement of Defence, para. 340.

565. Respondent also argues that Article 1(1)(e) of the Treaty, which includes business concessions conferred by law or under contract as protected investments, is inapplicable here because no entity from the Flemingo Group ever had concessions of the type covered by the Treaty.<sup>756</sup>
566. Respondent explains that typically business concessions that “are granted by the State, apply to activities in an area which is key to its security, and constitute a manifestation of administrative authority”.<sup>757</sup> Respondent adds that concessions apply to activities which are “extremely important to the State” and the entity that is granted a concession conducts business “as a substitute for the State”.<sup>758</sup> Such concessions, Respondent adds, are usually issued through administrative decisions.<sup>759</sup>
567. Respondent states that BH Travel did not perform any activities which are of strategic importance to Poland.<sup>760</sup> Respondent also notes that the “procedure for awarding concession is usually formalised and conducted in an administrative procedure which ends with issuance of an administrative decision by a competent authority body”.<sup>761</sup>
568. In this context, Respondent argues that Poland did not issue any concessions to BH Travel and that the document issued by PPL to BH Travel cannot be a concession under the Treaty because it was only a permit to operate in the DFZ issued under PPL’s internal rules.<sup>762</sup> Respondent also clarifies that decisions issued by the customs office (such as the permit to operate within the DFZ issued to Claimant) cannot be considered to be concessions either. Those customs permits “w[ere] secondary and depended on BH Travel winning the tender and agreeing [to] the conditions of lease and negotiating the wording of the Lease Agreements with PPL”.<sup>763</sup>
569. In Respondent’s view the term ‘concession’ in the Treaty should have the same meaning as under the Polish Business Activity Freedom Act because “the terms used in the BIT should in fact be supported by the legislation of its parties, and should be construed in accordance with that legislation”. The Treaty was concluded at a time when only the Business Activity Freedom Act was in force.<sup>764</sup> Under the Business Activity Freedom Act of 2 July 2004, a concession is “an individual administrative act (decision) repealing a prohibition to freely take up and pursue business activity of a given kind and thus allowing the recipient of that act (concessionaire) to legally perform such business, as a form of rationing of business activity”.<sup>765</sup> Respondent further

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<sup>756</sup> Statement of Defence, paras. 256, 341.

<sup>757</sup> Statement of Defence, para. 258.

<sup>758</sup> Statement of Defence, para. 342.

<sup>759</sup> Statement of Defence, para. 258.

<sup>760</sup> Statement of Defence, para. 342.

<sup>761</sup> Respondent’s Rejoinder, para. 26.

<sup>762</sup> Statement of Defence, para. 258.

<sup>763</sup> Statement of Defence, para. 259.

<sup>764</sup> Respondent’s Rejoinder, paras. 24-25.

<sup>765</sup> Rejoinder, para. 15, referring to M. Grabiec, *Commentary on Article 1 of the Act on Concessions for Works or Services*, Lexis Nexis 2014, **Exhibit RL-27**. Respondent submits that under the Act on Concessions for Construction Works or Services, a concession is “a kind of agreement concluded by and between the grantor of the concession and the concessionaire”. Respondent’s Rejoinder, para. 22, referring to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for public procurement of construction works contracts, supply contracts and service contracts, **Exhibit RL-29** and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession. Respondent contends that the use of the term “concession” in the Act on Concessions for Construction Works or Services is “a transposition from EU law into Polish law”.

submits that a ‘concession’ for services and a lease are under the Polish Civil Code “completely separate and different legal institutions”.<sup>766</sup>

570. Respondent concludes that the Lease Agreements are thus not ‘concessions’ but mere leases. Respondent concedes that, according to international jurisprudence, a lease agreement can be subject to expropriation. However, Respondent argues that the Tribunal must establish: (i) “that the contract was breached”; and (ii) “that the breach is attributable to the State”.<sup>767</sup>

## 2) Whether Respondent indirectly expropriated Claimant’s investment

### *Claimant’s Position*

571. Claimant contends that Respondent violated Article 5 of the Treaty through a series of measures that were incrementally implemented beginning with the termination of the Lease Agreements in February 2012 and culminating with BH Travel’s eviction from Chopin Airport in August 2012.<sup>768</sup> In Claimant’s view, the intended effect of those measures was to shut down BH Travel’s operations in Chopin Airport and to substantially deprive Claimant of the use and economic value of its investment in BH Travel.<sup>769</sup>
572. Claimant observes that, under international law, expropriation may occur directly or indirectly.<sup>770</sup> Article 5 of the Treaty covers both direct and indirect expropriation by providing investor protection against nationalisation and expropriation (direct expropriation) as well as against measures having effects equivalent to nationalisation or expropriation (indirect expropriation).<sup>771</sup>
573. Claimant explains that indirect expropriation need not occur through one single event and instead may arise through a series of measures over time – so-called “creeping expropriation”.<sup>772</sup> Moreover, the *intent* to expropriate is not a necessary element; instead the *effect* of the measure

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<sup>766</sup> Respondent’s Rejoinder, para. 23.

<sup>767</sup> Respondent’s Post-Hearing Brief, paras. 79-80, referring to Allahyar Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U. S. Claims Tribunal*, pp. 42-44.

<sup>768</sup> Statement of Claim, para. 190.

<sup>769</sup> Statement of Claim, para. 190; Claimant’s Reply, para. 401, referring to *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, Award dated 21 November 2007, ICSID Case No. ARB(AF)/04/05 (“*Archer Daniels v. Mexico Award*”), para. 246, **Exhibit CL-50**. See also Claimant’s Post-Hearing Brief, para. 274.

<sup>770</sup> Statement of Claim, para. 191, referring to *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, Award 7 October 2003, ICSID Case No. ARB/01/6 (“*AIG v. Kazakhstan Award*”), para. 10.3.1, **Exhibit CL-36**; *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award dated 13 September 2001, UNCITRAL (“*CME v. Czech Republic Partial Award*”), para. 604, **Exhibit CL- 37**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Award dated 20 August 2007, ICSID Case No. ARB/97/3 (“*Compañía de Aguas del Aconquija v. Argentina Award*”), para. 7.5.14, **Exhibit CL-38**.

<sup>771</sup> Statement of Claim, para. 191.

<sup>772</sup> Statement of Claim, para. 192, referring to *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 September 2003, para. 20.22, **Exhibit CL-39**; *Tradex Hellas S.A. (Greece) v. Republic of Albania*, Award dated 29 April 1999, ICSID Arbitration ARB/94/2, para. 191, **Exhibit CL-40**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award dated 24 July 2008, ICSID Case No. ARB/05/22, para. 455, **Exhibit CL-41**; *Siemens v. Argentina* Award, para. 263, **Exhibit CL-42**. See also Claimant’s Post-Hearing Brief, para. 267.

on the investor is what matters – as many tribunals have confirmed.<sup>773</sup>

574. Claimant further submits that a State indirectly expropriates an investment when it “substantially deprives” an investor of the benefit of its investment or rights thereto.<sup>774</sup> According to Claimant, in determining whether substantial deprivation has occurred, tribunals have focused on the loss and enjoyment of the investment,<sup>775</sup> while other tribunals have analysed the loss of an investment’s economic value.<sup>776</sup>
575. Claimant submits that the following measures implemented by Respondent “incrementally drove BH Travel out of Chopin Airport and ultimately destroyed the Claimant’s use and the economic value of its investments” in BH Travel:<sup>777</sup>
1. On 16 February 2012, PPL arbitrarily and unlawfully terminated the Lease Agreements, which termination deprived BH Travel and Claimant of the “valuable” concession for the duty-free shops.
  2. On 17 February 2012, the Customs Chamber arbitrarily imposed customs closures on all of BH Travel’s duty-free shops, which prevented BH Travel from operating the stores.
  3. PPL coerced and harassed BH Travel to leave its remaining two stores at Chopin Airport by, *inter alia*, preventing the delivery of goods to the stores, scheduling arbitrary safety inspections, and cutting off electricity supply.
  4. PPL requested the Governor of Mazovia to order BH Travel to vacate its premises in Chopin Airport within the framework of the Airport Act, on the basis of the planned modernization of Terminal 1.
  5. On 14 August 2012, the Governor of Mazovia evicted BH Travel from its remaining premises at Chopin Airport without compensation and without affording BH Travel an effective remedy against the administrative decision.<sup>778</sup>
576. Claimant contends that PPL’s actions, taken cumulatively, brought BH Travel’s operations at Chopin Airport, which were its only operations at that time, to a complete standstill.<sup>779</sup> In doing

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<sup>773</sup> Statement of Claim, para. 193, referring to *Compañía de Aguas del Aconquija v. Argentina* Award, para. 7.5.20, **Exhibit CL-38**, *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability dated 14 December 2012, ICSID Case No. ARB/08/5, para. 401, **Exhibit CL-43**. See also Claimant’s Post-Hearing Brief, para. 268, referring to *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability dated 28 October 1989, UNCITRAL, p. 209, **Exhibit CL- 138**.

<sup>774</sup> Statement of Claim, para. 194, referring to *Telenor Mobile Communications A.S. v. The Republic of Hungary*, Award dated 13 September 2006, ICSID Case No. ARB/04/15, para. 65, **Exhibit CL-44**; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award dated 12 April 2002, ICSID Arbitration ARB/99/6 (“**Middle East Cement v. Egypt Award**”), para. 107, **Exhibit CL-45**; *CME v. Czech Republic* Partial Award, para. 608, **Exhibit CL-37**; *Saipem v. Bangladesh* Award, para. 133, **Exhibit CL-21**; *AIG v. Kazakhstan* Award, para. 10.3.1, **Exhibit CL-36**; *BG Group Plc. v. The Republic of Argentina*, Final Award dated 24 December 2007, UNCITRAL, para. 260, **Exhibit CL-46**; *Compañía Del Desarrollo De Santa Elena, S.A. v. The Republic of Costa Rica*, Final Award dated 17 February 2000, ICSID Case No. ARB/96/1 (“**Santa Elena v. Costa Rica Final Award**”), para. 77, **Exhibit CL- 47**.

<sup>775</sup> Statement of Claim, para. 195, referring to *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award dated 22 May 2007, ICSID Case No. ARB/01/3, para. 245, **Exhibit CL-48**; *Pope & Talbot v. Canada*, Interim Award dated 26 June 2000, para. 100, **Exhibit CL-49**.

<sup>776</sup> Statement of Claim, para. 196, referring to *Archer Daniels v. Mexico* Award, para. 246, **Exhibit CL-50**; *Compañía de Aguas del Aconquija v. Argentina* Award, para. 7.5.26, **Exhibit CL-38**.

<sup>777</sup> Statement of Claim, para. 197.

<sup>778</sup> Statement of Claim, para. 197.

<sup>779</sup> Statement of Claim, para. 198, referring to First PwC Report, para. 31, **Exhibit CER-1**.

so, PPL indirectly expropriated Claimant's investment in BH Travel by depriving Claimant "of the use and economic value of its investment in BH Travel".<sup>780</sup>

577. Further, Claimant submits that PPL's expropriatory acts were intentional and had the express purpose of enabling PPL to proceed with the planned modernisation project in accordance with the schedule approved by the EU.<sup>781</sup> Claimant submits that many arbitral tribunals have found that an expropriation occurs where a State's allegations of contractual breach are "a pretext designed to conceal a purely expropriatory measure".<sup>782</sup> Referring to *Gemplus v. Mexico* as support, Claimant argues that "Respondent decided to pull the plug on BH Travel's operations at Chopin Airport regardless of whether or not the termination was legally justified".<sup>783</sup>
578. Claimant disagrees with Respondent's argument that no expropriation took place because "the Lease Agreements were concluded by BH Travel long before the acquisition by the Flemingo Group",<sup>784</sup> pointing out that arbitral tribunals have held that it is not necessary for an investor to lay down "the cornerstone for an investment" to be protected by a bilateral investment treaty.<sup>785</sup>
579. Claimant further takes issue with Respondent's argument that Claimant was aware of the planned modernisation of Terminal 1 and should have known that its activities would be suspended accordingly,<sup>786</sup> submitting that modernisation is often carried out in stages so that a terminal did not have to be shut down completely.<sup>787</sup>
580. Claimant also states that BH Travel and Baltona were not invited to participate in the tender for the new premises in Terminal 1.<sup>788</sup> Consequently, Claimant submits that Respondent's argument that "nothing stood in the way for BH Travel to return to the newly established premises [...] following the modernization of Terminal 1"<sup>789</sup> is "unavailing".<sup>790</sup>

#### *Respondent's Position*

581. Respondent avers that no direct or indirect expropriation occurred. According to Respondent, the termination of the Lease Agreements did not reduce the economic value of Claimant's purported investment in Baltona's stock, nor did it reduce the economic value of BH Travel.<sup>791</sup> Moreover, BH Travel concluded the Lease Agreements long before its acquisition by the Flemingo Group. The Flemingo Group, Respondent adds, was also aware of the planned modernisation, and

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<sup>780</sup> Statement of Claim, para. 198.

<sup>781</sup> Statement of Claim, para. 199, referring to Decision of the Supreme Administrative Court dated 28 November 2013, p. 3, **Exhibit C-112**.

<sup>782</sup> Claimant's Reply, para. 408, referring to *Malicorp v. Egypt* Award, para. 142, **Exhibit CL-109**.

<sup>783</sup> Claimant's Reply, paras. 408-409, referring to *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, Award dated 16 June 2010, ICSID Case No. ARB(AF)/04/3 ("**Gemplus v. Mexico Award**"), **Exhibit CL-110**.

<sup>784</sup> Statement of Defence, para. 343.

<sup>785</sup> Claimant's Reply, para. 403, referring to Claimant's Reply, paras. 202-204.

<sup>786</sup> Statement of Defence, para. 343.

<sup>787</sup> Claimant's Reply, para. 404, referring to Second Ahuja Witness Statement, para. 8, **Exhibit CWS-4**.

<sup>788</sup> Claimant's Reply, para. 407.

<sup>789</sup> Statement of Defence, para. 344.

<sup>790</sup> Claimant's Reply, para. 402.

<sup>791</sup> Statement of Defence, para. 343.

accordingly knew that activities in Chopin Airport would have to be suspended.<sup>792</sup>

582. Respondent further observes that – to the extent that Claimant considers the shareholding of the Flemingo Group in Baltona to be the investment – “these shares have not been expropriated at any time, because the Flemingo Group has not lost ownership or control of these shares to this day”.<sup>793</sup> If, however, the Lease Agreements are considered to be the investment, “even the unlawful termination of agreements will not constitute expropriation in the meaning of the BIT if this was performed by an entity not acting in the sphere of imperium of the State”.<sup>794</sup> Respondent submits that the termination of the Lease Agreements was lawful and that, in any event, the termination of the Lease Agreements cannot be attributed to Respondent. Respondent explains that the termination was purely a business decision, and there was no interference from the State. In other words, it did not result from orders, directives, recommendations, or instructions of the Government of Poland, and therefore the termination cannot result in a breach of the Treaty.<sup>795</sup>

### 3) Whether Respondent’s alleged indirect expropriation of Claimant’s investment was unlawful

#### *Claimant’s Position*

583. Claimant argues that Respondent’s indirect expropriation of Claimant’s investment was unlawful because it breached Article 5(1) of the Treaty. Article 5(1), which incorporates customary international law requirements, provides that an expropriation is legitimate only when it is made: (i) for a “public purpose”; (ii) “in accordance with the law” (*i.e.*, in accordance with due process); (iii) on a “non-discriminatory basis”; and (iv) against “fair and equitable compensation” which “shall be made without unreasonable delay”. Claimant argues that Respondent must satisfy all four elements for its expropriation to be considered lawful.<sup>796</sup> According to Claimant, Respondent accepts these standards for lawful expropriation under the Treaty.<sup>797</sup>

584. Claimant contends that Respondent failed to pay fair, equitable, and prompt compensation – on the contrary, Respondent did not pay any compensation at all. Claimant submits that it is accordingly unnecessary for the Tribunal to even consider the other requirements of Article 5(1).<sup>798</sup>

585. In any event, Claimant adds that Respondent’s expropriation was not done in “accordance with law”, which, Claimant submits, means “an obligation to accord due process in accordance with international law, as opposed to a requirement that Poland comply with its own domestic law”.<sup>799</sup> Claimant observes that, if the Contracting Parties to the Treaty intended the term “in accordance

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<sup>792</sup> Statement of Defence, paras. 343, 345.

<sup>793</sup> Respondent’s Rejoinder, para. 35.

<sup>794</sup> Respondent’s Rejoinder, paras. 40-41, referring to C. Schreuer, *The concept of Expropriation under the ETC and other Investment Protection Treaties* (2005), **Exhibit RL-32**.

<sup>795</sup> Respondent’s Post-Hearing Brief, paras. 82-84, 86.

<sup>796</sup> Statement of Claim, para. 200, referring to India-Poland Treaty, Article 5(1), **Exhibit CL-1**; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., 2012), p. 99, **Exhibit CL-4**.

<sup>797</sup> Claimant’s Post-Hearing Brief, para. 270.

<sup>798</sup> Statement of Claim, para. 202, referring to *Compañía de Aguas del Aconquija v. Argentina* Award, para. 7.5.21, **Exhibit CL-38**.

<sup>799</sup> Statement of Claim, para. 203, referring to R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), p. 106, **Exhibit CL-5**.

with law” to mean observance of the law of the host State, then they would have drafted the provision to reflect this.<sup>800</sup>

586. Further, Claimant contends that due process requires compliance with (in addition to the law of the host State) an international minimum standard of due process. The due process requirement can be breached in a number of ways, including: (i) failure to provide notice or a fair hearing; (ii) non-compliance with local law; and (iii) failure to provide a “means for legal redress”.<sup>801</sup>
587. Moreover, Claimant notes that Article 5(2) of the Treaty specifies the contours of the due process requirement for lawful expropriations and explicitly requires Respondent to accord the investor the right to “challenge an expropriatory measure before a ‘judicial or other independent authority’”.<sup>802</sup> Article 5(2) states:

The Investor affected shall have a right under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. The Contracting Party making the expropriation shall make every endeavour to ensure that such review is carried out promptly.<sup>803</sup>

588. Claimant also argues that Respondent breached minimum standards of due process when it denied Claimant an opportunity to be heard before the Governor of Mazovia and then denied Claimant any recourse against the Governor’s decision approving BH Travel’s eviction from Chopin Airport.<sup>804</sup>

#### *Respondent’s Position*

589. Respondent maintains that the termination of the Lease Agreements was lawful, stating that “each action taken by PPL considered separately, as well as all actions considered collectively did not constitute unlawful and unjust action, which could have led to the expropriation of the investment and constitute a breach of the BIT”.<sup>805</sup>

#### **4) Tribunal’s Analysis**

590. The Tribunal has concluded that the Lease Agreements were investments, under Article 1(1)(c) of the Treaty, because they granted BH Travel – and thus also indirectly Claimant under the Treaty – “[r]ights to any performance under contract having a financial value”.
591. Alternatively, although not argued by Claimant, the Lease Agreements could also be considered to be investments as “business concessions conferred under contract”, explicitly mentioned in Article 1(1)(e) of the Treaty. Indeed, the Lease Agreements for operating shops at Chopin Airport, with the accompanying duty-free status, granted BH Travel exclusive rights which only public authorities could grant. For the international law qualification of ‘concession’ for Treaty purposes, it is irrelevant whether or not the Lease Agreements would be qualified as

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<sup>800</sup> Statement of Claim, para. 203, *referring to* India-Poland Treaty, Article 5(2), **Exhibit CL-1**.

<sup>801</sup> Statement of Claim, para. 204, *referring to* A. Newcombe and L. Paradell, Chapter 7, “Expropriation” in *Law and Practice of Investment Treaties: Standards of Treatment* (2009), pp. 321-398, **Exhibit CL-6**.

<sup>802</sup> Statement of Claim, para. 205, *referring to* India-Poland Treaty, Article 5(2), **Exhibit CL-1**.

<sup>803</sup> Statement of Claim, para. 205, *referring to* India-Poland Treaty, Article 5(2), **Exhibit CL-1**.

<sup>804</sup> Statement of Claim, para. 206.

<sup>805</sup> Statement of Defence, para. 346; Respondent’s Post-Hearing Brief, para. 83.

‘concessions’ under Polish domestic law.

592. The Tribunal agrees with Claimant that Article 5(1) of the Treaty protects the investor not only against direct but also against indirect expropriations through a series of measures leading to a deprivation from the benefits of the investment.
593. The Tribunal disagrees with Respondent’s argument that Claimant’s relevant investment is the shareholding in Baltona and that the Flemingo Group continues to have full possession of these Baltona shares. As stated before, the relevant investments, protected by the Treaty in the case at stake, are the Lease Agreements entered into by BH Travel. The respective and successive shareholdings are legal investment vehicles which led to the duty-free shop Lease Agreements as the investment.
594. In the present case, the Lease Agreements have been annihilated by the acts of PPL, which for purposes of the Treaty are attributable to Respondent. The acts engaged by PPL include: (i) the termination of the Lease Agreements, which in the eyes of the Tribunal was a breach of contract; (ii) the request to the Customs Chamber to seal the premises and the blocking by the authorities of deliveries and BH Travel staff members; and (iii) the order under Polish public law issued by the Governor of Mazovia, upon the request of PPL, to evict BH Travel from Chopin Airport. These consecutive acts, which were upheld by the Governor of Mazovia’s intervention, in addition to the shutdown of the BH Travel shops, deprived Claimant of the benefit of its (indirect) investment in the BH Travel duty-free shops at Chopin Airport.
595. The Tribunal is aware that Respondent argues that the Lease Agreements were acquired before the Flemingo Group obtained the shares of Baltona, and thus its indirect shareholding in BH Travel. However, under Article 1(1) of the Treaty, not only investments *established*, but also investments *acquired* are protected. Consequently, the Treaty protects the expropriation of the Lease Agreements, even though Claimant indirectly acquired the investment after the commencement of the Lease Agreements, because the acquisition preceded any breach of the Treaty.
596. The Tribunal observes that, for the purpose of Article 5(1) of the Treaty, Respondent, through the actions of PPL, which are attributable to it, has expropriated Claimant’s investment and deprived Claimant of its benefits without payment of compensation, as Article 5(1) requires.
597. The Tribunal therefore concludes that Respondent has not only breached its FET obligation under Article 3(2) of the Treaty but also breached Article 5(1) of the Treaty.

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## VII. COMPENSATION

598. The Parties disagree on the question of Claimant's entitlement to compensation, and further disagree as to the method of calculation of damages.
599. Claimant relies on the damage calculations provided in the Expert Report prepared by Mr. Abdul Sirshar Qureshi of PricewaterhouseCoopers ("**First PwC Report**"),<sup>806</sup> which was later updated at the time Claimant's Reply was filed ("**Second PwC Report**").<sup>807</sup> Claimant also relies on the report of an industry expert, Mr. Abbas Mirza of ICF Limited ("**Mirza Report**"), which was submitted with the Second PwC Report.<sup>808</sup>
600. Claimant explains that BH Travel shops at Chopin Airport generated two main categories of revenue: marketing revenue and sales revenue. Sales revenue is primarily driven by the following factors: (i) passenger traffic ("**PAX**"); (ii) spend per passenger ("**SPP**"); and (iii) inflation. A third source of revenue would eventually be derived from the sale of its remaining stock and inventory when the shops close down ("**Working Capital**"). As to costs, BH Travel shops at Chopin Airport generated three types of costs: (i) employee costs ("**HR costs**"); (i) costs of goods sold ("**COGS**"); and (iii) rental costs. The percentage of total sales revenue that BH Travel retained after incurring the direct costs associated with the acquisition of goods sold is known as the Gross Margin ("**Gross Margin**").
601. Respondent denies that Claimant is entitled to compensation and challenges the assertions that any damage arose for Claimant. In addition, Respondent challenges Claimant's method of calculating its damages and submits that if any compensation should be awarded to Claimant, only Respondent's calculation of damage should be taken into account by the Tribunal. Respondent relies in this regard on the expert report prepared by Deloitte ("**Deloitte Report**" or "**First Deloitte Report**"),<sup>809</sup> which was updated and supplemented with calculations at the time Respondent's Rejoinder was filed ("**Deloitte Report No. 2**")<sup>810</sup>
602. It is noted that the Parties disagree on the various assumptions adopted by the Parties and Parties' experts in making their damages calculations. In particular they disagree on:
- a. whether, absent breach of the Treaty, the Lease Agreements would have been terminated or instead suspended and allowed to continue to the end of their original lease terms ("**Base Period**") in the modernised Terminal 1; and
  - b. whether, absent breach of the Treaty, there was any possibility of the Lease Agreements being renewed after the Base Period for a further period ("**Extension Period**").
603. In view of the differing approaches to the calculations, the Tribunal requested the Parties' experts to provide additional calculations of Claimant's damages under different scenarios, each adopting different assumptions ("**Scenario Calculations**"):
- a. Scenario A required a calculation of damages based on the assumptions that Terminal 1 was

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<sup>806</sup> First PwC Report, **Exhibit CER-1**.

<sup>807</sup> Second PwC Report, **Exhibit CER-3**.

<sup>808</sup> Mirza Report, **Exhibit CER-2**.

<sup>809</sup> Statement of Defence, para. 353, *referring to* Deloitte Report, **Exhibit RER-1**.

<sup>810</sup> Respondent's Rejoinder, para. 344 *referring to* Deloitte Report No. 2, **Exhibit RER-2**.

not modernised, and the Lease Agreements continued to the end of the Base Period, as well as some increases in the PAX and other operational improvements, if any.

- b. Scenario B required a calculation of damages based on the assumptions that the Lease Agreements were suspended for the duration of the modernisation of Terminal 1, and then continued to run to the end of their Base Period in the new Terminal 1.
- c. Scenario C was free for the Parties and their experts to determine, *i.e.*, the Parties were able to present any other assumptions and loss calculations.

604. The Parties were requested to submit their Scenario Calculations in the form of an Excel spreadsheet that was capable of being manipulated.<sup>811</sup>

605. Claimant submitted its Scenario Calculations comprising spreadsheets calculating its damages under its Scenarios A1, A2, B, and C.<sup>812</sup> Claimant argues that it should be awarded damages as calculated under its Scenario B Calculation. Respondent submitted its Scenario Calculations A, B, and C together with a post-hearing supplement to Deloitte Report No. 2, which was later revised in light of the Tribunal's Procedural Order No. 4 ("**Revised Post-Hearing Supplement to Deloitte Report No. 2**").<sup>813</sup> The Parties' arguments are set out below, divided as follows:

- Section A sets out the Parties' respective views on whether Claimant is entitled to full compensation, should Respondent be found to be liable on the merits. This section also provides an overview of the Parties' respective arguments and counter-arguments as to how any such compensation should be calculated.
- Sections B–E set out, in further detail, the Parties' arguments on how any such compensation should be calculated, including the Parties' positions on damages for actual losses (*damnum emergens*) (Section B), damages for loss of profits and loss of opportunity (*lucrum cessans*) (Section C), whether Claimant has substantially changed the amount claimed (Section D), and the applicable rate of interest (Section E).

#### **A. Standards applicable to compensation and overview of the Parties' arguments**

##### *Claimant's Position*

606. Claimant submits that it is entitled to an award of compensation in an amount sufficient to wipe out all of the financial consequences of Respondent's breach of its obligations under the Treaty.

607. Claimant notes that the Treaty does not set forth the standard of compensation for unlawful expropriation or other violations.<sup>814</sup> Accordingly, Claimant contends that the applicable standard

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<sup>811</sup> "[Concerning] the parties' proposal on the submission of calculations for scenarios A, B and C [...], the Tribunal would invite the experts or the parties to submit their data on an Excel sheet which can be manipulated [...]. See Hearing Transcript (16 October 2015), 153:4-8.

<sup>812</sup> Letter from the Claimant to the Tribunal dated 6 November 2015, which attached: PwC Model Scenario A1 Spreadsheets ("**Claimant's Scenario A1**"), PwC Model Scenario A2 Spreadsheets ("**Claimant's Scenario A2**"); PwC Model Scenario B Spreadsheets ("**Claimant's Scenario B**"), PwC Model Scenario C Spreadsheets ("**Claimant's Scenario C**") (referred to collectively as "**PwC Scenario Spreadsheets**").

<sup>813</sup> Revised Post-hearing Supplement to Deloitte Report No. 2 and appendices, which attached calculations for Scenario A ("**Respondent's Scenario A**"), Scenario B ("**Respondent's Scenario B**"), and Scenario C ("**Respondent's Scenario C**").

<sup>814</sup> Statement of Claim, para. 207.

of compensation in this case is the principle of full reparation under customary international law.<sup>815</sup> According to Claimant, this principle provides that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.<sup>816</sup>

608. Claimant submits that the tribunal in *AMT v. Zaire* held that international law “required” that the investor be restored to the conditions previously existing as if the illegal events had never occurred.<sup>817</sup> Claimant also refers to *Azurix v. Argentina*, stating that the tribunal in that case had concluded that the investor’s damage should be assessed “in a hypothetical context where the State would not have resorted to maneuvers but would have fully respected the provisions of the treaty and the contract concerned”.<sup>818</sup> Accordingly, Claimant states that the “but for” scenario “should disregard the consequences of any breaches of the underlying investment treaty, and assume that the host state would have fully complied with its obligations thereunder”.<sup>819</sup>
609. Claimant states that, in this case, the “but for” scenario must disregard the consequences of Respondent’s alleged violation of the India-Poland Treaty, including those of a continuous, creeping, or composite nature.<sup>820</sup> Claimant contends that international law provides that “the valuation of a right must exclude any diminution in value resulting from the conduct of the host state”<sup>821</sup> and that the breach is dated “to the first of the acts in the series”.<sup>822</sup> In the present dispute, Claimant contends that Respondent’s violation began on 8 December 2011, with PPL’s failure

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<sup>815</sup> Statement of Claim, para. 208. *See also* Claimant’s Post-Hearing Brief, paras. 288-289, referring to *Siemens v. Argentina* Award, para. 349, **Exhibit CL-42**; *S.D. Myers, Inc. v. Government of Canada*, Partial Award dated 13 November 2000, UNCITRAL, para. 310 (“**S.D. Myers v. Canada Partial Award**”), **Exhibit CL-51**; *CME Czech Republic B.V. v. The Czech Republic*, Final Award dated 14 March 2003, UNCITRAL (“**CME v. The Czech Republic Final Award**”), para. 498, **Exhibit CL-117**; *RosInvestCo UK Ltd. v. The Russian Federation*, Final Award dated 21 September 2010, SCC Case No. V079/2005, para. 249, **Exhibit CL-139**.

<sup>816</sup> Statement of Claim, para. 208, referring to *Case Concerning the Factory at Chorzów*, PCIJ, *Germany v. Poland*, Decision on Merits dated 13 September 1928, p. 7, **Exhibit CL-52**; further referring to ILC Articles on State Responsibility, Article 31(1) (“[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”), **Exhibit CL-3**; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award dated 2 October 2006, ICSID Case No. ARB/03/16 (“**ADC v. Hungary Award**”), para. 493, **Exhibit CL-53**; *El Paso v. Argentina* Award, para. 700, **Exhibit CL - 14**. *See also* Claimant’s Post-Hearing Brief, para. 290, referring to S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008) (“**Ripinsky and Williams**”), para. 89, **Exhibit CL-115**.

<sup>817</sup> Claimant’s Post-Hearing Brief, para. 291, referring to *American Manufacturing & Trading, Inc. v. Republic of Zaire*, Final Award dated 21 February 1997, ICSID Case No. ARB/93/1, para. 6.21 (“**American Manufacturing & Trading v. Republic of Zaire Final Award**”), **Exhibit CL- 140**. Claimant also cites other tribunals that have adopted similar approaches. *See* Claimant’s Post-Hearing Brief, para. 291, referring to *S.D. Myers v. Canada* Partial Award, para. 315, **Exhibit CL-51**; *Petrobart Limited v. The Kyrgyz Republic*, Final Award dated 29 March 2005, UNCITRAL p. 78, **Exhibit CL-141**; *Sapphire International Petroleum LTD v. National Iranian Oil Company*, Arbitral Award dated 15 March 1963, ILR 1963 (“**Sapphire v. National Iranian Oil Company Arbitral Award**”), pp. 185-186, **Exhibit CL-106**.

<sup>818</sup> Claimant’s Post-Hearing Brief, para. 292, referring to *Azurix v. Argentina* Award, para. 417, **Exhibit CL-10**.

<sup>819</sup> Claimant’s Post-Hearing Brief, para. 292.

<sup>820</sup> Claimant’s Post-Hearing Brief, para. 297.

<sup>821</sup> Claimant’s Post-Hearing Brief, paras. 294-295, referring to *Amco Asia Corporation and others v. Republic of Indonesia*, Resubmitted Award dated 31 May 1990, ICSID Case No. ARB/81/1 (“**Amco v. Indonesia Resubmitted Award**”), para. 187, **Exhibit CL-57**; Ripinsky and Williams, p. 251, **Exhibit CL-115**. Claimant also refers to the particular situation in *Azurix v. Argentina* Award, stating that the tribunal adopted the last date in the series of governmental measures as the relevant valuation date. *See* Claimant’s Post-Hearing Brief, para. 296, referring to *Azurix v. Argentina* Award, para. 417, **Exhibit CL-10**.

<sup>822</sup> Claimant’s Post-Hearing Brief, para. 293, referring to ILC Articles on State Responsibility, Article 15 and Commentary, p. 63, para. 10, **Exhibit CL-3**.

to consider any proposal to BH Travel other than the termination of the Lease Agreements by mutual agreement without compensation, and ended with BH Travel's eviction from Chopin Airport on 14 August 2012.<sup>823</sup>

610. Claimant asserts that the principle of full reparation encompasses both actual losses incurred (*damnum emergens*) and also loss of expected profits (*lucrum cessans*), insofar as these losses are established.<sup>824</sup> Claimant observes that Respondent does not appear to dispute the legal principles concerning the right of compensation, or dispute Claimant's right to pursue damages for lost profits and for loss of chance.<sup>825</sup>
611. First, with regard to actual loss, Claimant submits that it is entitled to recoup the operating losses incurred by BH Travel in relation to the Chopin Airport shops that remained in operation between 17 February 2012 (the day BH Travel's stores were sealed by the customs authorities, and the day after the notices of termination were issued by PPL) and 14 August 2012 (BH Travel's eviction from Chopin Airport), reduced by the revenues effectively generated by the shops during that period ("**Operating Losses**"). Claimant submits further that it is entitled to recoup the one-off costs incurred by BH Travel in order to end its Chopin Airport operations and vacate the premises in 2012, including staff severance, the costs of liquidating fixed assets, and transportation of inventory costs ("**One-Off Termination Costs**").<sup>826</sup> Claimant submits that, according to the calculation of Mr. Qureshi (of PwC), it has incurred, and should be compensated for, actual losses in the amount of EUR 1,070,370.<sup>827</sup>
612. Second, with regard to loss of profits, Claimant submits that it is "entitled to an award of compensation in an amount sufficient to recover the net present value of the lost profits that it

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<sup>823</sup> Claimant's Post-Hearing Brief, paras. 297, referring to Section V and Section VI of Claimant's Post-Hearing Brief and Claimant's Closing Statement, pp. 64 and 72, Slide 64 and Slide 72. Claimant submits that the "but for" scenario must wipe out the consequences of any and all of the following events:

(i) PPL's alleged failure to negotiate in good faith with BH Travel by not considering any proposal other than the termination of the BH Travel leases by mutual agreement without compensation as of the meeting of 8 December 2011; (ii) PPL's alleged bad faith "fishing expedition" aiming to identify pretexts to terminate the BH Travel lease agreements without compensation starting on 4 January 2012; (iii) PPL's alleged bad faith attempt to introduce through the back door in the DFZ Rules on 10 February 2012 a clause allowing for unilateral termination of the BH Travel leases without compensation on the basis of the planned modernization work; (iv) PPL's pretextual notices of termination of the Lease Agreements dated 16 February 2012; (v) The Warsaw Customs Chamber's closure of all BH Travel duty-free shops at Chopin Airport on 17 February 2012, preventing BH Travel from operating those stores; (vi) PPL's alleged illegitimate campaign of coercion and harassment to force BH Travel out of its remaining two stores at Chopin Airport by, *inter alia*, preventing the delivery of any goods to BH Travel's stores from 19 to 21 March 2011, scheduling arbitrary safety inspections in May 2012, and cutting of the electricity supply, all in violation of court-ordered injunctions; (vii) PPL's alleged illegitimate threats to claim contractual penalties and accordingly draw on the guarantees, which have left BH Travel with no choice but to surrender most of its premises at Chopin Airport by the end of March 2012; and (viii) The Governor of Mazovia's eviction of BH Travel from its remaining premises at Chopin Airport without compensation and without giving BH Travel an effective remedy against the administrative decision of the Governor providing the basis for the eviction.

<sup>824</sup> Statement of Claim, para. 209, referring to *Archer Daniels v. Mexico* Award, para 281, **Exhibit CL-50**; ILC Articles on State Responsibility, Articles 36(1)-36(2), **Exhibit CL-3**.

<sup>825</sup> Claimant's Reply, para. 411; Claimant's Post-Hearing Brief, para. 287.

<sup>826</sup> Statement of Claim, para. 231; Claimant's Reply, para. 541.

<sup>827</sup> Claimant's Reply, paras. 417, 558-559; Claimant's Post-Hearing Brief, para. 550. The amount initially cited was EUR 1,070,373, see Statement of Claim, paras. 231 and 237.

would have earned as of 17 February 2012 from the operations at Chopin Airport”.<sup>828</sup> Referring to legal commentators in support, Claimant states that “lost profits are recoverable if a claimant can demonstrate that the wrongful conduct has prevented him from realizing financial gain”.<sup>829</sup> Investment treaty tribunals, Claimant argues, have awarded compensation for loss of profits in cases where “the profits anticipated were probable or reasonably anticipated”.<sup>830</sup>

613. As a “sub-species” of its loss of profits claim, Claimant contends that it is also entitled to compensation for injury in the form of a loss of opportunity or “loss of chance”.<sup>831</sup> Referring to the award of the tribunal in *Lemire v. Ukraine*, Claimant submits that compensation for loss of chance “is normally calculated as the hypothetical maximum loss, multiplied by the probability of the chance coming to fruition”.<sup>832</sup> According to Claimant, Respondent damaged Claimant’s opportunity or chance to have the Lease Agreements renewed, and therefore is liable for the related losses.<sup>833</sup>
614. Mr. Qureshi was instructed by Claimant to calculate the measure of the damages that “would place Flemingo DutyFree in the financial position it would have been in had Poland not violated its obligations under the BIT”.<sup>834</sup> To make the calculation, Claimant explains, Mr. Qureshi considered two different periods:
- a. The Base Period, concerning the original lease terms for space in Terminal 1 and Terminal 2,<sup>835</sup> and
  - b. the Extension Period, addressing the damage to BH Travel’s opportunity to renew the Lease Agreements after their expiration.<sup>836</sup> Claimant explains that the probability that BH Travel would have the leases renewed was assumed to be 75% (on the basis that the Baltona Group had prevailed in 75% of the tenders for the lease of duty-free retail shops in which it has participated as an incumbent in Poland).<sup>837</sup>
615. Claimant claims that the “but for” scenario for the Base Period should assume a suspension of the Terminal 1 Lease Agreements for the duration of the modernisation. In addition, it should be assumed that BH Travel’s operations in Terminal 2 would have continued from 3 July 2012 to 31 December 2014 (the modernisation period) and through to the end of the stated guaranteed period of lease.<sup>838</sup> This “but for” scenario is reflected in Claimant’s Scenario B calculation (see

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<sup>828</sup> Statement of Claim, para. 213.

<sup>829</sup> Statement of Claim, para. 211, *referring to* Ripinsky and Williams, p. 279, **Exhibit CL-7**.

<sup>830</sup> Statement of Claim, para. 211, *referring to* Ripinsky and Williams, p. 165, **Exhibit CL-7**, *Compañía de Aguas del Aconquija v. Argentina* Award, para. 8.3.4, **Exhibit CL- 38**; Claimant’s Reply para. 532.

<sup>831</sup> Statement of Claim, para. 212, *referring to* Ripinsky and Williams, p. 291, **Exhibit CL-7** (loss of opportunity is a “sub-species of lost profits, which is resorted to when the available data does not allow making a more precise calculation of lost profits”).

<sup>832</sup> Statement of Claim, para. 212, *referring to* *Joseph Charles Lemire v. Ukraine*, Award dated 28 March 2011, ICSID Case No. ARB/06/18 (“*Lemire v. Ukraine* Award”), para. 251, **Exhibit CL-56**; Claimant’s Reply, para. 533.

<sup>833</sup> Statement of Claim, para. 232.

<sup>834</sup> Statement of Claim, para. 214, *referring to* First PwC Report, paras. 27-28, **Exhibit CER-1**.

<sup>835</sup> Statement of Claim, para. 215.

<sup>836</sup> Statement of Claim, paras. 232-233.

<sup>837</sup> Claimant’s Reply, para. 516, *referring to* First PwC Report, paras. 34 and 39, **Exhibit CER-1**.

<sup>838</sup> Claimant’s Post-Hearing Brief, para. 302, *referring to* First PwC Report, paras. 34-35, **Exhibit CER-1**.

paras. 617-620 below).

616. Claimant therefore contends that the “but for” scenario concerning BH Travel’s operations in Terminal 1 should assume for the Base Period that: (i) BH Travel would have vacated the Terminal 1 premises on 30 June 2012; (ii) BH Travel would have regained possession of the same six premises in Terminal 1 on 1 January 2015 after the completion of the modernisation; and (iii) the length of the terms under BH Travel’s six Terminal 1 Lease Agreements would have been extended to account for the planned shutdown of the terminal.<sup>839</sup> Claimant claims that Respondent does not dispute these “but for” scenario assumptions<sup>840</sup> and that Respondent’s quantum experts have accepted and used “the very same ‘but for’ assumption”.<sup>841</sup>
617. Claimant notes that Mr. Qureshi also submitted the following Scenario Calculations as requested by the Tribunal:
- a. Claimant’s Scenarios A1 and A2, “both assume that ‘Terminal 1 was not modernized and the lease agreements [in both terminals] continued to the end of the base period [with an Extension Period], assuming also some increase in PAX and operational improvements if any;’” and
    - i. In Claimant’s Scenario A1, it is assumed that BH Travel’s HR costs and COGS for the BH Travel shops at Chopin Airport would have increased proportionally with future sales revenues; and
    - ii. Claimant’s Scenario A2 calculations are based upon the assumption that BH Travel’s HR costs and COGS would have increased with inflation only, rather than with sales revenues.<sup>842</sup>
  - b. Claimant’s Scenario B “assumes that ‘the lease agreements [for BH Travel’s Terminal 1 shops] were suspended for the duration of the modernization and then continued to run to the end of their base period in the new Terminal 1’ with an Extension Period”.<sup>843</sup>
  - c. Claimant’s Scenario C, is an additional calculation of Claimant’s portion of the value of BH Travel’s lost opportunity to continue its operations for an indefinite period of time. Claimant submits this is for “illustrative purposes only”.<sup>844</sup>

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<sup>839</sup> Claimant’s Post-Hearing Brief, para. 310. According to Claimant, Mr. Qureshi followed the same approach. See Claimant’s Post-Hearing Brief, para. 311, referring to First PwC Report, para. 28, **Exhibit CER-1**. Claimant contends that these assumptions were corroborated by the testimony of Respondent’s witness, ■■■ Mr. [PN]. See Claimant’s Post-Hearing Brief, para. 306, referring to ■■■ Mr. [PN] Witness Statement, pp. 4-5, para. 22, **RWS-1**, and Second ■■■ Mr. [PN] Witness Statement, p. 1, para. 5, **RWS-3**.

<sup>840</sup> Claimant’s Post-Hearing Brief, para. 313, referring to Hearing Transcript (15 October 2015), 172: 21-25.

<sup>841</sup> Claimant’s Post-Hearing Brief, para. 312, referring to Deloitte Report No. 2, Appendix 5, **Exhibit RER-2**.

<sup>842</sup> Claimant’s Post-Hearing Brief, para. 438, referring to PwC Model Scenario A1 Spreadsheets; PwC Model Scenario A2 Spreadsheets.

<sup>843</sup> Claimant’s Post-Hearing Brief, para. 438, referring to PwC Model Scenario B Spreadsheets.

<sup>844</sup> See Claimant’s Post-Hearing Brief, footnote 926, referring to PwC Model Scenario C Spreadsheets; Letter from the Claimant to the Tribunal dated 6 November 2015.

618. Claimant provides that its pre-interest lost profits calculation (*i.e.*, excluding actual loss), under the different scenarios, amounts to the following sums:

Claimant's pre-interest lost profits in EUR:<sup>845</sup>

	<b>Base Period</b>	<b>Extension Period</b>	<b>Total</b>
Claimant's Scenario A1	18,713,130	43,405,290	62,118,420
Claimant's Scenario A2	23,030,750	57,161,450	80,192,200
Claimant's Scenario B	26,462,590	54,100,850	80,563,440

619. Claimant argues that of its Scenario Calculations submitted, the Tribunal should adopt its Scenario B Calculation, because, in Claimant's view, this accords with the appropriate "but for" scenario which disregards the consequences of Respondent's violation of the Treaty.<sup>846</sup>

620. Accordingly, Claimant requests the Tribunal to award compensation in the amount of EUR 81,633,810 (comprised of lost profits in the Base Period and Extension Period of EUR 80,563,440 under Claimant's Scenario B calculation, plus actual losses of EUR 1,070,370).<sup>847</sup>

621. Claimant explains the above amounts were calculated as 80.68% of BH Travel's actual loss and loss of profits, on the basis that Claimant held an indirect 80.68% interest in BH Travel on the date that Claimant views as the appropriate date of valuation, *i.e.*, 17 February 2012.<sup>848</sup> Claimant maintains that the later changes in its indirect shareholding in BH Travel (on 29 October 2012, see para. 49 above) should have no bearing on the calculation of Claimant's damages.<sup>849</sup>

622. Claimant also requests interest on the above damages. Mr. Qureshi applies an interest rate equal to a 6-month EURIBOR increased by 2% for the period from the valuation date (which for Claimant is 17 February 2012) until the date of the payment of the award.<sup>850</sup>

623. In response to Respondent's assertion that, under the "general concept of liability for damage", an element of causation needs to be established between the event and the alleged damage, Claimant submits that this is not relevant to the issue of quantum.<sup>851</sup> Claimant further disputes the application of an alleged "general concept of liability for damage" on the basis that the current proceedings are in fact governed by the Treaty, supplemented by international law.<sup>852</sup>

624. Claimant also defends its method of calculating BH Travel's damages, maintaining that the use

<sup>845</sup> Claimant's Post-Hearing Brief, p. 549.

<sup>846</sup> Claimant's Post-Hearing Brief, p. 275.

<sup>847</sup> Claimant's Post-Hearing Brief, para. 572 (d). Claimant does not provide a breakdown of the total amount claimed in its Request for Relief. However, it seems that the amount of EUR 81,633,810 claimed equals to the sum of EUR 1,070,370 (actual losses) and EUR 80,563,440 (lost profits under Scenario B for both Base Period and Extension Period).

<sup>848</sup> Statement of Claim, paras. 228-231 and; Claimant's Post-Hearing Brief, paras. 508-515.

<sup>849</sup> Claimant's Reply, para. 507, *referring to* Ripinsky and Williams, p. 243, **Exhibit CL-113**.

<sup>850</sup> *See* Second PwC Report, paras. 148-149, **Exhibit CER-3** and Mr. Qureshi's updated calculation attached to Claimant's letter dated 5 October 2015.

<sup>851</sup> Claimant's Reply, para. 543.

<sup>852</sup> Claimant's Reply, para. 545, *referring to* India-Poland Treaty, Article 9.3(c)(iii), **Exhibit CL-1**; Statement of Claim, para. 207.

of the discounted cash flow method (“**DCF method**”) is appropriate in the circumstances, and justifies the assumptions underlying its analysis.<sup>853</sup>

625. Claimant requests the Tribunal to draw adverse inferences from Respondent’s alleged breach of its obligations under the document production process.<sup>854</sup> Claimant argues that the documents Respondent refused to submit could have provided more precise data to its calculation of damages.<sup>855</sup>
626. At the conclusion of the hearing on 16 October 2015, Claimant submitted that the main points of contention between the Parties on quantum concern: (i) whether there is a capacity constraint on PAX of 15 million passengers a year; (ii) whether the DCF method can be used as a standalone valuation method; and (iii) the applicable discount rate.<sup>856</sup>

#### *Respondent’s Position*

627. Respondent “challenges the assertion that any damage arose for Claimant”,<sup>857</sup> and further submits that there is not an “adequate causal relationship between the termination of the Lease Agreements and BH Travel’s financial loss, referred to by the Claimant as its damage”.<sup>858</sup> Respondent also challenges the method of Claimant’s calculations, disputing both the DCF method used by Claimant to calculate its damages, and the assumptions underlying Claimant’s calculations.<sup>859</sup>
628. First, Respondent disputes that any financial damages had arisen on the part of the Claimant through the alleged expropriation.<sup>860</sup> In this regard Respondent claims that an analysis of Baltona’s operations, its global situation, and the value of BH Travel<sup>861</sup> shows that the ending of the Lease Agreements in fact had a beneficial impact on the value of the Flemingo Group’s investment in Baltona. Respondent explains its position by stating that “[m]any of the aspects regarding the history of BH Travel’s cooperation with PPL show that BH Travel’s operations for Baltona were a business burden, which had a negative influence on its financial standing”.<sup>862</sup>
629. Respondent relies on Deloitte Report No. 2 to assert that the “acceptance of rational assumptions regarding the calculation of the amount of alleged damages will substantially affect its amount”, concluding that “Flemingo has effectively suffered no loss”.<sup>863</sup>
630. Second, Respondent submits that the “general concept of liability for damages” provides that three elements are required in order to establish liability, namely: (i) the event, with which the

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<sup>853</sup> Claimant’s Reply, paras. 422-432; 463-529. According to Claimant, Mr. Qureshi and Mr. Charlton recognised that the DCF methodology is the appropriate approach in this case. However, as explained by Mr. Charlton, both sides do not agree about the assumptions. *See* Hearing Transcript (15 October 2015), 232: 7-17.

<sup>854</sup> Claimant’s Post-Hearing Brief, para. 567, *referring to* Document Requests No. 1, 4, 9, 14, 15, and 16.

<sup>855</sup> Claimant’s Post-Hearing Brief, paras. 566-570.

<sup>856</sup> Hearing Transcript (16 October 2015), 76: 11-15.

<sup>857</sup> Statement of Defence, paras. 345, 375.

<sup>858</sup> Statement of Defence, para. 351.

<sup>859</sup> Statement of Defence, para. 352; Respondent’s Rejoinder, paras. 340-343, 451.

<sup>860</sup> Respondent’s Rejoinder, paras. 340, 344, *referring to* Statement of Defence, paras. 348-428.

<sup>861</sup> Statement of Defence, para. 365. *See also* Deloitte Report, paras. 29-31, **Exhibit RER-1**.

<sup>862</sup> Statement of Defence, paras. 371-374.

<sup>863</sup> Respondent’s Rejoinder, para. 344, *referring to* Deloitte Report No. 2, para. 5.26, **Exhibit RER-2**.

provisions of the law oblige the debtor to remedy the damage; (ii) the damage; and (iii) the appropriate causal relationship. In Respondent's view, in order to establish the adequate causal relationship with respect to the specified facts, it should first be established whether the event constituted a necessary condition for damage (the *conditio sine qua non* test) and then whether the damage is a normal consequence of this event.<sup>864</sup>

631. Respondent states that the damages sought by Claimant relate to the termination of the Lease Agreements. However, Respondent asserts that the termination occurred for reasons which were directly attributable to BH Travel.<sup>865</sup> In this regard, Respondent emphasises that BH Travel's eviction from Chopin Airport was an action taken within the limits of the law, and accordingly any alleged damages would have arisen only as a result of BH Travel's own fault (meaning that Respondent cannot be held liable).<sup>866</sup>
632. Third, Respondent disputes the variables adopted by Claimant in its calculations, including the assumptions and data used to calculate the damage in both the Base Period and the Extension Period.<sup>867</sup> Respondent notes that, according to Deloitte, PwC's calculation is based on instructions from Claimant that were not sufficiently justified,<sup>868</sup> for example, the assumption that BH Travel's business at Chopin Airport would have been able to continue after July 2012,<sup>869</sup> and the assumed probability of 75% that Claimant would prevail in the public tender for further lease periods (according to Respondent this probability should be, at most, 30%).<sup>870</sup>
633. In respect of the DCF method applied by Claimant, Respondent submits that it is not suitable to be used independently to quantify damage, stating that it is "extremely susceptible to changes in the underlying assumptions".<sup>871</sup> Respondent argues that other methods should be used to ensure proper verification of the damage calculations, including referring to: (i) the value of BH Travel's assets; (ii) the relative amounts invested by Flemingo International; (iii) the value of BH Travel's shares after the termination of the Lease Agreements; and (iv) the value of BH Travel compared to a market benchmark.<sup>872</sup>
634. Accordingly, in the event that the Tribunal finds that Claimant has incurred some damages, Respondent submits that the calculation of damages should take into account the assumptions and data as provided in the Deloitte Report No. 2.<sup>873</sup> In reaching its calculation, Deloitte started by using the revised DCF model from the Second PwC Report and then made the adjustments to the financial projections and discount rate that Deloitte felt were necessary.<sup>874</sup> This result was cross-checked against Deloitte's loss estimation produced with available market information concerning Flemingo DutyFree, Baltona, and BH Travel.<sup>875</sup> Deloitte's calculation is that any such

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<sup>864</sup> Statement of Defence, para. 377.

<sup>865</sup> Statement of Defence, para. 378.

<sup>866</sup> Statement of Defence, para. 378.

<sup>867</sup> Respondent's Rejoinder, para. 345.

<sup>868</sup> Respondent's Rejoinder, para. 453, *referring to* Deloitte Report, para. 8, **Exhibit RER-1**.

<sup>869</sup> Statement of Defence, para. 386, 420-421; Respondent's Rejoinder, paras. 406-408.

<sup>870</sup> Statement of Defence, para. 411; Respondent's Rejoinder, paras. 364-365, 446-447.

<sup>871</sup> Respondent's Rejoinder, paras. 348-351, 370.

<sup>872</sup> Respondent's Rejoinder, paras. 348-398.

<sup>873</sup> Respondent's Rejoinder, para. 454.

<sup>874</sup> *See* Deloitte Report No. 2, para. 5.1, **Exhibit RER-2**. For example, a country risk and size risk premium were applied. *See* Hearing Transcript (15 October 2015), 236:17 to 238:23.

<sup>875</sup> *See* Deloitte Report No. 2, para. 5.1, **Exhibit RER-2**.

damages for the Base Period for BH Travel as a whole would amount to EUR 5 million.<sup>876</sup> Deloitte adds that it assessed the amount of additional costs incurred by BH Travel after 17 February 2012 at “EUR 0.2 million”. Deloitte thus concludes that, “[t]aking into account Claimant’s 80.68% shareholding in BH Travel, we assess the Claimant’s losses as [EUR] 4.2 million”.<sup>877</sup>

635. Deloitte does not consider it appropriate to include the Extension Period in its loss estimation, but submits that if this period is included, any such damage (for BH Travel as a whole) would amount to EUR 7 million (assuming a probability of 25% for Claimant being able to prevail in the public tender for further lease periods) or EUR 8 million (if the probability is assumed to be 50%).<sup>878</sup>
636. Respondent disputes that Claimant has an indirect interest in the alleged loss of 80.68%. Respondent notes that its experts used that percentage in their calculations, but claims it is inappropriate. Respondent submits that Claimant’s current interest in BH Travel actually amounts to 68.34%, as stated by Mr. Ahuja during the hearing.<sup>879</sup>
637. Respondent also submitted the following Scenario Calculations as requested by the Tribunal.<sup>880</sup>

- a. In Respondent’s Scenario A, it was assumed that Terminal 1 was not modernised and the Lease Agreements ran until the end of their terms (Base Period). PAX capacity was assumed to have been limited to 15 million passengers in 2020. The SPP (spend per passenger) factor for BH Travel for 2012 and thereafter is assumed to continue to increase in accordance with the projected level of inflation throughout the duration of the Lease Agreements.<sup>881</sup>
- b. In Respondent’s Scenario B, it was assumed that the Lease Agreements were suspended for the duration of the modernisation of Terminal 1, and then continued to run to the end of their Base Period in the new Terminal 1. The SPP factor was assumed to ■% between the Q1 2012 and Q1 2015 period. PAX capacity was assumed to be limited to 15 million passengers in 2020 (like in Scenario A).

For both Scenarios A and B, it is assumed that Gross Margin would, *i.e.*, at the level of 46.9%, and a discount rate of 13.7% is applied. All of Respondent’s other assumptions under Scenarios A and B are in line with the Deloitte Report No. 2.<sup>882</sup>

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<sup>876</sup> See Deloitte Report No. 2, para. 5.23, **Exhibit RER-2**.

<sup>877</sup> See Deloitte Report No. 2, paras. 2.17-2.18, **Exhibit RER-2**.

<sup>878</sup> See Deloitte Report No. 2, para. 5.25, Table 8, **Exhibit RER-2**.

<sup>879</sup> According to Respondent, Mr Ahuja clarified that, due to the restructuring process of Flemingo Group in 2010, (...) *Flemingo DutyFree owns roughly 85% of Flemingo International; 84.8%, to be precise. Flemingo International owns 100% of Ashdod. Ashdod owns 80%-plus, 80.6% of Baltona. And Baltona owns 100% of BH Travel. See Respondent’s Post-Hearing Brief, para. 208, referring to Hearing Transcript (12 October 2015), 153:10-14.*

<sup>880</sup> See Revised Post-hearing Supplement to Deloitte Report No. 2 and appendices: Respondent’s Scenario A, Respondent’s Scenario B, and Scenario C.

<sup>881</sup> Respondent’s Post-Hearing Brief, para. 210, referring to Revised post-hearing supplement to the Deloitte Report No. 2, paras. 2.5 and 2.9.

<sup>882</sup> Respondent’s Post-Hearing Brief, para. 211, referring to Revised post-hearing supplement to the Deloitte Report No. 2, paras. 2.22, 2.26-2.27; Deloitte Report No. 2, paras. 5.14-5.15, **Exhibit RER-2**.

- c. In Respondent’s Scenario C, Claimant’s loss is assumed to be equal to the full value for BH Travel as derived from the Heinemann transaction (EUR 6.2 million).<sup>883</sup>

638. Respondent submits that Claimant’s loss under Respondent’s three Scenario Calculations is provided in the table below. Respondent notes that Deloitte calculated Claimant’s final loss based on the assumption that Claimant has an 80.68% indirect share in BH Travel.<sup>884</sup> However, as Respondent views the appropriate percentage as being Claimant’s current indirect interest in BH Travel of 68.34%, Respondent also includes its own calculation taking only a 68.34% indirect interest into account:

Respondent’s calculation of Claimant’s final loss in EUR:<sup>885</sup>

	<b>Final loss (80.68% indirect interest)</b>	<b>Final loss (68.34% indirect interest)</b>
Respondent’s Scenario A	1.3 million	0.9 million
Respondent’s Scenario B	3.8 million	3.07 million
Respondent’s Scenario C	5.2 million	4.24 million

639. Respondent challenges the calculations provided by Claimant with respect to Scenarios A, B, and C. Respondent argues that Claimant, without the Tribunal’s consent, “interfered in the scope of the Tribunal’s order and has changed its significant assumptions”.<sup>886</sup>

640. First, Respondent challenges Claimant’s claim that there are certain “undisputed elements”, namely assumptions concerning PAX, SPP, Gross Margin, calculation of rent, discount rate, BH Travel renewal rights for Baltona Classic and Baltona Perfumery shops, and actual losses.<sup>887</sup> Respondent submits that these components remain in dispute.<sup>888</sup>

641. Second, Respondent states that Claimant’s Scenario Calculation spreadsheets were not capable of manipulation, contrary to the Tribunal’s direction. Respondent notes in this regard that Claimant has divided the content of its spreadsheets into “disputed” and “undisputed” elements, with only the “disputed” components being capable of being modified. Respondent also asserts that Claimant’s input sheet (“front page” tab) and the output sheet (“BH\_All” tab) are limited and do not allow an extensive analysis of the figures.<sup>889</sup>

642. Third, Respondent contends that Claimant adopted assumptions in each of Claimant’s Scenarios A1, A2, and B that are not in accordance with the Tribunal’s instructions. Respondent thus submits that Claimant’s calculations are “extremely inflated”.<sup>890</sup> In particular, Respondent notes

<sup>883</sup> Respondent’s Post-Hearing Brief, para. 212, referring to Revised post-hearing supplement to the Deloitte Report No. 2, para. 2.29.

<sup>884</sup> Respondent’s Post-Hearing Brief, para. 209, referring to Revised post-hearing supplement to the Deloitte Report No. 2, paras. 2.30-2.31.

<sup>885</sup> Respondent’s Post-Hearing Brief, paras. 209 and 213.

<sup>886</sup> Respondent’s Post-Hearing Brief, para. 219.

<sup>887</sup> Respondent’s Post-Hearing Brief, paras. 220-238. Respondent also states that Respondent’s experts have not agreed with Mr. Qureshi in respect to Flemingo’s indirect interest in BH Travel. See *infra* para. 741.

<sup>888</sup> Respondent’s Post-Hearing Brief, para. 238.

<sup>889</sup> Respondent’s Post-Hearing Brief, paras. 242-244.

<sup>890</sup> Respondent’s Post-Hearing Brief, paras. 263.

that Claimant assumed, without authorisation, that a 10-year extension period with a 75% probability factor is applicable, which violates the Tribunal's instruction that Scenarios A and B should only correspond to the Base Period.<sup>891</sup> Respondent further submits that Claimant also assumed, without authorisation, that: (i) BH Travel would have exercised its right to renew the Lease Agreements for Perfumery and Classic shops for 36 months;<sup>892</sup> (ii) SPP growth would increase after the year 2011 until it drops in 2015 to the same SPP level in 2011 under Scenario A;<sup>893</sup> (iii) SPP would increase similarly under both Scenarios A and B;<sup>894</sup> (iv) revenues of Bestseller and Arrival shops would rapidly grow in 2012, and further increase in 2013;<sup>895</sup> and (v) the calculation of rent is in some cases lower than that set out in the Lease Agreements.<sup>896</sup>

643. With respect to Claimant's request that the Tribunal draw adverse inferences from Respondent's alleged breach of its obligations under the document production process, Respondent submits that the absence of the documents requested did not prevent Claimant from calculating its damages, which increased in its Reply.<sup>897</sup> In Respondent's view, the increased calculation shows that the documents were not *de facto* needed by Claimant.<sup>898</sup>

## **B. Damages for actual losses (*damnum emergens*)**

### *Claimant's Position*

644. As mentioned in the overview above, Claimant submits that it is entitled to an award of compensation for actual losses incurred in the amount of EUR 1,070,370.<sup>899</sup> Claimant notes that Respondent does not appear to challenge the recoverability of actual losses under international law.<sup>900</sup>
645. Claimant states that neither Respondent nor Deloitte have replied to Claimant's arguments on actual losses provided in its Reply, which therefore remained unchallenged. Accordingly, Claimant submits that its arguments on actual losses should be "taken as undisputed between the parties' experts".<sup>901</sup>
646. According to Claimant, Mr. Qureshi found that BH Travel suffered actual damages as a result of

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<sup>891</sup> Respondent's Post-Hearing Brief, para. 246, *referring to* Hearing Transcript (15 October 2015), 172:21 to 173:26.

<sup>892</sup> Respondent's Post-Hearing Brief, para. 249. *See also* Respondent's Post-Hearing Brief, paras. 250-253, *referring to* Respondent's Rejoinder, para. 122, p. 30.

<sup>893</sup> Respondent's Post-Hearing Brief, para. 256.

<sup>894</sup> Respondent's Post-Hearing Brief, paras. 257-259.

<sup>895</sup> Respondent's Post-Hearing Brief, para. 260.

<sup>896</sup> Respondent's Post-Hearing Brief, para. 261.

<sup>897</sup> Respondent's Rejoinder, para. 308, 325-326, *referring to* Claimant's Redfern Schedule, point 14, p. 46, **Exhibit R-137**.

<sup>898</sup> Respondent's Rejoinder, para. 308, 325-326.

<sup>899</sup> Claimant's Reply, paras. 417, 558-559. The amount initially cited was EUR 1,070,373, *see* Statement of Claim, paras. 231 and 237.

<sup>900</sup> Claimant's Reply, para. 542.

<sup>901</sup> Claimant's Post-Hearing Brief, para. 554, *referring to* PwC Model Scenario A1 Spreadsheets; PwC Model Scenario A2 Spreadsheets; PwC Model Scenario B Spreadsheets. Claimant notes that the amount of actual losses is not included in the PwC lost profits calculations. *See* Claimant's Post-Hearing Brief, footnote 1336.

Respondent's wrongful measures corresponding to EUR 1,326,690.<sup>902</sup> Claimant argues that, since Claimant held an indirect 80.68% interest in BH Travel on 17 February 2012 (which in Claimant's view is the appropriate valuation date), Flemingo is entitled to EUR 1,070,373 for actual losses indirectly incurred.<sup>903</sup>

647. Claimant states that there are two sub-categories of actual losses incurred by Claimant in the present case, as identified by Mr. Qureshi:

actual 'operating loss' made by BH Travel between 17 February 2012 and 14 August 2012, when the last shop was vacated which consists of the revenues generated by the shops that remained in operation during that period and marketing revenues received, reduced by cost of goods sold and further costs, such as salaries of remaining employees, incurred in the period' [Operating Losses];<sup>904</sup> and

'one-off termination costs,' namely 'staff severance payments,' 'liquidation of fixed assets,' and 'transportation of inventory to other locations' [One-Off Termination Costs].<sup>905</sup>

648. Relying on legal commentators, Claimant argues that "incidental expenses incurred [...] as a result of the wrongful conduct of a State are recoverable as a matter of principle" and that "expenses must be considered incidental and be compensated if the [investor's] decision to withdraw is causally linked to the [State's] breach".<sup>906</sup> Such expenses, Claimant submits, may include costs incurred by the company related to "winding up its business, relocating its personnel, payment of lay-off wages, etc".<sup>907</sup> Additionally, Claimant contends that the "costs of maintaining a 'skeleton operation' of the investor's local subsidiary for some time following the breach" are also recoverable.<sup>908</sup>

649. With respect to Respondent's argument that there is "no reason to believe" that the costs of ending BH travel's operations at Chopin Airport were "appropriately causally related to the termination by PPL of the Lease Agreements", Claimant argues that incidental expenses are recoverable if they are "causally linked to the breach", without any additional requirement.<sup>909</sup> In this regard, Claimant also disputes the applicability of Respondent's alleged "general concept of liability for damage".<sup>910</sup> Moreover, Claimant points out that, as a general legal principle, Respondent cannot

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<sup>902</sup> Claimant's Reply, para. 558, referring to Second PwC Report, para. 147, **Exhibit CER-3**. See also Mr. Qureshi's updated calculation attached to Claimant's letter dated 5 October 2015.

<sup>903</sup> Claimant's Reply, para. 559, referring to Second PwC Report, para. 20(b), **Exhibit CER-3**. See also Mr. Qureshi's updated calculation attached to Claimant's letter dated 5 October 2015.

<sup>904</sup> Claimant's Reply, para. 541, referring to First PwC Report, paras. 142-147, **Exhibit CER-1**, Second PwC Report, para. 135(a), **Exhibit CER-3**.

<sup>905</sup> Claimant's Reply, para. 541, referring to First PwC Report, paras. 142-147, **Exhibit CER-1**, Second PwC Report, para. 135(b), **Exhibit CER-3**. According to Mr. Charlton from Deloitte, he does not think that there is a great deal of difference between Claimant's and Respondent's experts with regard to the assumptions on costs. He stated that Deloitte followed the same approach adopted by PwC. Hearing Transcript (15 October 2015), 226:11-15.

<sup>906</sup> Claimant's Reply, para. 546, referring to Ripinsky and Williams, p. 302, **Exhibit CL-113**.

<sup>907</sup> Claimant's Reply, para. 546, referring to Ripinsky and Williams, p. 302, **Exhibit CL-113**.

<sup>908</sup> Claimant's Reply, para. 547, referring to Ripinsky and Williams, p. 302, **Exhibit CL-113**. Claimant notes that the tribunal in *Siemens v. Argentina* allowed Siemens' claim observing that "the claim on account of post-expropriation cost is justified in order to wipe out the consequences of the expropriation", referring to *Siemens v. Argentina* Award, para. 387, **Exhibit CL-42**; further referring to I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2009) ("Marboe"), p. 310, **Exhibit CL-105**.

<sup>909</sup> Claimant's Reply, para. 553, referring to Ripinsky and Williams, p. 302, **Exhibit CL-113**. See also Claimant's Reply, para. 546-548.

<sup>910</sup> Claimant's Reply, para. 545.

invoke the burden of proof as to the amount of compensation for such losses to the extent that it would defeat the claim for compensation.<sup>911</sup>

650. In addition, Claimant contends that Respondent’s causality argument is not relevant to the issue of quantum, stating that if Respondent is found liable on the merits, then the causality arguments “must fail”.<sup>912</sup>
651. Claimant also challenges Respondent’s criticism of the inclusion of Operating Losses in the category of actual losses, and rejects the suggestion that these essentially concern lost profits.<sup>913</sup> Claimant relies on Mr. Qureshi’s evidence in the Second PwC Report to affirm that Operating Losses and One-Off Termination Costs are “undoubtedly” actual losses incurred due to the termination of the Lease Agreements.<sup>914</sup>
652. Claimant also addresses Respondent’s arguments that only “extraordinary” or “undeniably proven costs” are recoverable as a matter of international law and that the costs incurred bore the normal consequences related to ending operation at the space.<sup>915</sup> In this regard, Claimant observes that Respondent has provided no legal authority to support the contention that only “undeniably prove[n]” and “extraordinary” costs are recoverable under international law.<sup>916</sup>
653. Claimant does concede that BH Travel would have eventually incurred the One-Off Termination Costs at the end of its original or renewed lease periods at Chopin Airport. However, Claimant submits, such costs would have been incurred 10 or 20 years later, at the end of the expected concessions. Accordingly, Claimant argues that it is entitled to recover compensation for BH Travel’s One-Off Termination Costs as actual losses (noting that the calculation of Claimant’s future loss of profits has been adjusted to take into account the assumption that such costs should have been incurred by BH Travel in 2021 or 2031).<sup>917</sup>

#### *Respondent’s Position*

654. Respondent disputes that the Operating Losses claimed by Claimant are actual losses. Respondent also disputes that there is a causal relationship between the damage claimed and the acts of Respondent with respect to BH Travel, (*i.e.*, between the termination of the Lease Agreements and the end of BH Travel’s operations at Chopin Airport).<sup>918</sup> In addition, Respondent denies that the costs incurred by BH Travel qualify as damage to Claimant or that they have been shown to have been “extraordinary” in nature.<sup>919</sup>
655. Respondent’s first dispute is with respect to Claimant’s inclusion of BH Travel’s alleged loss of profits between 17 February 2012 and 14 July 2012 (*i.e.*, between the date of termination of the

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<sup>911</sup> Claimant’s Reply, para. 553, *referring to Gemplus v. Mexico Award*, para. 13.92, **Exhibit CL-110**.

<sup>912</sup> Claimant’s Reply, para. 544.

<sup>913</sup> Claimant’s Reply, para. 549, *referring to Statement of Defence*, paras. 398-400.

<sup>914</sup> Claimant’s Reply, paras. 549-551, *referring to Claimant’s Reply*, para. 550, Second PwC Report, para. 135(a)(b), **Exhibit CER-3**.

<sup>915</sup> Claimant’s Reply, para. 552, *referring to Statement of Defence*, para. 403.

<sup>916</sup> Claimant’s Reply, para. 553.

<sup>917</sup> Claimant’s Reply, paras. 554-555, *referring to First PwC Report*, para. 147, **Exhibit CER-1**, Second PwC Report, para. 136, **Exhibit CER-3**.

<sup>918</sup> Statement of Defence, para. 406.

<sup>919</sup> Statement of Defence, para. 402.

Lease Agreements and the date of the closure of BH Travel’s last shop) in the calculation of actual losses. According to Respondent, the alleged losses for such period should be treated as loss of future profits since they are hypothetical in nature.<sup>920</sup>

656. Respondent also argues that the costs incurred by BH Travel after the termination of its operation at Chopin Airport were not unexpected or “extraordinary”.<sup>921</sup> According to Respondent, “the Claimant should undeniably prove that the costs related to BH Travel ending its operations at Chopin Airport after the termination of the Lease Agreements were ‘extraordinary’ costs that BH Travel would never have incurred after the expiry of the guarantee terms and after ending operations at Chopin Airport”.<sup>922</sup>
657. Respondent further contends that the costs concerning the termination of the operation and the eviction from Chopin Airport were foreseeable, especially considering that “BH Travel was permanently and persistently not performing the obligations arising from the Lease Agreements”.<sup>923</sup>
658. In addition, Respondent submits that it has not been able to verify the costs allegedly incurred, namely the employee costs in connection with the ending of BH Travel’s operations. In this context, Respondent argues that it is difficult to assess whether such individual costs were justified or whether the amount is reasonable and not grossly overstated.<sup>924</sup>
659. Respondent disagrees with Claimant’s statement that the issue of actual losses is undisputed. Respondent reiterates that the ending of BH Travel’s operations at Chopin Airport bore the normal consequences related to ending operations and therefore such losses should not be compensated.<sup>925</sup>

### **C. Damages for loss of profits (*lucrum cessans*)**

#### **1) Loss of profits for the Base Period**

660. The Parties disagree as to whether Claimant is entitled to compensation for loss of profits in the Base Period (*i.e.*, the period of the original terms of the Lease Agreements).

#### *Claimant’s Position*

661. Claimant states that “lost profits are recoverable if a claimant can demonstrate that the wrongful conduct has prevented him from realizing financial gain”.<sup>926</sup> Investment treaty tribunals, Claimant argues, have awarded compensation for loss of profits in cases where “the profits anticipated were probable or reasonably anticipated”.<sup>927</sup> Claimant notes, as an example, that the

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<sup>920</sup> Statement of Defence, paras. 399-400.

<sup>921</sup> Statement of Defence, paras. 402-404.

<sup>922</sup> Statement of Defence, para. 402.

<sup>923</sup> Statement of Defence, para. 403.

<sup>924</sup> Statement of Defence, paras. 404-405.

<sup>925</sup> Respondent’s Post-Hearing Brief, para. 236.

<sup>926</sup> Statement of Claim, para. 211, *referring to* Ripinsky and Williams, p. 279, **Exhibit CL-7**.

<sup>927</sup> Statement of Claim, para. 211, *referring to* Ripinsky and Williams, p. 165, **Exhibit CL-7**, *Compañía de Aguas del Aconquija v. Argentina* Award, para. 8.3.4, **Exhibit CL- 38**; Claimant’s Reply para. 532.

tribunal in *Saar v. Poland* upheld a claim for lost profits based upon onward sales.<sup>928</sup>

662. Claimant submits that its loss of profits in the Base Period, as calculated by Mr. Qureshi of PwC, amounts to the following under the various Scenarios:
- a. Claimant's Scenario A1: EUR 18,713,130;
  - b. Claimant's Scenario A2: EUR 23,030,750; and
  - c. Claimant's Scenario B: EUR 26,462,590.<sup>929</sup>
663. As already noted (see para. 619 above), Claimant argues that of its Scenario Calculations, the Tribunal should adopt its Scenario Calculation B as this accords with the appropriate "but for" scenario which disregards the consequences of Respondent's violation of the Treaty.<sup>930</sup>
664. Set out below are Claimant's explanations of the reasoning behind each of the variables used in the calculation of its damages, as prepared by Mr. Qureshi of PwC, including its assumptions regarding revenue (driven by PAX, SPP, and inflation) and costs (made up of HR costs, COGS, and rental costs). Also included are Claimant's explanations of the Gross Margin it adopts as well as the discount rate used in its DCF calculations.
665. Claimant also submits in its Post-Hearing Brief that Respondent's quantum experts have agreed to, not challenged, and in some cases even relied upon some of the following components of the PwC's model: (i) the components, sources, and driving factors of BH Travel's revenues; (ii) PwC's projections of BH Travel's marketing revenues; (iii) ICF's calculation of the applicable PAX; (iv) ICF's calculation of the rate of increase of SPP at Chopin Airport; (v) Mr. Qureshi's projections of BH Travel's operating costs; (vi) the calculation of Flemingo DutyFree's indirect interest in BH Travel; (vii) the applicable discount rate; and (viii) the relevance of 17 February 2012 as the relevant valuation date.<sup>931</sup> According to Claimant, these elements are considered as "**Fixed Elements**" for the purposes of its Scenario Calculations.<sup>932</sup>
666. On the other hand, Claimant submits in its Post-Hearing Brief that the following components of PwC's model have been challenged by Deloitte: (i) the maximum PAX capacity of Chopin Airport; (ii) ICF's calculation of SPP for 2015 at Chopin Airport; and (iii) certain components of the applicable discount rate. Claimant notes that Mr. Qureshi identified such components as "Variable Elements" in Claimant's Scenario Calculations.<sup>933</sup>
667. Claimant's submissions in respect of each of the variables used in the calculation of its damages

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<sup>928</sup> Statement of Claim, para. 211, *referring to Saar Papier Vertriebs GmbH v. Republic of Poland*, Final Award dated 16 October 1995, UNCITRAL, para. 103, **Exhibit CL-55**.

<sup>929</sup> Claimant's Post-Hearing Brief, para. 549. *See* Table at Claimant's Post-Hearing Brief, p. 247, *referring to* PwC Model Scenario B Spreadsheets; PwC Model Scenario A1 Spreadsheets; PwC Model Scenario A2 Spreadsheets.

<sup>930</sup> Claimant's Post-Hearing Brief, p. 275.

<sup>931</sup> Claimant's Post-Hearing Brief, para. 439.

<sup>932</sup> Claimant's Post-Hearing Brief, para. 440, *referring to* PwC Model Scenario A1 Spreadsheets; PwC Model Scenario A2 Spreadsheets; PwC Model Scenario B Spreadsheets; PwC Model Scenario C Spreadsheets; Letter from the Claimant to the Tribunal dated 6 November 2015.

<sup>933</sup> Claimant's Post-Hearing Brief, paras. 441-442.

are summarised below.

General assumptions

668. Claimant explains that Mr. Qureshi was instructed to consider the 11 premises leased at Chopin Airport and distinguish between the original lease terms for space in Terminal 1 and those for space in Terminal 2. As already noted, the original lease terms are referred to as the “Base Period”.<sup>934</sup>
669. Claimant notes that in the First PwC Report, Mr. Qureshi calculated the lost profits from February 2012 through 30 June 2012, and from January 2015 until the various assumed expiration dates of the various Lease Agreements, with the last one expiring in June 2020.
670. With respect to the Lease Agreements in Terminal 2, Claimant states that Mr. Qureshi was instructed to assume that BH Travel would have continued to operate in the five premises leased at Terminal 2<sup>935</sup> and that the original terms and expiration dates would have remained the ones provided in those Lease Agreements. Claimant justifies this assumption by explaining that BH Travel’s operations in Terminal 2 should have remained undisturbed or unaffected by the modernisation of Terminal 1.
671. With respect to the Lease Agreements in Terminal 1, Claimant submits that different assumptions were applicable to the calculation of damages.<sup>936</sup> Claimant states that PPL planned to shut down Terminal 1 from approximately 3 July 2012 to 31 December 2014 due to the modernisation project at Chopin Airport. Claimant instructed Mr. Qureshi to consider potential scenarios where “BH Travel would not have been summarily removed from Terminal 1 on a pretextual basis (and without any compensation)”.<sup>937</sup>
672. In this regard, Claimant states that Mr. Qureshi was instructed to assume that:
- (i) BH Travel would have vacated the Terminal 1 premises on 30 June 2012, (ii) BH Travel would have regained possession of the same six premises in Terminal 1 on 1 January 2015 after the completion of the modernization, and (iii) the length of the terms under BH Travel’s six Terminal 1 leases would have been extended to account for the planned shutdown of the terminal.<sup>938</sup>
673. Claimant emphasises that none of the assumptions consider that the modernisation project at

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<sup>934</sup> Statement of Claim, para. 215.

<sup>935</sup> Statement of Claim, para. 216, *referring to* Lease Agreement between PPL and BH Travel (Arrival Shop) dated 11 May 2007, **Exhibit C-18**; Lease Agreement between PPL and BH Travel (Jewelry) dated 31 December 2007, **Exhibit C-19**; Lease Agreement between PPL and BH Travel (Bestseller) dated 29 September 2010, **Exhibit C-28**.

<sup>936</sup> Statement of Claim, paras. 217, *referring to* Lease Agreement between PPL and BH Travel (Classic) dated 13 March 2008, **Exhibit C-21**; Lease Agreement between PPL and BH Travel (Perfumery) dated 13 March 2008, **Exhibit C-20**; Lease Agreement between PPL and BH Travel (Esprit) dated 3 September 2008, **Exhibit C- 22**; Lease Agreement between PPL and BH Travel (Airport Shop) dated 9 September 2008, **Exhibit C-24**; Lease Agreement between PPL and BH Travel (Kids' Shop) dated 6 October 2008, **Exhibit C-25**; Lease Agreement between PPL and BH Travel (Accessories) dated 24 October 2008, **Exhibit C-26**.

<sup>937</sup> Statement of Claim, para. 217.

<sup>938</sup> Statement of Claim, para 218, *referring to* India-Poland Treaty, Article 5(1), **Exhibit CL-1**. Mr. Qureshi and Mr. Charlton from Deloitte stated before the Tribunal that both of them rely on these assumptions. Hearing Transcript (15 October 2015), 230:16 to 231:1.

Terminal 1 would have needed to be abandoned.<sup>939</sup>

674. Claimant justifies these assumptions by stating that one of three scenarios would have occurred with respect to BH Travel's Terminal 1 operations: (i) good faith negotiation would have resulted in an extension of the period of the Terminal 1 Lease Agreements by a period equal to the period of disruption; (ii) BH Travel would have been able to secure the same modification of the period of the Terminal 1 Lease Agreements through application to Polish Courts; or (iii) Article 27 of the Airport Act would have been used to formally expropriate Claimant's investment, requiring that compensation be paid in accordance with the standard set forth in Article 5(1) of the Treaty.<sup>940</sup> In Claimant's view, the first of these scenarios was corroborated by the testimony of Respondent's witness, ■■■ Mr. [PN].<sup>941</sup> All three scenarios, Claimant concludes, would have yielded the same financial consequences, which are reflected in the assumptions used by Mr. Qureshi.<sup>942</sup> These assumptions for the Base Period, advocated by Claimant, correspond to Scenario B.
675. Claimant disputes Respondent's contention that the valuation should not consider any period longer than June 2015 and Respondent's argument that there are "no grounds to assume that BH Travel's business activity at Chopin Airport would be continued after [...] July 2012".<sup>943</sup> According to Claimant, Respondent's position is "fundamentally flawed, as it would 'assume away' the very breach that the quantum model is designed to compensate, *i.e.*, the termination of the BH Travel Lease Agreements in breach of the BIT".<sup>944</sup>
676. Claimant also defends the growth assumptions used by Mr. Qureshi. Claimant denies Respondent's assertion that, based on Baltona and BH Travel's past performance, BH Travel would not have achieved financial profits in the future.<sup>945</sup> According to Claimant, the 2014 performance of the Baltona Group confirms Mr. Qureshi's growth projection.<sup>946</sup> Claimant notes that in the first quarter of 2015 Baltona achieved even greater results.<sup>947</sup> Claimant points out that the expert evidence of Messrs. Qureshi and Mirza, and the testimony of Mr. Jaroń, support Claimant's assertions regarding Baltona's potential for growth and strong management.<sup>948</sup> According to Claimant, these factors, coupled with Baltona's successful performance at other Polish airports, makes it reasonable to assume that BH Travel's performance would follow the

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<sup>939</sup> Statement of Claim, para. 219.

<sup>940</sup> Statement of Claim, para. 217, *referring to* Polish Civil Code (Extract) dated 23 April 1964, Article 363, **Exhibit C-127**; Claimant's Reply, para. 468.

<sup>941</sup> Claimant's Post-Hearing Brief, para. 306, *referring to* Hearing Transcript (13 October 2015), 150:25 to 151:5; ■■■ Mr. [PN] Witness Statement, para. 22, **Exhibit RWS-1**; Second ■■■ Mr. [PN] Witness Statement, paras. 5, **Exhibit RWS-3**.

<sup>942</sup> Statement of Claim, paras. 217-219; Claimant's Reply, para. 469; Claimant's Post-Hearing Brief, para. 309.

<sup>943</sup> Claimant's Reply, para. 465, *referring to* Statement of Defence, paras. 80-81.

<sup>944</sup> Claimant's Reply, para. 466.

<sup>945</sup> Claimant's Reply, para. 510, *referring to* Statement of Defence, para 408, Deloitte Report, para. 95, **Exhibit RER-1**.

<sup>946</sup> Claimant's Reply, para. 511, 84-91.

<sup>947</sup> Claimant's Reply, para. 511, *referring to* Baltona Group Results for Q1 dated 2015, **Exhibit C-228**.

<sup>948</sup> Claimant's Reply, paras. 511-513, *referring to* Mirza Report, paras. 3.4.1., 3.4.3. and 3.4.4., **Exhibit CER-2**, Second PwC Report, para. 106(a), **Exhibit CER-3**, Second Jaroń Witness Statement, para. 54, **Exhibit CWS- 5**. Mr. Mirza testified in front of the Tribunal that Baltona's performance is not unique "[b]ut it would definitely, in [his] experience, be in the top 5% of operators whereby you can achieve 30% year-on-year growth." According to him, "[i]t is a rare phenomenon indeed". See Hearing Transcript (14 October 2015), 183:23 to 184:1.

same positive trajectory.<sup>949</sup>

677. Claimant states that Mr. Qureshi calculated damages by considering the revenue that BH Travel shops would have generated if Respondent had not violated its obligation under the Treaty. Claimant states that Mr. Qureshi was advised to consider two types of revenue: sales revenue and marketing revenue.

#### Sales Revenue

678. With respect to sales revenue, Claimant explains that this is mostly generated by the selling of liquor, tobacco, and perfume.<sup>950</sup> Claimant further states that sales revenue is driven mainly by three factors: PAX, SPP, and inflation.<sup>951</sup>

#### PAX

679. Claimant highlights that Mr. Qureshi first relied on the official statistics issued by PPL to estimate PAX, including PPL's projection for future PAX growth.<sup>952</sup> In the Second PwC Report, Mr. Qureshi relied upon the PAX forecasts provided by industry expert Mr. Mirza in the Mirza Report.<sup>953</sup> Mr. Mirza later provided a supplemental calculation dated 6 November 2015 for Claimant's various Scenario Calculations.<sup>954</sup> Claimant states that, in contrast, Respondent does not rely on an industry expert in order to support its positions on PAX and SPP.<sup>955</sup>
680. Claimant challenges Respondent and Deloitte's claims that the PAX estimation adopted by Mr. Qureshi does not take into account certain characteristics of Chopin Airport and its growth pattern when compared to other Polish airports.<sup>956</sup> In addition, Claimant disputes the reliability of PPL's PAX statistics adopted by Deloitte to challenge Claimant's calculation, noting that Respondent objected to producing PPL's PAX forecast data in full.<sup>957</sup> In any event, Claimant points out, Mr. Qureshi's estimations were "closer to the actual growth in PAX at Chopin Airport than those [PAX forecasts] allegedly prepared by PPL".<sup>958</sup>
681. With respect to the PAX numbers provided by Mr. Mirza, Claimant notes that: (i) the PAX levels from 2010 to 2014 are based upon actual PAX data at Chopin Airport; (ii) the 2015 and 2016 PAX forecasts are based on flights scheduled for that period; and (iii) the long-term forecast (beyond 2016) is built on the historical relational between domestic international passengers at Chopin Airport and Polish GDP.<sup>959</sup>

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<sup>949</sup> Claimant's Reply, para. 514.

<sup>950</sup> Statement of Claim, para. 221, *referring to* First PwC Report, Appendices C and D, **Exhibit CER-1**.

<sup>951</sup> Statement of Claim, para. 221, *referring to* First PwC Report, para. 79, **Exhibit CER-1**.

<sup>952</sup> Statement of Claim, para. 221, *referring to* First PwC Report, para. 82, **Exhibit CER-1, SQ-31, SQ-32**.

<sup>953</sup> Claimant's Reply, para. 482, *referring to* Second PwC Report, para. 83, **Exhibit CER-3**.

<sup>954</sup> With regard to Mr. Mirza's PAX forecast (also referred by Claimant as ICF PAX Projections), *see* Table at Claimant's Post-Hearing Brief, p. 192, *referring to* Mirza Report, p. 38, **Exhibit CER-2**; ICF supplemental calculation dated 6 November 2015 ("**Mirza Supplemental Calculation**").

<sup>955</sup> Hearing Transcript (12 October 2015), 91:18-22.

<sup>956</sup> Claimant's Reply, para. 477, *referring to* Deloitte Report, paras. 62 and 67, **Exhibit RER-1**.

<sup>957</sup> Claimant's Reply, para. 478, *referring to* 2014-2019 PAX Forecast Disclosed by Respondent, **Exhibit C-270**; Second PwC Report, **Exhibit CER-3**; Deloitte Report, Exhibit E.05, **Exhibit RER-1**.

<sup>958</sup> Claimant's Reply, para. 479, *referring to* Second PwC Report, para. 81, **Exhibit CER-3**.

<sup>959</sup> Claimant's Reply, para. 480, *referring to* Mirza Report, para. 4.2.3, **Exhibit CER-2**.

682. Following the hearing, Claimant asserts that “[u]ltimately, the parties’ experts in fact agree on all PAX issues, with the notable exception of the debate as to whether Chopin Airport faces a looming ‘capacity constraint’ that will cap its passenger flow at 15 million passengers per annum”.<sup>960</sup> Claimant explains that Respondent’s experts have now endorsed Mr. Mirza’s approach to forecasting PAX at Chopin Airport, including the rate of yearly PAX increases, but have claimed that Mr. Mirza’s PAX projections should be “capped” at 15 million passengers per year due to operational and environmental constraints.<sup>961</sup> Claimant claims that: (i) such constraints are irrelevant or can be overcome; (ii) available data supports Mr. Mirza’s projection; and (iii) the data Deloitte relied upon does not help Respondent’s case.<sup>962</sup> Mr. Mirza opines that, in Chopin Airport’s current state, it will serve more than 22 million passengers in the long term.<sup>963</sup>

### *SPP*

683. Turning to SPP, Claimant explains that it is calculated as total sales revenue divided by total number of passengers. According to Claimant, in order to establish the SPP growth rate, Mr. Qureshi considered many factors, including “the experience at nearby international airports outside of Poland, Baltona’s operating experience at other Polish airports, and BH Travel’s operating experience at Chopin Airport”.<sup>964</sup> Mr. Qureshi’s calculation was updated to use the SPP growth rate contained in the Mirza Report,<sup>965</sup> which is the result of “purely a duty-free analysis”.<sup>966</sup> Claimant highlights that Respondent’s experts rely on only “a Polish language table” to support its conclusion concerning SPP.<sup>967</sup>

684. Claimant contests Respondent’s challenge to Mr. Qureshi’s approach to estimate SPP growth. Claimant points out that the actual SPP data for 2014, published after Mr. Qureshi’s First PwC Report, was on average higher than the SPP projected by Mr. Qureshi at that time.<sup>968</sup>

685. Claimant adds that Mr. Mirza has estimated the SPP growth from 2011 to 2031 (for both EU and Non-EU passengers, and using short-term, mid-term, and long-term stages of SPP growth) and found an average annual growth rate of █% in real terms if Terminal 1 was modernised (Scenario B) or █% in real terms if it is assumed that Terminal 1 was not modernised

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<sup>960</sup> Claimant’s Post-Hearing Brief, para. 446 (emphasis in the original).

<sup>961</sup> See Claimant’s Post-Hearing Brief, paras. 453-455.

<sup>962</sup> See Claimant’s Post-Hearing Brief, paras. 456-464, referring to Press article regarding Chopin Airport passengers forecasts, **Exhibit SQ-74**; Exhibit ICF 18, Commercial Offering; Hearing Transcript (14 October 2015), 142:6 to 156:12; Mirza Report, p. 38, **Exhibit CER-2**; Extract from the “Warsaw Airport - construction/expansion/reconstruction (modernization) of the airport infrastructure from July 2011 (“**CDM Report**”), p. 141, **R-140**; Comprehensive Analysis of the Capacity of Okęcie Airport was prepared in August 2011 for PPL (“**Comprehensive Analysis of Capacity**”), p. 5, Section 2, and p. 10, Section 7, **Exhibit R-141**.

<sup>963</sup> See Table “ICF PAX Projections” at Claimant’s Post-Hearing Brief, p. 192.

<sup>964</sup> Statement of Claim, para. 221, referring to First PwC Report, paras. 83-89, **Exhibit CER-1**. The Mirza Report is supplemented by the Mirza Supplemental Calculation. See Claimant’s Post-Hearing Brief, para. 465. Claimant notes that the only difference between the Mirza Report and the Mirza Supplemental Calculation concerning SPP lies in the approach to the modernisation of Chopin Airport’s Terminal 1. See Claimant’s Post-Hearing Brief, para. 468, referring to Claimant’s Post-Hearing Brief, para. 438.

<sup>965</sup> Claimant’s Reply, paras. 484, 490.

<sup>966</sup> Claimant’s Post-Hearing Brief, para. 467, referring to Hearing Transcript (14 October 2015), 179:19.

<sup>967</sup> Claimant’s Post-Hearing Brief, para. 473, referring to Deloitte Report No. 2, Exhibit 8, **Exhibit RER-2**; Hearing Transcript (15 October 2015), 143:9 to 145:13.

<sup>968</sup> Claimant’s Reply, para. 487, referring to Second PwC Report, para. 91, **Exhibit CER-3**.

(Scenario A).<sup>969</sup> Mr. Mirza explains that the modernisation at Chopin Airport would have created upside trading opportunities for Baltona.<sup>970</sup> Claimant reiterates that Mr. Mirza's estimation is adopted by Mr. Qureshi in the Second PwC Report.<sup>971</sup>

686. Claimant submits in its Post-Hearing Brief that, for the most part, "the Respondent's experts have accepted Mr. Mirza's forecast of SPP for use in the quantum analysis".<sup>972</sup> Claimant also notes that Respondent does not provide comments in relation to SPP in its Statement of Defence or in its Rejoinder.<sup>973</sup>
687. Claimant disputes Deloitte's assumption in Respondent's Scenario B Calculation that SPP in 2015 would be the same as in 2011. Relying on Mr. Mirza's evidence, Claimant argues that the following factors provide reasons to assume that a solid growth would have continued in 2012: (i) prior strong SPP growth and the quality of the management of Baltona; (ii) the existence of a strong spend growth potential in the short term; (iii) the increase in dedicated retail space and a more optimal layout of the modernised Terminal 1; and (iv) a better-quality environment of the modernised Terminal 1.<sup>974</sup>
688. Claimant also challenges Deloitte's assumption that to "the extent that retail spaces increases [...] passenger spend would be 'diluted' *i.e.*, spread across a wider base, meaning that BH Travel would not see any incremental benefit from an increase in PAX". Claimant contends that this SPP "dilution theory" should have been argued at an earlier stage of the proceedings. In any event, Claimant adds, Deloitte failed to provide evidence and the methodology supporting its assumption that SPP would dilute when PAX reaches 15 million.<sup>975</sup>
689. Claimant also disputes Deloitte's assumption that additional post-modernisation retail space would have likely been awarded to a different duty-free operator, to the exclusion of BH Travel. Claimant argues that the evidence available points to the opposite conclusion.<sup>976</sup>
690. In respect of the non-modernisation scenario (Scenario A), Claimant challenges Deloitte's forecast that SPP would have remained at the 2012 level and then increase by inflation only thereafter. In response, Claimant argues that: (i) PPL was constantly investing on the improvement of Chopin Airport; (ii) there are no reasons to assume that SPP at BH Travel's shops would have stagnated at the level of 2012; and (iii) in 2011 the average SPP at Chopin Airport was below regional averages and thus had the potential to grow.<sup>977</sup> Claimant highlights that Deloitte did not consider "operational improvements" as an SPP driver but only the

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<sup>969</sup> Claimant's Reply, para. 468.

<sup>970</sup> Claimant's Reply, para. 489, *referring to* Mirza Report, para. 4.2.4, **Exhibit CER-2**.

<sup>971</sup> Claimant's Reply, para. 490, *referring to* Second PwC Report, paras. 92-93, **Exhibit CER-3**.

<sup>972</sup> Claimant's Post-Hearing Brief, para. 469, *referring to* Deloitte Report No. 2, para. 5.13, **Exhibit RER-2**; Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.15.

<sup>973</sup> Claimant's Post-Hearing Brief, para. 469.

<sup>974</sup> Claimant's Post-Hearing Brief, paras. 470-471, *referring to* ICF Expert Report, paras. 5.1.5, 5.2.10 and 5.3, **Exhibit CER-2**; Hearing Transcript (14 October 2015), 176:7-11; Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.14.

<sup>975</sup> Claimant's Post-Hearing Brief, paras. 474-477, *referring to* Revised Post-hearing Supplement to Deloitte Report No. 2, paras. 2.7-2.8.

<sup>976</sup> Claimant's Post-Hearing Brief, para. 477, *referring to* Hearing Transcript (13 October 2015), 21:15-16; Hearing Transcript (13 October 2015), 22:3-17.

<sup>977</sup> Claimant's Post-Hearing Brief, para. 478, *referring to* Claimant's Post-Hearing Brief, para. 438; ICF Expert Report, para. 5.3.1, **Exhibit CER-2**; Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.16.

modernisation.<sup>978</sup>

691. In conclusion, concerning SPP, Claimant submits that: (i) Mr. Mirza's SPP base in 2015 is reasonable in view of the evidence on record; and (ii) Deloitte's SPP forecast for Scenario A is unsubstantiated, whereas the SPP projections provided by Mr. Mirza are credible.<sup>979</sup>

#### *Inflation*

692. The inflation rate used by Mr. Qureshi to calculate sales revenue, Claimant explains, was initially the International Monetary Fund's forecasts for inflation in Poland.<sup>980</sup> As Mr. Mirza's SPP forecast is based upon the Euro, Mr. Qureshi updated the projection of sale revenues by also considering inflation rates as forecasted by European institutions, such as the European Central Bank, and by the Warsaw-based Independent Centre for Economic Studies.<sup>981</sup>

#### Marketing revenue

693. With respect to marketing revenue, Claimant states that this corresponds to the amounts suppliers pay to BH Travel for marketing campaigns and events. According to Claimant, Mr. Qureshi calculated marketing revenue based on BH Travel's historical marketing revenues, and the marketing revenue achieved by Baltona's other duty-free shops during the period of 2012 and 2013.<sup>982</sup>

#### Working Capital

694. Claimant submits that, absent an extension of the leases at the end of the Base Period, "BH Travel would have received a stream of revenue consisting of the cash that it would have generated by selling its unsold stock or inventory" (called Working Capital).<sup>983</sup>

#### Costs

695. Claimant points out that Mr. Qureshi calculated the principal operating costs for the BH Travel shops at Chopin Airport, namely rental costs, HR costs, and COGS. Claimant explains that rental costs are calculated based on the 11 Lease Agreements with PPL, while HR costs and COGS are calculated on BH Travel's actual record of operations.<sup>984</sup>
696. Claimant submits that Mr. Qureshi also adjusted the project income streams of BH Travel to consider "corporate income tax, capital expenditures, and contributions to working capital".<sup>985</sup>

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<sup>978</sup> Claimant's Post-Hearing Brief, para. 479, *referring to* Hearing Transcript (15 October 2015), 172:11-15.

<sup>979</sup> Claimant's Post-Hearing Brief, para. 482. With regard to Mr. Mirza's SPP projections, *see* Table "Comparative Charts of International SPP (Modernization vs. Non-Modernization)" at Claimant's Post-Hearing Brief, p. 216.

<sup>980</sup> Statement of Claim, para. 221, *referring to* First PwC Report, para. 91, **Exhibit CER-1**.

<sup>981</sup> Claimant's Reply, para. 491, *referring to* Second PwC Report, para. 143(b), **Exhibit CER-3**.

<sup>982</sup> Statement of Claim, para. 222, *referring to* First PwC Report, paras. 98-99, **Exhibits CER-1, SQ-24, SQ-25, SQ-26, SQ-27, SQ-51**.

<sup>983</sup> Claimant's Post-Hearing Brief, paras. 483-485, *referring to* Letter from the Claimant to the Tribunal dated 6 November 2015; PwC Model Scenario (A1, A2 and B) Spreadsheets.

<sup>984</sup> Statement of Claim, paras. 223-224, *referring to* First PwC Report, paras. 101, 107(a), 108, 129, **Exhibit CER- 1**.

<sup>985</sup> Statement of Claim, para. 224, *referring to* First PwC Report, para. 129, **Exhibit CER-1**.

697. Claimant asserts that “Respondent’s experts confirmed at the hearing [that] Deloitte ‘followed’ ‘[m]ost of [the PwC] assumptions on costs’ – i.e., including HR Costs and COGS”. Moreover, “[t]he Respondent’s experts further confirmed that there is no ‘great deal of difference’ between [PwC and Deloitte in this regard] at all”.<sup>986</sup> Therefore, Claimant submits that PwC’s projection of HR Costs and COGS “should be treated as agreed between the parties”.<sup>987</sup>
698. Claimant goes on to describe the HR costs and COGS adopted by Mr. Qureshi under the Scenario Calculations. Under Claimant’s Scenario B (the modernisation scenario), Mr. Qureshi assumed that BH Travel would have to hire more personnel and order more goods in the increased retail space and that these increases will be in proportion to future sales revenues. By contrast, under Scenario A (the non-modernisation scenario), personnel and quantity of goods would either increase in line with future sales revenue (Claimant’s Scenario A1) or increase in line with inflation (Claimant’s Scenario A2).<sup>988</sup>
699. With respect to rental costs, Claimant states that, to its best understanding, “the parties’ experts are currently in agreement on the issue of projecting the rental costs that BH Travel would have incurred in any ‘but for’ scenario”, as Deloitte has conceded that Respondent’s █████% average minimum rent rate increase for the new Terminal 1 is unsubstantiated.<sup>989</sup>

#### Gross Margin

700. Claimant defines Gross Margin as the difference between total sales revenue and total costs of goods sold, divided by the total sales revenue, expressed as a percentage. It represents the percentage of total sales revenue that BH Travel retains after incurring the direct costs associated with acquisition of goods sold.<sup>990</sup>
701. Claimant states that Mr. Qureshi estimated that the Gross Margin of the various BH Travel shops was a weighted overall average of 46.8% in 2010. Mr. Qureshi assumed that BH Travel’s Gross Margin would have improved by 1% in 2012 and 2013 and then by 0.5% from 2014 onwards, until it reached an overall average Gross Margin of 54.4% by 2031.<sup>991</sup> Claimant submits that Mr. Qureshi’s Gross Margin assumptions are “reasonable” and supported by BH Travel’s historical Gross Margin improvements as well as Baltona’s financial results.<sup>992</sup>
702. Claimant challenges Deloitte’s approach, which assumes a constant Gross Margin at the level recorded by BH Travel in 2011 (46.9%). Claimant submits that Deloitte’s steady Gross Margin for BH Travel’s “but for” operations at Chopin Airport from 2011 to 2031 is too conservative,<sup>993</sup>

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<sup>986</sup> Claimant’s Post-Hearing Brief, para. 495, *referring to* Hearing Transcript (15 October 2015), 226:8-15.

<sup>987</sup> Claimant’s Post-Hearing Brief, para. 440.

<sup>988</sup> Claimant’s Post-Hearing Brief, paras. 493-496.

<sup>989</sup> C Claimant’s Post-Hearing Brief, paras. 487 and 490-492, *referring to* Hearing Transcript (15 October 2015), 226:8-15; Deloitte Report No. 2, para. 5.18, **Exhibit RER-2**.

<sup>990</sup> Claimant’s Post-Hearing Brief, para. 497.

<sup>991</sup> Claimant’s Post-Hearing Brief, para. 498, *referring to* PwC Hearing Presentation, p. 15, Slide 15; First PwC Report, para. 105, **Exhibit CER -1**; PwC Hearing Presentation, p. 16, Slide 16.

<sup>992</sup> Claimant’s Post-Hearing Brief, paras. 498 and 507.

<sup>993</sup> Claimant’s Post-Hearing Brief, paras. 499, 507, *referring to* Deloitte Report No. 2, paras. 5.14-5.15, **Exhibit RER-2**.

is not supported by evidence, and ignores Baltona's performance as a valuable indicator.<sup>994</sup>

Valuation date and Claimant's indirect interest in BH Travel

703. Claimant submits that the valuation date assumed by Mr. Qureshi is 17 February 2012 because PPL's notices of termination were issued on 16 February 2012 and customs authorities sealed BH Travel's shops on 17 February 2012. Claimant clarifies that Mr. Qureshi was instructed to consider post-valuation date data and events to project BH Travel's income stream and to ignore post-breach changes in the ownership structure of Claimant's investment.
704. Claimant does not share Respondent's and Deloitte's view that the calculation of damage should not consider post-valuation date data and events.<sup>995</sup> Claimant submits that this approach is not supported by previous investment arbitral tribunals.<sup>996</sup> Claimant argues instead that the use of such data can help with a more precise assessment of the investment.<sup>997</sup> Claimant also cites legal commentary to support its stance that if "good evidence of performance subsequent to the injury event does exist, a court (or an arbitral tribunal) may reasonably conclude that the actual business track record is useful information to be taken into account".<sup>998</sup>
705. Claimant asserts that, contrary to Respondent's contentions, changes to Claimant's indirect interest in BH Travel subsequent to the valuation date "have no bearing upon the calculation of Claimant's losses as on that time".<sup>999</sup> According to Claimant, "damages are to be assessed as on the date of valuation and 'changes to the investment subsequent to the valuation date are ignored'".<sup>1000</sup> Accordingly, Claimant is of the view that damages should be calculated on the basis of Claimant's 80.68% indirect shareholding in BH Travel as at 17 February 2016, and Claimant's later decreased indirect interest (from 29 October 2016 onwards) should be disregarded.
706. Finally, Claimant points out that the Second PwC Report considers "updated information, projections and calculations concerning cost of equity, inflation rates, and PAX levels at Chopin Airport".<sup>1001</sup> Also, Claimant explains that the Mirza Report contemplates "actual PAX and SPP data for the period from 2012 through to December 2014".<sup>1002</sup>

Discount rate

707. Claimant notes that the discount rate brings expected earnings to their present value to reflect the

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<sup>994</sup> Claimant's Post-Hearing Brief, paras. 499, 501-506. Claimant provides a Table ("BALTONA Polish DF JULY 2015 YTD FINANCIAL RESULTS in PLN") containing details of Baltona's performance at Claimant's Post-Hearing Brief, p. 231, referring to Baltona's financial results for July 2015, **Exhibit C-298**.

<sup>995</sup> Claimant's Reply, paras. 492-494, referring to Deloitte Report, para. 100, **Exhibit RER-1**.

<sup>996</sup> Claimant's Reply, para. 496, referring to *Amco Asia v. Indonesia* Resubmitted Award, para. 186, **Exhibit CL- 57**; *Kazakhstan v. Rumeli Telekom and Telsim Mobil*, Decision of the *Ad Hoc* Committee dated 25 March 2010, ICSID Case No. ARB/05/16 ("**Kazakhstan v. Rumeli Telekom Decision of the Ad Hoc Committee**"), para. 151, **Exhibit CL-111**; *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 US 689, 698 (1933), cited in M. Kantor, "*Chapter 2: Basic Valuation Approaches*" in *Valuation for Arbitration*, International Arbitration Law Library (2008) ("**Kantor**"), pp. 67-68, **Exhibit CL-112**.

<sup>997</sup> Claimant's Reply, para. 497, referring to Ripinsky and Williams, p. 259, **Exhibit CL-113**.

<sup>998</sup> Claimant's Reply, para. 497, referring to Kantor, p. 68, **Exhibit CL-112**.

<sup>999</sup> Claimant's Reply, para. 507, referring to Ripinsky and Williams, p. 243, **Exhibit CL-113**.

<sup>1000</sup> Statement of Claim, para. 226, further referring to Ripinsky and Williams, p. 243, **Exhibit CL-7**.

<sup>1001</sup> Claimant's Reply, para. 498, referring to Second PwC Report, paras. 143-144, **Exhibit CER-3**.

<sup>1002</sup> Claimant's Reply, para. 498, referring to Mirza Report, p. 38, **Exhibit CER-2**.

time value of money and is calculated by reference to the risk-free investment alternatives in the capital markets. Claimant explains that Mr. Qureshi built the discount rate containing the following three components: (i) the cost of equity; (ii) the yield on 10-year Polish government bonds; and (iii) a “Beta coefficient”. Mr. Qureshi’s discount rate is thus 8.18% (calculated taking post-valuation date data into account).<sup>1003</sup>

708. Claimant states that post-valuation date data and events should be used for purposes of calculating its damages, including the discount rate.<sup>1004</sup> Claimant contends that its position is in accordance with international case law and scholarly writings.<sup>1005</sup> Claimant states that Deloitte adopts the opposite approach and fails to provide reasons and legal authorities in support of its position.<sup>1006</sup>
709. Claimant nevertheless notes that Mr. Qureshi has provided an alternative assessment of the damages based on the discount rate considering only the data and events as known on the valuation date (which, in Claimant’s view, is 17 February 2012).<sup>1007</sup> The discount rate in this calculation is 10.96%.<sup>1008</sup>
710. Claimant submits in its Post-Hearing Brief that both Parties adopt the same overall approach for discount rate,<sup>1009</sup> and the dispute concerning discount rate is thus limited to three issues: (i) the date of calculation of the discount rate (using post-valuation date data and events); (ii) the necessity of an additional country risk premium; and (iii) the relevance of any size premium.<sup>1010</sup>
711. With regard to whether to apply an additional country risk premium, Claimant submits that it is wrong to increase the discount rate with an additional 1.1% country risk premium as applied by Deloitte.<sup>1011</sup> Claimant contends that, as explained by Mr. Qureshi, the rates of Polish government bonds adopted by PwC already reflect Polish country risk.<sup>1012</sup> Furthermore, Claimant claims that Deloitte failed to substantiate the data upon which it relied in order to calculate the 1.1% country risk premium,<sup>1013</sup> and that the country risk premium approach “has important methodological

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<sup>1003</sup> Claimant’s Post-Hearing Brief, paras. 516-518.

<sup>1004</sup> Claimant’s Post-Hearing Brief, para. 521 and 527, *referring to* PwC Hearing Presentation, p. 5, Slide 5.

<sup>1005</sup> Claimant’s Post-Hearing Brief, paras. 526-527, *referring to* *Amco Asia v. Indonesia* Resubmitted Award, para. 186, **Exhibit CL-57**; *Kazakhstan v. Rumeli Telekom* Decision of the *Ad Hoc* Committee, para. 151, **Exhibit CL-111**; *see also* *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 US 689, 698 (1933), cited in Kantor, p. 67, **Exhibit CL-112**; Ripinsky and Williams, p. 259, **Exhibit CL-115**.

<sup>1006</sup> Claimant’s Post-Hearing Brief, paras. 522-525, *referring to* Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.23.

<sup>1007</sup> Claimant’s Reply, para. 502, *referring to* Second PwC Report, paras. 152-159, **Exhibit CER-3**.

<sup>1008</sup> Claimant’s Post-Hearing Brief, para. 518.

<sup>1009</sup> Claimant’s Post-Hearing Brief, para. 519.

<sup>1010</sup> Claimant’s Post-Hearing Brief, para. 520, *referring to* Hearing Transcript (15 October 2015), 111:4-10; Hearing Transcript (15 October 2015), 232:18-23; Hearing Transcript (15 October 2015), 56:10-19; Letter from the Claimant to the Tribunal dated 6 November 2015; PwC Model Scenario A1 Spreadsheets; PwC Model Scenario A2 Spreadsheets; PwC Model Scenario B Spreadsheets; PwC Model Scenario C Spreadsheets; Revised Post-hearing Supplement to Deloitte Report No. 2, paras. 2.23–2.25 and Appendices A-C.

<sup>1011</sup> Claimant’s Post-Hearing Brief, paras. 530-531, *referring to* Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.24.

<sup>1012</sup> Claimant’s Post-Hearing Brief, paras. 529 and 532, *referring to* Hearing Transcript (15 October 2015), 21:10-14; Hearing Transcript (15 October 2015), 233:3-6.

<sup>1013</sup> Claimant’s Post-Hearing Brief, para. 533.

weaknesses”.<sup>1014</sup>

712. Finally, Claimant argues that no “size premium” should be added to the discount rate. It claims that Deloitte is wrong in increasing the discount rate by 2% on the basis that BH Travel is a small business and therefore has risky cash flows.<sup>1015</sup> According to Claimant, a premium should not be added, primarily because BH Travel is part of a larger group, *i.e.*, the Baltona Group and the Flemingo Group.<sup>1016</sup>

#### *Respondent’s Position*

713. As noted above, Respondent disputes the existence of damage to Claimant. However, in case the Tribunal finds that Claimant has lost profits under the Base Period, Respondent submits that it should only take account of Respondent’s calculation of loss.<sup>1017</sup> Pursuant to Deloitte Report No. 2, such damages for BH Travel would amount to EUR 5 million.<sup>1018</sup> This amount would need to be adjusted to account for the relevant indirect interest held by Claimant in BH Travel. Respondent submits that Claimant’s current indirect interest in BH Travel, 60.34%, is relevant for the calculation of damages, and not Claimant’s indirect interest at the time the Lease Agreements were cancelled.
714. Respondent explains that it did not present its own calculation in the Statement of Defence because “it was not obliged to do so”. In addition, Respondent contends that “it is not its role to present calculations of alleged damage, which, after all, it is challenging”.<sup>1019</sup> In Respondent’s view, the burden of proving the amount of damage lies with Claimant.<sup>1020</sup>

#### *General assumptions*

715. Deloitte submits that the historical financial results of BH Travel<sup>1021</sup> do not support the assumption applied by Mr. Qureshi, arguing that the forecast results will be significantly better than the historical data. In this regard, the Deloitte Report notes that the justification provided in the First PwC Report for the significant growth is in fact the acquisition by Flemingo Group.<sup>1022</sup>

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<sup>1014</sup> Claimant’s Post-Hearing Brief, para. 534, *referring to* F. Dorobantu, N. Dupont, and M. Maniatis, *ICSID Review, Country Risk and Damages in Investment Arbitration* (2015), p. 11, **Exhibit CL-122**.

<sup>1015</sup> Claimant’s Post-Hearing Brief, paras. 536 and 543, *referring to* Deloitte Report No. 2, Appendix 4; Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.25 and Hearing Transcript (15 October 2015), 111:13-19.

<sup>1016</sup> Claimant’s Post-Hearing Brief, paras. 537-542, *referring to* Hearing Transcript (15 October 2015), 21:4-9. Claimant addresses the size of both Flemingo and Baltona. With regard to Flemingo, Claimant refers to Ahuja Witness Statement, paras. 1, 25-29, **Exhibit CWS-1**; Second Jaroń Witness Statement, para. 28, **Exhibit CWS-5**; Loan Agreement between Flemingo International Ltd and Baltona of 30 March 2010, **Exhibit C-42**. Concerning Baltona, Claimant refers to **Claimant’s Opening Statement**, p. 48, Slide 48; Consolidated Financial Statement of Baltona 2010, **Exhibit C-223**; Consolidated Financial Statement of Baltona 2014, **Exhibit C-227**; Baltona’s financial results for July 2015, **Exhibit C-298**; Financial statement of BH Travel 2010, **Exhibit SQ-5**; Report of Baltona’s Management Board 20/2012, **Exhibit SQ- 67**; Second PwC Report, para. 48(a) and footnote 70, **Exhibit CER-3**; Stock Quotings of Baltona, **Exhibit SQ- 68**.

<sup>1017</sup> Respondent’s Post-Hearing Brief, para. 275.

<sup>1018</sup> *See* Deloitte Report No. 2, para. 5.24, **Exhibit RER-2**.

<sup>1019</sup> Respondent’s Rejoinder, para. 347.

<sup>1020</sup> Respondent’s Rejoinder, para. 384.

<sup>1021</sup> *See also* Deloitte Report, paras. 86-96, **Exhibit RER-1**, *referring to* Preliminary Financial Due Diligence Report PHZ Baltona S.A. dated 5 April 2010, **Exhibit C-39**.

<sup>1022</sup> *See also* Deloitte Report, para. 86, **Exhibit RER-1**, *referring to* First PwC Report, para. 22, **Exhibit CER-1**.

Respondent submits that after the acquisition, BH Travel continued to be poorly managed, and further submits that it had limited opportunities to improve its margins on core activities.<sup>1023</sup> Accordingly, Respondent concludes that it is unreasonable to expect a significant improvement in the financial standing of the company in the long-term.<sup>1024</sup>

716. Respondent further disagrees with Claimant’s assumption that BH Travel would have continued to operate after completion of the modernisation of Terminal 1 under the same conditions provided in the Lease Agreements. Respondent claims that the assumption is “illogical from the outset and unrelated to the reality of business”.<sup>1025</sup>
717. First, Respondent points to the fact that the retail space leased by BH Travel was liquidated as a consequence of the modernisation works. Accordingly, the Lease Agreements in Terminal 1 could not have been extended, and instead the lease of the new commercial space would have been the subject of a new public tender. In this regard, Respondent recalls that BH Travel initiated numerous court proceedings against PPL and suggests that, in this context, BH Travel may not have been invited to be part of a new tender.<sup>1026</sup>
718. Even if BH Travel might have participated in a public tender for the new commercial space and won it, Respondent stresses that it is wrong to assume that the same terms and conditions of the Lease Agreements would have been applied to the new term. Respondent explains that, after the modernisation of Terminal 1, the premises became completely different, modernised, and therefore better.<sup>1027</sup> As a consequence, the new retail and services areas at Terminal 1 have higher rates of rent.<sup>1028</sup>
719. Respondent also claims that the Lease Agreements were not to be extended automatically over the guaranteed period, unless strict conditions were satisfied, as provided in the Lease Agreements.<sup>1029</sup> Respondent states that BH Travel failed to meet the requirements provided in

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<sup>1023</sup> Statement of Defence, paras. 369 and 419.

<sup>1024</sup> Statement of Defence, paras. 369 and 419.

<sup>1025</sup> Statement of Defence, para. 420.

<sup>1026</sup> Respondent’s Rejoinder, paras. 407-408, *referring to* Statement of Defence, para. 422.

<sup>1027</sup> According to ■■■ Mr. [PN]’s testimony before the Tribunal, the size of duty-free stores in Terminal 1 are now 20% or 30% bigger than before. Hearing Transcript (14 October 2015), 68:19-20, reply to a question posed by Dr. Kühn. He stated that the new terminal “does not resemble the old terminal in any way”. *See* Hearing Transcript (14 October 2015), 70:23-24. He conceded that it would have been possible to amend the Lease Agreement so as to adjust the square footage or other provisions, however, he stated that it would have been very difficult. *See* Hearing Transcript (14 October 2015), 82:25 to 83:20, reply to questions posed by Mr. Willems.

<sup>1028</sup> Respondent’s Rejoinder, para. 408, *referring to* Letter from PPL to the State Treasury dated 12 February 2015, **Exhibit C-246**.

<sup>1029</sup> Respondent’s Rejoinder, para. 410, *referring to* Lease Agreement between PPL and BH Travel (Perfumery) dated 13 March 2008, **Exhibit C-20**; Lease Agreement between PPL and BH Travel (Classic) dated 13 March 2008, **Exhibit C-21**. Section 7 of these Lease Agreements provides:

The Parties agree that, upon the expiration of the period described in section 3, subject to implementation by the Lessee of the provisions of § 5 sections 6 and 10, and not being in arrears with the payments of the minimum leasing fee for a period longer than three payment periods during the first guaranteed period covering 84 months from the date of signing the first ‘Delivery/Acceptance Protocol’, guaranteed period covering 84 months shall be extended for further guaranteed period of 36 months, calculating from the end of the guaranteed period covering 84 months. § 5 section 6 The Lessee undertakes to perform adaptation works in the premises in respect of its business operations for marketing purposes or in order to refresh and/or adapt its offer to market requirements at least once every three years during the term of the Agreement. § 5 section

Section 7(3) of the Lease Agreements concerning “*inter alia* the performance of adaption works at the premises for marketing purposes and in order to refresh or adapt its offering to market requirements at least once every three years”.<sup>1030</sup>

720. Respondent argues that BH Travel failed to conduct the adaption works within the deadline and Claimant failed to present any evidence on this point.<sup>1031</sup> Therefore, in Respondent’s view, “it cannot be assumed that the premise causing the extension of the ‘guaranteed period’ would have taken place”.<sup>1032</sup> Accordingly, Respondent disagrees with Claimant’s contention that the Parties’ experts agreed that BH Travel would have exercised 36-month renewal rights for Baltona Classic and Baltona Perfumery.<sup>1033</sup>

#### Revenue

721. Respondent disputes the assumptions regarding Claimant’s estimated growth in respect of both SPP and PAX. The Deloitte Report submits that Mr. Qureshi’s assumptions are not supported by sufficient analysis of factors influencing passenger spending.

#### *SPP*

722. The Deloitte Report contests the use of the GDP of Poland as a key driver for the SPP factor, on the basis that only a part of the relevant consumers are Polish citizens.<sup>1034</sup>
723. The Deloitte Report also submits that Mr. Qureshi failed to explain how the comparators adopted in his calculation represent a valid reference to Chopin Airport. In response, the Deloitte Report analysed the records of historical SPP changes indicated by Mr. Qureshi<sup>1035</sup> and concluded that they have high variability. For this reason, the Deloitte Report submits that the validity of any comparison with other airports is undermined.<sup>1036</sup>
724. For the modernisation scenario (Scenario B), Respondent emphasises that its experts have retained the assumption for 2015 that any “[SPP] growth post-modernisation will be limited, and simultaneously disagreed with Claimant’s hypothesis that SPP would increase by over █% immediately following post-modernization”. Respondent also notes that for the period beyond 2015, its experts have assumed that “growth in SPP will be the same as forecast in the Mirza Report”.<sup>1037</sup> In the absence of modernisation (Scenario A), Deloitte argues that the potential for BH Travel’s SPP to grow was negligible and was thus assumed to grow from its 2012 level in

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10 The Lessee undertakes to organise seasonal and holiday promotion campaigns using the resources available to the Lessee, as well as to change the arrangement of the premises and its decoration in order to develop the sales of services offered in the premises”.

<sup>1030</sup> Respondent’s Rejoinder, para. 411. *See also* Respondent’s Post-Hearing Brief, paras. 250-253.

<sup>1031</sup> Respondent’s Rejoinder, paras. 412-413, *referring to* █ Ms. [IM] Witness Statement, para. 12, **Exhibit RWS-4**; Second █ Mr. [PN] Witness Statement, paras. 11-14, **Exhibit RWS-3**.

<sup>1032</sup> Respondent’s Rejoinder, para. 413.

<sup>1033</sup> Respondent’s Post-Hearing Brief, para. 233.

<sup>1034</sup> *See* Deloitte Report, para. 70, **Exhibit RER-1**.

<sup>1035</sup> Deloitte Report, para. 79, **Exhibit RER-1**, *referring to* Preliminary Financial Due Diligence Report, **Exhibit C-39**.

<sup>1036</sup> *See* Deloitte Report, para. 79, **Exhibit RER-1**.

<sup>1037</sup> Respondent’s Post-Hearing Brief, para. 225.

line with inflation only.<sup>1038</sup>

*PAX*

725. With regard to the potential further growth in PAX, Deloitte notes that the data applied by Mr. Qureshi concern forecast growth related to all Polish airports, and not specifically Chopin Airport. According to Deloitte, Chopin Airport is already the most developed and utilised airport in Poland,<sup>1039</sup> and therefore Mr. Qureshi should have explained the reasons why long-term PAX growth at Chopin Airport is comparable to other Polish airports.
726. Furthermore, Deloitte submits historical statistical data showing that the share of Chopin Airport PAX decreased considerably between the 2009 and 2014 estimates.<sup>1040</sup> Deloitte thus concludes that Mr. Qureshi failed to conduct a thorough analysis of PAX assumptions.<sup>1041</sup>
727. Furthermore, Respondent challenges Claimant's updates to the PAX index and upholds PPL's estimations.<sup>1042</sup> Specifically, Respondent opposes the assumptions and the calculation of PAX provided in the Mirza Report (which is adopted by Claimant) "as being unreliable, unproven by any evidence and therefore incredible".<sup>1043</sup>
728. According to Respondent, the Mirza Report assumes that the number of passengers at Chopin Airport will increase by approximately 10.8 million from 2016 to 2031, finally reaching 22.9 million passengers by 2031.<sup>1044</sup> Respondent submits that these assumptions are "too optimistic and unrealistic", since Chopin Airport is the most developed airport in Poland and has lower than average potential for future growth in future PAX.<sup>1045</sup>
729. Moreover, Respondent argues that the evidence relied upon by the Mirza Report is not reflected in other sources. Respondent cites the CDM Report, which estimates the PAX for Chopin Airport as follows: "2015 – 10,405,465, 2025 – 15,502,171, 2035 – 18,865,788";<sup>1046</sup> as well as PPL's estimations, which assumed that in 2015, Chopin Airport will accept 10,973,911 passengers.<sup>1047</sup> Both of these estimations, Respondent argues, are in line with the number of passengers at Chopin Airport during the first half of 2015.<sup>1048</sup> Respondent also cites PPL's Comprehensive Analysis of Capacity, which estimates that Chopin Airport will achieve its peak capacity in number of

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<sup>1038</sup> Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.16.

<sup>1039</sup> Respondent's Rejoinder, para. 417, *referring to* Deloitte Report, para. 11, **Exhibit RER-1**.

<sup>1040</sup> *See* Deloitte Report, para. 66, **Exhibit RER-1**, *referring to* Civil Aviation Authority at [www.ulc.gov.pl](http://www.ulc.gov.pl).

<sup>1041</sup> *See* Deloitte Report, para. 67, **Exhibit RER-1**.

<sup>1042</sup> Respondent's Rejoinder, para. 414, *referring to* Claimant's Reply, para. 478.

<sup>1043</sup> Respondent's Rejoinder para. 415.

<sup>1044</sup> Respondent's Rejoinder, para. 416, *referring to* Mirza Report, para. 4.3.1, **Exhibit CER-2**.

<sup>1045</sup> Respondent's Rejoinder, para. 417, *referring to* Deloitte Report, para. 11, **Exhibit RER-1**.

<sup>1046</sup> Respondent's Rejoinder, para. 419, *referring to* CDM Report, p. 140, <http://bip.polish-airports.com/pl/menuprzedmiotowe/raporty-srodowiskowe-1/raport-o-oddziaływaniu-na-srodowisko-przedsiębiorstwa-pn.-201eport-lotniczywarszawa-2013-budowa-rozbudowa-przebudowa-modernizacja-infrastruktury-lotniskowej201d/raport-o-oddziaływaniu-nasrodowisko-przedsiębiorstwa-pn.-201eport-lotniczy-warszawa-2013-budowa-rozbudowa-przebudowa-modernizacjainfrastruktury-lotniskowej201d/raport-dokument-pdf>, **Exhibit R-140**.

<sup>1047</sup> Respondent's Rejoinder, para. 419, *referring to* Deloitte Report, Exhibit E.05, **Exhibit RER-1**.

<sup>1048</sup> Respondent's Rejoinder, para. 420, *referring to* Printout from the PPL's website, **Exhibit R-142**.

passengers (15 million) by 2020 and will not increase after that.<sup>1049</sup> In light of these and other sources, Respondent submits that both Claimant's and Mr. Qureshi's estimation of 22 million passengers in 2020 are incorrect.<sup>1050</sup>

730. Respondent also states that the Comprehensive Analysis of Capacity supports PPL's estimations concerning the PAX index, and discredits the Mirza Report. Respondent explains that, in order to increase the capacity of Chopin Airport after 2020, major structural enlargements (which would be limited due to its surroundings and location) or even the construction of a new airport around Warsaw, would be required. In either case, Respondent claims that it is not realistically possible to increase passenger throughput at Chopin Airport after 2020 and therefore to achieve the PAX growth estimated by Claimant.<sup>1051</sup>
731. Deloitte further submits that, even if the 15 million capacity constraint were overcome, the increased PAX would require increased retail space, which would mean that SPP would be diluted (*i.e.*, spread across a wider base).<sup>1052</sup>
732. Respondent therefore maintains that the differences between the Parties' experts on PAX projections are significant. Respondent supports Deloitte's approach, according to which, from 2020 onwards, PAX would remain constant at 15 million passengers.<sup>1053</sup>

#### Costs

733. Respondent disputes Claimant's assertion that there is an agreement on the calculation of rental charges; however, these relate to the Extension Period and are accordingly described later in this Award (see paras. 780-783 below).

#### Gross Margin

734. Respondent notes that Mr. Qureshi has predicted an increase of the trade margin from 47.8% in 2010 to 48.2% in 2015 and 51.2% in 2020.<sup>1054</sup> According to Respondent, Mr. Qureshi's estimation is an "overly optimistic forecast". In Respondent's view, there is insufficient evidence for the claimed effectiveness of Claimant's business strategy that would justify the forecasted profit margin. Respondent claims that its experts provide a more reasonable approach, namely that the Gross Margin would remain at 46.9% in line with the last observed data point.<sup>1055</sup>
735. The Deloitte Report also notes that Mr. Qureshi's forecast of BH Travel's Gross Margin assumes a stable and continuous growth to levels recorded by two top performers in the duty-free market. According to Deloitte, Mr. Qureshi does not explain why these two companies are the most appropriate comparators. In addition, Deloitte submits that Mr. Qureshi does not seem to consider

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<sup>1049</sup> Respondent's Rejoinder, paras. 423-425, *referring to* Comprehensive Analysis of the Capacity, pp. 3-5 and 7, **Exhibit R-141**.

<sup>1050</sup> Respondent's Rejoinder, para. 420, *referring to* Deloitte Report No. 2, paras. 4.24-4.27; Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.6; PwC Report No. 2, p. 26, p. 81, **Exhibit CER-3**; Hearing Transcript (14 October 2015), 145:24 to 147:16.

<sup>1051</sup> Respondent's Rejoinder, para. 431.

<sup>1052</sup> Revised Post-hearing Supplement to Deloitte Report No. 2, paras. 2.6-2.8.

<sup>1053</sup> Respondent's Post-Hearing Brief, para. 223.

<sup>1054</sup> Respondent's Post-Hearing Brief, para. 227, *referring to* First PwC Report, para. 98, **Exhibit CER-1**.

<sup>1055</sup> Respondent's Post-Hearing Brief, para. 228.

that the Gross Margin target may differ among different duty-free shops.<sup>1056</sup>

Discount rate

736. Respondent challenges the discount rate adopted by Claimant to calculate the damages. Deloitte submits that the rate applied by Mr. Qureshi is considerably lower compared to the rates applied by stock market analysts for comparable companies.<sup>1057</sup>
737. Deloitte notes that Mr. Qureshi found the discount rate by estimating BH Travel's costs of equity at 6.6%. According to Deloitte, this number is underestimated. Deloitte compares BH Travel's costs of equity with that of Dufry AG, the leader in the duty-free industry. It states that Dufry AG's costs of equity remain within the range of 9.8%-11.7%.<sup>1058</sup>
738. Deloitte furthermore explains that Dufry AG is a company with a higher scale of operations and profitability than BH Travel and therefore BH Travel's costs of equity should be necessarily higher than those of Dufry AG. For Deloitte, this confirms the conclusion that the discount rate applied by Mr. Qureshi is significantly underestimated.<sup>1059</sup>
739. Respondent does not agree that country risk is fully reflected in the Polish bond interest adopted by Mr. Qureshi. Respondent claims that the discount rate should include a country risk premium of 1.1%. In addition, Respondent submits that the discount rate should include a size premium of 2% based on BH Travel's smaller size and thus higher risk.<sup>1060</sup>
740. In conclusion, Respondent claims that a discount rate of 13.7% should apply.<sup>1061</sup>

Valuation date

741. The Deloitte Report notes that Mr. Qureshi failed to take into account the change of the ownership structure that occurred on 29 October 2012 (see para. 108 above).<sup>1062</sup> Respondent claims that, as this change has a direct impact on Claimant's indirect stake in Baltona (and thus BH Travel), the calculation of the amount of the loss should reflect the reduction in ownership from 80.68% to 68.34%.<sup>1063</sup>
742. Respondent also criticises the period of time that Claimant took into account to assess the damage in the form of *lucrum cessans*. Respondent submits that any calculation should only consider the period up to June 2015, *i.e.*, the end of the Lease Agreements. According to Respondent, the evidence submitted in these proceedings shows that the Flemingo Group knew about the upcoming modernisation of Terminal 1 and considered the termination of the Lease Agreements

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<sup>1056</sup> See Deloitte Report, paras. 80 and 82, **Exhibit RER-1**.

<sup>1057</sup> See Deloitte Report, para. 98, **Exhibit RER-1**.

<sup>1058</sup> See Deloitte Report, para. 106, **Exhibit RER-1**.

<sup>1059</sup> See Deloitte Report, para. 106, **Exhibit RER-1**.

<sup>1060</sup> Respondent's Post-Hearing Brief, para. 231.

<sup>1061</sup> Respondent's Post-Hearing Brief, para. 231.

<sup>1062</sup> See Deloitte Report, para. 110, **Exhibit RER-1**.

<sup>1063</sup> Deloitte Report, para. 110, **Exhibit RER-1**, referring to First PwC Report, p. 4, **Exhibit CER-1**. See also Statement of Defence, para. 357.

that would result therefrom.<sup>1064</sup> Since it knew about the planned modernisation, Flemingo Group “must have taken [this] fact into consideration in its financial risk and its potential influence on the final estimation of the value of investment in Baltona’s shares.<sup>1065</sup> Thus, Respondent concludes that there are no sufficient grounds to assert and assume that Claimant would have continued its activities at Chopin Airport after June 2015.<sup>1066</sup>

743. Additionally, Deloitte criticised the calculation of a discount rate on a date later than the valuation date, as was done by Mr. Qureshi. According to Deloitte, the correct approach is to calculate the discount rate on the valuation date and use pre-judgment interest to reflect the time value of money up to the date of the award.<sup>1067</sup>

## 2) Loss of profits for the Extension Period

744. The Parties disagree as to whether Claimant is entitled to compensation for loss of profits in the Extension Period (*i.e.*, the period after the original terms of the Lease Agreements (Base Period) has come to an end).

### *Claimant’s Position*

745. Claimant contends that it is entitled to compensation for injury in the form of a loss of opportunity or “loss of chance”, as a “sub-species” of its loss of profits claim.<sup>1068</sup>
746. Claimant states that the compensation for lost profits for the Extension Period concerns its loss of opportunity, which “is normally calculated as the hypothetical maximum loss, multiplied by the probability of the chance coming to fruition”.<sup>1069</sup> According to Claimant, Respondent damaged Claimant’s opportunity or chance to have the Lease Agreements renewed, and therefore is liable for the related losses.<sup>1070</sup>
747. Claimant submits that its loss of profits in the Extension Period, as calculated by Mr. Qureshi of PwC, amounts to the following under the various Scenarios:
- a. Claimant’s Scenario A1: EUR 43,405,290;
  - b. Claimant’s Scenario A2: EUR 57,161,450; and
  - c. Claimant’s Scenario B: EUR 54,100,850.<sup>1071</sup>

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<sup>1064</sup> Statement of Defence, paras. 382-385, *referring to* Letter from MDA Capital dated 4 March 2010 to the Director of the Corporate Governance and Privatization Department III at the Ministry of the Treasury, **Exhibit R-96**, Preliminary Financial Due Diligence Report, **Exhibit C-39**.

<sup>1065</sup> Statement of Defence, para. 384, *referring to* the Preliminary Financial Due Diligence Report, **Exhibit C-39**.

<sup>1066</sup> Statement of Defence, para. 387.

<sup>1067</sup> Hearing Transcript (15 October 2015), 234:2 to 235:20.

<sup>1068</sup> Statement of Claim, para. 212, *referring to* Ripinsky and Williams, **Exhibit CL-7** (loss of opportunity is a “sub-species of lost profits, which is resorted to when the available data does not allow making a more precise calculation of lost profits”).

<sup>1069</sup> Statement of Claim, para. 212, *referring to* *Lemire v. Ukraine Award*, para. 251, **Exhibit CL-56**.

<sup>1070</sup> Statement of Claim, para. 232.

<sup>1071</sup> Claimant’s Post-Hearing Brief, para. 549. *See* Table at Claimant’s Post-Hearing Brief, p. 247, *referring to* PwC Model Scenario B Spreadsheets; PwC Model Scenario A1 Spreadsheets; PwC Model Scenario A2 Spreadsheets.

748. Claimant explains that the calculation for the loss of profits under the Extension Period used the same inputs and assumptions as for the Base Period.<sup>1072</sup>

*The probability of having the lease agreements renewed*

749. In order to claim the alleged opportunity lost, Claimant relies on the assumption that “an incumbent duty-free concessionaire is in the strongest position to win the renewal tender after the expiration of the concession”.<sup>1073</sup> According to Claimant, Mr. Qureshi assumed that Baltona’s opportunity to have the leases renewed is a 75% probability. Claimant explains that the 75% probability corresponds to the percentage of tenders in which Baltona, the incumbent, has prevailed over Aelia – Baltona’s main and only competitor in the Polish duty-free market, when Baltona was tendering as an incumbent.<sup>1074</sup>

750. Claimant points out that Mr. Mirza supports the assumption that an incumbent operator has increased chances to have lease agreements renewed. Specifically, Mr. Mirza submits that an incumbent operator has: (i) less of a learning curve; (ii) built up knowledge of the business and customers; and (iii) a strong working relationship with the airport management.<sup>1075</sup>

751. Furthermore, Mr. Mirza provides that “it is evident that duty-free operators have a strong chance of either being awarded extensions on their existing contracts or being reselected [...] in situations when contracts are up for a competitive tender”.<sup>1076</sup> Claimant points to a publicly available study prepared by Shipley, which states that the “average incumbent win rates are 70-90% across all industries”.<sup>1077</sup>

752. Claimant submits that Mr. Mirza’s analysis is consistent with previous Baltona tendering experience. Claimant states that Baltona has won three of the six tenders for Airport duty-free retail in Poland as an incumbent and in two of the three occasions where Baltona lost, the winner was another incumbent duty-free operator.<sup>1078</sup>

753. According to Claimant, the evidence confirms that BH Travel had significantly higher chances of remaining in the premises after the expiry of the Base Period.<sup>1079</sup> For this reason, Claimant contends that the 75% probability adopted by Mr. Qureshi is reasonable.<sup>1080</sup>

754. Claimant challenges Respondent’s concerns with the difficulties of predicting whether BH Travel would win the tender and whether it would necessarily generate profits during the Extension

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<sup>1072</sup> Statement of Claim, para. 235.

<sup>1073</sup> Statement of Claim, para. 232, *referring to* Jaroń Witness Statement, para. 11, **Exhibit CWS-2**.

<sup>1074</sup> Claimant’s Reply, para. 516, *referring to* First PwC Report, paras. 34, 39, **Exhibit CER-1**.

<sup>1075</sup> Claimant’s Reply, para. 521, *referring to* Mirza Report, para. 6.1.2., **Exhibit CER-2**. *See also* Claimant’s Post-Hearing Brief, para. 316, *referring to* Hearing Transcript (14 October 2015), 169: 15-22; Hearing Transcript (12 October 2015), 215: 5-11; Hearing Transcript (14 October 2015), 169:5-14; Hearing Transcript (12 October 2015), 215:12-21.

<sup>1076</sup> Claimant’s Reply, para. 521, *referring to* Mirza Report, para. 6.1.2., **Exhibit CER-2**.

<sup>1077</sup> Claimant’s Reply, para. 522, *referring to* Mirza Report, ICF-19, **Exhibit CER-2**.

<sup>1078</sup> Claimant’s Reply, para. 523, *referring to* Mirza Report, ICF-19, **Exhibit CER-2**.

<sup>1079</sup> Claimant’s Post-Hearing Brief, para. 315, *referring to* Statement of Claim, para. 232; Jaroń Witness Statement, para. 11, **Exhibit CWS-2**; Claimant’s Reply, paras. 515-534; ICF Expert Report, paras. 6.1.1-6.1.4, **Exhibit CER-2**; Second Kazimierski Witness Statement, paras. 17-26, **Exhibit CWS-6**; Claimant’s Opening Statement, p. 51, Slide 51; Deloitte Report No. 2, para. 4.10. **Exhibit RER-2**.

<sup>1080</sup> Claimant’s Reply, para 524; Hearing Transcript (16 October 2015), 88:15 to 90:2.

Period. In response to Respondent’s first concern, Claimant submits that the 75% probability factor is used to reflect the risk that BH Travel would not win the renewal tenders.<sup>1081</sup> With respect to Respondent’s second concern, Claimant answers that investment treaty tribunals and commentators support the assertion that future profits need not be “guaranteed” in order to entitle a claimant to compensation, as long as they are “probable or reasonably anticipated”<sup>1082</sup> or “more probable than not”.<sup>1083</sup> Claimant further submits that investment treaty tribunals have had no hesitation in awarding damages for loss of opportunity or “loss of chance”.<sup>1084</sup>

755. Claimant also challenges the evidence submitted by Respondent in its Rejoinder (letters from companies managing airports in Poland) to support Respondent’s contention that “there is no special business practice favouring existing lessees of commercial space at airports”.<sup>1085</sup> Claimant submits that the letters were produced specifically for these proceedings at the request of the Attorney General of the Polish State Treasury and do not reflect actual business records.<sup>1086</sup> Thus, they should be given no evidentiary weight.<sup>1087</sup> In addition, Claimant states that Respondent has actually conceded that BH Travel had an incumbency advantage.<sup>1088</sup>
756. Claimant also disputes Respondent’s quantum experts’ assertion that the “bad blood” between Baltona/BH Travel and PPL would have lessened the probability for renewal.<sup>1089</sup> According to Claimant, no “bad blood” existed between BH Travel and PPL before the 8 December 2011 meeting; at that time PPL was “fully satisfied” with BH Travel. Claimant states that any “bad blood” after that date was due to Respondent’s violations of its obligations. Consequently Claimant contends that Respondent’s “but for” scenario “fails to wipe out the ‘bad blood’ between BH Travel and PPL”.<sup>1090</sup> In Claimant’s view, the calculation of the loss of opportunity should be based upon “the same situation that existed between BH Travel and PPL before the 8 December 2011 meeting”.<sup>1091</sup>
757. Claimant further argues that Deloitte’s assumption about the need for “public” tenders to prolong

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<sup>1081</sup> Claimant’s Reply, para. 531; Claimant’s Post-Hearing Brief, para. 362.

<sup>1082</sup> Claimant’s Reply, para. 532, referring to *Archer Daniels v. Mexico* Award, para. 285, **Exhibit CL-50**; Statement of Claim, para. 211. *See also* Claimant’s Post-Hearing Brief, para. 363.

<sup>1083</sup> Claimant’s Reply, para. 533, referring to Ripinsky and Williams, p. 165, **Exhibit CL-113**, further referring to *Compañía de Aguas del Aconquija v. Argentina* Award, para. 8.3.4, **Exhibit CL-38**.

<sup>1084</sup> Claimant’s Reply, para. 533, referring to Ripinsky and Williams, p. 291, **Exhibit CL-113**; *Lemire v. Ukraine* Award, para. 251, **Exhibit CL-56**. *See also* Claimant’s Post-Hearing Brief, para. 364.

<sup>1085</sup> Claimant’s Post-Hearing Brief, para. 332, referring to Respondent’s Rejoinder, para. 442; Letters from the Port Lotniczy Poznan-Lawica sp. z o.o. to the State Treasury dated 24 June 2015 and 10 July 2015, **Exhibit R-143**; Letters from the Wrocław Airport to the State Treasury with supplement dated 25 June 2015 and 10 July 2015, **Exhibit R-144**; Letters from the Łódź Lublinek Airport to the State Treasury with supplement dated 18 June 2015 and 6 July 2015, **Exhibit R-145**; Letters from the Rzeszow Jasionka Airport to the State Treasury with supplement dated 24 June 2015 and 15 July 2015, **Exhibit R-146**; Letter from the Gdansk Airport to the State Treasury with supplement dated 23 June 2015, **Exhibit R-147**.

<sup>1086</sup> Claimant’s Post-Hearing Brief, para. 333. Claimant notes that Aelia / HDS (incumbent duty-free operator in Terminal 2 before the modernization) was awarded the lease agreements for the “shopping and dining area” in modernised Terminal 1. *See* Claimant’s Post-Hearing Brief, para. 336, referring to Press article regarding 10 year tender, **Exhibit SQ-71**; Hearing Transcript (14 October 2015), 41: 18-21.

<sup>1087</sup> Claimant’s Post-Hearing Brief, paras. 333-334.

<sup>1088</sup> Claimant’s Post-Hearing Brief, para. 320, referring to Respondent’s Rejoinder, para. 446.

<sup>1089</sup> Claimant’s Post-Hearing Brief, paras. 323-327, referring to Deloitte Report No. 2, paras. 4.14 and 4.21, **Exhibit RER-2**.

<sup>1090</sup> Claimant’s Post-Hearing Brief, paras. 324-326.

<sup>1091</sup> Claimant’s Post-Hearing Brief, para. 327.

or renew the Lease Agreements<sup>1092</sup> is wrong.<sup>1093</sup> Thus, Claimant concludes that Respondent did not produce evidence that would disprove Claimant's Extension Period scenario and therefore Claimant should not be deprived of its right since the lack of evidence is attributable to Respondent.<sup>1094</sup>

758. Finally, Claimant submits that Respondent has failed to provide any data to challenge Claimant's assumption that BH Travel had a good chance of having the Lease Agreements renewed.<sup>1095</sup>

*The increase of rental fees*

759. Claimant challenges Respondent's assertion concerning the increase of nearly █% in rental fees in the Extension Period after the conclusion of the modernisation at Terminal 1. Claimant also asserts that in Deloitte Report No. 2, Respondent's arguments concerning the increase in rental fees was abandoned.<sup>1096</sup>
760. Claimant agrees with Respondent that "the new lease agreements could potentially provide for increased rents".<sup>1097</sup> However, it submits that Mr. Qureshi's calculation has already captured such increases by considering the volume of BH Travel's sales and inflation (the variables on which rental is dependent).<sup>1098</sup>
761. Claimant notes that the estimation provided by the Deloitte Report is based on information provided by PPL.<sup>1099</sup> In this regard, Claimant argues that the alleged rental increase is not grounded on reliable evidence, and points out that Respondent has continuously resisted the disclosure of PPL's evidence concerning rental fees.<sup>1100</sup>
762. Claimant recalls that Respondent has claimed that this information constitutes trade secrets and that it is immaterial to the dispute.<sup>1101</sup> After the Tribunal ordered Respondent to produce this information, Claimant notes, Respondent produced only a letter from PPL that stated that "the average minimum rate for retailing and catering at Terminal 1 increased by approximately █%, whereby the average minimum rate for retailing increased by about █%".<sup>1102</sup> Claimant concludes that "[t]he record and chain of correspondences thus confirms that Deloitte must have accepted oral information in substantiation for the figures referred to in paragraph 83 of the

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<sup>1092</sup> See Claimant's Post-Hearing Brief, para. 346 and 348, *referring to* Deloitte Report No. 2, para. 4.11, **Exhibit RER-2**.

<sup>1093</sup> Claimant's Post-Hearing Brief, paras. 346-347. According to Claimant, the evidence shows that there is no such obligation. See Claimant's Post-Hearing Brief, para. 347, *referring to* Second █ Mr. [PN] Witness Statement, para. 22, **Exhibit RWS-3** and Hearing Transcript (13 October 2015), 72:18-19.

<sup>1094</sup> Claimant's Reply, para. 534, *referring to* *Gemplus v. Mexico*, paras. 13-99, **Exhibit CL-110**; *Sapphire v. National Iranian Oil Company* Arbitral Award, pp. 187-188, **Exhibit CL- 106**.

<sup>1095</sup> Claimant's Reply, para. 520.

<sup>1096</sup> Claimant's Post-Hearing Brief, para. 351.

<sup>1097</sup> Claimant's Reply, para. 529, *referring to* Statement of Defence, para. 421.

<sup>1098</sup> Claimant's Reply, para. 529, *referring to* First PwC Report, paras. 108-114, **Exhibit CER-1**; Second PwC Report, para. 122, **Exhibit CER-3**.

<sup>1099</sup> Claimant's Reply, paras. 525-526, *referring to* Deloitte Report, para. 83, **Exhibit RER-1**.

<sup>1100</sup> Claimant's Reply, para. 526, *referring to* Annex 1 to Procedural Order No. 2 – Tribunal's Decisions on Claimant's Requests for Production of Documents, para. 14.

<sup>1101</sup> Claimant's Reply, para. 526, *referring to* Annex 1 to Procedural Order No. 2 – Tribunal's Decisions on Claimant's Requests for Production of Documents, para. 14.

<sup>1102</sup> Claimant's Reply, para. 527, *referring to* Response letter from PPL to Mr. Piotr Rodkiewicz dated 28 January 2015.

Deloitte Report”.<sup>1103</sup>

763. Claimant also points to the Deloitte Report No. 2, where Respondent’s quantum experts concluded that the “█ average minimum rent increase assumption” is unsubstantiated and thus excluded it from their calculation.<sup>1104</sup> On that basis, Claimant concludes that Deloitte had not seen any evidence supporting the █ rental fees increase after the modernisation.<sup>1105</sup>

*The length of the Extension Period*

764. Claimant asserts that Mr. Qureshi was instructed to assume a 10-year extension for the Lease Agreements.<sup>1106</sup> Claimant observes that the 10-year period “corresponds to the same effective length of the Baltona Classic and Baltona Perfumery leases, which were on an economic basis the most significant of all of the 11 leases”.<sup>1107</sup>
765. Claimant challenges Respondent’s claim that “the practice applied to date by the companies managing airports in Poland” provides that a “five-year term is generally used in lease agreements” and not the ten years defended by Claimant.<sup>1108</sup> Claimant disputes the reliability and usefulness of the evidence provided by Respondent, *i.e.*, letters provided by companies managing airports in Poland (see para. 755 above).<sup>1109</sup>
766. Claimant submits that the evidence “confirms that the lease agreements between PPL and Aelia for the premises in modernised Terminal 1 provide for a 10-year guaranteed period of lease”.<sup>1110</sup> Thus, Claimant concludes that Mr. Qureshi’s 10-year guaranteed duration of the Extension Period is credible, and remains unchallenged.<sup>1111</sup>
767. Finally, Claimant notes that Mr. Qureshi prepared a “Scenario C” calculation “for illustrative purposes only”,<sup>1112</sup> which calculated Claimant’s portion of the value of BH Travel’s lost opportunity to continue its operations for an indefinite period of time. The Scenario C calculation provides that damages would amount to EUR 177,261,000. Claimant thus concludes that Mr. Qureshi’s other calculations “are reasonable, not to say conservative”.<sup>1113</sup>

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<sup>1103</sup> Claimant’s Reply, para. 528, *referring to* Deloitte Report, para. 83, **Exhibit RER-1**. *See also* Claimant’s Post-Hearing Brief, paras. 351-355. According to Claimant, the fact that the information about the rental fees was provided orally to Deloitte was confirmed during the Hearings. *See* Claimant’s Post-Hearing Brief, para. 355, *referring to* Hearing Transcript (15 October 2015), 90:7-8.

<sup>1104</sup> Claimant’s Post-Hearing Brief, para. 358, *referring to* Deloitte Report No. 2, para. 5.18, **Exhibit RER-1**.

<sup>1105</sup> Claimant’s Reply, para. 528 and Claimant’s Post-Hearing Brief, paras. 351-358.

<sup>1106</sup> Claimant’s Post-Hearing Brief, para. 317, *referring to* First PwC Report, paras. 34 and 39, **Exhibit CER-1**; Second PwC Report, paras. 58-74; Letter from the Claimant to the Tribunal dated 6 November 2015; PwC Model Scenario A1 Spreadsheets; PwC Model Scenario A2 Spreadsheets; PwC Model Scenario B Spreadsheets.

<sup>1107</sup> Statement of Claim, para. 233, Claimant’s Reply, para. 516, *referring to* First PwC Report, para. 39, **Exhibit CER-1**.

<sup>1108</sup> Claimant’s Post-Hearing Brief, para. 338, *referring to* Respondent’s Rejoinder, para. 447.

<sup>1109</sup> Claimant’s Post-Hearing Brief, para. 338, *referring to* Claimant’s Post-Hearing Brief, paras. 332-334.

<sup>1110</sup> Claimant’s Post-Hearing Brief, para. 341, *referring to* Press article regarding 10 year tender, **Exhibit SQ-71**.

<sup>1111</sup> Claimant’s Post-Hearing Brief, para. 344.

<sup>1112</sup> Claimant’s Post-Hearing Brief, para. 318, *referring to* Letter from the Claimant to the Tribunal dated 6 November 2015; PwC Model Scenario C Spreadsheets.

<sup>1113</sup> Claimant’s Post-Hearing Brief, para. 319.

*Respondent's Position*

768. Respondent challenges the claim that Claimant is entitled to damages concerning the lost profits during the Extension Period. Respondent also asserts that the assumptions used by Claimant concerning the Extension Period are not supported by the facts and evidence presented.<sup>1114</sup>
769. In the event that the Tribunal finds that Respondent is liable for damages for loss of profits in respect of the Extension Period, Respondent submits Deloitte's calculation of these damages should be accepted by the Tribunal. In making its calculation, Deloitte assumes two different probability factors concerning BH Travel's chances of having the leases renewed, either 25% or 50%. Accordingly, Deloitte states that if the Extension Period is included in the calculation for loss of profits, damage for BH Travel (as a whole) for this period would amount to EUR 7 million (assuming a probability of 25%) or EUR 8 million (if the probability is assumed to be 50%).<sup>1115</sup>
770. Respondent notes that Claimant also submits calculation of its damages under its own Scenario C. Respondent argues in this regard that Claimant's assumption under Scenario C concerning the probability factor of 75% and the continuation of the Lease Agreements for an indefinite period is "an extreme exaggeration and translates into an even more inflated loss estimate".<sup>1116</sup>

*The probability of having the Lease Agreements renewed*

771. Respondent disputes the assumptions relied on by Mr. Qureshi that the Lease Agreements would be prolonged or renewed for a new period after their expiration. According to Respondent, BH Travel's chances of winning a new tender were negligible.<sup>1117</sup> Deloitte's estimation provides that BH Travel's probability of winning should have been 50%, or, if considering the participation of its competitors, as low as 30%.<sup>1118</sup>
772. Respondent emphasises that PPL is subject to public tender procedures and therefore a new lease would require the announcement of a new tender.<sup>1119</sup> Respondent further justifies its conclusion that the probability of BH Travel winning a new tender in the modernised Terminal 1 was relatively low by noting that: (i) BH Travel was generating losses and therefore it was not clear whether it would be able to present a competitive offer relative to its main competitors, namely HDS and Keraniss;<sup>1120</sup> (ii) it is not certain whether BH Travel would have been able to meet the requirement of "coherent development of the airport space" that was adopted after the modernisation of Terminal 1;<sup>1121</sup> and (iii) Baltona won only three out of six tenders which it entered, *i.e.*, 50%. Respondent thus concludes that Claimant's assumption of a 75% probability of renewing the lease is unsupported by the facts.<sup>1122</sup> Furthermore, Respondent notes that Mr. Qureshi conceded that he was instructed to apply the 75% rate and he does not have the

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<sup>1114</sup> Respondent's Rejoinder, paras. 359 and 450, *referring to* Deloitte Report No. 2, Section 4 and para. 4.21, **Exhibit RER-2**.

<sup>1115</sup> *See* Deloitte Report No. 2, para. 5.25, Table 8, **Exhibit RER-2**.

<sup>1116</sup> Respondent's Post-Hearing Brief, para. 273.

<sup>1117</sup> Respondent's Rejoinder, para. 440.

<sup>1118</sup> Respondent's Rejoinder, para. 446.

<sup>1119</sup> Statement of Defence, paras. 411, 422.

<sup>1120</sup> Respondent's Rejoinder, para. 362.

<sup>1121</sup> Respondent's Rejoinder, para. 363.

<sup>1122</sup> Respondent's Rejoinder, para. 364, *referring to* Second Kazimierski Witness Statement, para. 21, **Exhibit CWS-6**; Deloitte Report No. 2, para. 4.18, **Exhibit RER-2**.

expertise to estimate the appropriate figure.<sup>1123</sup>

773. Respondent also argues that Claimant ignores the fact that the past interactions between BH Travel and PPL reduce the probability of the extension of the Lease Agreements.<sup>1124</sup>
774. Respondent also addresses Claimant's assumption that incumbent businesses have increased chances to succeed in tenders. In this regard, Respondent points out that three incumbent companies at Chopin Airport could take part in the tender (HDS, Keraniss, and BH Travel).<sup>1125</sup> In the view of such circumstances, BH Travel's financial difficulties,<sup>1126</sup> and the lack of similar difficulties on the part of BH Travel's competitors, Respondent submits that the chances of BH Travel winning the tender would have been no more than 30%.<sup>1127</sup>
775. In any event, Respondent concludes that the assumption that existing tenants have increased opportunities, as suggested in the Mirza Report,<sup>1128</sup> is groundless.
776. Respondent disputes Claimant's assertion that Poland has failed to provide any data disproving the assumption that an incumbent operator is in a better position to win a new tender after the expiration of the concession. According to Respondent, "it is the Claimant who is responsible for proving circumstances from which it is arguing consequences in this case." In Respondent's view, Claimant has failed to demonstrate that the Lease Agreements would have been extended when BH Travel was breaching its contractual obligations.<sup>1129</sup>
777. Respondent submits that BH Travel's chances of winning the tender need to be evaluated using objective criteria. In this regard, Respondent points to criteria applied by companies managing airports to extend lease agreements with existing lessees. These criteria include "an economic analysis, the level of revenue per 1m<sup>2</sup> of leased space, the frequency of late payments, the breaches of the provisions of the agreement by the lessee, and the breach of the generally applicable provisions of the law by the lessee".<sup>1130</sup> The criteria to extend a lease in another airport, Respondent notes, includes the analysis of whether "a lease agreement foresees this option and if the extension is viable for a company's business activities".<sup>1131</sup>
778. Respondent also submits that the theory that an incumbent holds a more favourable position is not borne out in practice. In one Polish airport, Wrocław Airport, Respondent observes, "new tenders led to the selection of lessees, [...] some of whom were new entities to [Wrocław Airport],

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<sup>1123</sup> Respondent's Post-Hearing Brief, paras. 266-267, *referring to* Hearing Transcript (15 October 2015), 32:15-22 and 46:24-4.

<sup>1124</sup> Respondent's Rejoinder, para. 359, *referring to* Deloitte Report No. 2, Section 4, **Exhibit RER-2**. *See also* Respondent's Post-Hearing Brief, para. 268.

<sup>1125</sup> Hearing Transcript (15 October 2015), 231:24-25.

<sup>1126</sup> *See supra*, para. 110.

<sup>1127</sup> Respondent's Rejoinder, para. 365, *referring to* ■ Ms. [IM] Witness Statement, paras. 12, 16, **Exhibit RWS-4**.

<sup>1128</sup> Respondent's Rejoinder, para. 444, *referring to* Mirza Report, para. 6.1.2, **Exhibit CER-2**.

<sup>1129</sup> Respondent's Rejoinder, para. 435-437, *referring to* Claimant's Reply, para. 520.

<sup>1130</sup> Respondent's Rejoinder, para. 442, *referring to* Letters from the Port Lotniczy Poznań-Ławica sp. z o.o. to the State Treasury dated 24 June 2015 and 10 July 2015, **Exhibit R-143**.

<sup>1131</sup> Respondent's Rejoinder, para. 442, *referring to* Letter from the Gdańsk Airport to the State Treasury dated 23 June 2015, p.1, **Exhibit R-147**.

but which have sound experience in their sector”.<sup>1132</sup> In the case of that airport, only four of the nine incumbents could continue in the airport’s new terminal.<sup>1133</sup> In another example, the airport in Łódź did not renew and did not add an annex to lease agreements with previous tenants from its old terminal.<sup>1134</sup>

779. Respondent further cites the findings of Deloitte Report No. 2, which refer to “an additional set of worldwide cases where incumbents were not successful in securing lease extensions”.<sup>1135</sup> In addition, Respondent disputes any claim of market trends concerning the “favourable chances” of an incumbent operator, considering that Baltona has only won three out of six tenders in which it participated in Poland.<sup>1136</sup>

*The increase of rental fees*

780. Respondent submits that the rental fees of the premises would have increased by, at minimum, █%–█% after the modernisation at Terminal 1, as provided by PPL.<sup>1137</sup> According to Deloitte, actual data points to an average minimum increase of █% for commercial areas in the modernised Terminal 1.<sup>1138</sup>
781. Deloitte Report No. 2 states that, in light of the one-off █% minimum rent increase in 2015 and the assumptions adopted in the report, Claimant has suffered no losses.<sup>1139</sup>
782. Finally, Respondent challenges Claimant’s submission that PPL’s information concerning the current rental fees are doubtful, contending that Claimant does not provide sufficient arguments to support this submission.<sup>1140</sup>
783. Respondent therefore disagrees with Claimant that the issue of the rental fees is undisputed between the Parties. Respondent maintains its position that the average minimum rent for commercial areas in the new Terminal 1 did increase by █% compared to the rates in 2011.<sup>1141</sup>

*The length of the Extension Period*

784. Respondent disputes that the renewal would have been for 10 years, as contended by Claimant. According to Respondent, the current practice is that the agreements are renewed for a period of

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<sup>1132</sup> Respondent’s Rejoinder, para. 443, *referring to* Letter from the Wrocław Airport to the State Treasury p. 2 25 dated June 2015 and 10 July 2015, paras. 4 and 5, **Exhibit R-144**. *See also* Respondent’s Post-Hearing Brief, para. 269.

<sup>1133</sup> Respondent’s Rejoinder, para. 443, *referring to* Letters from the Wrocław Airport to the State Treasury p. 2 dated June 2015 and 10 July 2015, paras. 4 and 5, **Exhibit R-144**.

<sup>1134</sup> Respondent’s Rejoinder, para. 443, *referring to* Letters from the Łódź Lublinek Airport to the State Treasury dated 18 June 2015 and 6 July 2015, p. 2, **Exhibit R-145**; Letter from the Kraków Airport to the State Treasury dated 23 June 2015, **Exhibit R-130**.

<sup>1135</sup> Respondent’s Rejoinder, para. 444, *referring to* Deloitte Report No. 2, para. 4.20, **Exhibit CER-3**.

<sup>1136</sup> Respondent’s Rejoinder, para. 445, *referring to* Second █ Mr. [PN] Witness Statement, para. 21, **Exhibit RWS-3**.

<sup>1137</sup> Respondent’s Rejoinder, para. 345; *see* Deloitte Report, para. 83, **Exhibit RER-1**.

<sup>1138</sup> Deloitte Report No. 2, para. 4.49(iii), *referring to* **Exhibit SQ-96**, **Exhibit RER-2**.

<sup>1139</sup> Respondent’s Rejoinder, para. 344, *referring to* Deloitte Report No. 2, para. 5.26, **Exhibit RER-2**.

<sup>1140</sup> Respondent’s Rejoinder, paras. 448-449, *referring to* Claimant’s Reply, para. 528.

<sup>1141</sup> Respondent’s Post-Hearing Brief, para. 230.

an average of five years.<sup>1142</sup>

785. At this point, Respondent again notes that Claimant submitted its Scenario C, which includes the continuation of the Lease Agreements by BH Travel for an “indefinite period”. Respondent claims that such an approach is “totally unrealistic”.<sup>1143</sup>

**3) Whether the DCF methodology should be applied as a standalone tool to calculate loss of profits**

786. The Parties disagree as to whether the DCF method may be used as a ‘standalone’ tool to calculate loss of profits in this case.

*Respondent’s Position*

787. Respondent submits that the DCF method alone cannot give reliable results in this case.<sup>1144</sup> Respondent argues that this fact is reflected in Claimant’s submissions, by noting that while Claimant calculated the amount of damages as EUR 54,212,393 in its Statement of Claim, “with unchanged facts and without any indication of the appearance of new or extraordinary circumstances” the same damages were calculated in the Reply to be EUR 84,956,370.<sup>1145</sup>

788. According to Respondent, these results show that the same facts applied to the DCF method can provide two different values. Respondent furthermore explains that the DCF method “is extremely susceptible to changes in the underlying assumptions made”. Respondent contends that “even a minor change in the accepted starting assumptions as variables for the calculations results in a significant difference in the result obtained using the DCF method”.<sup>1146</sup>

789. Respondent relies on the legal doctrine and the statements of legal commentators to assert that: (i) it is very easy to manipulate the DCF method;<sup>1147</sup> (ii) the DCF method used on its own, without verification by other methods, gives unreliable results;<sup>1148</sup> and (iii) contemporaneous market evidence should be relied on to value corporations and businesses.<sup>1149</sup>

790. To support its argument as to the unreliability of the DCF method when used alone, Respondent cites Deloitte’s response to the reasons Mr. Qureshi provided for maintaining the adoption of the DCF method:

- (i) A DCF valuation should be underpinned by realistic financial projections;

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<sup>1142</sup> Respondent’s Rejoinder, para. 447, *referring to* Letters from the Rzeszow Jasionka Airport to the State Treasury dated 24 June 2015 and 15 July 2015, p. 2, **Exhibit R-146**.

<sup>1143</sup> Respondent’s Post-Hearing Brief, para. 270.

<sup>1144</sup> Respondent’s Rejoinder, para. 370.

<sup>1145</sup> Respondent’s Rejoinder, para. 350, *mentioning* Statement of Claim, para. 237. The amount does not take into account Claimant’s calculation update provided in the letter dated 5 October 2015.

<sup>1146</sup> Respondent’s Rejoinder, para. 351.

<sup>1147</sup> Respondent’s Rejoinder, para. 352, *referring to* Florian Steiger, *The Validity of Company Valuation Using Discounted Cash Flow Methods*, p. 14, **Exhibit RL-41**.

<sup>1148</sup> Respondent’s Rejoinder, para. 353, *referring to* Florian Steiger, *The Validity of Company Valuation Using Discounted Cash Flow Methods*, p. 15, **Exhibit RL-41**.

<sup>1149</sup> Respondent’s Rejoinder, para. 354, *referring to* Michael W. Schwartz, David C. Bryan and Oliver J. Board, *Expert Testimony in BV Cases Should Be the Exception, Not the Rule*, **Exhibit RL-42**.

(ii) in order to limit the subjectivity inherent in the DCF valuation, use of alternative approaches is recommended by valuation and arbitration practitioners;

(iii) finding true/perfect comparables between different assets/companies can rarely be achieved in practice, but this does not invalidate the market based approach;

(iv) there are relevant market-derived references available in this case that can be applied as a high level "sanity cross-check" to the primary DCF valuation; and

(v) the DCF valuation is very sensitive where a large number of assumptions is used in the calculation. A cross-check of the DCF results to other market metrics is therefore necessary to ensure that the outcome of the valuation is a reliable approximation to the fair price i.e. the price at which an asset would exchange hands between a knowledgeable buyer and seller, acting at arm's length and in his best economic interest.<sup>1150</sup>

791. Respondent disputes Claimant's contention that "arbitral tribunals have uniformly uncritically repeatedly blessed the DCF method as a valid tool to quantify damages, including as a standalone method".<sup>1151</sup> In one case, Respondent notes, the tribunal considered the DCF method to not be an appropriate tool to calculate damages of a business that never operated or where the basis for its projected revenues has not been satisfactorily demonstrated. According to Respondent, that tribunal acknowledged that using DCF method in these circumstances provides an excessively speculative outcome.<sup>1152</sup>
792. In the current proceedings, Respondent notes that Terminal 1 was not going to continue to be available for rent, and now does not have space which is identical to the space that was the object of the Lease Agreements. Therefore, Respondent concludes that forecasting of revenue from shops which have not yet started to operate is highly speculative.<sup>1153</sup>
793. In another case, Respondent notes, the tribunal rejected the application of the DCF method because it was being applied to a loss-making company.<sup>1154</sup> Respondent recalls that BH Travel was also generating losses over the years of collaboration with PPL and submits that its overall financial performance did not significantly improve in 2011.<sup>1155</sup>
794. Respondent argues that the DCF model can be purely speculative given the lack of sufficient contemporary and/or historic data. Respondent points out that both the First and Second PwC Reports make optimistic assumptions, notwithstanding the modest amount of data available and the fact that Baltona was generating losses.<sup>1156</sup> Citing legal doctrine, Respondent further contends that the DCF method is "as good as the data used and the underlying assumptions".<sup>1157</sup>

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<sup>1150</sup> Respondent's Rejoinder, para. 356, referring to Deloitte Report No. 2, paras. 3.3, **Exhibit RER-2**.

<sup>1151</sup> Respondent's Rejoinder, para. 357, referring to Claimant's Reply, para. 425.

<sup>1152</sup> Respondent's Rejoinder, para. 358, referring to *Franck Charles Arif v. Moldova* Award, para. 576, **Exhibit RL-43**.

<sup>1153</sup> Respondent's Rejoinder, para. 360.

<sup>1154</sup> Respondent's Rejoinder, para. 366, referring to *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, Award dated March 2, 2015, ICSID Case No. ARB/10/13 ("*Hassan Awdi v. Romania Award*"), para. 514, **Exhibit RL-44**.

<sup>1155</sup> Respondent's Rejoinder, paras. 367-368, referring to Deloitte Report, para. 95, **Exhibit RER-1**, Deloitte Report No. 2, para. 4.42, **Exhibit RER-2**.

<sup>1156</sup> Respondent's Rejoinder, para. 369.

<sup>1157</sup> Respondent's Rejoinder, para. 369, referring to A. Charlton, *Discounted cash flows – Part 2, valuation and the financial crises* ("Charlton"), **Exhibit RL-45**.

795. In view of the foregoing, Respondent concludes that the use of the DCF method alone cannot provide reliable results.<sup>1158</sup>

*Claimant's Position*

796. Claimant objects to Respondent's assertion that the DCF method as a standalone tool is not useful in the present dispute.<sup>1159</sup> Claimant argues that "the DCF method is [...] 'commonly employed in actual corporate and financial transactions'".<sup>1160</sup> Furthermore, Claimant submits that the DCF method "is the only true method of assessing the value of income-producing assets".<sup>1161</sup>

797. Claimant also rejects Respondent's claim that "BH Travel was generating losses over the years of collaboration with PPL", and that "arbitral tribunals have been indicating that the use of the DCF method in the case of loss-making companies should be considered questionable".<sup>1162</sup> Claimant cites arbitral tribunals and legal commentators in support of its contention that the use of the DCF method is largely accepted as a method of assessing value of income-producing assets,<sup>1163</sup> stating that "investment treaty tribunals have repeatedly blessed the DCF method as a valid tool to quantify damages, including as a standalone method".<sup>1164</sup> According to Claimant, Respondent's argument "significantly misreads" the decisions by investment treaty tribunals concerning the use of DCF method on a standalone basis.<sup>1165</sup> Claimant cites investment treaty tribunals that applied the DCF method as a standalone tool to quantify the investors' damages, including *CMS v. Argentina*, *ADC v. Hungary*, and *Bau v. Thailand*.<sup>1166</sup>

798. Claimant refers to commentators to support its claim that damages may be quantified using a DCF model on a standalone basis, "even in the absence of a going concern".<sup>1167</sup>

799. Claimant submits that, in any event, BH Travel was a "going concern",<sup>1168</sup> and that the results of

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<sup>1158</sup> Respondent's Rejoinder, para. 370.

<sup>1159</sup> Claimant's Reply, para. 422, referring to Statement of Defence, para. 397.

<sup>1160</sup> Claimant's Reply, para. 423, referring to Ripinsky and Williams, p. 195, **Exhibit CL-113**.

<sup>1161</sup> Claimant's Reply, para. 424, referring to Ripinsky and Williams, p. 195, **Exhibit CL-113**.

<sup>1162</sup> Claimant's Post-Hearing Brief, para. 377, referring to Respondent's Rejoinder, paras. 366-367.

<sup>1163</sup> Claimant's Reply, paras. 423-424, referring to Deloitte Report, para. 32, **Exhibit RER-1**; Ripinsky and Williams, pp. 195 and 201, **Exhibit CL-113**.

<sup>1164</sup> Claimant's Reply, paras. 425-431, further referring to *ADC v. Hungary* Award, para. 502, **Exhibit CL-53**, *Walter Bau AG v. Thailand*, Award dated 1 July 2009, UNCITRAL, paras. 14.22 and 14.26, **Exhibit CL-76**; *National Grid P.L.C. v. Argentine Republic*, Award 3 November 2008, UNCITRAL ("*National Grid v. Argentina Award*"), para. 275, **Exhibit CL-60**; *CMS v. Argentina* Award, paras. 412 and 416, **Exhibit CL-26**; Ripinsky and Williams, p. 210, **Exhibit CL-113**.

<sup>1165</sup> Claimant's Post-Hearing Brief, para. 378.

<sup>1166</sup> Claimant's Post-Hearing Brief, para. 380, referring to *CMS v. Argentina* Award, para. 412, **Exhibit CL-26**; *ADC v. Hungary* Award, para. 502 (emphasis omitted), **Exhibit CL-53**; *ADC v. Hungary* Award, para. 502, **Exhibit CL-53**.

<sup>1167</sup> Claimant's Post-Hearing Brief, paras. 383-384, referring to J. Gotanda, *Recovering Lost Profits in International Disputes* (2004), p. 100, **Exhibit CL-114**; Ripinsky and Williams, pp. 283-284, **Exhibit CL-115**; H. Weisburg and C Ryan, "Means to be Made Whole: Damages in the Context of International Investment Arbitration," in Y. Derains and RH Kreindler (eds) *Evaluation of Damages in International Arbitration*, cited in Ripinsky and Williams, p. 284, **Exhibit CL-115**.

<sup>1168</sup> Claimant's Post-Hearing Brief, para. 385, referring to Second PwC Report, para. 106(a), **Exhibit CER-3**; ICF Expert Report, paras. 3.4.3-3.4.4, **Exhibit CER-2**. See also Claimant's Post-Hearing Brief, p. 165, which reproduces a table with BH Travel's financial results as reflected in Appendix 5, Deloitte Report No. 2 (page 3, Table 2 of the Deloitte Report No. 2), **Exhibit RER-2**.

the Baltona Group corroborate Claimant's ability to operate on a profitable basis.<sup>1169</sup>

800. Claimant challenges Respondent's claim that the DCF method is "inherently speculative" and therefore "it is not only possible but also necessary to use market quantifiers" in order to validate the DCF calculation.<sup>1170</sup> In response, Claimant refers to Mr. Qureshi's evidence that a benchmarking approach is "not necessary", and that "DCF can be used on a stand-alone basis as long as [the underlying] assumptions are accurate, reasonable and reliable".<sup>1171</sup> Citing commentators in support, Claimant concludes that "[s]peculation and uncertainty, inherent in any DCF analysis, can be dealt with by taking conservative estimates of cash flow projections and application of a higher discount rate".<sup>1172</sup>
801. Finally, Claimant refers to the remarks of the tribunal in *Himpurna v. PT*. While the tribunal in that case acknowledged the inherent and inevitable approximations involved in a DCF calculation of lost profits, Claimant notes that the tribunal concluded that the "fact that [DCF calculations] use ranges and estimates does not imply abandonment of the discipline of economic analysis; nor, when adopted by the arbitrators, does this method imply abandonment of the discipline of assessing the evidence before them".<sup>1173</sup>

#### 4) Whether other approaches to calculate the damages should be used in conjunction with the DCF methodology

802. The Parties disagree as to whether the assessment of Claimant's damages under the DCF method should be benchmarked against the results of other valuation approaches.

##### *Respondent's Position*

803. Respondent asserts that "the DCF methodology is not the only approach and [...] best practice requires that a valuation produced under one approach is cross-checked against valuation[s] produced under different approach[es]".<sup>1174</sup> Respondent thus claims that the calculation should make reference to market perspectives and other valuation methods.<sup>1175</sup>
804. Respondent also submits that the "Heinemann transaction [should be taken] as a reference point

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<sup>1169</sup> Claimant's Post-Hearing Brief, para. 386, referring to Consolidated Financial Statement of Baltona 2009, **Exhibit C-222**; Consolidated Financial Statement of Baltona 2010, **Exhibit C-223**; Consolidated Financial Statement of Baltona 2011, **Exhibit C-224**; Consolidated Financial Statement of Baltona 2012, **Exhibit C-225**; Consolidated Financial Statement of Baltona 2013, **Exhibit C-226**; Consolidated Financial Statement of Baltona 2014, **Exhibit C-227**; Claimant's Opening Statement, p. 47, Slide 47; Baltona Group Results for Q1 of 2015, **Exhibit C-228**; ICF Expert Report, paras. 3.4.1 and 3.4.3, **Exhibit CER-2**. See also Hearing Transcript (14 October 2015), 176:7-9; Hearing Transcript (14 October 2015), 176:9-11; PwC Hearing Presentation, p. 27, Slide 27; Second Jaroń Witness Statement, para. 54, **Exhibit CWS-5**; Hearing Transcript (12 October 2015), 170:4-10.

<sup>1170</sup> Claimant's Post-Hearing Brief, para. 387, referring to Respondent's Rejoinder, para. 393.

<sup>1171</sup> Claimant's Post-Hearing Brief, para. 388, referring to Hearing Transcript (15 October 2015), 17: 3-5.

<sup>1172</sup> Claimant's Post-Hearing Brief, para. 388, referring to Ripinsky and Williams, p. 211, **Exhibit CL-115**.

<sup>1173</sup> Claimant's Post-Hearing Brief, para. 389 referring to *Himpurna v. PT*, reprinted in 25 Y. B. COM. ARB. 13,103 (Berm.-Indon. 2000), para. 376, **Exhibit CL-116**; *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1367 (7th Cir. 1996), in J. Gotanda, *Recovering Lost Profits in International Disputes* (2004), p.101, **Exhibit CL-114**.

<sup>1174</sup> Respondent's Rejoinder, para. 369, referring to Charlton, **Exhibit RL-45**.

<sup>1175</sup> Statement of Defence, paras. 355, 391, 394, 397, referring to Deloitte Report, paras. 3, 36, **Exhibit RER-1**.

for the discussion on the quantum of the loss”.<sup>1176</sup>

805. Respondent disputes Claimant’s assertion that the use of other methods has no bearing on the calculation of damages in this case. According to Respondent, it is not clear why other benchmarks should not be used to verify the DCF method. In Respondent’s opinion, the calculation of damages in these proceedings not only can, but should, be verified.<sup>1177</sup>
806. Respondent therefore suggests three approaches to cross-check the DCF methodology: (i) an asset-based approach; (ii) acquisition price; and (iii) market perspective.

Asset-based approach

807. Respondent submits that the use of an asset-based approach is justified in this case.<sup>1178</sup>
808. Respondent claims that the use of an asset-based approach is ideal in cases where the value of future cash flows is insignificant or highly uncertain, like in the present case. In this regard, the Deloitte Report states that “an asset-based approach is recommended if: future cash flows are insignificant or highly uncertain (such as in the case of terminated Lease Agreements)”.<sup>1179</sup>
809. Respondent reiterates its argument that BH Travel was generating losses for many years and therefore could not have become profitable in a year. Such a short space of time, according to Respondent, does not allow for the reliable application of the DCF method.<sup>1180</sup>
810. Respondent refers to the findings of the tribunal in *Metaclad Corp. v. Mexico* as authority for rejecting the application of the DCF method to assess a business that was not making profit or where the enterprise has not operated for a sufficiently long time to establish a performance record.<sup>1181</sup> Respondent also points out that Deloitte had concluded that the value of future cash flows as in the case of the terminated Lease Agreements are insignificant or highly uncertain.<sup>1182</sup>
811. Even if it were assumed that BH Travel’s sales were growing, Respondent submits that future cash flows remain highly uncertain in light of the risk of termination of the Lease Agreements for BH Travel’s repeated breaches.<sup>1183</sup> Because of such uncertainty, Respondent concludes that the use of the asset-based approach is justified in this case.
812. Respondent explains that the asset-based method would take into account the value of the investment made and the factors which affected the value of the investments during the period between the acquisition of Baltona’s stock and its flotation on the Warsaw Stock Exchange. Additionally, it would consider the impact of the termination of the Lease Agreements by PPL on the results currently achieved by Baltona. Accordingly, Respondent submits that “the calculation of damage to Baltona’s value should be referred to the book value of BH Travel,

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<sup>1176</sup> Hearing Transcript (16 October 2015), 141:13-16. *See also* the Revised Post-hearing Supplement to Deloitte Report No. 2, paras. 2.28-2.29.

<sup>1177</sup> Respondent’s Rejoinder, paras. 371-373.

<sup>1178</sup> Respondent’s Rejoinder, para. 379.

<sup>1179</sup> Respondent’s Rejoinder, para. 375, *referring to* Deloitte Report, para. 35, **Exhibit RER-1** (emphasis omitted).

<sup>1180</sup> Respondent’s Rejoinder, para. 375.

<sup>1181</sup> Respondent’s Rejoinder, para. 376, *referring to* *Metalclad v. Mexico* Award, para. 120, **Exhibit RL-46**.

<sup>1182</sup> Statement of Defence, para. 392, *referring to* Deloitte Report, para. 34, **Exhibit RER-1**.

<sup>1183</sup> Respondent’s Rejoinder, para. 378, *referring to* Statement of Claim; Preliminary Financial Due Diligence Report, **Exhibit C-39**; ■■■ Ms. [IM] Witness Statement, para. 16, **Exhibit RWS-4**.

increased by the value of Lease Agreements until June 2015 and decreased by the value of any new operations undertaken by BH Travel after the termination”.<sup>1184</sup>

Acquisition price

813. Respondent points to the discrepancy between the EUR 7.4 million invested by Flemingo International and the amount of damages claimed of more than EUR 80 million.<sup>1185</sup> In view of the disparity between the two amounts, Respondent contends that it is necessary to rely on the acquisition price or investment price in order to calculate compensation.
814. Respondent notes that in *Tecmed v. Mexico*, the tribunal rejected the application of the DCF method in cases where there was substantial disparity between the actual investment and the damages claimed, and instead based its award on the acquisition price, plus the amount invested by the claimant.<sup>1186</sup> Furthermore, Respondent notes that, in *Metaclad*, the tribunal regarded the DCF method as a highly speculative tool and therefore relied on the value of the actual investment.<sup>1187</sup>
815. Respondent disputes Claimant’s assertion that it has incurred other costs in addition to the EUR 7.4 million allegedly incurred for Baltona’s shares, namely the amount of USD 26 million that Claimant claims to have paid for Flemingo International’s shares.<sup>1188</sup> Respondent submits that no evidence was presented to support the assertion that Claimant actually incurred costs of USD 26 million. Respondent argues that it cannot be ruled out that the transaction was only an accounting operation.<sup>1189</sup>

Market perspective

816. Respondent submits that other points of reference should be taken into account when estimating the amount of Claimant’s possible damages, such as:
- (i) market capitalization of the Baltona Group and the share of market capitalization which should be applied to BH Travel; (ii) the decrease in market capitalization of Baltona until the termination of the Lease Agreements (iii) the value of the shares after the termination of the Lease Agreements; and (iv) value of BH Travel as compared to a market benchmark (publicly listed companies with business profile comparable to BH Travel).<sup>1190</sup>
817. Respondent notes that the Deloitte Report adopts a market perspective in its analysis and finds discrepancies between the lost income claimed and the market value of the Baltona Group. Deloitte relied on data points which involve shares in “the actual company itself”. According to Deloitte, market implied values can be derived from the following sources:
- (i) the price paid by Flemingo entities for the acquisition of Baltona in 2010[;]
  - (ii) the past and recent stock market capitalisation of Baltona;
  - (iii) the price paid in 2011 by Baltona to Gerb. Heinemann GmbH for a minority interest in BH Travel i.e. exactly the same asset that is the subject of the claim. This transaction is

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<sup>1184</sup> Statement of Defence, para. 395.

<sup>1185</sup> Respondent’s Rejoinder, para. 380.

<sup>1186</sup> Respondent’s Rejoinder, para. 381, *referring to Tecmed v. Mexico* Award, para. 186, **Exhibit RL-47**.

<sup>1187</sup> Respondent’s Rejoinder, para. 382, *referring to Metalclad v. Mexico* Award, paras. 121-122, **Exhibit RL-46**.

<sup>1188</sup> Respondent’s Rejoinder, para. 383, *referring to* Claimant’s Reply, para. 444.

<sup>1189</sup> Respondent’s Rejoinder, para. 383.

<sup>1190</sup> Statement of Defence, para. 367.

especially relevant since it occurred within a relatively short time of the date of the claim;

- (iv) past and current market multiples implied by the stock market capitalisation of comparable public companies.

818. First, Respondent submits that during the market capitalisation of Baltona, the investors' forecast of the expected financial profits generated by BH Travel was considerably lower than the one adopted by Mr. Qureshi. A reason for this, Respondent suggests, is that the Lease Agreements were not as profitable for BH Travel as argued by Claimant and the profits were uncertain.<sup>1191</sup>
819. Respondent stresses that the reorganisation of BH Travel after the acquisition of Baltona by the Flemingo Group did not bring about the expected financial results.<sup>1192</sup> Moreover, Respondent reiterates its view that, on the date of the alleged expropriation, the Lease Agreements had non-material value for BH Travel due to the issues with PPL. After ending operations at Chopin Airport, Baltona claimed record sales and an increase of approximately 650% in operating profits for the third quarter of 2013.<sup>1193</sup> Therefore, Respondent concludes that the termination of the Lease Agreements did not damage Claimant's assets but actually contributed to an increase in Baltona's share value.<sup>1194</sup>
820. Respondent does not agree with Claimant's statement that "[t]he value of BH Travel's shares after the termination of the Lease Agreements cannot possibly be an indicator of the Claimant's lost income stream in a 'but for' scenario".<sup>1195</sup> Respondent explains that Claimant ignores the fact that Flemingo International made an investment in Baltona, not just BH Travel.<sup>1196</sup>
821. In addition, Respondent submits that "damages cannot be considered without reference to: (i) the value of the shares of BH Travel at the valuation date (representing the date of the triggering event, *i.e.*, the Termination), but also (ii) the value of the Baltona Group at Acquisition; and (iii) the value of the Baltona Group at the valuation date".<sup>1197</sup>
822. Respondent relies on the Deloitte Report to assert that: "(i) the termination of the Lease Agreements only affected BH Travel's business, it had no impact on the business of other companies from the Baltona Group; (ii) the whole of BH Travel's business boiled down to the Lease Agreements; and (iii) BH Travel is a 100% subsidiary of Baltona".<sup>1198</sup>
823. Respondent disputes Claimant's assertion that it is not possible or useful in this case to use market capitalisation to verify the results of its calculations, because BH Travel is not a publicly listed company.<sup>1199</sup> Respondent states that, based on Deloitte's recommendation, the calculation should include market capitalisation, "where the subject company is listed or its valuation could be derived from the market capitalisation of the group to which it belongs". Respondent concludes

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<sup>1191</sup> Statement of Defence, para. 374.

<sup>1192</sup> Statement of Defence, paras. 369, 419.

<sup>1193</sup> Statement of Defence, paras. 373-374, *referring to* Baltona's Press Release dated 1 December 2013, **Exhibit R-95**.

<sup>1194</sup> Statement of Defence, paras. 367-369.

<sup>1195</sup> Respondent's Rejoinder, para. 388, *referring to* Claimant's Reply, para. 454.

<sup>1196</sup> Respondent's Rejoinder, para. 389, *referring to* E-mails from Mr. Tomasz Jaroń dated 26 February 2010, **Exhibit R-139**.

<sup>1197</sup> Respondent's Rejoinder, para. 390, *referring to* Deloitte Report, para. 31, **Exhibit RER-1**.

<sup>1198</sup> Respondent's Rejoinder, para. 390.

<sup>1199</sup> Respondent's Rejoinder, para. 385, *referring to* Claimant's Reply, para. 449.

that the fact that BH Travel is not publicly listed does not prevent the use of a benchmark in the form of market capitalisation, since BH Travel is a subsidiary of Baltona, which is a publicly listed company.<sup>1200</sup> In addition, Respondent recalls that Claimant itself has made reference to Baltona's financial results to explain BH Travel's financial situation.<sup>1201</sup>

824. Respondent further notes that the Deloitte Report states that “[t]he valuation multiples implied from Mr. Qureshi’s DCF valuation of BH Travel are significantly (up to as many as 21 times under the Extension Scenario) higher than the median market multiples”.<sup>1202</sup> Respondent points out that Deloitte Report No. 2 identifies multiples implied by market capitalisation of Baltona that are a reasonable check for the DCF results.<sup>1203</sup>
825. Respondent also contends that BH Travel and Baltona’s situations cannot be considered in isolation from each other. Respondent recalls that, before the termination of the Lease Agreements, BH Travel’s activities constituted around 40% of Baltona’s business.<sup>1204</sup>
826. Respondent also disputes Claimant’s challenge to its use of a market benchmark as an indicator of the value of BH Travel.<sup>1205</sup> Respondent states that the fact the scholars and practitioners cited by Claimant disapprove of the use of a market benchmark<sup>1206</sup> does not prove that the use of this quantifier in this case is not justified. Respondent notes that Deloitte provides counter-arguments in its Report No. 2 in this respect.<sup>1207</sup>
827. Respondent concedes that no method is ideal and clarifies that it is not arguing for a single method of calculation. Respondent reiterates, however, its position that the DCF method is highly speculative and needs to be verified with prices paid for similar assets.<sup>1208</sup> According to Respondent, the DCF-based results elaborated by Deloitte are in line with selected market benchmarks.<sup>1209</sup>
828. Additionally, Respondent refers to the approach adopted by the tribunal in *Yukos v. Russian Federation* during the calculation of damages phase. According to Respondent, the tribunal acknowledged a “series of errors” in the claimant’s DCF valuation of Yukos. As a result, the tribunal applied a market method to the valuation of damages and finally estimated the amount of damages as USD 50 billion, instead of USD 114 billion initially requested and estimated by the DCF method.<sup>1210</sup>
829. Lastly, Respondent states that “the fact [that the] companies proposed by Deloitte do not perfectly reflect BH Travel’s situation does not prevent using the market benchmark approach [...] as was the case with Yukos”. In any event, Respondent notes that Deloitte maintains that their choice of

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<sup>1200</sup> Respondent’s Rejoinder, para. 386, *referring to* Deloitte Report, para. 36, **Exhibit RER-1**.

<sup>1201</sup> Respondent’s Rejoinder, para. 385, *referring to* Claimant’s Reply, para. 89.

<sup>1202</sup> *See* Deloitte Report, para. 44, **Exhibit RER-1**.

<sup>1203</sup> Respondent’s Rejoinder, para. 386, *referring to* Deloitte Report No. 2, para. 5.27, **Exhibit RER-2**.

<sup>1204</sup> Respondent’s Rejoinder, para. 387, *referring to* Deloitte Report, para. 39, **Exhibit RER-1**.

<sup>1205</sup> Respondent’s Rejoinder, para. 391, *referring to* Claimant’s Reply, para. 457-461.

<sup>1206</sup> Respondent’s Rejoinder, para. 392, *referring to* Claimant’s Reply, paras. 458-459.

<sup>1207</sup> Respondent’s Rejoinder, para. 392, *referring to* Deloitte Report No. 2, para. 3.4-3.5, **Exhibit RER-2**.

<sup>1208</sup> Respondent’s Rejoinder, para. 393.

<sup>1209</sup> Respondent’s Rejoinder, para. 398, *referring to* Deloitte Report No. 2, paras. 5.29-5.30, **Exhibit RER-2**.

<sup>1210</sup> Respondent’s Rejoinder, paras. 394-397, *referring to* *Hulley Enterprises Ltd. v. Russian Federation*, Final Award dated 18 July 2014, PCA Case No. AA 226, paras. 1787, 1802, **Exhibit RL-48**.

peer companies is valid.<sup>1211</sup>

*Claimant's Position*

830. Claimant disputes Respondent's claim that additional approaches are required to calculate the damages and to check the DCF method calculation.<sup>1212</sup>

*Asset-based approach*

831. Claimant submits that the use of an asset-based approach is not appropriate in this case because it does not accurately reflect the value of a continuing business, like BH Travel. In view of this, Claimant states, an asset-based approach could produce a less reliable result than income-based or market-based methods.<sup>1213</sup> Claimant concludes that the use of an asset-based approach is justified only when "future cash flows are insignificant or highly uncertain",<sup>1214</sup> which, Claimant argues, is not the case in the present dispute.
832. Claimant disputes Respondent's claim that the *Metaclad* award supports the use of an asset-based approach.<sup>1215</sup> In that case, the tribunal noted that future profits cannot be used to determine fair market value if an enterprise has not operated for a sufficiently long time to establish a performance record, or has failed to make a profit. According to Claimant, BH Travel had been operating at Chopin Airport for more than four years, and had thus been operating "for a sufficiently long time to establish a performance record".<sup>1216</sup>

*Acquisition price*

833. Claimant disagrees that the amounts spent in relation to the purchase of Baltona's shares should be taken into account when calculating quantum.<sup>1217</sup> According to Claimant, historical costs should not mechanically be used as a "good indicator" of the market value of an investment.<sup>1218</sup> In addition, Claimant contends that such an approach would not satisfy the full compensation requirement of international law, which requires that the award must be equivalent to the investment's fair market value.<sup>1219</sup>
834. Claimant refers to Mr. Qureshi's evidence to contend that the price of the Baltona Group as at the acquisition date is not comparable to the loss assessment. According to Mr. Qureshi, at the time of acquisition, "an average investor may have underestimated the growth perspectives and

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<sup>1211</sup> Respondent's Rejoinder, para. 398, referring to Deloitte Report No. 2, paras. 3.13-3.16, **Exhibit RER-2**.

<sup>1212</sup> Claimant's Reply, paras. 422-425, referring to Statement of Defence, para. 397.

<sup>1213</sup> Claimant's Reply, paras. 435-436, referring to Ripinsky and Williams, pp. 218-219, **Exhibit CL-113**.

<sup>1214</sup> Claimant's Reply, para. 437, referring to Deloitte Report of 30 October 2014, para. 34, **Exhibit RER-1**, further referring to Second PwC Report, paras. 41-43, **Exhibit CER-3**.

<sup>1215</sup> Claimant's Post-Hearing Brief, para. 411, referring to *Metaclad v. Mexico* Award, para. 120, **Exhibit CL-30**.

<sup>1216</sup> Claimant's Post-Hearing Brief, para. 412, referring to *Metaclad v. Mexico* Award, para. 120, **Exhibit CL-30**; Financial Statement of BH Travel 2008, **Exhibit SQ-3**; Financial Statement of BH Travel 2009, **Exhibit SQ-4**; Financial statement of BH Travel 2010, **Exhibit SQ-5**; Financial Statement of BH Travel 2011, **Exhibit C-157**; Financial statement of BH Travel 2012, **Exhibit SQ-7**.

<sup>1217</sup> Claimant's Reply, para. 439, referring to Statement of Defence, para. 367; Deloitte Report, para. 37, **Exhibit RER-1**.

<sup>1218</sup> Claimant's Reply, para. 440, referring to Ripinsky and Williams, p. 229, **Exhibit CL-113**, further referring to Marboe, para. 5.262, **Exhibit CL-105**.

<sup>1219</sup> Claimant's Reply, para. 442, referring to Ripinsky and Williams, p. 231, **Exhibit CL-113**.

cash generating potential [of the Baltona Group] as the Polish duty-free market was not properly developed” and Baltona was mismanaged at the time.<sup>1220</sup>

835. Claimant submits that the amounts invested by Flemingo Group in Baltona cannot be reduced to just the amount paid by Flemingo International to acquire the shares, *i.e.*, EUR 7.4 million. Claimant argues that other kinds of contributions were given to Baltona, such as loans,<sup>1221</sup> know-how, management time, “sweat equity”, and management restructuring.<sup>1222</sup>
836. Claimant also disputes that the awards in *Metaclad* and *Tecmed* support Respondent’s effort to establish that the amounts invested by the Flemingo Group are relevant for the purposes of the quantification of Claimant’s damages, arguing that the tribunals in those cases would have reached different conclusions if they had had data on the operations of the relevant businesses.<sup>1223</sup>

### Market perspective

#### *Market capitalisation of Baltona*

837. First, Claimant disputes the use of the market capitalisation of the Baltona Group as a relevant indicator of the losses suffered by BH Travel. Claimant notes that BH Travel is not a listed company and therefore Claimant disputes the relevance of comparing Mr. Qureshi’s valuation of the lost income stream with the portion of Baltona Group’s market capitalisation applicable to BH Travel.<sup>1224</sup> Furthermore, Claimant notes that investment treaty tribunals (like *CMS* and *Enron*) have held that the “market capitalization of a company is often not a sound indicator of fair market value”.<sup>1225</sup> According to Claimant, Respondent did not address in its Rejoinder the significance of the case law cited, nor did it address Mr. Qureshi’s factual finding concerning the small percentage of publicly traded shares and the illiquid nature Baltona’s trading history.<sup>1226</sup>

#### *The value of BH Travel shares after the termination of the Lease Agreements*

838. Second, Claimant challenges the assertion that the value of BH Travel’s shares after the termination of the Lease Agreements is relevant to the calculation.<sup>1227</sup> Claimant contends that the value of BH Travel would have been different if Respondent had not breached its Treaty obligations. Claimant concludes that investment treaty tribunals have also “consistently” excluded post-valuation date factors that result from the relevant State’s bilateral investment

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<sup>1220</sup> Claimant’s Post-Hearing Brief, para. 419, *referring to* Second PwC Report, para. 47(b), **Exhibit CER-3**.

<sup>1221</sup> Claimant’s Reply, para. 444, *referring to* Second Jaroń Witness Statement, para. 28, **Exhibit CWS-5**; Loan Agreement between Flemingo International Ltd and Baltona dated 30 March 2010, **Exhibit C-42**.

<sup>1222</sup> Claimant’s Reply, para. 445, *referring to* Claimant’s Reply, paras. 66-91, Second Jaroń Witness Statement, paras. 18-35, **Exhibit CWS-5**; Second PwC Report, para. 99, **Exhibit CER-3**. *See also* Claimant’s Post-Hearing Brief, paras. 42-421.

<sup>1223</sup> Claimant’s Post-Hearing Brief, para. 415, *referring to* Respondent’s Rejoinder, paras. 380-382; *Metalclad v. Mexico* Award, paras. 121-122, **Exhibit CL-30**; *Tecmed v. Mexico* Award, para. 186, **Exhibit CL-11**.

<sup>1224</sup> Claimant’s Reply, para. 449, *referring to* Statement of Defence, paras. 367 and 385, Deloitte Report, para. 36, **Exhibit RER-1**.

<sup>1225</sup> Claimant’s Reply, para. 450, *referring to* *CMS v. Argentina*, para. 412, **Exhibit CL-26**; *Enron Creditors Recovery Corp. v. Argentina* Award, para. 383, **Exhibit CL-48**; *further referring to* Second PwC Report, para. 48(b), **Exhibit CER-3**.

<sup>1226</sup> Claimant’s Post-Hearing Brief, para. 426, *referring to* Second PwC Report, para. 48(b), **Exhibit CER-3**.

<sup>1227</sup> Claimant’s Reply, para. 453, *referring to* Statement of Defence, para. 367, Deloitte Report, para. 31, **Exhibit RER-1**.

treaty violations.<sup>1228</sup>

*The value of BH Travel as compared to a market benchmark*

839. Third, Claimant disputes the relevance of the value of BH Travel as compared to a market benchmark.<sup>1229</sup> Claimant observes that no two businesses are identical and notes that the companies used by Deloitte are “at different stages of development compared to BH Travel, as they are large enterprises with established positions” while BH Travel “was a company at its development stage”.<sup>1230</sup> Claimant also notes that arbitral tribunals have not favoured the market-based method of market multiples.<sup>1231</sup>
840. Claimant points out that Mr. Qureshi had considered the market multiples approach to value damages, but concluded that this approach would be inappropriate for the present circumstances.<sup>1232</sup> Claimant also notes that Mr. Qureshi pointed to inconsistencies between the Deloitte Report and Deloitte Report No. 2 in terms of selections of comparable companies.<sup>1233</sup> According to the table provided by Claimant, both Deloitte reports considered eleven “peer companies” in total, but only three of the companies were selected as “peer company” by both reports.<sup>1234</sup> In addition, neither report provided the data on which Deloitte relied to select “peer companies” to BH Travel, which in Claimant’s view means that the selection is unsubstantiated.<sup>1235</sup>
841. Claimant responds to Respondent’s reference to the tribunal in *Yukos*, which had relied upon a comparable companies method as a means of determining Yukos’ value.<sup>1236</sup> According to Claimant, the tribunal in *Yukos* would not have adopted this approach had it not found a reliable proxy to determine the value of Yukos using the comparable companies approach.<sup>1237</sup>

*The Heinemann Share Purchase Agreement as a benchmark of fair market value*

842. Fourth, Claimant disputes Deloitte’s assertion that the “the price paid in Baltona to Gerb. [sic] Heinemann GmbH for a minority interest in BH Travel [...] is especially relevant since it

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<sup>1228</sup> Claimant’s Reply, para. 455, *referring to Amco Asia v. Indonesia* Resubmitted Award, para 186, **Exhibit CL- 57**.

<sup>1229</sup> Claimant’s Reply, para. 457, *referring to* Statement of Defence, para. 367, Deloitte Report, para. 41, **Exhibit RER-1**.

<sup>1230</sup> Claimant’s Reply, para. 460, *referring to* Second PwC Report, paras. 34 and 36, **Exhibit CER-3**. Mr. Qureshi testified before the Tribunal that he does not agree that the companies and transactions cited by Deloitte are relevant comparators. *See* Hearing Transcript (15 October 2015), 207:7 to 209:19.

<sup>1231</sup> Claimant’s Reply, para. 458, *referring to* Ripinsky and Williams, pp. 214-215, **Exhibit CL-113**, *CMS v. Argentina* Award, para. 412, **Exhibit CL-26**.

<sup>1232</sup> Claimant’s Post-Hearing Brief, para. 431, *referring to* Second PwC Report, paras. 33 and 51-55, **Exhibit CER-3**.

<sup>1233</sup> Claimant’s Post-Hearing Brief, para. 433, *referring to* PwC Hearing Presentation, p. 24, Slide 24.

<sup>1234</sup> *See* Claimant’s Post-Hearing Brief, para. 433. *See* Table at Claimant’s Post-Hearing Brief, p. 186. Claimant refers to Deloitte Report, para. 45, **Exhibit RER-1** and Deloitte Report No. 2, Section 3.14, **Exhibit RER-2**.

<sup>1235</sup> Claimant’s Post-Hearing Brief, para. 434, *referring to* Claimant’s Reply, para. 360.

<sup>1236</sup> Claimant’s Post-Hearing Brief, para. 435, *referring to Yukos Universal Limited (Isle of Man) v. The Russian Federation*, Final Award dated 18 July 2014, PCA Case No. AA 227 (“*Yukos v. Russia Final Award*”), para. 1787, **Exhibit CL-121**.

<sup>1237</sup> Claimant’s Post-Hearing Brief, para. 435, *referring to Yukos v. Russia* Final Award, paras. 1787-1788, **Exhibit CL-121**.

occurred within a relatively short time of the date of the claim”.<sup>1238</sup>

843. Claimant submits that “the price allocated to [the] BH Travel minority shareholding under the Heinemann [Share Purchase Agreement] is not representative of the fair market value of BH Travel as on the valuation date of 17 February 2012, and therefore has no bearing upon the quantification of the Claimant’s damages”.<sup>1239</sup>
844. According to Claimant, the Heinemann transaction does not meet the conditions, as provided by case law, to be used as an indicator of fair market value of an investment.<sup>1240</sup> Claimant points to *CME v. Czech Republic*, in which the tribunal did not value the expropriated company based upon the price that had been paid for a 5.8% shareholding one year before the expropriation. The *CME* tribunal stated that a minor inaccuracy in the pricing of the minority share “would magnify into a serious error when valuing the 100 per cent shareholding”.<sup>1241</sup>
845. The tribunal in *SPP v. Egypt* adopted a similar approach, according to Claimant. In *SPP*, the tribunal declined to treat the past sales of minority shares (one for 25% and the other for the repurchase of some of those shares) as an indicator of the whole company’s fair market value. Claimant notes that the tribunal in *SPP* found that “there was a very limited number of transactions and there was no market as such for the shares that were sold”.<sup>1242</sup>
846. Claimant submits that: (i) the Heinemann transaction captures no more than a 10% shareholding in BH Travel;<sup>1243</sup> (ii) the transaction does not capture the “control premium” that a buyer would pay;<sup>1244</sup> (iii) the transaction was concluded in the context of a broader settlement agreement between BH Travel and Heinemann dated 8 March 2011,<sup>1245</sup> and the price allocated to the shares was affected by approximately “17 economic components”<sup>1246</sup> and non-market considerations;<sup>1247</sup> and (iv) Deloitte fails to neutralise the impact of the various economic components, such as the impact of the parties’ other business objectives provided in the

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<sup>1238</sup> Claimant’s Post-Hearing Brief, para. 395, referring to Deloitte Report No. 2, para. 3.10(iii), **Exhibit RER-2**.

<sup>1239</sup> Claimant’s Post-Hearing Brief, para. 408.

<sup>1240</sup> Claimant’s Post-Hearing Brief, para. 396. Claimant relies on commentators Ripinsky & Williams to argue that “the case law suggests that past (actual or contemplated) transactions can be used as an indicator of the fair market value of an investment only where the following conditions are cumulatively met” (emphasis in the original): (i) “The shareholding sold is large enough to avoid the danger of magnification of a pricing inaccuracy;” (ii) “The transactions(s) must be at arm’s length;” (iii) “[T]he negotiated price must not be affected by non-market considerations or other value-distorting factors;” and (iv) “Since the time of the transaction, there have been no events or other circumstances that would significantly change the market value”. See Claimant’s Post-Hearing Brief, para. 396, referring to Ripinsky and Williams, p. 218, **Exhibit CL-115**.

<sup>1241</sup> Claimant’s Post-Hearing Brief, para. 397, referring to *CME v. Czech Republic* Final Award, paras. 156-157 and 610-611, **Exhibit CL-117**.

<sup>1242</sup> Claimant’s Post-Hearing Brief, para. 398, referring to *Southern Pacific Properties (SPP) Limited v. Arab Republic of Egypt*, Award dated 20 March 1992 (“*SPP v. Egypt Award*”), para. 197, **Exhibit CL-118**.

<sup>1243</sup> Claimant’s Post-Hearing Brief, para. 400, referring to Share Purchase Agreement between PHZ Baltona S.A. and Gebr. Heinemann KG of 8 March 2011, p. 1, Preamble, Section (A), **Exhibit C-156**.

<sup>1244</sup> Claimant’s Post-Hearing Brief, para. 401.

<sup>1245</sup> Claimant’s Post-Hearing Brief, para. 402, referring to Signed Settlement Agreement between Gebr. Heinemann, Baltona S.A. and BH Travel Retail Poland sp. z.o.o. of 8 March 2011, **Exhibit C-216**.

<sup>1246</sup> Claimant’s Post-Hearing Brief, paras. 403, referring to Hearing Transcript (16 October 2015), 81:17-24.

<sup>1247</sup> Claimant’s Post-Hearing Brief, para. 404, referring to Signed Settlement Agreement between Gebr. Heinemann, Baltona S.A. and BH Travel Retail Poland sp. z.o.o. of 8 March 2011, pp. 5-6, Article 2.2, **Exhibit C-216**; Hearing Transcript (16 October 2015), 81:17-24.

agreements with Heinemann.<sup>1248</sup> Therefore, Claimant submits that the Heinemann transaction is not representative of the fair market value of BH Travel.<sup>1249</sup>

**D. Whether Claimant made substantial changes to the amount claimed from the Statement of Claim to Claimant’s Reply**

*Respondent’s Position*

847. In its Rejoinder, Respondent argues that Claimant changed the amount of damages claimed from its Statement of Claim to its Reply. Respondent argues that Claimant originally requested (in its Statement of Claim) EUR 54,212,393 in compensation for all damages allegedly incurred. However, in Claimant’s Reply the amounts claimed for both the Base Period and Extension Period lost profits were increased and the total amount requested reached EUR 84,956,370.<sup>1250</sup> The comparative figures provided by Respondent are arranged in the table below:

Claimant’s claimed damages	Statement of Claim	Claimant’s Reply
Actual losses	EUR 1,070,373	EUR 1,070,373
Base Period lost profits	EUR 17,082,271	EUR 26,786,860
Extension Period lost profits	EUR 36,059,749	EUR 57,099,140
TOTAL	EUR 54,212,393	EUR 84,956,370

848. Respondent notes that the amounts claimed in Claimant’s Reply as Base Period and Extension Period lost profits increased by nearly EUR 31 million.<sup>1251</sup>

849. Respondent argues that the amount has not been increased by capitalising the variable indicator or capitalising interest, but by generating a completely new amount of the claim. Respondent contends that no new events have arisen in the meantime and therefore there is no justification for Claimant’s increase.<sup>1252</sup> According to Respondent, “Claimant intentionally understated the amount of the claims asserted” in the proceedings.<sup>1253</sup>

850. Respondent states that it “does not agree with Claimant’s assertion that the change in the amount of the compensation asserted can be treated as an amendment of the [original] claim”.<sup>1254</sup> In this regard, Respondent argues that Article 20 of the UNCITRAL Rules, concerning the amendment or supplementation of claims, should be interpreted narrowly.<sup>1255</sup>

<sup>1248</sup> Claimant’s Post-Hearing Brief, paras. 405-407, referring to Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.29.

<sup>1249</sup> Claimant’s Post-Hearing Brief, para. 408.

<sup>1250</sup> Respondent’s Rejoinder, paras. 329-330.

<sup>1251</sup> Respondent’s Rejoinder, para. 334.

<sup>1252</sup> Respondent’s Rejoinder, paras. 334-335, 337.

<sup>1253</sup> Respondent’s Rejoinder, para. 338.

<sup>1254</sup> Respondent’s Rejoinder, para. 334.

<sup>1255</sup> Respondent’s Rejoinder, paras. 332-333, referring to UNCITRAL Rules, Articles 20, **Exhibit CL-2**. Article 20 of the UNCITRAL Rules provides that:

851. Respondent states that it should be concluded that Claimant intentionally understated the amount of the claims in its Statement of Claim, thereby limiting Respondent's right to a fair defence (arguing that it would have prepared the Statement of Defence differently and the Deloitte Report would have been different in scope).<sup>1256</sup>

*Claimant's Position*

852. Claimant explains in its Reply that, as in any quantification of damages in a "but for" scenario, Mr. Qureshi's calculation in the First PwC Report relied on certain assumptions and data that were available at the time. In the First PwC Report, Mr. Qureshi assessed the damages to be EUR 54,212,393 (before interest).<sup>1257</sup>

853. For the conclusion of the Second PwC Report, Claimant explains, Mr. Qureshi relies on "new data in the record and other procedures he has performed".<sup>1258</sup> For instance, the Second PwC Report takes into account the technical data and forecasts provided in the Mirza Report concerning PAX and SPP, which was submitted with Claimant's Reply, including post-valuation date data and events.<sup>1259</sup> Claimant stresses that the calculation of the damages should consider post-valuation date data and events since they can help provide a more precise assessment of the investment.<sup>1260</sup>

854. Accordingly, Mr. Qureshi's calculations of damages in the Second PwC Report (Claimant's Reply) amount to EUR 84,956,370,<sup>1261</sup> which corresponds to the sum of: (i) EUR 1,070,370, for actual losses;<sup>1262</sup> (ii) EUR 26,786,860, for Base Period loss of profits;<sup>1263</sup> and (iii) EUR 57,099,140, for Extension Period loss of profits.<sup>1264</sup>

855. Mr. Qureshi also provides a calculation of lost profits based on only pre-valuation date data and events (*i.e.*, data and events prior to 17 February 2012), in case the Tribunal finds this to be warranted. Using such data, the total damages would amount to: EUR 15,039,210, for Base Period loss of profits;<sup>1265</sup> EUR 26,431,330, for Extension Period loss of profits.<sup>1266</sup>

856. Mr. Qureshi confirmed during the hearing that he had made changes in the Second PwC Report based on new information contained in the Mirza Report and new information concerning

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During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to other parties or any other circumstances.

<sup>1256</sup> Respondent's Rejoinder, para. 339.

<sup>1257</sup> Claimant's Reply, para. 412, *referring to* First PwC Report, para. 40, **Exhibit CER-1**.

<sup>1258</sup> Claimant's Reply, para. 417.

<sup>1259</sup> Claimant's Reply, para. 537, 540.

<sup>1260</sup> Claimant's Reply, para. 497, *referring to* Ripinsky and Williams, p. 259, **Exhibit CL-113**.

<sup>1261</sup> Claimant's Reply, para. 417, *further referring to* Second PwC Report, para. 20, **Exhibit CER-3**.

<sup>1262</sup> Claimant's Reply, paras. 559. The amount initially cited was EUR 1,070,373, *see* Statement of Claim, paras. 231, 237.

<sup>1263</sup> Claimant's Reply, para. 537.

<sup>1264</sup> Claimant's Reply, para. 540.

<sup>1265</sup> Claimant's Reply, para. 536, *referring to* Second PwC Report, para. 155, **Exhibit CER-3**.

<sup>1266</sup> Claimant's Reply, paras. 538-540, *referring to* Second PwC Report, para. 155, **Exhibit CER-3**. *See also* Mr. Qureshi's updated calculation attached to Claimant's letter dated 5 October 2015.

discount rate.<sup>1267</sup> He avers that the model is exactly the same.<sup>1268</sup>

857. The figures provided in Claimant’s Statement of Claim and Reply are arranged in the table below:

Claimant’s claimed damages	Statement of Claim	Claimant’s Reply (including post-valuation date data and events)	Claimant’s Reply (excluding post-valuation date data and events)
Actual losses	EUR 1,070,373	EUR 1,070,373	EUR 1,070,373
Base Period lost profits	EUR 17,082,271	EUR 26,786,860	EUR 15,039,210
Extension Period lost profits	EUR 36,059,749	EUR 57,099,140	EUR 26,431,330
TOTAL	EUR 54,212,393	EUR 84,956,373	EUR 42,540,913

#### E. Applicable rate of interest

##### *Claimant’s Position*

858. Claimant submits that, pursuant to the customary international law principle of full reparation,<sup>1269</sup> it should be awarded both pre-award and post-award interest until the date of full payment of the award, at a rate of no less than EURIBOR plus a premium of 2%,<sup>1270</sup> compounded semi-annually.<sup>1271</sup>

859. Claimant disagrees with Respondent’s claims that: (i) a premium of 2% on top of the EURIBOR could only be substantiated if Claimant proved that it could actually invest its funds at such rate;<sup>1272</sup> (ii) interest should be compounded annually, but not “semi-annually”;<sup>1273</sup> and (iii) there are no grounds to award interest on the damages regarding the Extension Period.<sup>1274</sup>

860. Claimant points to previous tribunals that have awarded 2% over the applicable interbank offer

<sup>1267</sup> Hearing Transcript (15 October 2015), 41:3 to 42:12.

<sup>1268</sup> Hearing Transcript (15 October 2015), 23:18-21.

<sup>1269</sup> Statement of Claim, paras. 238-239, referring to ILC Articles on State Responsibility, Article 38(1) and (2), **Exhibit CL-3**; further referring to ILC Articles on State Responsibility, Article 38 Commentary, para. 10, **Exhibit CL-3**; *Compañía de Aguas del Aconquija v. Argentina* Award, para. 9.2.3., **Exhibit CL-38**; *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, Excerpts of Award dated 1 March 2012, ICSID Case No. ARB/08/8, para. 429, **Exhibit. CL-58**.

<sup>1270</sup> Statement of Claim, para. 242, referring to *PSEG v. Turkey* Award, para. 348, **Exhibit CL-59**; *National Grid v. Argentina* Award, para. 294, **Exhibit CL-60**; *Sempra Energy International v. Argentina* Award, para. 486, **Exhibit CL-17**; *Rumeli v. Kazakhstan* Award, para. 769, **Exhibit CL-12**.

<sup>1271</sup> Statement of Claim, para. 243, referring to *El Paso v. Argentina* Award, para. 746, **Exhibit CL-14**, *Siemens v. Argentina* Award, paras. 399-401, **Exhibit CL-42**; *ADC v. Hungary* Award, para. 522, **Exhibit CL-53**; *Compañía de Aguas del Aconquija v. Argentina* Award, para. 9.2.8., **Exhibit CL-38**; *National Grid v. Argentina* Award, para. 294, **Exhibit CL-60**. See also Claimant’s Post-Hearing Brief, para. 562.

<sup>1272</sup> Claimant’s Post-Hearing Brief, para. 557, referring to Respondent’s Rejoinder, para. 457.

<sup>1273</sup> Claimant’s Post-Hearing Brief, para. 559, referring to Respondent’s Rejoinder, para. 458.

<sup>1274</sup> Claimant’s Post-Hearing Brief, para. 560.

rate,<sup>1275</sup> and applied compounding interest on a semi-annual basis.<sup>1276</sup> Finally, Claimant contends that Respondent's claim concerning the award of interest on the damages regarding the Extension Period is wrong as a financial matter and lacks legal authority.<sup>1277</sup>

#### *Respondent's Position*

861. Respondent challenges Claimant's claim for interest in its entirety.<sup>1278</sup>
862. Respondent states that the rates requested by Claimant are unreasonably high and that the premium increase of 2% is unjustified. Respondent further asserts that the application of interest on damages regarding the Extension Period from 17 February 2012 is groundless, would provide to Claimant an unfounded benefit, and would be penal in nature.<sup>1279</sup>
863. Respondent submits that, in the event that interest is awarded, "the EURIBOR rate should be applied without an additional premium of 2%,"<sup>1280</sup> and further submits that interest should be compounded at maximum annually (not semi-annually).<sup>1281</sup>

#### **F. Tribunal's Analysis**

864. The Tribunal has established (see paras. 529-560 and 590-597 above) that Respondent breached Articles 3(2) and 5 of the Treaty as a result of PPL's termination of the Lease Agreements on 16 February 2012 with immediate effect and without compensation, by hindering further exploitation of the duty-free shops, and by obtaining BH Travel's eviction from its premises at Chopin Airport on 14 August 2012.
865. The Treaty itself does not set forth the standard of compensation for these breaches. Under customary international law, as codified in Article 31(1) of the ILC Articles, Claimant is entitled to full reparation in an amount sufficient to wipe out all of the injury it has incurred due to Respondent's wrongful acts. Full reparation encompasses both actual losses (*damnum emergens*) and loss of profits (*lucrum cessans*).

##### **1) Damages for actual losses (*damnum emergens*)**

866. Claimant argues that the actual losses that BH Travel incurred as a result of the unlawful measures amount to EUR 1,326,690. In Claimant's view, it is therefore entitled to EUR 1,070,370 for actual losses, which corresponds to the 80.68% share in BH Travel that Claimant held at the time of the termination of the Lease Agreements. The actual losses claimed by Claimant comprise:

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<sup>1275</sup> Claimant's Post-Hearing Brief, para. 558, referring to *Hassan Awdi v. Romania* Award, para. 518, **Exhibit RL-44**; *National Grid v. Argentina* Award, para. 294, **Exhibit CL-60**; *Sempra Energy International v. Argentina* Award, para. 486, **Exhibit CL-17**. See also *Rumeli v. Kazakhstan* Award, para. 769, **Exhibit CL-12**.

<sup>1276</sup> Claimant's Post-Hearing Brief, para. 559, referring to *Hassan Awdi v. Romania* Award, para. 519, **Exhibit RL-44**. Claimant also states that commentators support the claim for compound interest on a semi-annual basis. See Claimant's Post-Hearing Brief, para. 559, referring to Ripinsky and Williams, p. 387, footnote 135, **Exhibit CL-115**.

<sup>1277</sup> Claimant's Post-Hearing Brief, paras. 560-561.

<sup>1278</sup> Statement of Defence, para. 428.

<sup>1279</sup> Respondent's Rejoinder, paras. 456-457, 459.

<sup>1280</sup> Respondent's Rejoinder, para. 457.

<sup>1281</sup> Respondent's Rejoinder, para. 458, referring to *Compañía de Aguas del Aconquija v. Argentina* Award, **Exhibit CL-38**; *Siemens v. Argentina* Award, **Exhibit CL-42**; *Metalclad v. Mexico* Award, **Exhibit RL-46**.

“Operating Losses” and “One-Off Termination Costs”.

Operating Losses

867. Claimant argues that BH Travel’s Operating Losses amounted to EUR 237,449 with respect to the termination of the Lease Agreements of the Baltona Airport shop and the Baltona Accessories shop. These shops remained in operation until BH Travel’s eviction on 14 August 2012, but were hindered by PPL in several ways and thus generated less than normal revenues. Claimant claims that the Operating Losses related to these two shops concern “the negative result of revenues generated by these shops between 17 February and 14 August [2012] minus the costs of the goods sold, salaries of remaining employees and other costs incurred in the period”.<sup>1282</sup>
868. The compensation for this loss should, in Respondent’s view, be claimed as lost profits.<sup>1283</sup>
869. The Tribunal observes that a claim for operating losses and a claim for lost profits start from different premises: while a claim for lost profits assumes that operations have ceased, operating losses supposes that the contract is still operational but not correctly performed. Moreover, the two claims are of a different nature: while a claim for future lost profits would remain hypothetical in nature, a claim for operation losses can be based upon actual data.
870. The amount claimed by Claimant is not much different from the amount accepted by Respondent’s expert.<sup>1284</sup> Claimant has calculated the salaries of remaining employees (HR costs) and COGS on the basis of BH Travel’s actual records of operation and Respondent has agreed with these figures.<sup>1285</sup> The Tribunal is willing to accept this claim for Claimant’s share of BH Travel’s Operating Losses of EUR 237,499.

One-Off Termination Costs

871. Claimant alleges that BH Travel suffered damages for One-Off Termination Costs, in the amount of EUR 1,089,243, made up of: severance payments, liquidation of fixed assets, and transport of inventory to other locations. The Tribunal does not agree with Respondent’s allegation that BH Travel could have foreseen the termination of the Lease Agreements with immediate effect because BH Travel had triggered the termination itself by persistently not performing its obligations. Indeed, from the summary of facts (see paras. 184-190 above), it appears that these alleged non-performances could not give rise to the termination of the Lease Agreements.
872. The Tribunal is aware that Respondent has not been in a position to verify the data from which Claimant has calculated the One-Off Termination Costs. However, it observes that the experts from both sides, PwC and Deloitte, are highly regarded accounting firms, and that Respondent’s expert did not challenge the commercial data on which its counterpart based its calculation. Rather, Respondent’s criticism concerned the methodology and computation.<sup>1286</sup> In any event,

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<sup>1282</sup> The Tribunal notes that by claiming the Operating Losses of the Baltona Airport and Baltona Accessories shops up to 14 August 2012, Claimant must consider these shops to be operational until that date. As such, any hypothetical suspension and related extension of the Lease Agreements for these shops would only start as of 14 August 2012.

<sup>1283</sup> Statement of Defence, para. 400.

<sup>1284</sup> See Deloitte Report No. 2, p. 39, **Exhibit RER-2**.

<sup>1285</sup> See *supra* para 697.

<sup>1286</sup> See Deloitte Report No. 2, pp. 39-41, **Exhibit RER-2**.

while it is true that when the respective Lease Agreements would have come to an end, staff severance payments would have to be paid, fixed assets would need to be liquidated and remaining inventory would need to be transported, the circumstances are somewhat different when all the Lease Agreements are terminated early, on the same day and with immediate effect. In such circumstances, Claimant had no opportunity to mitigate its damages. Taking the foregoing into account, the Tribunal considers that it would be appropriate to compensate Claimant for its share of BH Travel's One-Off Termination Costs, which Claimant has estimated to be EUR 1,089,243.

873. Accordingly, the Tribunal is prepared to accept that BH Travel suffered actual losses of EUR 1,326,690 (*i.e.*, Operating Losses of EUR 237,449 and One-Off Termination Costs of EUR 1,089,243). The Tribunal notes that this amount will need to be adjusted to take into account the appropriate amount of Claimant's indirect interest in BH Travel (see paras. 933-934 below).

## 2) Damages for loss of profits (*lucrum cessans*)

874. As indicated above, the breach of the Treaty was the termination of the Lease Agreements on 16 February 2012 with immediate effect and without compensation. In order to establish full compensation, the Tribunal has to reconstruct in a "but for" scenario the conditions which previously existed as if the breach of the Treaty had never occurred and the Lease Agreements had continued to take their expected course.<sup>1287</sup>

875. It is noted that the Parties disagree on the appropriate "but for" scenario. In particular they disagree:

- a. whether, absent breach of the Treaty, the Lease Agreements would have been terminated or instead suspended and allowed to continue to the end of their original lease terms (*i.e.*, the Base Period) in the modernised Terminal 1; and
- b. whether, absent breach of the Treaty, there was any possibility of the Lease Agreements being renewed after the Base Period for a further period (*i.e.*, the Extension Period).

876. The Tribunal will first address damages for loss of profits in the Base Period and the issue of whether the modernisation of Terminal 1 should be taken into account in the damages calculations.

### Choice of Scenario A

877. As already noted above, the Tribunal requested the Parties' experts to provide the following Scenario Calculations:

- a. Scenario A required a calculation of damages based on the assumptions that Terminal 1 was not modernised, and the Lease Agreements continued to the end of the Base Period, as well as some increases in the PAX and other operational improvements, if any.
- b. Scenario B required a calculation of damages based on the assumptions that the Lease Agreements were suspended for the duration of the modernisation of Terminal 1, and then

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<sup>1287</sup> See e.g. *Azurix v. Argentina* Award, para. 417, **Exhibit CL-10**; see also, *inter alia*, *American Manufacturing & Trading, Inc. v. Republic of Zaire* Final Award, para. 6, **Exhibit CL-140**, and other cases, see *supra* footnote 817.

continued to run to the end of their Base Period in the new Terminal 1.

878. Claimant argues for the application of Scenario B. Claimant alleges that, in a “but for” scenario, the Lease Agreements of Terminal 1 would not have been terminated, and instead would have been suspended during the modernisation and then continued in the modernised Terminal 1 on 1 January 2015. This outcome, in Claimant’s view, would have been achieved either through good faith negotiations between the contracting parties or through application to the Polish courts. In Claimant’s view, this would have resulted in the terms of each of the Lease Agreements being extended as from 1 January 2015 by the time of the suspension.
879. The Tribunal notes that under Claimant’s suggested Scenario B, with the suspension and proportionate extension of the Terminal 1 Lease Agreements, the remaining time on the terms of those Lease Agreements would only run in the new premises of the modernised Terminal 1 for the following number of months:

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Premises	Start of term of Lease Agreement	End of term of Lease Agreement	Approximate time remaining on Lease Agreements
Baltona Perfumery (Exhibit C-20)	October 2008	October 2015 or October 2018	44 or 80 months <sup>1288</sup>
Baltona Classic (Exhibit C-21)	October 2008	October 2015 or October 2018	44 or 80 months <sup>1289</sup>
Baltona Esprit (Exhibit C-22)	January 2009	January 2016	46.5 months
Baltona Airport Shop <sup>1290</sup> (Exhibit C-24)	September 2008	September 2013	13 months
Baltona Kid's World (Exhibit C-25)	October 2008	October 2012	8 months
Baltona Accessories <sup>1291</sup> (Exhibit C-26)	October 2008	October 2015	38.5 months
Baltona Bestseller <sup>1292</sup> (Exhibit C-28)	September 2010	September 2015	43.5 months

880. Scenario B is not a realistic scenario. The retail space in Terminal 1 was liquidated as a consequence of the modernisation works. The existing Lease Agreements in Terminal 1 therefore could not have been extended. Instead, new leases for new commercial spaces would have been tendered. The expected course of events would thus have been that the Lease Agreements in Terminal 1 would have been terminated because of the impending modernisation with full compensation. The appropriate “but for” scenario, is therefore Scenario A.
881. Indeed, termination with compensation was what Polish law, *i.e.*, the Airport Act (which contains specific rules governing the preparation and implementation of investments concerning public airports) provided for in its Article 27(3): “[l]oss suffered as a result of termination of agreements [...] shall be subject to compensation”.<sup>1293</sup> The Tribunal is aware that the Lease Agreements did

<sup>1288</sup> The Lease Agreements for the Baltona Perfumery and Baltona Classic shops had a guaranteed period of lease of 84 months from the date of signing the Lease Agreements. In addition, both Lease Agreements provided that the guarantee period shall be extended for a further period of 36 months if certain requirements were met (including the performance of adaptation works). Respondent alleges that the Lease Agreements for the Baltona Perfumery and Baltona Classic shops would not have automatically been extended for 36 months because BH Travel failed to carry out the required 3-yearly adaptation and refreshing (*see* ■ Ms. [IM] Witness Statement, para. 12, **Exhibit RWS-4**; Second ■ Mr. [PN] Witness Statement, paras. 11-14, **Exhibit RWS-3**). Accordingly, for the purposes of the table calculating the approximate time remaining on the Baltona Perfumery and Baltona Classic Lease Agreements, the Tribunal provides two time periods, the first excluding the 36 month extension, and the second including the 36 month extension.

<sup>1289</sup> *Id.*

<sup>1290</sup> The Baltona Airport shop remained in operation until 14 August 2012.

<sup>1291</sup> The Baltona Accessories shop remained in operation until 14 August 2012.

<sup>1292</sup> It is unclear whether Baltona Bestsellers (Southern Concourse) is located in Terminal A *i.e.*, Terminal 1, **Exhibit C-28**. However, apparently no access to that shop has been blocked, **Exhibit C-90**.

<sup>1293</sup> Act of 12 February 2009 on Specific Rules Governing the Preparation and Implementation of Investments Concerning Public Airports, **Exhibit C-56**.

not foresee termination because of investments and modernisation of Chopin Airport. However, as the Lease Agreements were ruled by Polish law, the Airport Act introduced this mode of termination into the contractual relationship.

882. Theoretically, it could have been possible for PPL and Claimant to work out whatever arrangement would suit them in respect of the Terminal 1 Lease Agreements, instead of going for the simple termination with compensation, as provided for by Airport Act. Indeed, in a general manner, negotiations about alternative solutions still remain possible. However, the results of such negotiations cannot be predicted with sufficient certainty. In addition, Claimant fails to submit evidence in this respect. Moreover – and more crucially – when the decision to terminate became imminent, the relations between PPL and BH Travel at that time excluded any possibility of negotiating, in good faith, an extension of the Lease Agreements. The probability of such alternative arrangements were extremely small and Claimant has not proven the contrary. Indeed, there was extreme animosity between PPL and BH Travel, which started in December 2011,<sup>1294</sup> and culminated in numerous court proceedings in 2012 and in the introduction of the present arbitration proceedings in January 2014. All this excludes the assumption that PPL would be willing to allocate leases for duty-free shops to BH Travel once Terminal 1 had been modernised in 2015.
883. PPL’s desire to terminate the Lease Agreements was already obvious before 16 February 2012, perhaps because it already had in mind BH Travel’s replacement for the exploitation of the duty-free shops. Moreover, as the Airport Act indicates, terminating was the most evident solution. A resumption of the Terminal 1 Lease Agreements after 34.5 months in a completely new setting, with substantially bigger surfaces and different sales concepts, would have raised delicate problems of contract adaptation and would therefore have led to unpredictability and insecurity.
884. Consequently, the Tribunal does not agree with Claimant that in the “but for” scenario the Lease Agreements in Terminal 1 would not have been terminated on 16 February 2012, that the leases of the Terminal 1 duty-free shops would have been suspended for the period of the renovation of the Terminal (from 16 February 2012 until 30 December 2014), and that the 34.5 months’ suspension would have been added to the period of the respective leases.
885. Besides, when BH Travel’s Lease Agreements in Terminal 1 were terminated, the balance of all their contractual terms in the Base Period was rather limited, as noted in the table in paragraph 879 above. Even in the hypothesis that the Terminal 1 Lease Agreements’ terms would have been extended by the 34.5 months’ suspension, there would not have been many remaining months available for an alleged “adapted” continuation of each of these Lease Agreements. It is for instance very unlikely that BH Travel would have started to install and exploit the Baltona Kid’s World shop with a remaining lease period of only 8 months. It also remains doubtful that BH Travel would have engaged in the installation and exploitation of a new Airport Shop with only 13 months remaining. It may even be uncertain whether it would have installed and exploited the Baltona Esprit, Baltona Accessories, and Baltona Bestseller shops with less than 4 years remaining. Moreover, it is not certain whether BH Travel would have met the requirements under the Lease Agreements for the Baltona Perfumery and Baltona Classic shops that would allow the

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<sup>1294</sup> The fact that the relations between PPL and BH Travel seemed less strained before 8 December 2011 is irrelevant. In any event, Respondent has pointed out that even before 8 December 2011, Claimant, at least in Respondent’s view, had not perfectly performed its obligations under the Lease Agreements.

lease terms of those shops to be extended by 36 months. As such, it is also not certain whether these shops would have been installed and exploited.

886. As the Tribunal has noted, five to seven years is apparently the minimal timeframe for the granting of an airport shop concession.
887. In addition, it is noted that the Lease Agreements of the Baltona Arrival, Baltona Jewellery, Warehouse, and Social Rooms in Terminal 2 would not have been affected by the modernisation of Terminal 1, and thus in the Scenario A “but for” scenario would not be subject to suspension and corresponding extension. This would mean that, absent the termination without compensation on 16 February 2012, the Lease Agreements for the Terminal 2 premises would have continued until:

<b>Premises</b>	<b>Start of term of Lease Agreement</b>	<b>End of term of Lease Agreement</b>	<b>Approximate time remaining on Lease Agreements</b>
Baltona Arrival shop (Exhibit C-18)	May 2007	May 2014	27 months
Baltona Jewelry shop (Exhibit C-19)	December 2007	December 2014	34 months
Warehouse (Exhibit C-23)	September 2008	3 months’ notice	3 months
Social Rooms (Exhibit C-27)	September 2010	3 months’ notice	3 months

PAX and SPP

888. As stated above, the Tribunal considers that Scenario A, which assumes that Terminal 1 was not modernised and that the Lease Agreements in both Terminals 1 and 2 would have continued until the end of their original contract terms, is the most appropriate measure of Claimant’s damages in the “but for” scenario applicable in this case. Had the Lease Agreements been terminated with compensation, the compensation would have been calculated as the loss of profits that would have been earned by Claimant if the Lease Agreements in both Terminals had continued until the end of their respective terms without interruption in the un-modernised Terminal 1 and in Terminal 2.
889. The Tribunal will in this Scenario A assume some increases in the rate of passenger traffic (PAX) and spending (SPP).
890. In Respondent’s view, in Scenario A, the PAX capacity would be limited to 15 million passengers in 2020 due to operational and environmental constraints. However, the relevant period to calculate lost profits only stretches until 2018. Mr. Mirza, the industry expert who submitted the most optimistic PAX projections, estimated the PAX in 2018 at 13.8 million. Consequently, the issue of whether, in the long run, PAX could exceed 15 million is not relevant for the present damages calculation in the Base Period.

891. Claimant has considered the PAX growth in relation to all Polish airports and not specifically to Chopin Airport, which is the most developed and utilised airport in Poland. Due to the fact that Chopin Airport is the most developed airport in Poland, Respondent considers that it has a lower than average potential for future growth in PAX and SPP. Accordingly, the PAX and SPP comparisons with other airports have limited relevance.
892. However, in the Base Period the Tribunal has to assess loss of profits in the years 2012 to 2018 only. As this period already belongs largely to the past, the Tribunal can base its estimates upon actual PAX and SPP numbers for Chopin Airport. The actual PAX data for the years 2012 to 2014 are available. Actual PAX data for the years 2012 to 2014 have been submitted by Claimant,<sup>1295</sup> with which Respondent agrees in its Scenario A calculation.<sup>1296</sup>
893. For the few years still required (2015 to 2018), the Tribunal can look to Claimant's and Respondent's forecast figures in Scenario A, which again do not differ.<sup>1297</sup>
894. Respondent is of the view that the SPP factor for BH Travel would have only increased as of 2012 in accordance with the projected level of inflation. Respondent argues that Polish GDP is less relevant as a key driver for SPP as only a part of the relevant consumers are Polish. Claimant's expert, Mr. Mirza, provides SPP projections premised on the specific features of BH Travel and Chopin Airport with benchmarking and comparison adjustments. The Tribunal notes that in Claimant's Scenario A1 and Scenario A2 calculations, Mr. Mirza adopted an SPP forecast based on the assumption that Terminal 1 was not modernised (*i.e.*, disregarding his previous modernisation-related assumptions). On this basis, Mr. Mirza estimates that BH Travel would have continued to operate in Terminal 1, and due to better management, the SPP would have grown from EUR █████ in 2011 to EUR █████ in 2031 at an average of █████% in real terms.<sup>1298</sup> Based on the foregoing, the Tribunal is prepared to accept this adjusted SPP figure.
895. The Parties have discussed whether the spread of the shopping across a wider base and the modernisation of the shops would have increased or, on the contrary, diluted the SPP. The Tribunal does not consider this issue to be relevant in Scenario A because it does not contemplate the scenario of a 34.5 month extension of the Lease Agreements and a re-installment of BH Travel in the renovated Terminal 1.

*Profit margin (Gross Margin)*

896. The Tribunal has to establish the Gross Margin of the sales, *i.e.*, the difference between the total sales revenue and the total COGS, divided by the total sales revenue. For Claimant, the Gross Margin of the shops was on average 46.8% in 2010 and would have improved by 1% in 2012 and 2013, and then by 0.5% from 2014 onwards.<sup>1299</sup> For Respondent, the Gross Margin would have

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<sup>1295</sup> Mirza Supplemental Calculation; PwC Scenario Spreadsheets; Respondent's Scenario A.

<sup>1296</sup> Deloitte Report No. 2, Appendix 5, **Exhibit RER-2**; Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.5; Respondent's Scenario A.

<sup>1297</sup> Claimant's Reply, para 498; Mirza Report, p. 38, **Exhibit CER-2**. PwC Scenario Spreadsheets; Respondent's Scenario A; Deloitte Report No. 2, Appendix 5, **Exhibit RER-2**; Revised Post-hearing Supplement to Deloitte Report No. 2, para. 2.5; Respondent's Scenario A.

<sup>1298</sup> Mirza Report, **Exhibit CER-2**.

<sup>1299</sup> In the First PwC Report, para. 98, the trading margin would have increased from 47.7% in 2010 to 48.2% in 2015.

remained at 46.9%.<sup>1300</sup>

897. The Tribunal notes again that Mr. Qureshi provided two calculations for Scenario A: Scenario A1 in which he assumed that BH Travel's HR costs and COGS would have increased proportionally with future sales revenues; and Scenario A2 in which he assumed that BH Travel's HR costs and COGS would have increased with inflation only.<sup>1301</sup> The Tribunal is of the view that while it may be that BH Travel might have continued to improve its efficiency, it is not clear that its HR costs and COGS would only have increased in line with inflation, notably because increased sales revenue obviously requires more personnel and more stock. Accordingly, the Tribunal finds it reasonable in the circumstances to adopt the HR costs and COGS figures provided in Claimant's Scenario A1 calculation.

Discount rate

898. The Parties also disagree on the applicable discount rate. Claimant has relied on inflation forecasts provided by the International Monetary Fund, the European Central Bank and the Warsaw Independent Center for Economic Studies.<sup>1302</sup>

899. The Tribunal agrees with Claimant that the discount rate and a correct assessment of the damages can be based upon post-valuation date data and events. The use of such data can help with a more precise assessment of the damages.<sup>1303</sup> The Tribunal prefers to establish the discount rate on the basis of post-valuation date data, instead of calculating the discount rate on the valuation date and allocating pre-judgment interest to reflect the time value of money up to the date of the Award.<sup>1304</sup>

900. The Tribunal agrees that the rates of Polish government bonds, adopted by Claimant's expert, already reflect Polish country risk. Moreover, the discount rate does not need to be increased by a size premium as BH Travel, although a relatively small company, is part of a larger consortium. For Claimant the discount rate is 6.6%, *i.e.*, the cost of equity.<sup>1305</sup> Respondent submits that the cost of equity of Dufry ACS, a leading company in the same business sector, is 9.8-11.7%. In Respondent's view, BH Travel's cost of equity should be higher. In light of the foregoing, the Tribunal estimates a discount rate of 8% to be justified.

901. The Tribunal finds an adequate causal relationship between the termination of the Lease Agreements and BH Travel's financial losses. It does not accept Respondent's argument that the termination of the Lease Agreements had a beneficial impact simply because the sales revenue of Baltona had substantially increased when compared with the increased sales revenue of one of its subsidiaries, *i.e.*, BH Travel (which was also lucrative, albeit allegedly to a lesser extent). While Respondent argues that BH Travel had been making losses in 2009 and that its financial performance did not significantly improve in 2011, the Tribunal notes that, according to Respondent's expert,<sup>1306</sup> between 2009 and 2011 its sales revenue had increased by 36% and its

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<sup>1300</sup> Respondent's Post-Hearing Brief, para. 228.

<sup>1301</sup> Claimant's Post-Hearing Brief, para. 547.

<sup>1302</sup> *See supra* para. 692.

<sup>1303</sup> *See* Ripinsky and Williams, **Exhibit CL-115**; Kantor, **Exhibit CL-112**.

<sup>1304</sup> *See supra* paras. 704 and 743.

<sup>1305</sup> *See supra* para. 737.

<sup>1306</sup> Deloitte Report, para. 95, **Exhibit RER-1**.

EBITA margin (earnings before interest, taxes, and amortisation) had increased by 4.8%.

902. Moreover, the Tribunal does not agree with Respondent's argument that it was BH Travel's behaviour that had led to the termination of the Lease Agreements, and so PPL (and therefore Respondent also) cannot be held liable for the termination. The Tribunal has already established that the pretextual termination by PPL triggered Respondent's responsibility under the Treaty.

Valuation date

903. The Tribunal does not agree with Claimant that the breach began on 8 December 2011 with PPL's failure to consider any solution other than the termination of the Lease Agreements by mutual agreement but without any compensation. PPL's attempts to obtain termination without compensation by themselves do not constitute a breach of the Treaty. The actual termination of the Lease Agreements on 16 February 2012 was the first illegal act under the Treaty which led to BH Travel's forceful expulsion from its premises at the Chopin Airport on 14 August 2012. In any event, the Tribunal notes that the valuation date put forward by Claimant is 17 February 2012.<sup>1307</sup>
904. In the Tribunal's view, the appropriate valuation date is 16 February 2012 ("**Valuation Date as determined by the Tribunal**"), *i.e.*, the date on which the Lease Agreements were terminated, and not 17 February 2012, the date the customs authorities sealed some of BH Travel's shops. This sealing was only a consequence of the termination, on the previous day, of the Lease Agreements with immediate effect. Besides, of the shops affected by the termination, only 6 were duty-free shops and 3 were not located in the DFZ.
905. Claimant disputes Respondent's claim that the valuation of Flemingo DutyFree's losses should be based upon the current indirect interest in BH Travel and not upon the indirect interest as on the valuation date.<sup>1308</sup> The Tribunal accepts that Claimant's indirect interest in BH Travel at the time of the breach is relevant and therefore, for the purpose of calculating Claimant's damages, retains Claimant's indirect interest of 80.68% in BH Travel (see paras. 933-934 below).

Growth projection

906. Respondent alleges that, based on BH Travel's past performance, BH Travel would not have achieved financial profits in the future. The Tribunal, however, accepts Claimant's growth projections for the relevant future years, based upon the 2014-2015 performances of the Baltona Group and the assumption of improved management.

Method of calculating loss

907. The Parties have extensively discussed whether a DCF analysis is the proper method to assess loss of profits, and whether it can be used on a standalone basis. Respondent considers the DCF method as being too susceptible to changes in the underlying assumptions to be used independently to quantify damages, referring to *Franck Charles Arif v. Republic of Moldova* in support of its contentions.<sup>1309</sup> However, in that case, the duty-free shops had never entered into operation or had been open for only a few days. In the present case, by contrast, BH Travel had

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<sup>1307</sup> See *supra* paras. 621 and 703-705.

<sup>1308</sup> Claimant's Reply, para. 505, referring to Deloitte Report, para. 110, **Exhibit RER-1**.

<sup>1309</sup> *Franck Charles Arif v. Moldova* Award, para. 576, **Exhibit RL-43**.

already operated shops for more than four years. Moreover, in the *Franck Charles Arif* case, the tribunal did not have recourse to the alternative standards Respondent proposes, but in fact relied on a wasted cost calculation.

908. Respondent argues that the DCF method may only be applied to a going concern, which, Respondent submits, BH Travel was not. However, in the Tribunal's view, the BH Travel shops had been operational for more than four years – a sufficient period to allow for a projection of lost profits because of early termination.
909. Respondent considers that the DCF method should be combined with a market-based approach. Respondent also submits that other valuation methods – such as the value of BH Travel's assets, the value of BH Travel shares after termination, and the value of BH Travel compared to a market benchmark – should be used.
910. The Tribunal recognises that approximation in DCF calculations is inherent and inevitable, as has been recognised by the tribunal in *Himpurna v PT*, among others.<sup>1310</sup> The determination of future expected cash flows is not “rocket science”. However, the Tribunal is of the view that the DCF method remains an adequate way to assess the net present value of the income produced under BH Travel's Lease Agreements for their remaining terms.
911. The Tribunal also notes that, because the Tribunal does not find an extension of the Lease Agreements likely (see paras. 921-931 below), and compensation is most appropriately determined in accordance with Scenario A, the DCF method is not being used in this case to project profits far into the future.
912. The Tribunal here derives comfort from the fact that the compensation for lost profits covers mainly past months, and that it is only for two of the Lease Agreements (Baltona Perfumery and Baltona Classic) that a projection of lost profits until October 2018<sup>1311</sup> would be required.

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<sup>1310</sup> *Himpurna v. PT*, reprinted in 25 Y. B. COM. ARB. 13,103 (Berm.-Indon. 2000), p. 102, **Exhibit CL-116**; *See supra* para. 801.

<sup>1311</sup> As previously noted, the Lease Agreements for the Baltona Perfumery and Baltona Classic shops had a guaranteed period of lease of 84 months from the date of signing the Lease Agreements. In addition, both Lease Agreements provided that the guarantee period shall be extended for a further period of 36 months if certain requirements were met (including the performance of adaptation works). Respondent alleges that the Lease Agreements for the Baltona Perfumery and Baltona Classic shops would not have automatically been extended for 36 months because BH Travel failed to carry out the required adaptation and refreshing. However, the Tribunal assumes that, in view of the commercial importance of attractive shops and an extension, BH Travel would most likely have engaged in the necessary adaptations and refreshing were it not for the pending modernisation which would have made such works superfluous. PPL could not, in good faith, require such works so close to the planned closing of the shops. Moreover, if PPL would have considered these works nevertheless required, in the given circumstances, it should have drawn BH Travel's attention to the insufficiency of the existing installation. Accordingly, the Tribunal is prepared to accept the period of 10 years for the terms of the Lease Agreements of the Baltona Perfumery and Baltona Classic shops (*i.e.*, including the 36 month extension) for the purposes of assessing Claimant's damages in the Base Period under Scenario A1.

Premises	Latest end of term of Lease Agreement
Baltona Perfumery (Exhibit C-20)	October 2018
Baltona Classic (Exhibit C-21)	October 2018
Baltona Esprit (Exhibit C-22)	January 2016
Baltona Airport Shop <sup>1312</sup> (Exhibit C-24)	September 2013
Baltona Kid's World (Exhibit C-25)	October 2012
Baltona Accessories <sup>1313</sup> (Exhibit C-26)	October 2015
Baltona Bestsellers <sup>1314</sup> (Exhibit C-28)	September 2015
Baltona Arrival shop (Exhibit C-18)	May 2014
Baltona Jewelry shop (Exhibit C-19)	December 2014
Warehouse (Exhibit C-23)	3 months' notice
Social rooms (Exhibit C-27)	3 months' notice

913. Indeed, as the Tribunal does not need to assess the potential cash flow from new shops with an unknown cost structure and commercial strategy, the DCF method is not too speculative for the estimates of the potential cash flow for the few remaining years in the closed duty-free shops.<sup>1315</sup> Moreover, the limited DCF analysis that is taking place can be underpinned by realistic financial projections. The use of ranges and estimates does not imply abandonment of the analysis of evidence and the discipline of economic analysis.<sup>1316</sup>

Other methods to assess damages

914. As stated above, Respondent argues that – besides the DCF method – other valuation standards should be applied.

<sup>1312</sup> The Baltona Airport shop remained in operation until 14 August 2012.

<sup>1313</sup> The Baltona Accessories shop remained in operation until 14 August 2012.

<sup>1314</sup> It is unclear whether The shop Bestsellers (Southern Concourse) is located in Terminal A, *i.e.*, Terminal 1 (see Lease Agreement between PPL and BH Travel (Bestseller) dated 29 September 2010, **Exhibit C-28**). However, apparently no access to that shop has been blocked (see Decision of the District Court of Warsaw dated 24 February 2012, **Exhibit C-90**).

<sup>1315</sup> See *supra* para. 801.

<sup>1316</sup> See *supra* para. 801.

915. Respondent suggests, *inter alia*, the BH Travel share price. Respondent refers to the price Heinemann received in March 2001 for the sale of a mere 10% of BH Travel shares. The Tribunal does not consider this price relevant for the valuation of the prospect of profits for the years 2012 and following. Indeed, as confirmed by *CME v. Czech Republic*<sup>1317</sup> and *SPP v. Egypt*,<sup>1318</sup> from the acquisition price for a small minority of shares, which were not “cloaked with company control” (*i.e.*, they did not have a company control premium), one should not deduce the value of a company. Moreover, the few shares were transferred in a global settlement which also encompassed a setoff for unpaid deliveries of goods and future supply conditions.
916. The Tribunal similarly does not consider the book value of the Lease Agreements and other assets or the value of BH Travel shares at the moment of termination to be relevant. The Tribunal is not assessing the price of assets, and therefore does not need benchmarks to do so, contrary to what Respondent suggests.<sup>1319</sup>
917. Respondent has also discussed Baltona’s financial position, its market capitalisation and forecasts. However, the Tribunal considers the financial position of Baltona to be equally irrelevant for the purposes of assessing BH Travel’s lost profits. Although BH Travel encompasses some 40% of Baltona’s activities, there are no grounds to assume that its profitability is the same as Baltona’s overall profitability.
918. The Tribunal also does not see a need to make use of benchmarks related to other companies from the sector.<sup>1320</sup> These benchmarks are not only difficult to select, but are unrelated to the profits lost by BH Travel in respect of the specific Lease Agreements at issue.
919. The amount for which Baltona acquired BH Travel’s shares, or the amount for which Claimant acquired Flemingo International and became the indirect shareholder of BH Travel, are similarly irrelevant.
920. The Tribunal also does not consider the amounts invested by the Flemingo Group to be relevant for determining BH Travel’s value and loss of value after the termination of the Lease Agreements, contrary to what Respondent has suggested.

*Loss of chance of renewal of the Lease Agreements (loss of profits in the Extension Period)*

921. Claimant also claims compensation for its loss of chance to have the Lease Agreements renewed after their initial term (*i.e.* in the Extension Period). Claimant alleges that, in a “but for” scenario, it would have had a 75% chance to get all the Lease Agreements in the modernised Terminal 1 as an incumbent, had its relationship with PPL not been disturbed. The Tribunal here observes that Claimant only obtained an extension of its lease for duty-free shops in Polish airports in 50% – and not 75% – of the cases in which it was an incumbent. While Respondent states that it does not consider an extension probable, at most it would assume a probability of 25% or 50% for Claimant to prevail in a public tender for a future lease period. Respondent would then evaluate the damages for a *perte d’une chance* to be respectively EUR 7 or 8 million.<sup>1321</sup>

<sup>1317</sup> *CME v. Czech Republic* Final Award, paras 156-157, **Exhibit CL-117**.

<sup>1318</sup> *SPP v. Egypt* Award para 197, **Exhibit CL-118**.

<sup>1319</sup> Respondent’s Rejoinder, para. 686.

<sup>1320</sup> *See supra* para. 816.

<sup>1321</sup> *See supra* para. 769.

922. As stated in *Lemire v. Ukraine*,<sup>1322</sup> the compensation for loss of chance “is normally calculated as the hypothetical maximum loss, multiplied by the probability of the chance coming into fruition”.
923. The Tribunal does not agree with Claimant’s assumption that the probability that BH Travel would have had the Lease Agreements renewed was 75%. Indeed, the basis for this assumption, *i.e.*, that the Baltona Group had prevailed in 75% of the tenders for leases of duty-free shops in the past, became irrelevant in the specific context of new leases in the modernised Terminal 1.
924. Compensation for a loss of chance should be in proportion to the probability of its occurrence, as is also confirmed by Article 7.4.3 of the UNIDROIT Principles on International Commercial Contracts.<sup>1323</sup> A sufficient causal link between the loss and the breach is required. The harm must be a direct consequence of the breach.
925. The Tribunal observes that in the “but for” scenario, Claimant was not an “incumbent” with a competitive advantage over its competitors to obtain the new leases in the modernised Terminal 1. Indeed, there was a 2-year and 10-month period between the termination of the Lease Agreements (in both Terminals 1 and 2) in February 2012 and the time that the new leases for the modernised Terminal 1 had to be allocated in 2015. In those 34.5 months BH Travel had completely disappeared from Terminal 1 while its competitors HDS and Keraniss continued to operate their duty-free shops in Terminal 2. These competitors would be the real incumbent concessionaires. In other words, HDS and Keraniss – and not BH Travel – were the incumbents with a high probability of securing the new leases in Terminal 1.
926. While it is true that in the “but for” scenario, the Lease Agreements in Terminal 2 would not have been terminated, it is not enough to state that BH Travel’s limited presence in Terminal 2 would have been sufficient to have increased its chances of securing new lease agreements in the modernised Terminal 1. BH Travel had a limited presence in Terminal 2 and there were two other “incumbents” in Terminal 2 (HDS and Keraniss). In addition, the breakdown in the relationship between PPL and BH Travel makes it unlikely that the Lease Agreements for Terminal 2 would have been renewed.
927. The Tribunal also observes that although tender proceedings seem not to be required, they were followed for the conclusion of the Lease Agreements during the 2005 tender process “to ensure transparency and competitiveness”. It is reasonable to assume that such a process would also be followed for the granting of the new leases in the modernised Terminal 1.
928. It is noted that the conditions for the 2005 tender process left some discretion to PPL to establish and evaluate the required criteria (*inter alia*, store concept, brand equity, monthly rent) and to select the actual tenderer. No indications have been submitted to suggest that PPL’s discretion in selecting the potential tenderers and granting the concessions would not apply for the new leases after the modernisation.
929. Considering that PPL had retained the discretion to invite companies to tender, to establish the tender criteria, and to evaluate the submitted offers, it may be expected that BH Travel’s competitors, which had continued substantial operations in Terminal 2, would have had an

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<sup>1322</sup> See *supra* para. 613, referring to *Lemire v. Ukraine Award*, **Exhibit CL-56**.

<sup>1323</sup> International Institute for the Unification of Private Law, *UNIDROIT Principles on International Commercial Contracts*, 2010.

advantage above BH Travel (who in the “but for” scenario would have left Terminal 1 for nearly three years and retained only a limited presence in Terminal 2).

930. Moreover, the case at stake does not concern a mere extension of the lease of the same premises, but rather the creation of a completely new concession, with walk-through shops, greater surfaces, different business models, and higher rent prices.<sup>1324</sup>
931. In brief, the loss of a chance requires, in a “but for” scenario, a causal link between the non-breach and the probability that a future event would have occurred if no breach had been committed. The Tribunal fails to see the causal link between the termination of the Lease Agreements on 16 February 2012 – with compensation – and the granting of completely new lease agreements, nearly three years later.

#### Adverse inferences

932. Claimant requests the Tribunal to draw adverse inferences from Respondent’s breach of the Tribunal’s orders to produce documents which could have provided more precise data regarding its calculation of damages. However, with regard to Claimant’s calculation of its actual losses (Operating Losses and One-Off Termination Costs), Claimant does not need data from Respondent. Neither does Claimant need the data for the calculations of its loss of profits in the remaining contract terms (the Base Period). Data from Respondent would only have been useful for the evaluation of the loss of the chance to conclude lease agreements for the new shops in the modernised Terminal 1 (the Extension Period), especially to allow the Tribunal to have insight into the lease conditions and rent. However, as the Tribunal has rejected Claimant’s claims for this “loss of chance”, there is no need to make these evaluations, and thus no need to determine whether adverse inferences should be drawn.

### **3) Claimant’s indirect interest in BH Travel**

933. As Respondent has noted (see para. 636 above), Claimant did not have a full 100% indirect interest in BH Travel. According to Claimant, it had an indirect interest of 80.68% in BH Travel at the time the Lease Agreements were terminated. However, as Mr. Ahuja has confirmed, by the time of the hearing Flemingo’s indirect interest in BH Travel was only 68.34%.<sup>1325</sup>
934. The Tribunal agrees with Claimant that post-breach changes in the ownership of Claimant’s investment have to be ignored. Such changes have no bearing on the calculation of Claimant’s losses as at that time. Claimant’s interest has to be assessed as on the Valuation Date as determined by the Tribunal (see para. 904 above) and changes subsequent to that date are to be ignored.<sup>1326</sup> Indeed, to take a prosaic and quite extreme example to illustrate this principle, the owner of a car remains entitled to claim compensation for damages inflicted to the car, even if he had already sold the car immediately after the accident. Therefore, the Tribunal accepts that Claimant’s indirect interest in BH Travel at the time of the breach (the Valuation Date as

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<sup>1324</sup> Hearing Transcript (14 October 2015), 64:7-23, reply to a question posed by the President. *See also* 67:20 to 68:20, reply to questions posed by Dr. Kühn.

<sup>1325</sup> According to Respondent, Mr Ahuja clarified that, due to the restructuring process of Flemingo Group (...) *Flemingo DutyFree owns roughly 85% of Flemingo International; 84.8%, to be precise. Flemingo International owns 100% of Ashdod. Ashdod owns 80%-plus, 80.6% of Baltona. And Baltona owns 100% of BH Travel. See Respondent’s Post-Hearing Brief, para. 208, referring to Hearing Transcript (12 October 2015), 153:10-14.*

<sup>1326</sup> Ripinsky and Williams, note 1162, p. 243, **Exhibit CL-115**.

determined by the Tribunal) is relevant and for the purpose of the present proceedings, retains Claimant's indirect interest of 80.68% in BH Travel to calculate Claimant's damages.

935. Accordingly, the Tribunal is prepared to accept Claimant's claim for actual loss of EUR 1,070,370, being 80.68% of BH Travel's total actual losses of EUR 1,326,690. Similarly, Claimant may claim 80.68% of BH Travel's lost profits, as quantified by the Tribunal in paragraph 942 below.

#### **4) Alleged changes to the amount claimed**

936. In its Rejoinder, Respondent argues that Claimant had changed the amount of damages claimed from its Statement of Claim to its Reply, noting that the amounts claimed in the Reply as Base Period and Extension Period lost profits increased by nearly EUR 31 million.<sup>1327</sup> Respondent argues that the amount had been increased by generating a completely new amount of the claim.

937. Respondent submits that Claimant intentionally understated the amount of the claims in its Statement of Claim, thereby limiting Respondent's right to a fair defence.<sup>1328</sup>

938. The Tribunal has an obligation to ensure that each Party is treated with equality and provided with "a reasonable opportunity of presenting its case" pursuant to Article 17 of the UNCITRAL Rules. This must be done with a view to "conduct[ing] the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

939. The Tribunal is satisfied that Respondent has had a fair and reasonable opportunity to respond to all elements of Claimant's case, including the amount of damages set out in Claimant's Reply. Indeed, Respondent was able to address these damages claims both at the hearing, and in its Post-Hearing Brief. Accordingly, no further consideration of this issue is required.

#### **5) Interest**

940. Claimant requests that the Tribunal grant it interest equal to a 6-month EURIBOR, increased by 2% for the period from the valuation date until the date of payment of the award.<sup>1329</sup>

941. The Tribunal grants Claimant's request, taking into account the fact that EURIBOR 6-month is at present negative.

#### **6) Quantification of damages**

942. Taking the above into account, the Tribunal finds that the total amount of damages recoverable by Claimant is EUR 17,902,790.

943. The Tribunal based its calculation on Claimant's Scenario A1 Calculation, since this calculation most closely correlates with the "but for" scenario that the Tribunal has found to be applicable and incorporates, to the largest extent, the factors that the Tribunal has held to be reasonable for the purposes of the DCF calculation. In order to bring Claimant's A1 Scenario Calculation in line with the Tribunal's findings, the Tribunal made the following two adjustments to the spreadsheet:

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<sup>1327</sup> Respondent's Rejoinder, para. 334.

<sup>1328</sup> Respondent's Rejoinder, para. 339.

<sup>1329</sup> Claimant's Post-Hearing Brief, paras. 555-562.

- i. Reducing the “Extension scenario probability” on the *Front Page* sheet to 0% (*i.e.*, on the *Front Page* sheet, row 21 was adjusted to 0); and
  - ii. Adjusting the discount rate to 8% on the *BH\_All* sheet (*i.e.*, on the *BH\_All* sheet, row 321 was changed from 6.8% to 8%).
944. The result of these amendments is a calculation of EUR 17,902,790 for Claimant’s share (at 80.68%) of BH Travel’s losses.
945. Claimant’s claim for its actual losses (EUR 1,070,370) was included within Claimant’s Scenario A1 Calculation (see row 59 on the *Front Page* sheet) and so this amount does not need to be added.

## VIII. COSTS OF ARBITRATION

946. The Treaty contains no provisions on the allocation of the costs of arbitration in the case of a dispute between an Investor and a Contracting Party.
947. Articles 38 to 40 of the UNCITRAL Rules address the fixing and apportionment of the costs of arbitration.

Article 38 defines the “costs of arbitration” as follows:

[...] The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Article 40 of the UNCITRAL Rules provides as follows:

- 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
- 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

## 1) The Parties' submissions on costs

### *Claimant's Position*

948. Claimant claims the following costs of arbitration:

<b>Claimant's Costs (EUR)</b>		
<b>Article 38</b>	<b>Total</b>	<b>Description</b>
Tribunal costs and costs of assistance (Arts. 38(a), (b), (c))	<b>EUR 425,000.00</b>	Claimant's Share of Tribunal and Institutional Costs (PCA registry support)
Travel and other expenses of witnesses (Art. 38(d))	EUR 5,365.04	Mr. Ahuja
	EUR 3,540.15	Mr. Jaroń
	EUR 823.00	Mr. Kazimierski
	<b>EUR 9,728.19</b>	<b>Sub-total</b>
Costs for legal representation and assistance (Art. 38(e))	EUR 1,648,203.50	Fees and expenses of White and Case LLP
	EUR 110,730.97	Fees and expenses of Wolf Theiss P. Daszkowski sp.k
	EUR 207,134.14	Expert fees and expenses (PwC)
	EUR 123,270.00	Expert fees and expenses (ICF)
	EUR 14,799.64	Translation costs
	EUR 5,992.77	In-house Management Travel Expenses
	<b>EUR 2,110,131.02</b>	<b>Sub-total</b>
Fees and expenses of the appointing authority and the Secretary-General of the PCA (Art. 38(f))	--	No expenses claimed
	<b>EUR 2,544,859.21</b>	<b>TOTAL</b>

949. Claimant submits that Respondent should bear Claimant's costs in this arbitration, including the costs of legal representation and assistance, in the amount of EUR 2,544,859.21.<sup>1330</sup> Claimant argues that Respondent's treatment of the investment was intentional and wrongful. Therefore, pursuant to Articles 38 and 40(1)(2) of the UNCITRAL Rules, Respondent should bear the costs of arbitration incurred by Claimant.

<sup>1330</sup> Claimant's Post-Hearing Brief, paras. 563-565. Claimant's Cost Summary, para. 1.

950. Claimant submits that numerous UNCITRAL tribunals have awarded the successful party all or a portion of the costs on the principle that the “loser pays”, and maintains that it should be the successful party in this case.<sup>1331</sup>
951. Claimant further submits that tribunals have ordered a party to pay the costs of arbitration where the party engaged in misconduct or insufficiently cooperated with the proceedings thereby unnecessarily raising the cost of arbitration.<sup>1332</sup> Claimant argues that Respondent, *inter alia*, engaged in “repeated obstructionist tactics” and raised frivolous and superfluous claims, including unfounded jurisdictional objections and a “baseless defence on quantum”, which resulted in significantly and unnecessarily increasing Claimant’s costs and complicating the resolution of the dispute.<sup>1333</sup>
952. Claimant argues that Respondent’s claim for costs should be dismissed in its entirety as it “is aware of no facts that would warrant any apportionment of costs to Flemingo DutyFree”.<sup>1334</sup> Claimant rejects Respondent’s claim that it behaved in a “misleading” way and committed “misconduct” by requesting an extension to file the Post-Hearing Brief, noting in this regard that the Tribunal found that the timing of its submission caused no prejudice to Respondent. Claimant also rejects Respondent’s claim that it had a “strategy in its habitual litigants practice” calling it “baseless and far-fetched”.<sup>1335</sup>
953. In light of the foregoing, Claimant requests that the Tribunal order Respondent to bear all the costs incurred by Claimant in relation to this arbitration and, subject to readjustment, to include any further costs that Claimant may incur in the future in relation to the arbitration.<sup>1336</sup>
954. In addition, Claimant requests that the Tribunal award Claimant compound interest on its costs in this arbitration<sup>1337</sup> at a rate of no less than EURIBOR plus a premium of 2%<sup>1338</sup> until the payment of the award. Claimant characterises Respondent’s claim that interest on costs has a “penal character, which is contrary to the very essence of the compensation and arbitration proceedings” as baseless, noting that Respondent does not cite any legal authority to support its claim.<sup>1339</sup>

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<sup>1331</sup> Claimant’s Cost Summary, paras. 4-5, *referring to Saar Paper v. Poland*, Interim Award dated 17 August 1994, UNCITRAL, para. 21, **Exhibit CL-144**; *SwemBalt AB v. Latvia*, Decision dated 23 October 2000, para. 49, **Exhibit CL-145**.

<sup>1332</sup> Claimant’s Cost Summary, paras. 7-8, *referring to G. Flecke-Giammarco, Chapter 13A: The Allocation of Costs by Arbitral Tribunals in International Commercial Arbitration*, in Jorge A. Huerta-Goldman, A. Romanetti, et al. (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration*, Global Trade Law Series, Volume 43, p. 415 (2013), **Exhibit CL-146**; *European American Investment Bank AG (EURAM) v. Slovak Republic*, Award on Costs dated 20 October 2014, UNCITRAL, p. 18, para. 43, **Exhibit CL-147**; *Desert Line Projects LLC v. The Republic of Yemen*, Award dated 6 February 2008, ICSID Case No. ARB/05/17, para. 43, **Exhibit CL-148**; *Siag v. Egypt* Award, para. 304, **Exhibit CL-29**.

<sup>1333</sup> Claimant’s Cost Summary, paras. 9-14.

<sup>1334</sup> Claimant’s Reply, para. 563.

<sup>1335</sup> Claimant’s Comments on Respondent’s Cost Summary, p. 1.

<sup>1336</sup> Claimant’s Cost Summary, para. 18.

<sup>1337</sup> Statement of Claim, para. 247; Claimant’s Reply, para. 564, *referring to S.D. Myers v. Canada*, Final Award Concerning the Apportionment of Costs between the Disputing Parties, para. 50, **Exhibit CL-61**.

<sup>1338</sup> Statement of Claim, para. 247, *referring to* Statement of Claim, para. 242.

<sup>1339</sup> Claimant’s Cost Summary, para. 21.

*Respondent's Position*

955. Respondent claims the following costs of arbitration:

<b>Respondent's Costs (PLN and EUR)</b>		
<b>Article 38</b>	<b>Total</b>	<b>Description</b>
Tribunal costs and costs of assistance (Arts. 38(a), (b), (c))	<b>PLN 1,792,200.00</b>	Respondent's Share of Tribunal and Institutional Costs (PCA registry support)
Travel and other expenses of witnesses (Art. 38(d))	<b>PLN 16,035.61</b>	Cost of the appearance of the witnesses (■■■ Ms. [IM], ■■■ Mr. [PN], ■■■ Mr.[MM])
Costs for legal representation and assistance (Art. 38(e))	PLN 798,260.68	Fees of Bird & Bird
	PLN 26,103.40	Disbursements and administrative fees of Bird & Bird
	PLN 1,121,640.00	Expert fees and expenses (Deloitte)
	EUR 1,149.37 and PLN 2,997.21	Cost of representation by counsel from the State Treasury Solicitor's Office (Mr. Buczkowska)
	PLN 5,869.02	Cost of Respondent representation at the hearing by representative of Polish Ministry of Infrastructure and Development (Mr. Czechorowski)
	PLN 14,582.89	Translation costs
	<b>PLN 1,969,453.20 and EUR 1,149.37</b>	<b>Sub-total</b>
Fees and expenses of the appointing authority and the Secretary-General of the PCA (Art. 38(f))	--	No expenses claimed
<b>PLN 3,777,688.81 and EUR 1,149.37</b>		<b>TOTAL</b>

956. Respondent claims that the Tribunal should award it the costs of the proceedings, including arbitrators' fees and expenses, the administrative costs, the costs of the Respondent's legal representation and the costs incurred by the Respondent in connection with the present arbitration, pursuant to Articles 38 to 40 of the UNCITRAL Rules and in the amounts of PLN 3,777,688.60 and EUR 1,149.37.<sup>1340</sup>

<sup>1340</sup> Respondent's Cost Summary, p. 2. Respondent claims PLN 3,777,699.60, which is PLN 0.21 less than the Tribunal's calculation of the total PLN amount in the table above.

957. Respondent disputes Claimant’s assertion that if Claimant is the winning party, Respondent should pay all the costs of the arbitration proceedings as a matter of right.<sup>1341</sup> Rather, Respondent maintains that tribunals often require the parties to bear their own costs irrespective of which party succeeds.<sup>1342</sup>
958. Respondent submits that if it is the prevailing party, it should be awarded full compensation of costs incurred following the principle of “the cost follows the event” as applied by multiple tribunals.<sup>1343</sup> However, in the event that Respondent is not the successful party, Respondent submits that the costs of the arbitration proceedings, including the cost of the Parties’ representation, should be apportioned between the two Parties taking into account the circumstances of the case.<sup>1344</sup> Specifically, Respondent argues that Claimant engaged in “misleading behaviour and conduct” including, *inter alia*, “submission of the Post-Hearing Brief after the deadline” which should be penalised by the Tribunal. Respondent argues further that Claimant initiated arbitration proceedings as a part of its “*habitual litigants practice*” of simultaneously initiating dozens of proceedings against the same entity and should thus bear the cost of its strategy.<sup>1345</sup>
959. Respondent contends that Claimant’s Cost Summary contains “a series of erroneous and misleading arguments”. Respondent submits that it has never abandoned or changed any of its arguments, nor did it engage in obstructionist behaviour. Respondent further submits that Claimant’s argument that its costs were increased due to Respondent’s actions is “empty and baseless” and Respondent cannot be held liable for exercising its right to defend itself.<sup>1346</sup>
960. Respondent argues that it in no way contributed to Claimant’s costs, and that Claimant’s increased costs were largely due to its own fault. Respondent maintains that Claimant chose to incur expert fees rather than use publicly available expert data or reports. Respondent further maintains that Claimant’s legal fees are unreasonably high due to its employment of excessive legal representation that was not necessary to bring and support its claim.<sup>1347</sup>
961. Respondent argues that Claimant engaged in behaviour resulting in additional and unnecessary costs to Respondent, for which Claimant should be held liable. Respondent maintains Claimant made substantial changes to the calculation of quantum with each submission, and due to Claimant’s “evasive and contrived” quantum analysis, it had to engage additional experts, generating unnecessary costs. Respondent further maintains that Claimant referred to a new series

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<sup>1341</sup> Respondent’s Comments on Claimant’s Cost Summary, para. 34 referring to *Santa Elena v. Costa Rica* Final Award, **Exhibit CL-47**; *Metalclad v. Mexico* Award, **Exhibit CL-30**; *Marvin Feldman v. Mexico* Award, **Exhibit CL- 134**; *Middle East Cement v. Egypt* Award, **Exhibit CL-45**; *Tecmed v. Mexico* Award, **Exhibit CL-11**; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Award dated 24 May 2004, ICSID Case No. ARB/01/7, **Exhibit RL-49**; *CMS v. Argentina* Award, **Exhibit CL-26**; *Enron v. Argentina* Award, **Exhibit CL-48**; *Sempra v. Argentina* Award, **Exhibit CL- 17**; *Archer Daniels v. Mexico* Award, **Exhibit CL-50**; *Saipem v. Bangladesh* Award, **Exhibit CL-21**; *El Paso v. Argentina* Award, **Exhibit CL-14**; *Marion Unglaube v. Costa Rica* Award, **Exhibit CL-35**; *Franck Charles Arif v. Moldova* Award, **Exhibit RL- 43**.

<sup>1342</sup> Respondent’s Comments on Claimant’s Cost Summary, para. 35 referring to M. Kinnear, *Damages in Investment Treaty Arbitration*, p. 570 [in:] K. Yannaca-Small, *Arbitration under International Investment Agreements*, A Guide to the Key Issues.

<sup>1343</sup> Respondent’s Cost Summary, p. 3 referring to *Phoenix v. Czech Republic* Award, para. 151, **Exhibit RL-15**.

<sup>1344</sup> Respondent’s Cost Summary, p. 5.

<sup>1345</sup> Respondent’s Cost Summary, p. 6.

<sup>1346</sup> Respondent’s Comments on Claimant’s Cost Summary, paras. 1, 2, 8-10, 12.

<sup>1347</sup> Respondent’s Comments on Claimant’s Cost Summary, paras. 13, 17, 27-28.

of facts in its Reply that had not been present in the Statement of Claim, requiring Respondent to spend additional time and resources responding to the new arguments and evidence. Respondent also submits that due to Claimant's requests for an additional hearing day and extension of deadline to submit its Post-Hearing Brief, Respondent incurred additional and unnecessary costs for which Claimant should be held liable. Respondent further submits that Claimant engaged Respondent in obstructionist letter-writing campaigns that also created additional costs.<sup>1348</sup>

962. In light of the foregoing, Respondent requests that the Tribunal award it full compensation of the costs incurred during the arbitral proceedings.
963. Respondent disputes the application of interest on the costs connected to this arbitration as contended by Claimant. Respondent maintains that such a claim has a penal character and it is contrary to the essence of compensation in arbitration proceedings.<sup>1349</sup> Therefore, the Tribunal should not award interest.<sup>1350</sup>

## 2) Tribunal's Analysis

### Fixing the Costs of Arbitration Pursuant to Article 38 of the UNCITRAL Rules

#### *Article 38(a): the fees of the Tribunal to be stated separately as to each arbitrator*

964. In determining the amount of its fees, the Tribunal has taken account of Article 39(1) of the UNCITRAL Rules, pursuant to which "[t]he fees and expenses of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case".
965. The fees of Dr. Wolfgang Kühn amount to EUR 237,000.00. The fees of Mr. John M. Townsend amount to EUR 178,800.00. The fees of Professor Hans van Houtte, the Presiding Arbitrator, amount to EUR 213,345.00.

#### *Article 38(b): the travel and other expenses incurred by the arbitrators*

966. The combined travel and other expenses incurred by the arbitrators totals EUR 23,489.77.

#### *Article 38(c): the cost of expert advice and other assistance required by the Tribunal*

967. The cost of assistance required by the Tribunal includes the PCA's fees and expenses for registry services which amount to EUR 112,912.25. The cost of other assistance required by the Tribunal, including costs of court reporting, interpretation, catering, courier services, hearing venue services, office supplies and printing, support staff overtime (security, information technology), telecommunications, banking services, and award registration, totals EUR 63,875.47.

#### *Article 38(d): The travel and other expenses of witnesses as approved by the Tribunal*

968. The Tribunal approves the travel and other expenses of witnesses submitted by the Parties,

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<sup>1348</sup> Respondent's Comments on Claimant's Cost Summary, paras. 18, 20-21, 23-25.

<sup>1349</sup> Respondent's Rejoinder, para. 460.

<sup>1350</sup> Respondent's Comments on Claimant's Cost Summary, para. 38.

namely: EUR 9,728.19 + PLN 16,035.61 (i.e., EUR 3,758.85),<sup>1351</sup> which total EUR 13,487.04.

*Article 38(e): The costs for legal representation of and assistance to the successful party claimed during the proceedings and determined by the Tribunal to be reasonable*

969. Claimant is the successful party in these proceedings. It has claimed during these proceedings costs for legal representation and assistance in the amount of EUR 2,544,859.21. The Tribunal views these costs as reasonable.

*Article 38(f): Fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the PCA*

970. No such fees and expenses were claimed by the Parties.

*Total costs of arbitration*

971. In accordance with Article 38 of the UNCITRAL Rules, the Tribunal fixes the costs of arbitration at EUR 3,387,768.74.

*Apportioning the Costs of Arbitration Pursuant to Article 40 of the UNCITRAL Rules*

972. Article 40(1) of the UNCITRAL Rules provides that the costs of arbitration shall in principle be borne by the unsuccessful party. It also grants the Tribunal discretion to apportion the costs otherwise between the Parties if it considers a different apportionment reasonable taking into consideration the circumstances of the case.
973. Article 40(2) provides that taking into account the circumstances of the case, the Tribunal is free to determine which party shall bear the costs of legal representation and assistance referred to in Article 38(e).
974. In light of the fact that Claimant has prevailed only in part on its claims for damages, the Tribunal considers that the Parties should bear the costs of arbitration enumerated under Article 38(a), (b), and (c) in equal shares, that the Parties should bear their own “travel and other expenses of witnesses” under Article 38(d), and that Respondent should bear 60% of Claimant’s costs of legal representation and assistance under Article 38(e). The Tribunal orders Respondent to bear 60% of Claimant’s costs of legal representation and assistance under Article 38(e) in the amount of EUR 1,526,916.00. The Tribunal does not consider an award of interests on costs to be warranted.
975. The Parties deposited a total of EUR 850,000.00, in equal shares to cover the fees and expenses of the Tribunal and the PCA. The remaining balance on the deposit is EUR 20,577.51. This amount shall be reimbursed to the Parties in equal shares.

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<sup>1351</sup> The PLN/EUR currency conversion was calculated on 12 August 2016 according to <https://www.oanda.com/currency/converter/>.

## **IX. DECISION OF THE TRIBUNAL**

976. The Tribunal hereby:

- (i) DETERMINES, by majority, that it has jurisdiction over this dispute pursuant to Articles 1 and 2 of the Treaty;
- (ii) DETERMINES that the actions taken by PPL in terminating the Lease Agreements are attributable to Respondent;
- (iii) DETERMINES that Respondent violated Articles 3(2) and 5(1) of the Treaty;
- (iv) ORDERS Respondent to pay compensation to Claimant in the amount of EUR 17,902,790 (which includes compensation for Claimant's share of BH Travel's actual losses (*damnum emergens*) and loss of profits (*lucrum cessans*));
- (v) ORDERS Respondent to pay interest on EUR 17,902,790 equal to a 6-month EURIBOR increased by 2%, compounded every 6 months, for the period from the Valuation Date as determined by the Tribunal (16 February 2012) until the date of full payment;
- (vi) ORDERS Respondent to pay compensation to Claimant in the amount of EUR 1,526,916, reflecting 60% of Claimant's costs for legal representation and assistance;
- (vii) ORDERS that the Parties bear their own "travel and other expenses of witnesses", and that the Parties bear all other costs incurred in connection with this arbitration in equal shares;
- (viii) ORDERS that the remainder of the deposit held by the PCA be reimbursed to the Parties in equal shares;
- (ix) DISMISSES all other claims.

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Seat: The Hague

Date: 12 August 2016



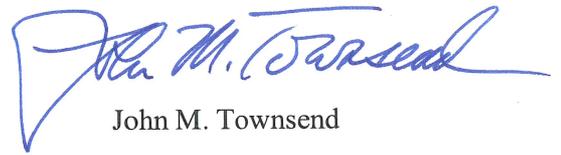
Hans van Houtte

Presiding Arbitrator



Wolfgang Kühn

Co-Arbitrator



John M. Townsend

Co-Arbitrator