



SCC Case No. V 2019/126

In the matter of

**Mercuria Energy Group Limited** (Cyprus)

(Simou Menardou 8, Ria Court 8, 6515 Larnaca, Cyprus. Registration No. HE 145530)

– Claimant –

vs.

**The Republic of Poland**

(ul. Piękna 18, 00-549, Warsaw, Poland)

– Respondent –

**FINAL AWARD**

Seat: Stockholm, Sweden

Arbitral Tribunal

Ms. Juliet Blanch

(Lamb Building, 3rd Floor South Temple, London, EC4Y 7AS, UK)

Prof. Dr. Laurence Boisson de Chazournes

(Boulevard du Pont-d' Arve 40, 1211 Genève 4, Switzerland)

Prof. Dr. Klaus Sachs (Chairperson)

(Nymphenburger Str. 12, D-80335 München, Germany)

Secretary of the Tribunal

Ms. Bronte Hannah

29 December 2022

## TABLE OF ABBREVIATIONS

<b>AEPA</b>	1966 Act on the Enforcement Procedure in Administration
<b>CAP</b>	1960 Code of Administrative Procedure
<b>CETA</b>	Comprehensive Economic Trade Agreement between the EU and Canada
<b>CJEU</b>	Court of Justice of the European Union
<b>Claimant</b>	Mercuria Energy Group Limited
<b>CMC</b>	Case Management Conference
<b>EC</b>	European Commission
<b>EC Submission</b>	Submission of the European Commission on the interpretation of Article 26 of the ECT filed in this arbitration on 12 March 2021
<b>ECT</b>	1994 Energy Charter Treaty
<b>EU</b>	European Union
<b>FET</b>	Fair and Equitable Treatment
<b>Hearing</b>	Hearing conducted from 28 June to 1 July 2021 in a virtual format
<b>ISDS</b>	Investor-State Dispute Settlement
<b>JSE</b>	J&S Energy S.A. (Claimant's subsidiary)
<b>LACP</b>	2002 Law on Administrative Court Procedure
<b>Loan Agreement</b>	Loan Agreement entered into by Claimant and JSE on 23 June 2008 (Exhibit CL-19)
<b>ME</b>	Minister of Energy of the Republic of Poland
<b>MRA or ARM</b>	Materials Reserves Agency of the Republic of Poland
<b>PAC or RAC</b>	Provincial Administrative Court in Warsaw, Poland
<b>REIO</b>	Regional Economic Integration Organization

<b>Revaluation Agreement</b>	Revaluation Agreement entered into by Claimant and JSE on 30 June 2008 (Exhibit C-25)
<b>SAC</b>	Supreme Administrative Court of the Republic of Poland
<b>SCC</b>	Arbitration Institute of the Stockholm Chamber of Commerce
<b>SCC Board</b>	SCC's Board of Directors
<b>SCC Rules</b>	2017 Arbitration Rules of the SCC
<b>Tax Ordinance</b>	Polish Tax Ordinance of 29 August 1997 (Journal of Laws of 2019, item 900; consolidated text, as amended)
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>VCLT</b>	Vienna Convention on the Law of Treaties

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## A. INTRODUCTION

1. This arbitration was initiated on the basis of Article 26(2)(c) and Article 26(4)(c) of the Energy Charter Treaty ("**ECT**"), which entered into force on 21 and 28 July 2001 for the Republic of Poland and the Republic of Cyprus, respectively. This proceeding is administered by the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC**") under the 2017 SCC Rules ("**SCC Rules**").
2. This case concerns a dispute between Mercuria Energy Group Limited and the Republic of Poland that has arisen in connection with the recovery of accrued interest over a financial penalty that was paid by Claimant's subsidiary to the Polish Materials Reserves Agency ("**MRA**") and subsequently overturned by the Polish administrative courts.

### I. Parties

#### 1. Claimant

3. Mercuria Energy Group Limited ("**Claimant**" or "**Mercuria**") is a limited liability company organised and existing under the laws of the Republic of Cyprus, under the registration number HE 145530, but not registered for VAT.<sup>1</sup> Since 2007, Claimant has been the operational parent company of Mercuria Energy Group, an international global energy and commodity trading group.<sup>2</sup>
4. Claimant has its registered office at:  
  
Simou Menardou 8  
Ria Court 8, Office 302  
6515 Larnaca  
Cyprus
5. Claimant owns and controls J&S Energy S.A. ("**JSE**" or "**Claimant's subsidiary**"), a joint-stock company organised under the laws of the Republic of Poland, with registration number KRS: 0000052065, and tax identification number NIP: 5261019751.<sup>3</sup>

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<sup>1</sup> Request for Arbitration, para. 5.

<sup>2</sup> Statement of Claim, para. 62.

<sup>3</sup> Statement of Claim, para. 12.

6. JSE's domicile is the following:

ul. Piękna 18  
00-549 Warsaw  
Poland

7. Claimant is represented in this arbitration by:

Mr. Jarosław Kolkowski  
Mr. Krzysztof Korwin-Kossakowski

**Drzewiecki, Tomaszek i Wspólnicy sp. k.**

Belvedere Plaza  
Ul. Belwederska 23  
00-761 Warsaw  
Poland  
kolkowski@dt.com.pl  
korwin-kossakowski@dt.com.pl

**2. Respondent**

8. Respondent in this arbitration is the Republic of Poland ("**Respondent**" or "**Poland**").

9. Respondent's postal address is:

ul. Hoża 76/78  
00-682 Warsaw  
Poland

10. Respondent is represented by:

Mr. Marcin Kałduński  
Mr. Maciej Martynski  
Ms. Kamila Lipecka  
Mr. Bartosz Soloch

**General Counsel to the Republic of Poland**

ul. Hoża 76/78  
00-682 Warsaw  
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marcin.kaldunski@prokuratoria.gov.pl  
maciej.martynski@prokuratoria.gov.pl  
kamila.lipecka@prokuratoria.gov.pl  
bartosz.soloch@prokuratoria.gov.pl

11. Claimant and Respondent are referred to jointly as the "**Parties**".

## II. Arbitral Tribunal

12. In accordance with Articles 16 and 17 of the SCC Rules, the Arbitral Tribunal ("**Tribunal**") was constituted as follows:

As Co-Arbitrator appointed by Claimant:

Ms. Juliet Blanch  
Lamb Building, 3rd Floor South  
Temple, London, EC4Y 7AS  
United Kingdom  
Tel.: +44 207 167 2040  
Email: Juliet.Blanch@arbchambers.com

As Co-Arbitrator appointed by Respondent:

Prof. Dr. Laurence Boisson de Chazournes  
Université de Genève  
Boulevard du Pont-d' Arve 40  
1211 Geneve 4  
Switzerland  
Tel.: +41 22 37 98544  
Email: Laurence.BoissonDeChazournes@unige.ch

As Chairperson in accordance with the Parties' agreement:

Prof. Dr. Klaus Sachs  
CMS Hasche Sigle  
Nymphenburger Str. 12  
D-80335 München  
Germany  
Tel.: +49 89 23 807-109  
Email: Klaus.Sachs@cms-hs.com

13. As Administrative Secretary of the Tribunal:<sup>4</sup>

Ms. Bronte Hannah  
CMS Hasche Sigle  
Nymphenburger Str. 12  
D-80335 München  
Germany  
Tel.: +49 89 23 807-227  
Email: Bronte.Hannah@cms-hs.com

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<sup>4</sup> Ms. Hannah took over the position as Administrative Secretary from Mr. Marcus Weiler, also from CMS Hasche Sigle in Munich, on 10 June 2021.



## **B. PROCEDURAL HISTORY**

14. Claimant's Request for Arbitration dated 12 September 2019 was registered by the SCC on 16 September 2019.
15. In its Request for Arbitration, Claimant proposed that the Tribunal should consist of three arbitrators and appointed Ms. Juliet Blanch as its party-appointed arbitrator pursuant to Article 17 of the SCC Rules. Claimant proposed Geneva as the seat of the arbitration.
16. On 4 October 2019, Respondent challenged Claimant's nomination of Ms. Juliet Blanch, pursuant to Article 19 of the SCC Rules. On 7 October 2019, the SCC invited Claimant to respond to Respondent's challenge.
17. On 11 October 2019, Claimant submitted its Reply to Respondent's notice of challenge.
18. On 14 October 2019, Respondent filed its Answer to the Request for Arbitration ("**Answer**"), proposing a method for appointing the Chairperson by the Parties or by the party-appointed arbitrators if the Parties failed to reach an agreement. Respondent proposed Paris as the seat of the arbitration. Respondent also raised several preliminary objections, requesting the SCC Board to dismiss the case due to an obvious lack of jurisdiction pursuant to Article 12(i) of the SCC Rules, and requesting the bifurcation of the arbitration ("**Request for Bifurcation**").
19. On 17 October 2019, the SCC forwarded the Answer to Claimant, inviting any comments until 24 October 2019.
20. On 18 October 2019, Ms. Blanch provided her Confirmation of Acceptance, Availability and Independence with disclosure to the SCC. The SCC distributed this information to the Parties on 23 October 2019.
21. On 24 October 2019, Claimant submitted its Reply to Respondent's Answer to the Request for Arbitration, agreeing that the Parties should first try to reach an agreement on the procedure for the appointment of the Chairperson of the Tribunal and rejecting Respondent's proposal of Paris as the seat of the arbitration. Claimant submitted that there were no grounds for the SCC to dismiss the case under Article 12(i) of the SCC Rules and reserved the right to comment on Respondent's further jurisdictional objections and

Request for Bifurcation at a later stage of the proceedings.

22. Also on 24 October 2019, Respondent requested the SCC Board to call on Ms. Juliet Blanch to provide further information as to an arbitration mentioned in her disclosure. Claimant sent a responsive letter on the same day. On 25 October 2019, Respondent submitted a further letter on this issue in response to Claimant's comments.
23. On 28 October 2019, the SCC invited Respondent to comment on Claimant's letter dated 24 October 2019 with respect to the appointment of a chairperson by 1 November 2019.
24. Also on 28 October 2019, Ms. Blanch provided the requested clarification to the SCC Board over the information contained in her confirmation of acceptance.
25. On 30 October 2019, Claimant provided further comments on the challenge of Ms. Blanch.
26. On 20 November 2019, the SCC Board issued its decisions that the SCC does not manifestly lack jurisdiction over the dispute and that the seat of the arbitration is Stockholm, as well as determining the advance on costs. Further, the SCC Board dismissed the challenge against the appointment of Ms. Blanch, pursuant to Article 11(vii) of the SCC Rules.
27. On 30 November 2019, Respondent informed the SCC that it appointed as its party-appointed arbitrator Prof. Laurence Boisson de Chazournes, pursuant to Article 17 of the SCC Rules.
28. On 3 December 2019, the SCC noted that Parties wished to jointly appoint the chairperson and requested further information on the appointment procedure by 10 December 2019. On 17 December 2019, the SCC reminded the parties to submit this information by 20 December 2019.
29. Also on 3 December 2019, Prof. Boisson de Chazournes submitted her Confirmation of Acceptance, Availability and Independence to the SCC.
30. On 23 December 2019, Claimant informed the Co-Arbitrators and the SCC that the Parties agreed to appoint Prof. Klaus Sachs as Chairperson of the Tribunal. Respondent confirmed this agreement on 22 December 2019. By correspondence dated 8 January 2020,

the SCC confirmed the appointment of Prof. Klaus Sachs as Chairperson of the Tribunal nominated by the joint agreement of the Parties, pursuant to Article 17(i) of the SCC Rules.

31. On 9 January 2020, Prof. Klaus Sachs submitted his confirmation of acceptance as Chairperson of the Tribunal, pursuant to Article 18(3) of the SCC Rules.
32. On 13 January 2020, the SCC transferred the case file to the Tribunal. By correspondence of the same date, the SCC communicated that the Parties had paid the advance on costs and that the final award shall be rendered by 13 July 2020.
33. On 15 January 2020, the Tribunal invited Respondent to state the reasons for its Request for Bifurcation by 29 January 2020, and Claimant to provide its responsive comments by 12 February 2020.
34. On 17 January 2019, the SCC informed the Parties that the Tribunal would like to engage Mr. Marcus Weiler as Administrative Secretary and invited the Parties to comment on Mr. Weiler's engagement by 22 January 2020. The SCC informed the Tribunal that the Parties did not raise any objections to the engagement of Mr. Weiler on 23 January 2020.
35. On 20 January 2020, Respondent requested the Tribunal to decide its jurisdictional objection that Article 26 of the ECT does not apply to intra-EU investment arbitration and that EU law prevails in case of conflict with the ECT ("**EU Law Objection**") by way of summary procedure under Article 39(1) of the SCC Rules ("**Request for Summary Procedure**"). Further, Respondent requested that its Request for Bifurcation be discussed and decided after the Statement of Claim.
36. On 21 January 2020, the Tribunal invited Claimant to comment on Respondent's Request for Summary Procedure by 28 January 2020, pursuant to Article 39(4) of the SCC Rules.
37. On 22 January 2020, Claimant provided its comments on Respondent's Request for Summary Procedure, requesting that the Tribunal decide on said request only after the case management conference or that the Tribunal reject said request.
38. On 23 January 2020, the Tribunal invited Respondent to comment on Claimant's comments of the previous day.

39. Also on 23 January 2020, Mr. Marcus Weiler submitted his confirmation of acceptance as Administrative Secretary of the Tribunal.
40. On 29 January 2020, Respondent submitted its comments on the reasons for its Request for Bifurcation. In its letter, Respondent requested the Tribunal to rule on the EU Law Objection by way of summary procedure or, in the alternative, that its Request for Bifurcation be discussed and decided after the submission of the Statement of Claim.
41. On 30 January 2020, the Tribunal invited Claimant to provide its comments on Respondent's two alternative requests by 12 February 2020.
42. On 12 February 2020, Claimant submitted its comments on Respondent's requests of 29 January 2020, objecting to all requests for bifurcation and indicating Claimant was amenable to dealing with the Request for Bifurcation following the Statement of Claim.
43. On 20 February 2020, the Tribunal issued Procedural Order No. 1, whereby it dismissed Respondent's Request for Summary Procedure. It also reserved its decision on Respondent's Request for Bifurcation and allowed Respondent to state the reasons for its Request for Bifurcation after the submission of the Statement of Claim.
44. On the same day, the Tribunal circulated a draft Procedural Order No. 2, inviting the Parties to liaise with each other and to reach an agreement on the procedural issues therein, as well as on the format of the Case Management Conference ("**CMC**"), and to revert to the Tribunal with a joint proposal by 10 March 2020.
45. On 7 March 2020, Claimant submitted to the Tribunal the Parties' joint proposal of the text of Procedural Order No. 2. It also indicated that the Parties were unable to agree on the Procedural Calendar therein.
46. On 10 March 2020, the Parties submitted their respective proposals of the Procedural Calendar and comments as to the format of the CMC.
47. On 11 March 2020, Respondent added that it was no longer able to participate in an in-person conference due to measures taken by the President of the General Counsel to the Republic of Poland in response to the COVID-19 pandemic and suggested to either organise the CMC via telephone or to postpone it. Claimant responded with its comments by e-mail of the same day.

48. Also on 11 March 2020, the Tribunal proposed to the Parties to hold the CMC preferably via videoconference or, if this encountered technical difficulties, by telephone on 26 March 2020.
49. On 12 March 2020, the Tribunal circulated amongst the Parties a revised draft of Procedural Order No. 2 in the terms agreed by the Parties, and the Tribunal's proposal for the Procedural Calendar. The Tribunal noted that each Party would have the opportunity to comment on said proposal during the CMC.
50. On 26 March 2020, the CMC was held via videoconference at 11 a.m. CET, following which the Tribunal issued Procedural Order No. 2 and circulated a revised draft of the Procedural Calendar for the Parties' consideration.
51. On 27 March 2020, Claimant confirmed it had no further comments and expressed its agreement with Procedural Order No. 2 and the Procedural Calendar proposed.
52. On 30 March 2020, Respondent confirmed its agreement with Procedural Order No. 2 and the Procedural Calendar proposed.
53. On 31 March 2020, the Tribunal issued Procedural Order No 3, in which it determined the Procedural Calendar, including two scenarios: Scenario 1 (bifurcation granted) and Scenario 2 (bifurcation denied or withdrawn).
54. On 15 May 2020, Claimant submitted its Statement of Claim.
55. On 5 June 2020, Respondent submitted the reasons for its Request for Bifurcation ("**Reasons for Request for Bifurcation**").
56. On 17 June 2020, the SCC extended the deadline for rendering the final award until 30 November 2021 as per the Tribunal's request in view of the Procedural Calendar, pursuant to Article 43 of the SCC Rules.
57. On 26 June 2020, Claimant filed its Reply to Respondent's Request for Bifurcation.
58. On 10 July 2020, the Tribunal issued Procedural Order No. 4, rejecting Respondent's Request for Bifurcation and joining Respondent's objections to the Tribunal's jurisdiction and the admissibility of Claimant's claims to the merits.

59. On 2 November 2020, Respondent submitted its Statement of Defence.
60. On 3 November 2020, Respondent submitted a corrected version of its Statement of Defence. On the following day, the Tribunal acknowledged receipt of the new version to be included in the record.
61. On 21 December 2020, due to unforeseen circumstances, the Chairperson of the Tribunal proposed, and the Parties accepted, to reschedule the evidentiary hearing of three to five days to be held in the week of 28 June 2021.
62. On 23 December 2020, Respondent submitted its Request for the Production of Documents in the form a Redfern Schedule. On the same date, Claimant informed the Tribunal that it would not be submitting its requests for the production of documents because it had already received the three specific documents it had requested from Respondent.
63. On 7 January 2021, the Tribunal issued Procedural Order No. 5, containing its decision on Respondent's requests for production of documents by Claimant.
64. On 25 January 2021, Respondent indicated to the Tribunal that Claimant had failed to comply with Procedural Order No. 5 and requested the Tribunal to order Claimant to conduct a diligent search and to produce the responsive documents accordingly.
65. On the same date, the Tribunal acknowledged receipt of Respondent's letter of 25 January 2021, and invited Claimant to submit its comments by 1 February 2021.
66. On 1 February 2021, Claimant submitted its comments on Respondent's letter dated 25 January 2021, indicating that Respondent's complaints were groundless.
67. On 3 February 2021, the Tribunal issued Procedural Order No. 6, under which it determined that Claimant had not failed to comply with the Procedural Order No. 5. The Tribunal however, requested Claimant to assign the newly produced documents to the specific requests of Respondent.
68. On 9 February 2021, the European Commission (the "**Commission**" or "**EC**") submitted its Request for Leave to intervene as a non-disputing party under Article 4(1) of Annex III of the SCC Rules. The Tribunal forwarded the Commission's Request to Intervene to the Parties and invited them to comment on the Request by 23 February 2021.

69. On 23 February 2021, the Parties submitted their respective comments on the Commission's Request to Intervene.
70. On 26 February 2021, the Tribunal issued Procedural Order No. 7, under which the Tribunal allowed the Commission to file a written submission on the interpretation of Article 26 of the ECT as non-disputing treaty party, pursuant to Article 4 of Annex III to the SCC Rules. In addition, it refused to grant the Commission access to the documents filed or to attend any hearings in this arbitration. The Tribunal also invited the Parties to submit a joint proposal regarding the potential modification of the Procedural Calendar.
71. On 3 March 2021, the Parties submitted their respective proposals for modification of the Procedural Calendar, as they were unable to reach an agreement.
72. On 8 March 2021, the Tribunal issued Procedural Order No. 8 with an updated Procedural Calendar.
73. On 12 March 2021, the Commission filed its submission on the interpretation of Article 26 of the ECT ("**EC Submission**").
74. On 29 March 2021, Claimant submitted its Reply to the Statement of Defence.
75. On 12 April 2021, the Parties submitted their respective comments on the EC Submission. The comments of both Parties also contained requests to the Tribunal: Claimant requested the Tribunal to order the Commission to confirm that its submission was made on behalf of the European Union ("**EU**") as the non-disputing party to the ECT and to provide copies of all factual and legal exhibits it relied upon in the submission, and Respondent submitted an application to suspend the proceedings until the upcoming Opinion on the CJEU concerning the intra-EU application of the ECT.
76. By e-mail of 13 April 2021, the Tribunal invited the Parties to submit comments on the request(s) made by the respective other Party by 19 April 2021.
77. On 19 April 2021, Respondent submitted its observations in response to Claimant's requests of 12 April 2021 and Claimant submitted its comments on the Respondent's request to suspend the proceedings of the same date.
78. On 21 April 2021, the Tribunal issued Procedural Order No. 9, rejecting Respondent's

request to stay the proceedings, and stipulating that it would request the Commission to confirm whether its Submission had been filed on behalf of the EU as a non-disputing treaty party, and to provide the factual and legal exhibits relied upon in the EC Submission. By email of the same day, the Tribunal made these requests to the Commission pursuant to Procedural Order No. 9.

79. On 27 April 2021, the Commission confirmed that it had filed the EC Submission as a non-disputing treaty party (as the external representative of the EU) and submitted the legal authorities relied upon in the EC Submission.
80. By email of 28 April 2021, the Tribunal requested further clarification from the Commission on the same matter. The Commission responded on 29 April 2021, confirming that the EC Submission of 12 March 2021 was filed by the Commission on behalf of the European Union. The Tribunal forwarded this response to the Parties on 3 May 2021.
81. By separate e-mail of 3 May 2021, the Tribunal requested the Parties to inform the Tribunal of any agreement concerning the conduct of the Hearing by 10 May 2021.
82. On 10 May 2021, the Parties informed the Tribunal of their joint agreement and the steps undertaken by them to organise a virtual hearing to be held on 28 June 2021, pursuant to the Procedural Calendar.
83. On 4 June 2021, Respondent submitted its Rejoinder.
84. On 8 June 2021, the Tribunal requested the Parties to provide an update on the joint organization of the Hearing, including a proposed schedule, by 9 June 2021. In addition, the Chairperson informed the Parties that due to Mr. Weiler's other commitments, the Tribunal intended to have Ms. Bronte Hannah to act as Administrative Secretary going forward, to which the Parties provided their consent on 8 June 2021 (Respondent) and 9 June 2021 (Claimant).
85. On 9 June 2021, the Parties notified the Tribunal of the witnesses to be examined at the Hearing.
86. On 10 June 2021, the SCC confirmed that Ms. Hannah would act as new Administrative Secretary at the request of the Tribunal and with the consent of the Parties.



87. On 12 June 2021, each Party submitted its proposal for the Hearing Schedule, as they were unable to agree on a joint proposal. Claimant refrained from commenting on the letter Respondent filed in support of its proposal.
88. On 14 June 2021, the Pre-Hearing Conference was held via video conference at 17:00 CET. The Parties reached an agreement on the Hearing Schedule, except for two points to be decided by the Tribunal.
89. On 16 June 2021, the Tribunal issued the final Hearing Schedule as Annex 1 to the Minutes of the Pre-Hearing Conference Call.
90. On 24 June 2021, Respondent informed the Tribunal that, as discussed in the Pre-Hearing Conference Call, its experts were not willing to testify in English and would testify in Polish with interpretation. Claimant submitted an objection to this by e-mail of the same day and requested the Tribunal to order that the experts testify in English, or their expert reports be disregarded. The Tribunal denied Claimant's requests on 25 June 2021.
91. On 25 June 2021, the Parties submitted their opening presentations to opposing Counsel and the Tribunal.
92. From 27 June 2021 to 1 July 2021, the Tribunal held the Hearing with the Parties in a virtual format using the services of Opus 2 as agreed by the Parties.
93. At the Hearing, the following witnesses and experts were heard remotely:
  - i) From Claimant:
    - 1) Mr. Jarek Astramowicz (fact witness); and
    - 2) Professor Marek Wierzbowski (expert witness).
  - ii) From Respondent:
    - 1) Mr. Tomasz Błażej (fact witness);
    - 2) Ms. Elżbieta Piskorz (fact witness);
    - 3) Mr. Dariusz Brociek (fact witness);
    - 4) Professor Wojciech Piątek (expert witness); and
    - 5) Dr. Izabela Andrzejewska-Czernek (expert witness).

94. As per the Parties' agreement, all fact and expert witnesses provided their testimony via videoconference from the offices of Counsel for Claimant and Counsel for Respondent respectively, with a member of opposing Counsel present.
95. The Tribunal records that it had no undue difficulties in assessing witnesses, locating documents, or following Counsel's submissions, and that it did not observe or hear anything which would cause it to consider that the mode of the Hearing had given rise to any undue difficulties for the witnesses or Counsel. In any event, no such difficulty was raised by either Party.
96. On 30 June 2021, the Parties made their closing presentations available to opposing Counsel and the Tribunal.
97. On 15 July 2021, the Tribunal distributed a List of Questions to the Parties and requested them to inform the Tribunal of their agreement concerning a page limit for the Post-Hearing Briefs due 2 September 2021, which would include responses to the Tribunal's List of Questions, according to the agreement of the Parties during the Hearing.
98. On 21 July 2021, the Parties informed the Tribunal that they agreed on a limit of 40 pages for the Post-Hearing Briefs.
99. On 2 September 2021, the Parties simultaneously submitted their Post-Hearing Briefs. In its Post-Hearing Brief, Respondent requested the Tribunal to grant the Parties leave to file short submissions on the CJEU's Judgment of the same date in the case C-741/19 *Republique Moldavie v. Komstroy LLC* ("**Komstroy Judgment**" or "**Komstroy**") and to suspend the arbitral proceedings.
100. By email of 6 September 2021, the Tribunal invited Claimant to submit its comments to the Respondent's requests of 2 September 2021 included in its Post-Hearing Brief.
101. On 8 September 2021, Claimant submitted its comments to the Respondent's request to suspend the arbitral proceedings and to grant the Parties leave to file submissions on the *Komstroy* Judgment.
102. On 9 September 2021, Respondent submitted its Statement of Costs, while Claimant requested an extension of the deadline for the Parties to submit their Statement of Costs in light of Respondent's pending request for the Parties to be granted leave to comment on

the CJEU's Ruling.<sup>5</sup>

103. On 14 September 2021, the Tribunal issued Procedural Order No. 10 inviting the Parties to submit their comments on the *Komstroy* Judgment by 24 September 2021. The Tribunal also invited Claimant to submit the remaining authorities referenced in its Post Hearing Brief by 28 September 2021. In addition, the Tribunal reserved its decision on Respondent's request to suspend the proceedings until after the Tribunal had received the Parties' comments on the *Komstroy* Judgment. The Parties were also invited to submit their (revised) statements of costs by 1 October 2021.
104. On 24 September 2021, the Parties submitted their comments on the *Komstroy* Judgment.
105. On 1 October 2021, the Parties submitted their (revised) Statements of Costs.
106. On 12 October 2021, the Tribunal issued Procedural Order No. 11 suspending the arbitral proceedings until 28 February 2022 in light of the pending decision of the Polish Supreme Administrative Court (the "SAC").
107. On 2 November 2021, the Tribunal requested an extension of the date for rendering the final award. On the following day, the SCC Board informed the Parties that the final award shall be rendered by 2 May 2022.
108. On 31 December 2021, pursuant to Procedural No. 11, Respondent informed the Tribunal that the SAC had not yet delivered its judgment in the cassation claim proceedings and that the Parties were going to present an update on the progress of the SAC proceedings at the end of January 2022. On the same day, Claimant confirmed Respondent's communication and stated that, as evidenced by the SAC's website, no hearing has been scheduled for the case before 28 February 2022, and thus no such judgment was to be expected by the end of January 2022.
109. By letter dated 31 January 2022, Respondent provided the Tribunal with an update on the proceedings before the SAC (*i.e.* that the SAC had referred JSE for examination at an *in camera* sitting in a date not yet determined) and requested leave to produce further documentary evidence, *i.e.* the Minister of Climate and Environment's Request dated 13

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<sup>5</sup> Respondent's Post-Hearing Brief, para. 153.

January 2022, for examination of the case out of the normal order. On the same date, Claimant confirmed that the Minister of Climate and Environment had filed a Request for having the court proceedings accelerated, as JSE received a copy of said Request on 18 January 2022, but that there is no need in submitting it as new evidence. In addition, Claimant submitted that JSE had filed a corresponding request (*i.e.* to accelerate proceedings) with the SAC.

110. By email dated 1 February 2022, the Tribunal granted Respondent's request to produce new evidence (*i.e.* the Minister of Climate and Environment's Request dated 31 January 2022). In the same email, pursuant to Procedural Order No. 11, the Tribunal reserved its decision on the future conduct of these proceedings and stated that it expected to receive a further update from the Parties following any developments in the SAC proceedings or, at the latest, by 28 February 2022.
111. On 2 February 2022, Respondent provided the Tribunal with the Minister of Climate and Environment's Request for examination of the case out of the normal order dated 13 January 2022, as new evidence as Exhibit R-131. On the same date, Claimant submitted JSE's request filed with the SAC as Exhibit C-116.
112. On 22 February 2022, Claimant informed the Tribunal that it had received an official notification from the SAC of an *in camera* hearing scheduled for 15 March 2022.
113. On 24 February 2022, the Tribunal issued Procedural Order No. 12, containing its decision to prolong the suspension of the arbitral proceedings until 30 April 2022, and requested the Parties to inform it of any further developments in the cassation proceedings before the SAC. The Tribunal also requested the Parties to provide the Tribunal with an update on the progress of the SAC proceedings at the end of April 2022 (if the SAC had not rendered its judgement prior thereto).
114. On 18 March 2022, Claimant submitted an update on the recent developments in the proceedings conducted before the SAC. In said update, Claimant indicated that the SAC had rendered a Judgment dismissing the ME's cassation claim on 15 March 2022, and that as a result, the SAC proceedings were concluded. Claimant indicated that it did not have a copy of the SAC Judgment yet but that it has been officially reported by the SAC on its website. Claimant further requested the Tribunal to resume the arbitral proceedings

immediately, as well as to order Respondent to present the Tribunal, within seven days, either (i) a declaration that JSE's claim for the repayment of the outstanding part of the penalty with interest will be satisfied in full within 28 (twenty eight) days; or (ii) a declaration that the aforementioned claim shall not be satisfied.

115. On 25 March 2022, Respondent submitted its comments on Claimant's submission dated 18 March 2022. In its submission, Respondent requested the Tribunal to dismiss the Claimant's request to resume the proceedings until the SAC delivers its Judgment with reasons and guidelines. In addition, Respondent requested leave to submit as new evidence the CJEU's Judgement C-109/20 (*Poland v. PL Holdings*) and the Svea Court of Appeal's order of 24 November 2021 (*Greentech (now Athena) and Novenergia v. Italy*).
116. On 3 April 2022, Claimant submitted its comments on Respondent's request for leave to submit new evidence dated 25 March 2022.
117. On 6 April 2022, the Tribunal issued Procedural Order No. 13 further prolonging the suspension of the proceedings until 30 June 2022 and requested the Parties to immediately inform the Tribunal upon receipt of the SAC's Judgement. The Tribunal also granted Respondent's request for leave dated 25 March 2022 to submit new evidence, *i.e.* the CJEU's Judgement C-109/20 (*Poland v. PL Holdings*) and the Svea Court of Appeal's order of 24 November 2021 (*Greentech (now Athena) and Novenergia v. Italy*).
118. On 8 April 2022, Claimant pointed out that the arbitral proceedings had been suspended until 30 June 2022 but that the deadline for the final award was still 2 May 2022. On the same date, Respondent provided the Tribunal with the CJEU's Judgement in the *Republic of Poland v. PL Holdings Sàrl* case and the Svea Court of Appeal's order of 24 November 2021 in the *Greentech (now Athena) and Novenergia v. Italy* case.
119. By letter dated 8 April 2022, the Tribunal requested an extension of the deadline to render the final award until 30 September 2022, in accordance with Article 43 of the SCC Rules.
120. On 11 April 2022, the SCC Board informed the Parties that the Tribunal requested an extension of the date for rendering the final award and invited the Parties to submit comments by 13 April 2022.
121. On 20 April 2022, Respondent filed its request to submit as new evidence the decisions

of the Paris *Cour d'Appel* in the *SLOT v. Republic of Poland* and *Strabag v. Republic of Poland*. On the same date, Claimant commented on and objected to the Respondent's submission of new evidence and stated that Respondent filed said request at the time the SAC delivered copies of the Judgment issued on 15 March 2022, with written justification, which Claimant will submit to the Tribunal on 25 April 2022 at the latest.

122. Also on 20 April 2022, the SCC Board decided to extend the date for rendering the award until 30 September 2022.
123. On 25 April 2022, Claimant submitted a copy of the SAC's Judgement rendered on 15 March 2022 with its written reasoning and an English translation and requested the Tribunal to resume the arbitration proceedings immediately. In addition, Claimant reiterated its request made on 18 March 2022 to resume the arbitral proceedings immediately, as well as to order Respondent to present the Tribunal, withing seven days, either (i) a declaration that JSE's claim for the repayment of the outstanding part of the penalty with interest will satisfied in full within 28 days; or (ii) a declaration that the aforementioned claim shall not be satisfied.
124. Also on 25 April 2022, the Tribunal granted Respondent's request for leave to submit the French original versions of the decisions of the Paris Court of Appeal in the *SLOT v. Republic of Poland* and *Strabag v. Republic of Poland* of 19 April 2022, accompanied by English language translations in accordance with Section 16.1 of Procedural Order No. 2. In addition, pursuant to Claimant's comments of 20 April 2022, the Tribunal noted that it is understood that the SAC's decision including its written justification has become available to the parties to the SAC proceedings and as a result, the Tribunal expects to be informed of all subsequent developments in this regard in accordance with its decision in Procedural Order No. 13.
125. On 2 May 2022, Respondent commented on Claimant request of 25 April 2022, by confirming that Respondent had received a copy of the SAC's Judgement of 15 March 2022, together with reasons, and as a result, Respondent requested the Tribunal (i) to resume the arbitral proceedings; (ii) to allow Respondent until 15 June 2022 to submit its comments on the SAC's Judgment; and (iii) to refrain from deciding on the further course of the arbitral proceedings until such time. In addition, pursuant to the Tribunal's decision

of 25 April 2022 in which the Tribunal granted Respondent leave to submit new evidence, Respondent submitted the Paris Court of Appeal judgments in the *SLOT v. the Republic of Poland* and *Strabag v. the Republic of Poland* of 19 April 2022 as Exhibit RL-168 and Exhibit RL-169, respectively.

126. On 3 May 2022, Claimant objected to Respondent's request for leave to submit its analysis of the SAC's Judgment and called upon the Tribunal once more to grant Claimant's requests as set forth in Claimant's submission of 25 April 2022 (*i.e.* to resume the arbitral proceedings immediately, as well as to order Respondent to present the Tribunal, within seven days, either (i) a declaration that JSE's claim for the repayment of the outstanding part of the penalty with interest will be satisfied in full within 28 days; or (ii) a declaration that the aforementioned claim shall not be satisfied).
127. Also on 3 May 2022, the Tribunal decided that Respondent was to submit its comments on the SAC's Judgment of 15 March 2022 by 23 May 2022, limiting the scope of these comments on the content of the SAC's Judgment and the impact of this Judgment on these arbitral proceedings, and further reserved its decision on the Parties' remaining requests as contained in their respective submissions of 2 and 3 May 2022.
128. On 23 May 2022, Respondent filed its submission on the SAC's Judgment of 15 March 2022, pursuant to the Tribunal's instructions dated 3 May 2022.
129. By letter dated 25 May 2022, Claimant reiterated its request for the Tribunal to render its final award as soon as possible. In said letter, Claimant contends that Respondent made it clear in its submission of 23 May 2022 that, in its opinion, the SAC's Judgment of 15 March 2022 was not final, while JSE's public-law claims would be subject to another round of administrative proceedings and, inevitably, yet another round of administrative court proceedings.
130. On 1 June 2022, the Tribunal issued Procedural Order No. 14, containing its decision to resume the arbitral proceedings, noting that neither Party objected to the resumption of the proceedings following the submission of their respective comments on the SAC's Judgment of 15 March 2022.
131. By email of 24 June 2022, Respondent requested leave to submit as new evidence the

arbitral award of 16 June 2022 rendered in SCC Case No. V 2016/135 *Green Power Partners and SCE Solar don Benito v. Spain* ("**Green Power v. Spain**").

132. On 28 June 2022, Claimant requested the Tribunal to reject Respondent's request of 24 June 2022 to submit new evidence (*i.e.* the arbitral award rendered in *Green Power v. Spain*). In addition, Claimant requested leave to submit as new evidence the MRA's decision of 23 June 2022 on the extension of the administrative proceedings; the ICSID annulment decision of 10 June 2022 in *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* ("**RREEF Infrastructure v. Spain**"); and other publications concerning the modernisation of the ECT.
133. On 29 June 2022, the Tribunal acknowledged receipt of Claimant's letter dated 28 June 2022 and invited Respondent to submit its comments.
134. On 1 July 2022, Respondent indicated that it did not object to Claimant's request of 28 June 2022 to adduce new evidence.
135. On 3 July 2022, the Tribunal issued Procedural Order No. 15 deciding the Parties' respective requests to submit new evidence requested on 24 and 28 June 2022.
136. On 5 July 2022, Respondent submitted as new evidence the arbitral award rendered in *Green Power v. Spain* as Exhibit RL-170. On the following day, Claimant submitted as new evidence the MRA's decision of 23 June 2022 on the extension of the administrative proceedings; the ICSID annulment decision in *RREEF Infrastructure v. Spain* dated 10 June 2022; and other publications concerning the modernisation of the ECT as Exhibits C-119, C-120, CL-61, CL-62 and CL-63, together with an updated list of exhibits.
137. On 28 July 2022, Claimant requested leave to submit as new evidence the MRA's ruling of 25 July 2022, in which it extended the administrative proceedings regarding the repayment of the outstanding part of the 2008 Penalty until 30 November 2022. On the following day, the Tribunal acknowledged receipt of Claimant's request and invited Respondent to submit its comments on Claimant's request.
138. On 4 August 2022, Respondent indicated that it did not object to Claimant's request of 28 July 2022 to submit new evidence. On the same day, the Tribunal granted Claimant's request of 28 July 2022 to submit the MRA's ruling of 25 July 2022 as new evidence.



139. On 9 August 2022, Claimant submitted as new evidence the MRA's ruling of 25 July 2022 as Exhibit C-121, together with an updated list of exhibits.
140. By letter of 12 August 2022, the SCC Board informed the Parties of the Tribunal's request to extend the deadline to render its final award until 31 October 2022 and invited the Parties to submit their comments.
141. By letter of 16 August 2022, the SCC Board communicated to the Parties its decision that the final award shall be rendered by 31 October 2022.
142. On 10 October 2022, the Tribunal requested the SCC Board an extension of the date for rendering the final award until 30 November 2022.
143. On 11 October 2022, the SCC Board informed the Parties that the Tribunal requested to extend the deadline for rendering the award until 30 November 2022 and invited the Parties to submit comments, if any, by 14 October 2022.
144. By letter dated 17 October 2022, the SCC Board decided to extend the date for rendering the award until 30 November 2022.
145. On 22 November 2022, the Tribunal requested the SCC Board to grant an extension to the deadline for rendering the final award until 15 December 2022, as well as to increase the Advance on Costs.
146. On the same day, the SCC Board informed the Parties that the Tribunal requested to extend the deadline for rendering the award until 30 November 2022 and invited the Parties to submit comments no later than 24 November 2022.
147. By letters dated 25 November 2022, the SCC Board decided to extend the date for rendering the award until 15 December 2022 and that additional advances amounting to EUR 29,500 be paid by the Parties in equal shares by 2 December 2022.
148. On 28 November 2022, the Tribunal requested the SCC Board to finally determine the Costs of the Arbitration, pursuant to Article 49(2) of the SCC Rules.
149. On the same day, the Tribunal requested the Parties to submit any additional costs incurred in connection with these proceedings since their Statement of Costs submitted on 1 October 2021.

150. On 30 November 2022, the SCC Board determined the final Costs of the Arbitration. On 5 December 2022, the SCC informed the Tribunal that the Parties had paid the additional advances as ordered.
151. By letter of 6 December 2022, Claimant requested leave to submit as new evidence the ruling by the President of the MRA dated 30 November 2022.
152. On 7 December 2022, the Tribunal acknowledged receipt of Claimant's letter dated 6 December 2022 and invited Respondent to submit its comments.
153. On 9 December 2022, Respondent requested the Tribunal to dismiss Claimant's request of 6 December 2022.
154. On the same date, the Parties submitted their additional costs incurred in connection with these proceedings since their Statement of Costs submitted on 1 October 2021.
155. On 12 December 2022, the Tribunal granted Claimant's request to submit new evidence and declared that, following the submission of the new evidence, the arbitral proceedings would be considered closed pursuant to Article 40 of the SCC Rules. Claimant submitted the new evidence as Exhibit C-122 on the same day.
156. Also on 12 December 2022, Respondent informed the Tribunal that the Swedish Supreme Court announced that it would deliver its judgement in the *PL-Holdings v. Poland* annulment proceedings on 14 December 2022. Respondent further declared that it would seek the Tribunal's leave to introduce the judgement of the Swedish Supreme Court into the record and thus requested the Tribunal not to close the arbitral proceedings until 15 December 2022.
157. On 14 December 2022, Respondent submitted its request to introduce new evidence, *i.e.* the awards of: (i) the Swedish Supreme Court in the *PL Holdings v. Poland* case and (ii) the Svea Court of Appeal in the *Novenergia II - Energy & Environment (SCA), SICAR v. Spain* case. Following invitation from the Tribunal and on the same day, Claimant submitted its comments on Respondent's request.
158. Also on 14 December 2022, the Tribunal requested an extension of the date for rendering the final award. On the same day, the SCC Board decided that the final award should be rendered by 2 January 2023.

159. On 15 December 2022, the Tribunal granted Respondent's request to submit new evidence and invited the Parties to submit their comments on the new evidence by 22 December 2022, including a statement of any additional costs incurred since their previous cost submissions filed on 9 December 2022.
160. On 16 December 2022, Respondent submitted the judgements of: (i) the Swedish Supreme Court in the *PL Holdings v. Poland* case, and (ii) the Svea Court of Appeal in the *Novenergia II - Energy & Environment (SCA), SICAR v. Spain* case as Exhibit RL-172 and Exhibit RL-171, respectively.
161. On 22 December 2022, the Parties submitted their respective comments on this new evidence, as well as their additional costs incurred since the previous cost submissions filed on 9 December 2022.
162. By email dated 23 December 2022, the Tribunal declared these arbitration proceedings closed, pursuant to Article 40 of the SCC Rules.

## C. OVERVIEW OF THE DISPUTE AND THE ARBITRATION AGREEMENT

163. The dispute arises in connection with a financial penalty imposed on Claimant's subsidiary JSE in 2008 by the Minister of Energy ("**ME**") and the President of the MRA and subsequently repealed by judgements of the Provincial Administrative Court in Warsaw ("**PAC**") and the Supreme Administrative Court of Poland ("**SAC**"). In particular, the dispute between the Parties concerns the non-payment of statutory interest upon the reimbursement of the Penalty to JSE.
164. Claimant contends that Respondent has breached its obligations regarding the promotion, protection and treatment of JSE as Claimant's investment. In particular:
- i. The obligation to accord Claimant's investment Fair and Equitable Treatment and most constant Protection and Security, and not to impair by unreasonable or discriminatory measures the management, maintenance, use or enjoyment of Claimant's investment in accordance with Article 10(1) of the ECT ("**FET**"); and
  - ii. The obligation to ensure that Poland's domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments, investment agreements and investment authorizations, pursuant to Article 10(12) of the ECT ("**Effective Means**").
165. The present dispute is referred to arbitration by virtue of the arbitration agreement contained in Article 26, subparagraphs (2)(c) and (4)(c) of the ECT, which read, in their relevant part, as follows:

### **"ARTICLE 26**

#### **SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY**

- (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*
- (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable*

*settlement, the Investor party to the dispute may choose to submit it for resolution:*

- (a) to the courts or administrative tribunals of the Contracting Party to the dispute;*
- (b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
- (c) in accordance with the following paragraphs of this Article.*

*[...]*

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

*[...]*

- (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce."*<sup>6</sup>

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<sup>6</sup> **Exhibit RL-61**, Energy Charter Treaty, December 1994, Article 26.

## D. PRELIMINARY MATTERS

### I. Scope of This Award

166. In Procedural Order No. 4, the Tribunal rejected Respondent's Request for Bifurcation and joined Respondent's objections to the Tribunal's jurisdiction and the admissibility of Claimant's claims to the merits.<sup>7</sup>

167. Therefore, this Award addresses Respondent's objections to the Tribunal's jurisdiction and the admissibility of Claimant's claims (**Section G.**); before reviewing the merits of the alleged breaches of the FET and Effective Means standards (**Section H.**); as well as the claimed damages (**Section I.**).

#### 1. Jurisdiction

168. Respondent has presented several objections to the jurisdiction of the Tribunal and the admissibility of Claimant's claims.

169. *First*, Respondent submits that the Tribunal does not have jurisdiction over the present dispute on account of an alleged incompatibility of Article 26 of the ECT and European Union law in the context of intra-EU disputes ("**EU Law Objection**") (**Section G.II.**).

170. In addition, Respondent objects to the jurisdiction of the Tribunal under the ECT ("**ECT Objections**") (**Section G.III.**), alleging that:

- i) Claimant is not an "*Investor*" within the meaning of Article 26 of the ECT;
- ii) Claimant did not make an "*Investment*" under Article 1(6) of the ECT;
- iii) Respondent denied Claimant benefits under Article 17(1) of the ECT;
- iv) Claimant is barred from initiating arbitration under Article 26(2) of the ECT due to a fork-in-the-road clause;
- v) Claimant's initiation of this arbitration constitutes an abuse of process;

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<sup>7</sup> Procedural Order No. 4.

- vi) Claimant's claims are premature and not ripe for adjudication; and
- vii) Claimant's claims are outside of the Tribunal's jurisdiction or inadmissible under the "clean hands" principle.

## 2. Merits

171. On the merits, Claimant argues that Respondent has violated its obligations under the ECT on two accounts: (i) a failure to provide effective means for the enforcement of rights pursuant to Article 10(12) of the ECT (**Section H.I.**); and (ii) a failure to grant Claimant's investment fair and equitable treatment under Article 10(1) of the ECT (**Section H.II.**).
172. As a result, Claimant submits that it is entitled to receive compensation for the aggregate amount of PLN 152,862,917.25 up to 15 May 2020, plus accrued interest thereafter (**Section I.**).<sup>8</sup>

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<sup>8</sup> Statement of Claim, paras. 219, 229(a)-(b).

## E. FACTUAL BACKGROUND

173. The following is a brief summary of the facts surrounding the present dispute.

### I. JSE's Activities in Poland

174. JSE was incorporated in Poland in 1995.<sup>9</sup> Its share capital was initially held by two Polish nationals.<sup>10</sup> In mid-2004, the ownership of JSE's share capital was transferred to Claimant (at the time called J&S Holding Limited),<sup>11</sup> which was incorporated in Cyprus on 10 February 2004, and ultimately renamed as Mercuria Energy Group Limited on 11 January 2007.<sup>12</sup>

175. JSE's business activity focused on importing and trading in petrochemicals from Russian Federation and Eastern Europe.<sup>13</sup> By 2001, it became the largest independent petrochemical and oil product trader and marketer in Poland.<sup>14</sup> JSE was also the largest independent importer of fuel into Poland, with an estimated share in the Polish market of over 10%.<sup>15</sup> Since 2012, JSE reduced its activities in the Polish market.<sup>16</sup>

### II. Penalty Imposed on JSE

176. On 16 October 2007, the President of the MRA imposed a pecuniary penalty on JSE for an alleged breach of JSE's obligation to create and maintain the mandatory stocks of liquid fuels,<sup>17</sup> on the basis of Polish regulations (*i.e.* the State Reserves Act and Regulation of the ME of 14 June 2020) implementing EU directives 68/414/EEC and 2006/67/EC.<sup>18</sup>

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<sup>9</sup> Request for Arbitration, para. 9; Statement of Claim, para. 65; Statement of Defence, para. 96.

<sup>10</sup> Statement of Claim, para. 66; Statement of Defence, para. 96; **Exhibit CL-18**, MEG Award on Jurisdiction, para. 81.

<sup>11</sup> Statement of Defence, para. 96; Statement of Claim, paras. 59, 65-66; **Exhibit C-1**, Certificate of Incorporation of Mercuria Energy Group, two Certificates of Change of Name, Certificate of Registered Office and Certificate do Good Standing; **Exhibit CL-18**, MEG Award on Jurisdiction, para. 81.

<sup>12</sup> Statement of Claim, para. 59; **Exhibit C-1**, Certificate of Incorporation of Mercuria Energy Group, two Certificates of Change of Name, Certificate of Registered Office and Certificate do Good Standing.

<sup>13</sup> Request for Arbitration, para. 9; Statement of Defence, para. 97.

<sup>14</sup> Request for Arbitration, para. 9; Statement of Defence, para. 97.

<sup>15</sup> Request for Arbitration, para. 9; Statement of Defence, para. 97.

<sup>16</sup> Request for Arbitration, para. 9; Statement of Defence, para. 98.

<sup>17</sup> **Exhibit R-41**, MRA President's decision on imposing a fine on JSE.

<sup>18</sup> Statement of Defence, paras. 77-78, 85-86, 245; **Exhibit R-028**, Act of 6 September 2001 amending the SRA; **Exhibit R-029**, Regulation of the Minister of Economy of 14 June 2020 on the schedule for accumulating liquid fuels, p. 2.



177. On 14 December 2017, the decision of the President of the MRA was reversed by the ME (as a second-instance authority) following JSE's appeal.<sup>19</sup>
178. On 3 April 2008, the MRA issued a decision imposing a pecuniary penalty on JSE in the amount of PLN 461,695,807.26.<sup>20</sup> JSE filed an appeal against this decision before the ME on 17 April 2008.<sup>21</sup>
179. On 5 June 2008, by its decision No. 23/06/2008, the ME reduced the Penalty imposed on JSE to PLN 452,045,537.36 (the "**Penalty**").<sup>22</sup>
180. On 23 June 2008, the MRA issued a notice to JSE demanding payment of the Penalty with interest calculated from 20 June 2008<sup>23</sup> at the rate applicable to tax arrears under the Act of 29 August 1997 – the Tax Ordinance (Journal of Laws of 2019, item 900) (the "**Tax Ordinance**").<sup>24</sup>
181. On the same date, JSE filed an appeal before the PAC against the decisions issued by (i) the MRA on 3 April 2008 and (ii) the ME on 5 June 2008.<sup>25</sup>

### III. Loan Agreement

182. On 23 June 2008, Claimant and JSE concluded a Loan Agreement for USD 212,900,000 to provide JSE with the funds to pay the Penalty ("**Loan Agreement**").<sup>26</sup> Claimant and JSE concluded a Revaluation Agreement on 30 June 2008 that calculated the capital sum of the Loan Agreement at PLN 450,049,310 ("**Revaluation Agreement**").<sup>27</sup> The loan amount was divided into two tranches: PLN 443,919,000 drawn on 27 June 2008 and PLN 6,130,310 drawn on 30 June 2008.<sup>28</sup>
183. Also on 30 June 2008, JSE paid the MRA a total amount of PLN 454,053,525.36

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<sup>19</sup> **Exhibit R-42**, ME's Decision quashing the MRA President's decision.

<sup>20</sup> **Exhibit C-18**, decision No. BPR-0250-2C/08, dated 3 April 2008.

<sup>21</sup> Statement of Claim, para. 83; Statement of Defence, para. 120.

<sup>22</sup> **Exhibit C-19**, decision No. 23/06/2008, dated 5 June 2008.

<sup>23</sup> **Exhibit C-20**, Notice No. BRJ/zo/PB-530-38/226-1/08/684, dated 23 June 2008.

<sup>24</sup> **Exhibit R-23**, Tax Ordinance of 29 August 1997 (Journal of Laws of 2019, item 900; consolidated text, as amended).

<sup>25</sup> **Exhibit R-43**, Appeal of J&S Energy S.A. to the RAC of 23 June 2008.

<sup>26</sup> **Exhibit CL-19**, the Loan Agreement.

<sup>27</sup> **Exhibit C-25**, the Revaluation Agreement.

<sup>28</sup> **Exhibit C-85**, statement of account No. 1-2008, dated 30 June 2008.

comprising the Penalty plus statutory interest at the rate applied to tax arrears.<sup>29</sup>

184. On 1 July 2008, JSE made an additional payment to cover the payment of interest in the amount of PLN 1,796,510.70.<sup>30</sup>
185. On 8 July 2008, the MRA informed JSE that there had been a change in the rate of interest for the late payment of tax arrears as of 26 June 2008.<sup>31</sup> A rate of 15% per annum was to be applied to the Penalty imposed on JSE.<sup>32</sup>
186. On 11 July 2008, JSE made a further interest payment in the amount of PLN 211,477.30.<sup>33</sup>
187. On 10 November 2009 and after the MRA returned the Penalty to JSE without accrued interest, JSE repaid to Claimant PLN 450,049,810.00 under the Loan Agreement.<sup>34</sup>

#### **IV. Abrogation of the Penalty**

188. On 23 December 2008, the PAC rendered a judgement that repealed the MRA's decision of 3 April 2008 and the ME's decision of 5 June 2008 imposing the Penalty on JSE.<sup>35</sup>
189. On 20 October 2009, the SAC upheld the PAC's judgement of 23 December 2008, confirming the repeal of the Penalty imposed on JSE.<sup>36</sup> As a result, the case files were returned to the MRA for reconsideration, after which the MRA discontinued the administrative proceedings against JSE on 26 February 2010 and the Penalty was never reinstated.<sup>37</sup>

#### **V. Repayment of the Penalty without Interest**

190. On 22 October 2009, JSE issued a request for payment to the MRA demanding the

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<sup>29</sup> **Exhibit C-21**, Transfer confirmation of 30 June 2008.

<sup>30</sup> **Exhibit C-22**, Transfer confirmation of 1 July 2008.

<sup>31</sup> **Exhibit C-24**, Letter No. BFKfn-073-39/2008, dated 8 July 2008.

<sup>32</sup> Statement of Claim, para. 91.

<sup>33</sup> **Exhibit C-23**, Transfer confirmation of 11 July 2008.

<sup>34</sup> **Exhibit C-83**, JSE's bank statement of 30 November 2009, positions 4 and 5; Statement of Claim paras. 216-217; **Exhibit C-86**, Calculation of interest - sheet 1; **Exhibit C-87**, Calculation of interest - sheet 2; **Exhibit C-88**, Calculation of interest - sheet 3.

<sup>35</sup> **Exhibit C-26**, Judgment of the Provincial Administrative Court in Warsaw, dated 23 December 2008 (Case ref. No. VI SA/Wa 1567/08).

<sup>36</sup> **Exhibit C-27**, Judgment of the Supreme Administrative Court, dated 20 October 2009 (Case ref. No. II GSK 380/09).

<sup>37</sup> **Exhibit C-28**, Decision No. BO-025-2C/10, dated 26 February 2010.

repayment of PLN 454,053,525.36 with interest accrued on the basis of Article 78.1 and Article 78.3.1, in connection with Article 2.2 of the Tax Ordinance and calculated from:

- i. 1 July 2008 for the sum of PLN 452,045,537.36,
- ii. 2 July 2008 for the sum of PLN 1,796,510.70, and
- iii. 12 July 2008 for the sum of PLN 211,477.30.<sup>38</sup>

191. The request for payment stated that the value of accrued interest calculated as such amounted to PLN 73,125,802.95 as of 22 October 2009.<sup>39</sup>
192. On 9 November 2009, the MRA returned the exact amount JSE had paid in connection with the Penalty, that is, PLN 454,053,525.36 without any additional interest.<sup>40</sup>
193. In letters dated 13, 18 and 20 November 2009, JSE requested the MRA to pay the accrued interest on the reimbursed Penalty pursuant to Article 77(1)(2) and Article 78a in conjunction with Article 2(2) of the Tax Ordinance.<sup>41</sup>
194. By letter dated 3 December 2009, the MRA informed JSE of its position that the Tax Ordinance was not applicable to the reimbursement of the Penalty.<sup>42</sup>
195. On 7 January 2010, JSE filed complaint with the PAC alleging that the MRA had failed to act on the PAC's judgement of 23 December 2008.<sup>43</sup> The MRA filed a response to the PAC on 5 February 2010.<sup>44</sup> The PAC rejected JSE's complaint as inadmissible on 26 April 2010.<sup>45</sup>
196. On 19 February 2010, JSE submitted a motion to the ME to reinstate the deadline to

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<sup>38</sup> **Exhibit C-29**, Demand for payment of 22 October 2009.

<sup>39</sup> **Exhibit C-29**, Demand for payment of 22 October 2009.

<sup>40</sup> **Exhibit C-30**, Payment confirmation of 9 November 2009.

<sup>41</sup> **Exhibit R-46**, Request of J&S Energy S.A. for payment of 13 November 2009; **Exhibit R-047**, Corrected request of J&S Energy S.A. for payment of 18 November 2009; **Exhibit R-048**, Corrected request of J&S Energy S.A. for payment of 20 November 2009.

<sup>42</sup> **Exhibit C-31**, Letter No. BPdp-024-647/09, dated 3 December 2009.

<sup>43</sup> **Exhibit R-55**, Complaint of J&S Energy S.A. to the RAC of 10 January 2010.

<sup>44</sup> **Exhibit R-056**, MRA's Response to the Complaint of 5 February 2010.

<sup>45</sup> **Exhibit C-33**, Ruling of the Provincial Administrative Court in Warsaw, dated 26 April 2010 (Case ref. No. VI SA/Wa 250/10).

appeal the MRA's position adopted in its letter of 3 December 2009.<sup>46</sup>

197. On 6 April 2010, the ME issued a ruling concluding that the MRA's letter of 3 December 2009 was not an administrative decision, declared JSE's motion inadmissible for this reason, and concluded that "*the non-existence of an administrative decision from a legal point of view (an act of the authority is not a decision but a material and technical act) is the main reason for the appeal being inadmissible*".<sup>47</sup>
198. On 12 May 2010, JSE filed an appeal before the PAC against the ruling of the ME dated 6 April 2010.<sup>48</sup> On 3 November 2010, the PAC dismissed JSE's appeal.<sup>49</sup>

## VI. Civil Proceedings

199. JSE initiated three civil proceedings in Poland which were discontinued, as follows:

### 1. First Civil Action

200. On 17 November 2009, JSE initiated a first civil law action for a payment order with the Warsaw District Court, 1st Civil Division, under Article 484(2) of the Code of Civil Procedure ("**CCP**").<sup>50</sup>
201. In said action, JSE claimed compensation for damages under Article 417(1) and (2) of the Civil Code for (i) the "*unlawful acts or omissions*" from the ME and MRA that imposed and executed the Penalty, respectively; and/or for (ii) "*issuing a final decision*" by which damage was caused.<sup>51</sup> In particular, JSE claimed damages for the execution of an unlawful administrative decision (*i.e.* the ME's decision imposing the fine in June 2008), which was repealed by the PAC and SAC judgments,<sup>52</sup> thus confirming its unlawfulness.<sup>53</sup>

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<sup>46</sup> **Exhibit C-35**, Motion for reinstating the deadline to appeal, dated 19 February 2010.

<sup>47</sup> **Exhibit C-36**, Ruling No. BP-I-024-129/10, dated 6 April 2010.

<sup>48</sup> Statement of Claim, para. 115.

<sup>49</sup> **Exhibit C-38**, Judgment of the Provincial Administrative Court in Warsaw, dated 3 November 2010 (Case ref. No. VI SA/Wa 1484/10).

<sup>50</sup> **Exhibit R-49**, Statement of Claim of J&S Energy S.A.

<sup>51</sup> **Exhibit R-49**, Statement of Claim of J&S Energy S.A., p. 4.

<sup>52</sup> **Exhibit C-26**, Judgment of the Provincial Administrative Court in Warsaw, dated 23 December 2008 (Case ref. No. VI SA/Wa 1567/08); **Exhibit C-27**, Judgment of the Supreme Administrative Court, dated 20 October 2009 (Case ref. No. II GSK 380/09).

<sup>53</sup> **Exhibit R-49**, Statement of Claim of J&S Energy S.A., p. 5.

202. On this basis, JSE claimed compensation in the amount of (i) PLN 64,636,447.36; (ii) PLN 255,113.48; and (iii) PLN 29,285.46, plus interest at the rate applicable to tax arrears (as of July 2008) under the Tax Ordinance.<sup>54</sup> According to JSE, this damages calculation considered that the MRA had returned the (principal of the) Penalty (*i.e.* PLN 454,053,525.36) a few days earlier.<sup>55</sup> In its claim, JSE did not request damages for (i) the costs of the Loan Agreement and (ii) the loss of profits on the funds, although it considered they were applicable.<sup>56</sup>
203. On 18 December 2009, the First Civil Action was discontinued by the District Court in Warsaw, following JSE's withdrawal dated 16 December 2009 (*i.e.* before the commencement of the hearing).<sup>57</sup>

## 2. Second Civil Action

204. On 1 February 2011, JSE filed a Second Civil Action by means of an application for the issue of summons against the MRA and the ME to appear for a settlement conference before the District Court in Warsaw, 8th Commercial Division.<sup>58</sup> This action was initiated under Article 417 of the Civil Code (*i.e.* "*claims damages for the enforcement or the issuance of an unlawful administrative decision and not for failure to enforce an administrative court decision*").<sup>59</sup>
205. In this action, JSE clarified that it claimed damages caused: (i) by the ME, under Article 417(2) of the Civil Code, for issuing a final decision (imposing the Penalty) which was repealed by the PAC and SAC and the enforcement of which resulted in damage to JSE's assets; and (ii) by the MRA, under Articles 417(1) and (2) of the Civil Code, for executing the decision of the ME.<sup>60</sup>

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<sup>54</sup> **Exhibit R-49**, Statement of Claim of J&S Energy S.A., p. 6 (*i.e.* "*under Article 78 para. 1 in conjunction with Article 56 para. 1 and Article 2 para. 2 of the Tax Ordinance.*").

<sup>55</sup> **Exhibit R-49**, Statement of Claim of J&S Energy S.A., p.7.

<sup>56</sup> **Exhibit R-49**, Statement of Claim of J&S Energy S.A., p. 6.

<sup>57</sup> **Exhibit R-53**, Court decision to discontinue proceedings of 18 December 2009.

<sup>58</sup> **Exhibit R-57**, Application of J&S Energy S.A. for the issue of summons to appear for a settlement conference of 1 February 2011 (case no. VIII GCo 61/11).

<sup>59</sup> **Exhibit R-57**, Application of J&S Energy S.A. for the issue of summons to appear for a settlement conference of 1 February 2011 (case no. VIII GCo 61/11).

<sup>60</sup> **Exhibit R-57**, Application of J&S Energy S.A. for the issue of summons to appear for a settlement conference of 1 February 2011 (case no. VIII GCo 61/11).

206. JSE claimed for compensation the same amounts requested in its First Civil Action. However, this time JSE claimed the costs of servicing the Loan Agreement granted by Mercuria (*i.e.* the interest).<sup>61</sup>
207. On 10 May 2011, a hearing was held before the District Court in Warsaw but the parties in said proceedings did not reach an agreement.<sup>62</sup>

### 3. Third Civil Action

208. On 20 May 2011, JSE filed a Third Civil Action by means of an application for the issue of summons against the MRA and the ME to settle the matter before the Regional Court in Warsaw, 8th Commercial Division.<sup>63</sup> This action was initiated under Article 405 of the Civil Code (*i.e.* "*unjust enrichment*"),<sup>64</sup> pursuant to which "*who, without a legal basis, has obtained a material benefit at the expense of another person, is obliged to give the benefit in kind, and if this is not possible, to refund its value*".<sup>65</sup>
209. As for compensation, JSE claimed the same amounts requested in its First and Second Civil Actions.<sup>66</sup> However, JSE stated this time that the value of unjust enrichment was equal to the difference between the amount due to JSE (including interest) and the amount that it received on 9 November 2009 from the MRA.<sup>67</sup>
210. On 3 August 2011, the 8th Commercial Division of the Warsaw Court summoned the parties in said proceeding to attend to a hearing on 26 September 2011.<sup>68</sup> The proceedings

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<sup>61</sup> **Exhibit R-57**, Application for the issue of summons to appear for a settlement conference of 1 February 2011, para. 5 (where "*interest on the loan concerned shall be equal to interest on the fine reimbursed as at its reimbursement to the [JSE]*").

<sup>62</sup> Respondent's Post Hearing Brief, para. 48; **Exhibit R-058**, Warsaw District Court's Notice of 3 March 2011 (case no. VIII GCo 61/11).

<sup>63</sup> **Exhibit R-59**, Application of J&S Energy S.A. for the issue of summons to appear for a settlement conference of 20 May 2011 (case no. VIII GCo 339/11)

<sup>64</sup> **Exhibit R-59**, Application of J&S Energy S.A. for the issue of summons to appear for a settlement conference of 20 May 2011 (case no. VIII GCo 339/11).

<sup>65</sup> **Exhibit R-59**, Application of J&S Energy S.A. for the issue of summons to appear for a settlement conference of 20 May 2011 (case no. VIII GCo 339/11), p. 3; **Exhibit R-060**, Warsaw District Court's Notice of 3 March 2011 (case no. VIII GCo 339/11).

<sup>66</sup> **Exhibit R-59**, Application of J&S Energy S.A. for the issue of summons to appear for a settlement conference of 20 May 2011 (case no. VIII GCo 339/11)

<sup>67</sup> **Exhibit R-59**, Application of J&S Energy S.A. for the issue of summons to appear for a settlement conference of 20 May 2011 (case no. VIII GCo 339/11), p. 4.

<sup>68</sup> **Exhibit R-60**, Warsaw District Court's Notice of 3 August 2011 (case no. VIII GCo 339/11).

were subsequently discontinued by the Court.<sup>69</sup>

## **VII. Administrative Court Judgements**

211. As discussed below, the Administrative Courts of Poland rendered six judgements between 2010 and 2022 in relation to the administrative proceedings involving the MRA and JSE following the reimbursement of the Penalty.

### **1. PAC 1<sup>st</sup> Judgement Ordering the MRA to Resolve JSE's Application**

212. On 10 November 2010, JSE filed an application for the recognition of overpayment of a financial penalty with the MRA ("**JSE's Application**"), requesting the recognition of an overpayment of PLN 64,636,447.36 in relation to the Penalty, plus interest calculated at the rate applicable to tax arrears as follows:<sup>70</sup>

- i. on the amount of PLN 64,352,048.42, from 1 July 2008 until the date of refund of the overpayment;
- ii. on the amount of PLN 255,113.48, from 2 July 2008 until the date of refund of the overpayment; and
- iii. on the amount of PLN 29,285.46, from 12 July 2008 until the date of refund of the overpayment.

213. On 8 December 2010, the MRA responded to JSE's Application with a letter stating that the MRA maintained its position as taken in its letter of 3 December 2009 that the Tax Ordinance was not applicable to the reimbursement of the Penalty.<sup>71</sup>

214. On 27 December 2010, JSE sent a letter to the MRA demanding that JSE's Application be resolved in the form of an administrative decision.<sup>72</sup> On 11 January 2011, the MRA sustained its position by stating that no further action would be taken with reference to

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<sup>69</sup> Respondent's Post Hearing Brief, para. 49.

<sup>70</sup> **Exhibit C-39**, Motion for declaration and repayment of the overpayment of the penalty, dated 10 November 2010.

<sup>71</sup> **Exhibit C-40**, Letter No. Bpdp-024-629/10, dated 8 December 2010.

<sup>72</sup> **Exhibit C-41**, Letter of 27 December 2010.

its letter of 3 December 2009.<sup>73</sup>

215. During January and February 2011, JSE and the MRA exchanged further written correspondence, in which their respective positions were maintained.<sup>74</sup>
216. On 10 March 2011, JSE filed a complaint with the PAC regarding the President of the MRA's alleged inaction to consider JSE's Application of 10 November 2010.<sup>75</sup>
217. On 13 June 2011, the PAC rendered a judgement ordering the President of the MRA to examine the merits of and resolve JSE's Application within two months, dismissing the remainder of JSE's appeal ("**PAC 1<sup>st</sup> Judgement**").<sup>76</sup>

## **2. SAC Judgement Dismissing 1<sup>st</sup> Cassation Claim**

218. On 20 September 2011, the President of the MRA filed a cassation claim before the SAC to overturn PAC's 1<sup>st</sup> Judgement of 13 June 2011.<sup>77</sup>
219. On 28 February 2013, the SAC dismissed the cassation claim ("**SAC 1<sup>st</sup> Judgement**").<sup>78</sup>

## **3. PAC 2<sup>nd</sup> Judgement Repealing MRA's Denial of Payment Recognition**

220. On 6 June 2013, the President of the MRA issued a decision on JSE's Application of 10 November 2010 refusing the existence of an overpayment and establishing that the reimbursement of the Penalty (paid by JSE in the amount of PLN 454,053,525.36) was not subject to interest.<sup>79</sup>
221. On 21 June 2013, JSE filed an appeal with the ME (as the second-instance authority) against the President of the MRA's decision of 6 June 2013.<sup>80</sup> The deadline for the ME's

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<sup>73</sup> **Exhibit C-42**, Letter No. Bpdp-024-11/11, dated 11 January 2011.

<sup>74</sup> **Exhibit C-43**, Letter of 20 January 2011; **Exhibit C-44**, Letter No. Bpdp-024-60/11, dated 8 February 2011; **Exhibit C-45**, Letter of 16 February 2011; **Exhibit C-46**, Letter of 22 February 2011; **Exhibit C-47**, Letter No. Bpdp-024-96/11, dated 25 February 2011.

<sup>75</sup> Statement of Claim, para. 120.

<sup>76</sup> **Exhibit C-48**, Judgment of the Provincial Administrative Court in Warsaw, dated 13 June 2011 (Case ref. No. VI SAB/Wa 6/11).

<sup>77</sup> Statement of Claim, para. 127.

<sup>78</sup> **Exhibit C-49**, Judgment of the Supreme Administrative Court, dated 28 February 2013 (Case ref. No. II GSK 2172/11).

<sup>79</sup> **Exhibit C-50**, Decision No. BRI-5c/13, dated 6 June 2013.

<sup>80</sup> Statement of Defence, para. 191.



decision initially set as 30 September 2013 was subsequently amended to 31 October 2013, 2 December 2013, 31 January 2014 and, ultimately, 13 May 2014.<sup>81</sup>

222. On 10 January 2014, JSE filed a complaint before the PAC regarding the ME's conduct of the appellate proceedings.<sup>82</sup> On 15 May 2014, the PAC imposed a fine on the ME after finding that the ME had prolonged the appellate proceedings.<sup>83</sup>
223. On 13 May 2014, the ME upheld the decision of the President of the MRA from 6 June 2013 (*i.e.* refusing the existence of an overpayment and establishing that the reimbursement of the Penalty paid by JSE was not subject to interest).<sup>84</sup> On 24 June 2014, JSE filed an appeal before the PAC against this decision of the ME.<sup>85</sup> On 24 July 2014, the ME submitted its response.<sup>86</sup>
224. On 12 December 2014, the PAC repealed the President of the MRA's decision of 6 June 2013 and the ME's decision of 13 May 2014, while declaring both decisions unenforceable ("**PAC 2<sup>nd</sup> Judgement**").<sup>87</sup>

#### **4. SAC Judgement Dismissing 2<sup>nd</sup> Cassation Claim**

225. On 18 February 2015, the ME filed a second cassation claim before the SAC to have the PAC 2<sup>nd</sup> Judgement overturned (and JSE's appeal of 24 June 2014 against the decision of the ME of 13 May 2014, rejected).<sup>88</sup>
226. On 29 November 2016, the SAC dismissed the cassation claim filed by the ME and upheld the PAC's ruling of 12 December 2014 ("**SAC 2<sup>nd</sup> Judgement**").<sup>89</sup>

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<sup>81</sup> **Exhibit C-51**, Notice L.Dz. 1713/13, dated 26 July 2013; **Exhibit C-52**, Notice L.Dz. 2161/13, dated 26 September 2013; **Exhibit C-53**, Notice L.Dz. 2395/13, dated 29 October 2013; **Exhibit C-54**, Notice L.Dz. 2636/13, dated 28 November 2013; **Exhibit C-55**, Notice L.Dz. 623/13, dated 31 March 2014.

<sup>82</sup> Statement of Claim, para. 135.

<sup>83</sup> **Exhibit C-56**, Judgment of the Provincial Administrative Court in Warsaw, dated 15 May 2014 (Case ref. No. VI SAB/Wa 12/14).

<sup>84</sup> **Exhibit C-57**, Decision No. 5/05/2014, dated 13 May 2014.

<sup>85</sup> Statement of Claim, para. 140.

<sup>86</sup> **Exhibit C-59**, Reply to the appeal, dated 24 July 2014.

<sup>87</sup> **Exhibit C-58**, Judgment of the Provincial Administrative Court in Warsaw, dated 12 December 2014 (Case ref. No. VI SA/Wa 2437/14).

<sup>88</sup> Statement of Claim, para. 145; Statement of Defence, para. 194; **Exhibit C-57**, Decision No. 5/05/2014, dated 13 May 2014.

<sup>89</sup> **Exhibit C-64**, Judgment of the Supreme Administrative Court, dated 29 November 2016 (Case ref. No. II GSK 1166/15).

## 5. PAC 3<sup>rd</sup> Judgment Revoking Decision Discontinuing JSE's Application

227. On 16 May 2017, the President of the MRA issued two administrative decisions:

- i) A ruling (*postanowienie*) refusing to initiate proceedings for the confirmation of overpayment of the Penalty requested by JSE on 10 November 2010 ("**May 2017 Ruling**");<sup>90</sup> and
- ii) A decision (*decyzja*) discontinuing *ex officio* the entire proceedings for the refund of the overpaid Penalty as per JSE's applications dated 13, 18 and 20 November 2009 ("**May 2017 Decision**").<sup>91</sup>

228. On 22 and 25 May 2017, JSE filed two appeals before the ME against both the May 2017 Ruling and the May 2017 Decision, respectively.<sup>92</sup>

229. On 7 August 2017, the ME abrogated the May 2017 Ruling<sup>93</sup> and revoked the May 2017 Decision.<sup>94</sup>

230. On 16 October 2017, the President of the MRA issued another decision discontinuing the JSE's Application of 10 November 2010 ("**Discontinuance of JSE's Application**").<sup>95</sup> Following an appeal by JSE with the ME, the MRA's decision discontinuing the JSE's Application was upheld by the ME on 18 January 2018.<sup>96</sup>

231. On 21 February 2018, JSE filed an appeal before the PAC against the ME's decision of 18 January 2018.<sup>97</sup> On 22 March 2018, the ME filed its response to JSE's appeal.<sup>98</sup>

232. On 14 September 2018, the PAC revoked the President of the MRA's decision of 16 October 2017 and the ME's decision of 18 January 2018 ("**PAC 3<sup>rd</sup> Judgment**").<sup>99</sup>

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<sup>90</sup> **Exhibit C-65**, Ruling No. BPI-3C/17, dated 16 May 2017.

<sup>91</sup> **Exhibit C-66**, Decision No. BPI-4C/17, dated 16 May 2017.

<sup>92</sup> **Exhibit C-67**, Appeal of 22 May 2017; **Exhibit C-68**, Appeal of 25 May 2017.

<sup>93</sup> **Exhibit C-69**, Ruling No. 1/08/2017, dated 7 August 2017.

<sup>94</sup> **Exhibit C-70**, Decision No. 17/08/2017, dated 7 August 2017.

<sup>95</sup> **Exhibit C-71**, Decision No. BPI-35C/17, dated 16 October 2017.

<sup>96</sup> **Exhibit C-72**, Decision No. 1/01/2018, dated 18 January 2018.

<sup>97</sup> **Exhibit C-73**, Appeal of 21 February 2018.

<sup>98</sup> **Exhibit C-74**, Reply to the appeal, dated 22 March 2018.

<sup>99</sup> **Exhibit C-75**, Judgment of the Provincial Administrative Court in Warsaw, dated 14 September 2018 (Case ref. No. VI SA/Wa 540/18).

## 6. SAC Judgement Dismissing 3<sup>rd</sup> Cassation Claim

233. On 7 December 2018, the ME filed a third cassation claim against the PAC's 3<sup>rd</sup> Judgement of 14 September 2018.<sup>100</sup>

234. On 10 December 2020, the ME filed a submission before the SAC, supplementing the statement of reasons for the cassation claim, including the following two conclusions:

*"a) First, assuming the the [sic] monetary penalty imposed on the Appellant (hereinafter the 'Penalty') is governed by the provisions of Title III the Code, the overpayment had not occurred on the dates indicated by the Appellant; no interest had accrued, either;*

*b) If the Appellant believes that it had suffered loss due to the payment of the Penalty, it should have sought damages on the grounds of civil law since it is not possible to recover such damages in administrative proceedings (in the form of interest)."*<sup>101</sup>

235. By way of a summary, the ME further concluded as follows:

*"Therefore, in the period before the decision of the Minister for Economy became final and non-appealable and its quashing by the Supreme Administrative Court's judgement of 20 October 2009 (II GSK 380/09), the Penalty was due and, as such, it was not an overpayment in the period after its payment until the date of the said judgement of the Supreme Administrative Court.*

*Immediately after the decision of the Minister for Economy was quashed by the final and non-appealable judgement but before expiration of the deadline defined in Article 77(1)(3) of the Code, the Penalty was returned in full to the Appellant. Thus, the Appellant has no grounds for seeking that the ARM Governor be*

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<sup>100</sup> **Exhibit C-76**, Cassation claim of 7 December 2018; Statement of Defence, para. 168.

<sup>101</sup> **Exhibit C-96**, ME's submission dated 10 December 2020, p. 2 (text highlighted in the original).

*ordered to ascertain the overpayment of PLN 64,352,048.40 and to pay interest on the Penalty amount for the period during which the Penalty was not an overpayment.*

*In view of the foregoing as well as the earlier arguments, the Judgement is not correct and should be quashed."*<sup>102</sup>

236. On 15 March 2022, the SAC dismissed the cassation claim filed by the ME ("**SAC 3<sup>rd</sup> Judgement**").<sup>103</sup>

237. In the SAC 3<sup>rd</sup> Judgement, the SAC stated as follows:

*"It results from the cassation appeal that the legal dispute in the present case concerns the assessment of the correctness of the position of the Court of First Instance which, when reviewing the legality of the decision of the President of the [MRA] on the determination of the overpayment, pursuant to Article 145 §1.1 letter c) of the LPAC, annulled the appealed decision of the [ME] and the decision preceding it.*

*The contested judgement [of 14 September 2018] is in conformity with the law."*<sup>104</sup>

238. The SAC further stated as follows:

*"It is emphasised that, apart from its restitution function, the institution of refunding the overpayment also fulfils a compensatory function, which serves to repair the damage that the entrepreneur (taxpayer) suffered as a result of being deprived of financial resources concerning the obligation to pay the undue public levy. This function is performed by interest on the overpayment (cf. judgement of the Constitutional Tribunal of 21 July 2010, SK*

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<sup>102</sup> **Exhibit C-96**, ME's submission dated 10 December 2020, p. 5 (text highlighted in the original).

<sup>103</sup> **Exhibit C-118**, Judgement of the Supreme Administrative Court, dated 15 March 2022 (Case ref. No. II GSK 349/19).

<sup>104</sup> **Exhibit C-118**, Judgement of the Supreme Administrative Court, dated 15 March 2022 (Case ref. No. II GSK 349/19), p. 9.

21/08). [...] *In the light of the above principles, in general the purpose of the overpayment interest rate is to provide compensation to entities (taxpayers and entrepreneurs) which, as a result of defective actions by the public authorities, were deprived of the possibility of using their funds which they had to pay on account of undue public levy.*"<sup>105</sup>

239. The SAC Judgment endorsed in particular the application of Article 78 §3.1 of the Tax Ordinance to claim interest, as follows:

*"The Supreme Administrative Court hearing the case fully shares the views in the abovementioned judgements and the position of the Court of First Instance on the appropriate application in the present case of the provisions of Section III of the Tax Ordinance and, given the specificity of the proceedings on the grounds of the applicable statutory provisions, the possibility of claiming interest on the basis of Article 78 §3.1 of the Tax Ordinance. This was already determined in the judgement of the Supreme Administrative Court of 29 November 2016".*<sup>106</sup>

#### **VIII. Administrative Proceedings Following the SAC 3<sup>rd</sup> Judgement**

240. On 23 June 2022, the President of the MRA issued a (non-appealable) notice in which it extended the administrative proceedings regarding the repayment of the outstanding part of the 2008 Penalty with interest until 25 July 2022, as follows:

*"Pursuant to Article 123 § 1 of the Polish Law on Proceedings before Administrative Courts of 30 August 2002 (consolidated text: Poland's Journal of Laws of 2022, item 329, as amended; hereinafter referred to as the 'CAP') in connection with Article 36 § 1 of the CAP, please be informed that the proceedings on*

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<sup>105</sup> **Exhibit C-118**, Judgement of the Supreme Administrative Court, dated 15 March 2022 (Case ref. No. II GSK 349/19), p. 9.

<sup>106</sup> **Exhibit C-118**, Judgement of the Supreme Administrative Court, dated 15 March 2022 (Case ref. No. II GSK 349/19), p. 14.

*determining overpayment of a financial penalty by [JSA] initiated by the application of the Company of 10 November 2010 will not be completed within the deadline specified in Article 35 of the CAP.*

*I hereby set a new deadline of 25 July 2022 for settling the case.*

*Please be informed that the reason for the failure to settle the case within the statutory deadline is the need to conduct extensive evidentiary proceedings and to consider the entire circumstances of the case, all letters submitted by [JSE] and the evidence contained in the case file. As the Authority is bound by the judgements issued in the present case, including those issued by the Province Administrative Court in Warsaw on 14 September 2018 in case no. VI SA/Wa 540/18, the statutory one month's deadline for settling the case is insufficient to re-examine it taking into account all legal assessments and indications.*

***Notice:** This Decision does not require justification. Pursuant to Article 141 § 1 of the CAP, [SAC] is not entitled to appeal against this Decision.*<sup>107</sup>

241. On 25 July 2022, the President of the MRA issued a second (non-appealable) notice in terms similar to the first notice above, to further extend the administrative proceedings until 30 November 2022.<sup>108</sup>
242. On 30 November 2022, the President of the MRA issued a third (non-appealable) notice setting a new deadline for settling JSE's case until 31 January 2023.<sup>109</sup> This notice stated that:

*"[...] the reason for the failure to settle the case within the statutory time limit is the need for additional consultations with the tax*

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<sup>107</sup> **Exhibit C-119**, Ruling No. BPIzo.520.117.2022/716, dated 23 June 2022 (text in bold in the original document).

<sup>108</sup> **Exhibit C-120**, Ruling No. BPIzo.520.117.2022/914, dated 25 July 2022.

<sup>109</sup> **Exhibit C-122**, Ruling No. BPI – 8P/22 (BPIzo.520.117.2022/1350), dated 30 November 2022.

*administration authorities—based on Article 75 § 1 in conjunction with Article 77 § 1 of the CAP—with regard to the extensive evidence gathered in the present proceedings, the statutory time limit for settling the case, even with its previous extension, proved to be far from sufficient to conduct a repeated, in-depth assessment of the evidence aimed at issuing a substantive decision taking into account all legal assessments and indications."*

## **IX. Previous Arbitration Award**

243. On 24 July 2008, Claimant initiated an SCC arbitration against Respondent under the ECT, alleging that Respondent's conduct had violated Respondent's obligations under Article 10(1) of the ECT, namely to (i) accord Fair and Equitable Treatment; (ii) not to impair Claimant's investment by unreasonable measures or discriminatory measures; and (iii) to accord constant protection and security ("**Previous Arbitration**").<sup>110</sup>
244. In particular, Claimant argued in the Previous Arbitration that Respondent's conduct as a whole (from February 2006) had breached the FET obligation, while the elements of said breach concerned, *inter alia*, (i) the harassment of JSE (*e.g.*, excessive inspections of JSE's premises); and (ii) the imposition and execution of the Penalty on JSE for its failure to comply with its mandatory reserves obligations.<sup>111</sup>
245. The Previous Arbitration was bifurcated and decided in two awards, as follows:
- i. The award on jurisdiction dated 17 December 2009,<sup>112</sup> dismissing Respondent's objections *ratione materiae*, *personae*, and *voluntatis*,<sup>113</sup> and that Claimant had

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<sup>110</sup> **Exhibit CL-18**, Mercuria Energy Group Limited vs. Minister of Economy (SCC Case No. V 096/2008), Final Award, made on 22 December 2011, paras. 151, 215.

<sup>111</sup> **Exhibit CL-18**, Mercuria Energy Group Limited vs. Minister of Economy (SCC Case No. V 096/2008), Final Award, made on 22 December 2011, paras. 215-216.

<sup>112</sup> **Exhibit CL-17**, Mercuria Energy Group Limited vs. Minister of Economy (SCC Case No. V 096/2008), Award on Jurisdiction, made on 17 December 2009.

<sup>113</sup> Based on Article 1(8) ECT ("*establish a new Investment*"); Article 1(7) ECT (admitting the incorporation test but questioning the origin of the funds); and Article 26(3)(b)(i) ECT ("*conditional consent*" reservation if Claimant activated the fork-in-the-road by submitting its dispute to domestic courts or administrative tribunals), respectively; **Exhibit CL-17**, Mercuria Energy Group Limited vs. Minister of Economy (SCC Case No. V 096/2008), Award on Jurisdiction, made on 17 December 2009, paras. 74, 83, 88.

not established a *prima facie* case,<sup>114</sup> thereby finding that the tribunal had jurisdiction over the dispute ("**MEG Award on Jurisdiction**"); and

- ii. The final award dated 22 December 2011, finding that Respondent had not breached Article 10(1) of the ECT ("**MEG Award**").<sup>115</sup>

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<sup>114</sup> **Exhibit CL-17**, Mercuria Energy Group Limited vs. Minister of Economy (SCC Case No. V 096/2008), Award on Jurisdiction, made on 17 December 2009, para. 97.

<sup>115</sup> **Exhibit CL-18**, Mercuria Energy Group Limited vs. Minister of Economy (SCC Case No. V 096/2008), Final Award, made on 22 December 2011, para. 824(i).



## **F. RELIEF SOUGHT**

246. This section sets out the relief sought by the Parties.

### **I. Claimant's Request for Relief**

247. In its Reply, Claimant upheld its request for relief as provided for in its Statement of Claim, as follows:

*"(a) order the Respondent to pay the Claimant the aggregate amount of PLN 152,862,917.25;*

*(b) order the Respondent to pay the Claimant interest accrued on the amount of 75,372,118.98, at the rate applied to tax arrears in accordance with the Polish Tax Ordinance, as from time to time announced by the Polish Minister of Finances, from 16 May 2020 until the day on which the amount stipulated in (a) is paid to the Claimant;*

*(c) order the Respondent to reimburse the Claimant for all costs and expenses incurred in this arbitration, including the fees and expenses incurred by the Claimant in accordance within Art. 49 of the 2017 SCC Rules, the fees and expenses of any experts appointed by the Arbitral Tribunal and by the Claimant, and the fees and expenses of the Claimants' [sic.] legal representation, as well as any other costs incurred by the Claimant[] as a result of any failure by the Respondent to comply with the 2017 SCC Rules;*

*(d) order the Respondent to pay the Claimant interest accrued on the amounts referred to in (c) above, at the standard rate of 5% per annum, until the day on which such amounts are paid to the Claimant, if they are not paid within seven days from the*

*date of the notification of the Arbitral Tribunal's Award."*<sup>116</sup>

248. Claimant did not amend this request for relief in its Post-Hearing Brief.

## **II. Respondent's Request for Relief**

249. In its Rejoinder and Post-Hearing Brief, Respondent upheld its request for relief as provided for in its Statement of Defence, as follows:

- "(a) Decide that it does not have jurisdiction or that Mercuria's Claims are inadmissible;*
- (b) Dismiss Mercuria's Claims in their entirety, should the Tribunal find that it has jurisdiction or that the Claims are admissible;*
- (c) Require Mercuria to bear all costs of the arbitration; and*
- (d) Grant any other relief it deems appropriate."*<sup>117</sup>

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<sup>116</sup> Statement of Claim, para. 229; Reply para. 151.

<sup>117</sup> Statement of Defence, para. 425; Rejoinder para. 254; Respondent's Post-Hearing Brief, para. 153

## G. JURISDICTION

250. By way of introduction, the Tribunal wishes to emphasise that it has carefully reviewed all of the arguments and evidence presented by the Parties during the course of these proceedings. Although the Tribunal may not address all such arguments and evidence in full detail in its reasoning below, the Tribunal has nevertheless considered and taken them into account in arriving at its decision.

251. The Tribunal will first establish its competence to rule on its own jurisdiction (I). Subsequently, the Tribunal will deal with Respondent's objection to the validity of the ECT arbitration clause in intra-EU disputes due to its alleged incompatibility with EU law (II). Finally, the Tribunal will address Respondent's remaining objections to the Tribunal's jurisdiction and the admissibility of Claimant's claims (III).

### I. *Compétence de la Compétence*

252. From the outset, it must be noted that the Tribunal's power to determine its own jurisdiction, referred to as the principle of *compétence de la compétence*, is undisputed between the Parties and reflected in Section 2 of the Swedish Arbitration Act that reads: "*The arbitrators may rule on their own jurisdiction to decide the dispute.*"

253. The principle of *compétence de la compétence* naturally encompasses the power of the Tribunal to determine – as a starting point – the law governing its jurisdiction, based on the agreement of the Parties and, if necessary, other relevant circumstances of the case.<sup>118</sup>

254. Having established its power to do so, the Tribunal will venture to examine its jurisdiction to hear the case at hand. Respondent raised eight separate jurisdictional objections, which the Tribunal will address individually in the following sections.

## II. EU Law Objection

255. In this section, the Tribunal will examine the Parties' positions pertaining to EU Law and

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<sup>118</sup> See e.g. **RL-170**, *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V 2016/135, Award of 16 June 2022, para. 153: "*The principle according to which the Tribunal has compétence de la compétence includes the power to determine the law applicable to jurisdiction in the light of all the relevant circumstances of the case, particularly the existence of an agreement between the Parties on this issue.*"

the EC Submission on the interpretation of Article 26 of the ECT, in order to determine whether the EU Law Objection deprives the Tribunal of its jurisdiction in this case.

256. The Tribunal notes that Respondent has endorsed in full the position of the EC Submission,<sup>119</sup> to be "*consider[ed] as part of the Respondent's case in the present arbitration*".<sup>120</sup> In consideration thereof, the Tribunal will first address Respondent's position (1.), followed by the EC Submission's position (2.), and then Claimant's position (3.).

## **1. Respondent's Position**

257. It is Respondent's position that the Tribunal does not have jurisdiction to adjudicate an intra-EU dispute under the ECT "*due to the lack of a valid arbitration agreement*".<sup>121</sup> As its main argument, it contends the arbitration agreement in Article 26 of the ECT became invalid (for intra-EU investors) from the moment Poland became part of the EU on 1 May 2004 (a).<sup>122</sup>

258. Alternatively, Respondent submits that the Tribunal should deny its jurisdiction since Claimant's investment was made within the same "area" within the meaning of Article 1(10) of the ECT (b)).

### **a) Inapplicability of Article 26 of the ECT within the EU**

259. In essence, Respondent contends that Article 26 of the ECT is inapplicable to disputes between an EU investor and an EU Member State, under the following considerations:

- *First*, the arbitration agreement in Article 26 of the ECT became invalid from the moment Poland became part of the EU on 1 May 2004;<sup>123</sup> and
- *Second*, accepting *jurisdiction* over intra-EU disputes by this Tribunal would contradict fundamental principles of EU law, namely the principle of autonomy<sup>124</sup>

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<sup>119</sup> Submitted by the European Commission on behalf of the EU as a "non-disputing treaty Party", pursuant to Article 4(1) of Appendix III to the 2017 SCC Rules.

<sup>120</sup> Respondent's observations on the EC Submission, para. 2.

<sup>121</sup> Statement of Defence, para. 227.

<sup>122</sup> Respondent's observations on the EC Submission, para. 3; Statement of Defence, para. 261.

<sup>123</sup> Statement of Defence, para. 261; Respondent's observations on the EC Submission, para. 3.

<sup>124</sup> Article 19(1) of the TEU; Articles 267 and 344 of the TFEU.

and non-discrimination,<sup>125</sup> thus violating public policy of the *lex fori* (Sweden). Consequently, any award rendered in this arbitration would be subject to set-aside proceedings in Sweden<sup>126</sup> and be unenforceable within the EU, which would run counter to the Tribunal's duty to render an enforceable award.<sup>127</sup>

260. According to Respondent, its position is supported, *inter alia*, by the following:

- Principles of EU Law, *i.e.* "principle of autonomy" (Article 19 of the TFEU) and of "non-discrimination" (Article 18 of the TFEU) ((i));
- *Achmea* Judgment rendered by the CJEU on 6 March 2018, determining the incompatibility of intra-EU arbitration ((ii));
- *Komstroy* Judgement rendered by the CJEU on 2 September 2021, determining the incompatibility of ECT arbitration clause with EU law ((iii));
- Opinion 1/17 (CETA) issued by the CJEU on 30 April 2019, confirming the unlawfulness of ISDS mechanism between the EU Member States ((iv));
- *Anie* case Opinion by the Advocate General on 29 October 2020, confirming that the *Achmea* Judgement precludes intra-EU arbitrations under the ECT ((v));
- *Achmea* Declaration issued by the EU Member States of 15 January 2019, over the incompatibility of intra-EU arbitration under the ECT, with EU Law ((vi));
- Position adopted by the EU institutions and the EU Member States' Courts, including the EC and the courts of Germany and Sweden, endorsing the *Achmea* Judgement and the incompatibility of ISDS clauses with EU law when applied intra-EU ((vii));
- Evidence from the modernisation negotiations regarding the ECT between the Contracting Parties ((viii)); and

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<sup>125</sup> Article 18 of the TFEU.

<sup>126</sup> Under Sections 33 and 34 of the Swedish Arbitration Act.

<sup>127</sup> Statement of Defence, paras. 227-229, 276 et al.

- Arbitral jurisprudence, specifically the *Green Power v. Spain* award ((ix)).

(i) Principles of EU Law

261. Respondent submits that the intra-EU application of Article 26 of the ECT, violates EU law principles, namely, the principle of autonomy ((1)); and the principle of non-discrimination ((2)), as follows:

(1) Principle of Autonomy

262. Respondent contends that the offer to enter an arbitration agreement under Article 26 of the ECT is inapplicable to intra-EU disputes, as it violates the principle of autonomy of EU law enshrined in Article 19 of the Treaty on European Union ("TEU") and Articles 267 and 344 of the Treaty on the Functioning of the European Union ("TFEU").<sup>128</sup>

263. Respondent further submits that the principle of autonomy is a well-established principle that aims to preclude the obligations of EU Member States being adjudicated by a body that is not part of the EU judicial system, as confirmed by the Court of Justice of the European Union ("CJEU") in its decision No. C-459/03 *Commission v. Ireland*.<sup>129</sup>

264. In Respondent's view, the CJEU has also found that Article 344 of the TFEU prohibits EU Member States from submitting a dispute involving the interpretation or application of the EU Treaties (Opinion 1/19), or regarding the EU's access to the ECHR (Opinion 2/13), to any dispute resolution method other than that provided for in the EU Treaties (*i.e.* the TEU and the TFEU).<sup>130</sup>

(2) Principle of Non-Discrimination

265. Respondent also submits that the intra-EU application of Article 26 of the ECT would contradict the EU law principle of non-discrimination, enshrined in Article 18 of the TFEU.<sup>131</sup> For example, following Italy's withdrawal from the ECT and pursuant to Article 47(3) of the ECT, Italian investors who made an investment after 1 January 2016 will not

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<sup>128</sup> Statement of Defence, para. 227.

<sup>129</sup> Statement of Defence, para. 231.

<sup>130</sup> Statement of Defence, para. 231.

<sup>131</sup> Statement of Defence, para. 263.

benefit from the protection afforded by the ECT.<sup>132</sup> According to Respondent, Italian investors in this scenario, would be in a disadvantageous position compared to their European counterparts, which would suffice to establish discrimination as prohibited by and under EU law.<sup>133</sup>

(ii) *Achmea* Judgment

266. Respondent contends that the Judgment of the CJEU of 6 March 2018 in *Slovakia v. Achmea*, C-284/16 ("**Achmea Judgement**" or "**Achmea**") constitutes the application of the principle of autonomy of EU law to investor-State dispute resolution and is critical for deciding the issue of jurisdiction in the present case.<sup>134</sup>

(1) Content

267. Respondent points out that in *Achmea*, the CJEU held as follows:

*"Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."*<sup>135</sup>

268. Respondent submits that, in its reasoning, the CJEU held that:

- an arbitral tribunal constituted under an intra-EU BIT may be called upon to interpret or apply EU Law because it forms part of the law in force in every EU

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<sup>132</sup> Statement of Defence, para. 263.

<sup>133</sup> Statement of Defence, para. 263.

<sup>134</sup> Statement of Defence, paras. 231, 233.

<sup>135</sup> Statement of Defence, para. 234; **Exhibit CL-11**, Judgment of the CJEU of 6 March 2018 in *Slovakia v Achmea*, C-284/16, para. 31.

Member State and derives from an international agreement between the Member States;

- an arbitral tribunal would not be entitled to refer to the CJEU for a preliminary ruling because it cannot be classified as "a court or tribunal of a Member State" within the meaning of Article 267 of the TFEU;
- intra-EU BITs could thus prevent disputes from being resolved "*in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law*";
- submitting investment disputes to a body that is not a part of the EU judicial system is not compatible with the principle of sincere cooperation because it calls into question the principle of mutual trust between Member States, as well as the preservation of the law established by the EU Treaties.<sup>136</sup>

269. On this basis, Respondent contends that since the *Achmea* Judgement prevents intra-EU investment arbitration,<sup>137</sup> and assuming Claimant is an EU national and Respondent, an EU Member State, this Tribunal lacks jurisdiction over the present case.<sup>138</sup>

## (2) Substantive Scope

270. Respondent submits that the *Achmea* Judgment is not limited to intra-EU BITs and must be applied to multilateral agreements to which the EU Member States are party, such as the ECT.<sup>139</sup>

271. In particular, Respondent claims that the CJEU's assessment of ISDS provisions in intra-EU BITs was not made conditional upon any particularities of the case, because the *Achmea* Judgement does not refer to the exact wording of Article 8 of the Netherlands-Slovakia BIT or draw a distinction between Treaties entered into exclusively by a Member

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<sup>136</sup> Statement of Defence, paras. 235 - 238; **Exhibit CL-11**, Judgment of the CJEU of 6 March 2018 in *Slovakia v Achmea*, C-284/16, paras. 42 - 58.

<sup>137</sup> Answer, para. 36.

<sup>138</sup> Answer, para. 36; Statement of Defence, para. 227.

<sup>139</sup> Statement of Defence, para. 241.



State and those entered into by the Member States and the EU.<sup>140</sup>

272. In Respondent's view, given that the decisive criteria in the *Achmea* Judgement was the possibility that the arbitral tribunal may need to interpret or apply EU law, it can be concluded that intra-EU investment arbitration is generally incompatible with EU law.<sup>141</sup>
273. Respondent contends that the interpretation or application of EU law by the arbitral tribunal is possible both under the ECT and the 2017 SCC Rules. First, Article 26(6) of the ECT provides that the arbitral tribunal is to decide the issues in dispute in accordance with the Treaty, the applicable rules and principles of international law (comprising EU law).<sup>142</sup> Second, Article 27(1) of the SCC Rules provides that an arbitral tribunal is to apply the law or rule of laws it considers most appropriate to decide the merits of the dispute.<sup>143</sup> Therefore, Respondent claims that this Tribunal may be called upon to apply EU law in the present arbitration.<sup>144</sup>
274. In addition, Respondent contends that examining the factual background of a case may also require the Tribunal to interpret EU law, even if only for the purpose of excluding its application.<sup>145</sup> Respondent submits the regulatory and political background of the claims in this arbitration are strongly linked to EU law: The ECT and EU law both cover the matter of mandatory stocks of liquid fuels which is the activity related to Mercuria's alleged investment, and the Fine imposed on JSE was based on Polish regulations implementing EU directives concerning energy security.<sup>146</sup>

### (3) Temporal Scope

275. Respondent argues that there can be no doubt with regard to the temporal effects of the *Achmea* Judgment in the absence of express temporal restrictions. As a result, Respondent contends CJEU's rulings are binding interpretations of a provision of EU law to be applied

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<sup>140</sup> Statement of Defence, paras. 240-241.

<sup>141</sup> Statement of Defence, para. 242.

<sup>142</sup> Statement of Defence, para. 244; Article 26(6) of the ECT; **Exhibit CL-8**, *Vattenfall vs. Germany*, ICSID Case No. ARB/12/12, Decision of the *Achmea* Issue of 31 August 2018, paras. 140-150; **Exhibit CL-6**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras 4.127, 4.129.

<sup>143</sup> Statement of Defence, para. 244; Article 27(1) 2017 SCC Rules.

<sup>144</sup> Statement of Defence, para. 244.

<sup>145</sup> Statement of Defence, para. 244.

<sup>146</sup> Statement of Defence, para. 245.

*ex tunc*, that is, from the time of the Treaty provision's entry into force.<sup>147</sup>

(iii) *Komstroy* Judgement

276. Respondent also relies on the *Komstroy* Judgment of the CJEU of 2 September 2021 to argue that *Achmea* Judgement analysis applies to the ECT arbitration clause to the effect that the latter is inapplicable in the intra-EU context.<sup>148</sup>

277. Specifically, Respondent quotes the CJEU stating that:

*"the autonomy of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves."*<sup>149</sup>

278. According to Respondent, this argument of the CJEU is supported by the following<sup>150</sup>:

- The ECT arbitration clause allows to bypass the EU judicial system in the same way as the clause denounced in the *Achmea* Judgment.
- The ECT arbitration is distinct from the ordinary commercial arbitration.
- The CJEU views the ECT as a bundle of bilateral obligations.

279. Respondent argues that the *Komstroy* Judgement supports Respondent's argument that the ECT is in conflict from EU law and that conflict should be resolved in favour of EU law. First, the EU status as a Regional Economic Integration Organisation ("**REIO**") is controlling. Second, the conflict rules of general international law and the specific arrangement between Poland, Cyprus, and Sweden point to EU law.<sup>151</sup> Respondent specifically relies on Swedish law as *lex fori* to support its position.<sup>152</sup>

280. Additionally, Respondent noted that the CJEU opined that simple commercial

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<sup>147</sup> Statement of Defence, para. 247.

<sup>148</sup> Respondent's Post-Hearing Brief, para. 36.

<sup>149</sup> Respondent's Post-Hearing Brief, para. 36 with reference to **Exhibit RL-165**, CJEU judgment of 2 September 2021 in case *C-741/19 Republica Moldavie v. Komstroy LLC*, para 65.

<sup>150</sup> Respondent's Post-Hearing Brief, para. 36.

<sup>151</sup> Respondent's Submission on the *Komstroy* case, paras. 8-9.

<sup>152</sup> Respondent's Submission on the *Komstroy* case, para. 11.

transactions cannot qualify as protected investment under the ECT.<sup>153</sup>

(iv) Opinion 1/17 CETA

281. Respondent argues that the CJEU's Opinion 1/17 on the Comprehensive Economic Trade Agreement between the EU and Canada (**CETA**) confirms the CJEU's position on the unlawfulness of ISDS mechanisms between EU Member States.<sup>154</sup> Respondent contends that CETA was accepted because – in contrast to traditional ISDS – it has specific features that insulate the EU legal order from the CETA Court's decision.<sup>155</sup> For example, the CETA contained mechanisms such as the explicit exclusion of (i) the application of EU law, (ii) the control of EU Member States' actions related to the implementation of EU law and (iii) any legal effect of the CETA Tribunal rulings within the EU.<sup>156</sup> Respondent submits that none of these mechanisms are present in the ECT.<sup>157</sup>

(v) *Anie* Case

282. Respondent argues that the Advocate General in his Opinion of 29 October 2020 in the case C-798/18 *Federazione nazionale delle imprese elettrotecniche ed elettroniche v. Ministero dello Sviluppo Economico, Gestore dei servizi energetici (GSE) SpA* ("**Anie case**"), confirmed that the *Achmea* Judgement precluded the intra-EU application of ECT dispute settlement, as follows:

"... it does not seem to me that that provision can be relied on by investors of the Union as against institutions of the Union or Member States."<sup>158</sup>

"In the light of that judgment, it seems to me that, inasmuch as Article 26 of the Energy Charter, which is headed 'Settlement of disputes between an investor and a Contracting Party', provides that such disputes may be resolved by arbitral tribunals, that provision is not applicable

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<sup>153</sup> Respondent's Submission on the *Komstroy* case, paras. 5, 13-14.

<sup>154</sup> Statement of Defence, para. 250; **Exhibit CL-1**, CJEU Opinion of 30 April 2019.

<sup>155</sup> Statement of Defence, para. 250.

<sup>156</sup> Statement of Defence, para. 250; **Exhibit CL-1**, CJEU Opinion of 30 April 2019, paras. 121-133.

<sup>157</sup> Statement of Defence, para. 250.

<sup>158</sup> Statement of Defence, para. 251; **Exhibit RL-048**, *Anie* Opinion, para. 92.

to intra-Community disputes."<sup>159</sup>

(vi) *Achmea* Declaration of the EU Member States

283. Respondent submits that on 15 January 2019, 22 EU Member States (including Cyprus and Poland) signed a Declaration of the Representatives of the Governments of the Member States on the legal consequences of the judgement of the Court of Justice in *Achmea* and on investment protection in the European Union ("**Achmea Declaration**").<sup>160</sup>
284. It is Respondent's position that the *Achmea* Declaration expresses the understanding that EU law takes precedence over investment treaties concluded between Member States under EU principles, but also under public international law, including the Vienna Convention on the Law of Treaties ("**VCLT**") regarding the conflict of laws (*lex posterior*).<sup>161</sup>
285. Moreover, the *Achmea* Declaration contains its signatories' understanding of the limits to the intra-EU applicability of the ECT pursuant to Article 31 of the VCLT.<sup>162</sup> In any case, being an unequivocal expression of the parties' consent, it trumps any other means of interpretation.<sup>163</sup>
286. Respondent further contends that the *Achmea* Declaration is of binding nature, as demonstrated by various respondent States' use of this Declaration as the authoritative statement on the interpretation or application of the ECT.<sup>164</sup> Respondent maintains there is nothing in the Declaration or in the circumstances surrounding its conclusion to suggest that its signatories did not intend it to be a binding instrument.<sup>165</sup> Respondent submits that this

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<sup>159</sup> Statement of Defence, para. 251; **Exhibit RL-048**, Opinion of AG Øe of 29 October 2020 in case C-798/18 *Anie* fn. 5 to para. 93.

<sup>160</sup> Statement of Defence, para. 258; **Exhibit C-12**, Declaration of the Representatives of the Governments of the Members States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, dated 15 January 2019, p. 2 ("*[f]urthermore, international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied.*").

<sup>161</sup> Statement of Defence para. 260.

<sup>162</sup> Statement of Defence, para. 262.

<sup>163</sup> Statement of Defence, para. 262.

<sup>164</sup> Statement of Defence, para. 262.

<sup>165</sup> Statement of Defence, para. 262.

understanding is supported by the CJEU.<sup>166</sup>

(vii) EU Institutions and EU Member States' Courts

287. It is Respondent's position that the interpretation of EU law proposed by the CJEU in *Achmea* and *Komstroy* has been understood and endorsed by all relevant stakeholders, including the EU Institutions and Member States along with their domestic courts.<sup>167</sup>

288. *First*, the Commission as the "guardian of the Treaties", issued a Communication on intra-EU investment, confirming the application of the *Achmea* Judgment to the ECT and thus, the incompatibility of Article 26 of the ECT with EU Law, as follows:

*"[t]he Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in Achmea applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU."*<sup>168</sup>

289. *Second*, domestic courts of EU Member States have understood the *Achmea* and *Komstroy* Judgements as rendering the intra-EU application of ISDS clauses impossible:<sup>169</sup>

- i. The German Federal Court, in its decision of 31 October 2018, applied the principles formulated by the CJEU in the *Achmea* Judgement, finding that the conflict

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<sup>166</sup> Statement of Defence para. 262; **Exhibit RL-048**, Opinion of AG Øe of 29 October 2020 in case C-798/18 *Anie*, fn. 55 to para 93.

<sup>167</sup> Statement of Defence, para. 252.

<sup>168</sup> Answer para. 37; Statement of Defence, para. 256; **Exhibit RL-008**, Communication of the Commission to the European Parliament and the Council, *Protection of intra-EU investment*, 19 July 2018, COM(2018), pp. 3-4.

<sup>169</sup> Statement of Defence, para. 255.

between the ISDS clause in investment agreements and EU law leads to a lack of a valid arbitration agreement.<sup>170</sup>

- ii. The Stockholm Court of Appeal, in its *PL Holdings* judgement of 22 February 2019, endorsed the *Achmea* interpretation of EU Law, finding that it is not possible to enter into arbitration agreements on the basis of intra-EU BITs.<sup>171</sup> The Supreme Court of Sweden later set aside two arbitral awards in its *PL-Holdings* judgement of 14 December 2022, finding that the arbitration was impermissible under EU law and thus in conflict with the principles of the legal order in Sweden.<sup>172</sup>
- iii. The Svea Court of Appeal set aside the *Novenergia II v. Spain* award in its decision of 13 December 2022, finding that ECT arbitration clause was invalid in an intra-EU context and that the dispute was therefore non-arbitrable.<sup>173</sup>

(viii) Modernisation of the ECT

290. Respondent notes that in June 2022, the negotiations on the modernisation of the ECT were concluded and a tentative agreement was reached among 53 Contracting Parties.<sup>174</sup> Among other revisions of the Treaty, Article 24(3) is of importance:

*"For greater certainty, Articles 7, 26, 27, 29 shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation in their mutual relations."*<sup>175</sup>

291. Respondent submits that the plain interpretation of Article 24(3) in the light of Article 31 of the VCLT, specifically the phrase "[f]or greater certainty", confirms that Article 26 of

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<sup>170</sup> Statement of Defence para. 253; **Exhibit RL-073**, Federal Court of Justice (*Bundesgerichtshof*) Judgment, Case No. I ZB 2/15, 31 October 2018.

<sup>171</sup> Statement of Defence, para. 254; **Exhibit RL-074**, Judgment of the Svea Court of Appeal, Case No. T 8538-17, T 120333-17, 22 February 2019, p. 40.

<sup>172</sup> Respondent's Submission on New Evidence and Re-Updated Statement on Costs, paras. 16-21; **Exhibit RL-172**, *PL-Holdings v. Poland*, Judgment of Supreme Court of Sweden, Case No. T 1569-19, 14 December 2022.

<sup>173</sup> Respondent's Submission on New Evidence and Re-Updated Statement on Costs, paras. 9-15; **Exhibit RL-171**, *Novenergia II - Energy & Environment (SCA), SICAR v. Spain*, Judgment of the Svea Court of Appeal, Case No. T 4658-18, 13 December 2022.

<sup>174</sup> Respondent's Submission on New Evidence dated 18 July 2022, para. 8.

<sup>175</sup> Respondent's Submission on New Evidence dated 18 July 2022, para. 9.

the ECT is not applicable between an intra-EU investor and the EU Contracting Party.<sup>176</sup> Respondent also relies on the EC Announcement to the same effect.<sup>177</sup>

(ix) *Green Power Award*

292. Respondent submits that the Tribunal should follow the SCC award in *Green Power v. Spain* of 16 June 2022.<sup>178</sup>
293. According to Respondent, the *Green Power v. Spain* tribunal declared that its jurisdiction was not only governed by Article 26 of the ECT, but also by international law, and the law of the seat. *i.e.* Swedish arbitration law.<sup>179</sup> By operation of Section 48 of the Swedish Arbitration Act, the *Green Power v. Spain* tribunal held that the primacy of EU law in the relations between the EU Member States is a matter of *lex superior*.<sup>180</sup>
294. Moreover, no disconnection clause was needed to carve out the intra-EU disputes from the remit of Article 26 of the ECT.<sup>181</sup>
295. In contrast, Respondent submits that the Tribunal should disregard the Annulment Committee decision in *RREEF Infrastructure v. Spain*. Respondent argues that the decision is inapplicable in the present case, as the standard for the ICSID annulment review does not allow the Committee to assess whether the law was correctly or wrongly applied.<sup>182</sup>

**b) Investor Coming from the Same Territory as Respondent**

296. Alternatively, should the Tribunal treat Article 26 of the ECT as applicable to intra-EU disputes, Respondent contends that it would still have to deny its jurisdiction due to the fact that Claimant's investment was made within the same "Area", within the meaning of Article 1(10) of the ECT.<sup>183</sup>

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<sup>176</sup> Respondent's Submission on New Evidence dated 18 July 2022, para. 10.

<sup>177</sup> Respondent's Submission on New Evidence dated 18 July 2022, para. 11.

<sup>178</sup> Respondent's Submission on New Evidence dated 18 July 2022, para. 17.

<sup>179</sup> Respondent's Submission on New Evidence dated 18 July 2022, para. 17.

<sup>180</sup> Respondent's Submission on New Evidence dated 18 July 2022, para. 18 with reference to **Exhibit RL-170**, *Green Power v. Spain*, SCC Case No. V 2016/135, Award of 16 June 2022, paras. 468-477.

<sup>181</sup> Respondent's Submission on New Evidence dated 18 July 2022, para. 17.

<sup>182</sup> Respondent's Submission on New Evidence dated 18 July 2022, paras. 12-16.

<sup>183</sup> Statement of Defence, para. 273; Article 10(1) of the ECT: "...With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation."

297. For Respondent, the term "area" in said provision encompasses the territory of (i) each of the ECT Contracting States (EU and non-EU countries); and (ii) of the EU as an REIO, which is also an ECT Contracting State. As a result, an EU investor investing in another EU State is investing in the same territory or economic area, falling outside the scope of the dispute resolution mechanism provided for in Article 26 of the ECT.<sup>184</sup>
298. According to Respondent, in the arbitration at hand, it should be logically concluded that, when referring to investments made "in the territory" of a Contracting Party, Article 26(1) of the ECT refers simultaneously to both the territory of an EU Member State (Respondent) and the territory of the EU.<sup>185</sup> The Tribunal notes that this argument is also raised by the EC Submission (referred below).<sup>186</sup>
299. Respondent argues that such interpretation is not precluded by the plain meaning of the text of the ECT, and that it is the only reading mandated under Article 31(3)(c) of the VCLT which avoids a conflict between the ECT and EU law.<sup>187</sup>
300. Finally, Respondent submits that as a consequence of the foregoing:
- i. There is no valid arbitration agreement under Article 26 of the ECT;<sup>188</sup>
  - ii. Subsidiarily, Claimant (the investor) comes from the same territory as Respondent, falling outside the scope of the arbitration clause in Article 26 of the ECT;<sup>189</sup> and
  - iii. In any event, an arbitral award rendered by this Tribunal would be non-enforceable in Sweden as the *lex arbitri*, which would be contrary to the Tribunal's duty to render an enforceable award.<sup>190</sup>

## 2. EC Submission

301. On behalf of the EU, the European Commission made the following submissions concerning the interpretation of Article 26 of the ECT: Relevant EU law background (a));

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<sup>184</sup> Statement of Defence, para. 274.

<sup>185</sup> Statement of Defence, para. 274.

<sup>186</sup> EC Submission, para. 37.

<sup>187</sup> Statement of Defence, paras. 228, 275.

<sup>188</sup> Statement of Defence, paras. 264 et al.

<sup>189</sup> Statement of Defence, paras. 273-275.

<sup>190</sup> Statement of Defence, paras. 276-278.



Article 26 of the ECT does not apply to intra-EU disputes (**b**)); and the ECT only creates rights *vis-à-vis* third countries (**c**)).

**a) Relevant EU Law Background**

302. The Commission refers to the *principle of autonomy* of EU law preserved by (i) Article 267 of the TFEU, which sets forth the preliminary ruling procedure that is the keystone of uniform interpretation and application of EU law; and (ii) Article 344 of the TFEU that reinforces said objective, by prohibiting Member States from creating other dispute settlement mechanisms for matters implicating EU Law.<sup>191</sup>
303. Additionally, the Commission states that equally essential is the *principle of primacy* of EU law (developed by jurisprudence) to ensure EU law takes precedence over the legal order applicable in each Member State.<sup>192</sup> The Commission submits that the CJEU has held that the constitutional order of the EU contains certain core principle prevailing over Treaty provisions, including the primacy of EU law.<sup>193</sup>
304. The Commission affirms that EU law is based on a set of common values as provided for in Article 2 of the TFEU, under which the *principle of mutual trust* between Member States is to be recognised and the law of the Union respected.<sup>194</sup>
305. It is the submission of the Commission that international courts and tribunals have consistently accepted the nature of EU law as "international law" applicable between Member States.<sup>195</sup>

**b) Article 26 of the ECT Inapplicable to the Intra-EU Disputes**

306. The Commission submits that no conflict exists between ECT and EU Law (*i.e.* TEU and

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<sup>191</sup> EC Submission, para. 15.

<sup>192</sup> EC Submission, para. 16.

<sup>193</sup> EC Submission, para. 16; Judgment of the CJEU of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para. 285.

<sup>194</sup> EC Submission, para. 17.

<sup>195</sup> EC Submission, paras. 18, 70; Judgment of the CJEU of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, para. 41; Judgment of 5 February 1963 in *Van Gend en Loos*, 26/62, EU:C:1963:1 in which the CJEU refers to the then European Economic Community as "*a new legal order of international law*", p. 12.

TFEU), since the ECT does not apply *inter se* between two EU Member States.<sup>196</sup>

307. Alternatively, the Commission submits that in case of conflict, EU Law should prevail over the ECT under the principle of primacy, applied as a "*special*" conflict rule (*i.e.* Member States are not competent to place any international agreement on a higher footing than a rule of EU law).<sup>197</sup>
308. The Commission rejects the view adopted by arbitral tribunals that Article 16 of the ECT, which provides that other treaties concerning investment promotion, protection and dispute resolution shall not "be construed to derogate" from the ECT, is a special conflict rule in favour of the ECT, stating that this provision, does not reverse the primacy of EU law (as a *lex posterior*).<sup>198</sup>
309. In addition, the Commission submits that the principle of primacy extends to intra-EU application of multilateral treaties (*e.g.*, ECT), even where *third countries* are also part of them.<sup>199</sup>
310. The Commission further states that Articles 267 and 344 of the TFEU preclude intra-EU investment arbitration, as interpreted by the CJEU in the *Achmea* Judgment.<sup>200</sup> In any event, the Commission contends that multilateral investment treaties such as the ECT create a bundle of bilateral reciprocal obligations between Contracting Parties, each of which operates independently of the others, and are thus no different to bilateral investment treaties (the *Achmea* Judgment was based on a BIT).<sup>201</sup>
311. In the Commission's view, EU Law already protects all forms of intra-EU investment and introducing a further dispute resolution method (*i.e.* Article 26 of the ECT) to a situation covered by EU Law unjustifiably calls into question the principle of mutual trust (Article 2 of the TEU) upon which the Union is founded.<sup>202</sup> The Commission argues that the CJEU confirmed in *Achmea* that the key problem was the violation of the principle of mutual

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<sup>196</sup> EC Submission, para. 3.

<sup>197</sup> EC Submission, paras. 3, 16, 78-79, 85, 89-92.

<sup>198</sup> EC Submission, para. 81.

<sup>199</sup> EC Submission, para. 80.

<sup>200</sup> EC Submission, paras. 62, 63(a).

<sup>201</sup> EC Submission, para. 60.

<sup>202</sup> EC Submission, para. 17.

trust, thus leaving no room for treating the intra-EU application of the ECT differently from intra-EU BITs.<sup>203</sup>

312. On this basis, the Commission states as follows:

*"There is simply no space – or need for that matter – for a separate avenue providing other substantive rights or protection than those afforded by the Union legal order."*<sup>204</sup>

313. The Commission further argues that both the CJEU's Opinion 1/17 (CETA) and the Commission's Decision SA:40348, support the conclusion that the intra-EU application of Article 26 of the ECT is not only in breach of Articles 267 and 344 of the TFEU, but also in breach of the principles of autonomy and mutual trust.

314. It is the Commission's contention that both the *Achmea* Judgment and Opinion 1/17 (CETA) apply equally to the intra-EU application of ECT, as they deal with the same legal issue of interpretation of EU Law.<sup>205</sup> According to the Commission, EU law is "international law" applicable between all Member States and is therefore covered by the term "*applicable rules and principles of international law*" under Article 26 of the ECT with the result that EU law is binding under the ECT in an intra-EU context, pursuant to Article 1(3) of the ECT.<sup>206</sup>

315. Moreover, the Commissions contends that the intra-EU application of the ECT may require the interpretation or application of EU law while arbitral tribunals constituted under the ECT are beyond the supervision and control of the EU judicial system because there is no full review of an arbitral award by a court in a Member State.<sup>207</sup> Investor-State dispute settlement is therefore only permissible in treaties between the EU and *third countries* where the principles of mutual trust and sincere cooperation between EU Member States do not apply.<sup>208</sup>

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<sup>203</sup> EC Submission, para. 75.

<sup>204</sup> EC Submission, para. 17.

<sup>205</sup> EC Submission, paras. 66, 69-70.

<sup>206</sup> EC Submission, para. 70.

<sup>207</sup> EC Submission, para. 74.

<sup>208</sup> EC Submission, para. 75.

**c) ECT Only Creates Rights *vis-à-vis* Third Countries**

316. The Commission argues that Article 26 of the ECT only creates rights and obligations between the EU and EU Member States *vis-à-vis* third countries (not within the EU internal market in energy), for the following reasons:
- i. EU and EU Member States are a single entity of international law;
  - ii. A REIO clause is used in the ECT; and
  - iii. The intra-EU inapplicability of ECT is confirmed by interpretative declarations.
317. *First*, the Commission states that CJEU case law confirms that EU Member States are bound by treaty obligations to other contracting parties, but not between EU Member States because the EU and its Member States are considered a "*single entity of public international law*".<sup>209</sup> Referring to Opinion 2/91, the Commission submits that the CJEU found that where a multilateral international agreement is entered into by the EU and EU Member States, both have a "*duty of cooperation*" that "*results from the requirement unity in the international representation of the Community*".<sup>210</sup>
318. The Commission contends that, by the same token, pursuant to Article 31 of the VCLT, an EU investor making an investment in another EU Member State, falls outside of the scope of Article 26 of the ECT, in that said "*Investor*" is not making an investment in the "*Area*" of "*another Contracting Party*". Rather, said investor would be investing in the same economic area of the EU.<sup>211</sup>
319. *Second*, the Commission maintains that the use of the so-called REIO clause in the ECT reflects the understanding of *third countries* that the EU and EU Member States are a single entity of public international law. According to the Commission, it is recognised by the common practice of the international community, through the REIO clause, that the EU and its Member States, when acting together on the international scene, as in the case of the ECT, only create legal obligations *vis-à-vis* third countries.<sup>212</sup>

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<sup>209</sup> EC Submission, paras. 21, 23, 26.

<sup>210</sup> EC Submission, para. 20.

<sup>211</sup> EC Submission, para. 37.

<sup>212</sup> EC Submission, para. 34.

320. *Third*, the Commission refers to interpretative declarations of the Commission and the EU Contracting Parties (as the "masters of the treaties") informing arbitral tribunals of the "correct interpretation" of the ECT.
321. The Commission refers to its Communication of 19 July 2018, that Article 26 of the ECT "*if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member State of the EU and another Member State of the EU*".<sup>213</sup>
322. Further, the Commission submits that the 2019 Interpretative Declaration of EU Member States (*i.e.* stating that the ECT does not apply intra-EU and signed by both Cyprus and Poland) has a "binding force" upon arbitral tribunals.<sup>214</sup> According to the Commission, the silence of other EU States in said Declaration is irrelevant, since silence does not express a difference in view, but the absence of a view.<sup>215</sup>
323. The Commission invited the Tribunal (should the Tribunal have any doubt) to suspend this arbitration until the CJEU delivers its Opinion on the compatibility of intra-EU application of the ECT with the EU Treaties, as requested by the Kingdom of Belgium and, separately, the Svea Court of Appeal in Sweden.<sup>216</sup>
324. It is the position of the Commission that the CJEU has the exclusive jurisdiction over the interpretation and application of international agreements concluded by the EU and EU Member States, insofar as the application of these agreements between two EU Member States is at stake. Further, the Commission maintains that the CJEU's rulings are binding upon EU Member States and arbitral tribunals as a matter of public international law, as supported by the ICSID tribunal in *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain* ("**BayWa v. Spain**") Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019.<sup>217</sup>
325. Based on the foregoing, the Commission concludes that Poland has not validly consented to intra-EU arbitration under the ECT, and this arbitral tribunal lacks the competence to

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<sup>213</sup> EC Submission, para. 50.

<sup>214</sup> EC Submission, paras. 10-11, 56.

<sup>215</sup> EC Submission, para. 11, Footnote 18.

<sup>216</sup> EC Submission, paras. 4, 76.

<sup>217</sup> EC Submission, paras. 5-6.

hear the present case (*i.e.* initiated by a Cypriot investor) <sup>218</sup>

### 3. Claimant's Position

326. In this section, the Tribunal will summarise Claimant's position on the *Achmea* objection raised by Respondent, and Claimant's comments on the EC Submission. In particular, Claimant submits that the *Achmea* Judgment is not applicable to the ECT (a)) and neither is the *Komstroy* Judgement (b)); while discussing the rules of treaty interpretation (c)); and the role of the EU as a Contracting Party to the ECT (d)).

#### a) No Impact of the *Achmea* Judgment on the ECT

327. Claimant rejects Respondent's argument that the *Achmea* Judgment is applicable to the ECT because the Judgment only refers to intra-EU BITs and is silent on the ECT.<sup>219</sup> According to Claimant, the CJEU itself confirmed this view in its Opinion 1/17 of 30 April 2019, regarding the ISDS mechanism in the CETA.<sup>220</sup>

328. Claimant contends that there is no single decision by any arbitral tribunal or a domestic court in the EU supporting Respondent's application of the *Achmea* Judgment to the ECT's arbitration clause.<sup>221</sup>

329. *First*, Claimant submits that arbitral tribunals have consistently refused to deny jurisdiction under the so-called *Achmea* objection, considering, *inter alia*, (i) the lack of conflict between the ECT and EU Law; (ii) non-EU countries did not accept that EU Law would prevail over any other norm; (iii) Article 16 of the ECT as a conflict rule confirms that Respondent's view is untenable; (iv) nothing in the EU precludes ISDS under the ECT; and (v) Article 344 of the TFEU only applies between Member States and not between an investor and a State.<sup>222</sup>

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<sup>218</sup> EC Submission, para. 93.

<sup>219</sup> Statement of Claim, para. 19.

<sup>220</sup> Statement of Claim, para. 19.

<sup>221</sup> Statement of Claim, paras. 34, 53; Claimant's comments on the EC Submission, paras. 50 et al.

<sup>222</sup> Statement of Claim paras. 35-51; **Exhibit CL-6**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.146; **Exhibit CL-7**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30 Decision on Jurisdiction of 6 June 2016, para. 74; **Exhibit CL-8**, *Vattenfall vs. Germany*, ICSID Case No. ARB/12/12, Decision of the *Achmea* Issue of

330. *Second*, Claimant refers to the Svea Court of Appeal in Stockholm granting a provisional stay of enforcement of arbitration awards, for example in the case *Novenergia II v. Italy*.<sup>223</sup> However, Claimant maintains that this decision has no bearing on the merits of the award in said case and is a practical consequence of the expected ruling by the same court in another pending case of annulment of an arbitral award (*i.e. Novenergia II v. Spain*).<sup>224</sup> It is Claimant's position that Respondent cannot draw any conclusion from State courts' provisional rulings suspending proceedings pending the recognition or annulment of arbitral awards.<sup>225</sup>
331. With regard to the judgments of the Svea Court of Appeals in *Novenergia II v. Spain* and the Swedish Supreme Court in *PL Holdings v. Poland*, Claimant submits that these decisions are inapplicable to the case at hand and have no impact on this Tribunal's jurisdiction or the enforceability of this Award.<sup>226</sup>
332. Regarding Opinion 1/17 (CETA), Claimant refutes the argument advanced in the EC Submission that said Opinion "*further clarified the scope of the Judgment in Achmea*".<sup>227</sup> Claimant affirms that the CJEU made a clear distinction between intra-EU BITs and multilateral treaties with non-EU countries.<sup>228</sup>

#### **b) No Impact of the *Komstroy* Judgment on the ECT**

333. Claimant submits that the *Komstroy* Judgement of the CJEU equally has no effect on the dispute resolution provisions of the ECT for the following reasons:
- The underlying arbitral case was not an intra-EU one but rather a dispute between

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31 August 2018, para. 192; **Exhibit CL-9**, *Masdar vs. Spain*, ICSID Case No. ARB/14/1, Award of 16 May 2018, para. 340; **Exhibit CL-10**, *Novenergia II vs. Italy*, Award of 23 December 2018, para. 398; **Exhibit CL-12**, *9REN vs. Spain*, ICSID Case No. ARB/15/15, Award of 31 May 2019, para. 173; **Exhibit CL-13**, *Stadtwerke München vs. Spain*, Award of 2 December 2019, para. 135.

<sup>223</sup> Statement of Claim, para. 53; **Exhibit CL-14**, Minutes of the Svea Court of Appeals in Stockholm, dated 28 March 2019 (Case No. T 3229-19).

<sup>224</sup> Statement of Claim, para. 53; Annulment proceedings pending before the Svea Court of Appeal in Stockholm (Case No. T 4658-18), *Novenergia II vs. the Kingdom of Spain*, (SCC Arbitration (2015/06); **Exhibit BSOL 37**, Press release, Spain secures stay of enforcement of energy charter treaty award in Swedish court, iareporter.com, 18 May 2018.

<sup>225</sup> Statement of Claim, para. 54.

<sup>226</sup> Claimant's Comments to the New Evidence, paras. 9-37.

<sup>227</sup> Claimant's Comments on the EC Submission, para. 17; EC Submission, para. 63(b).

<sup>228</sup> Claimant's Comments on the EC Submission, paras. 17-19; **Exhibit CL-1**, CJEU Opinion 1/17 of 30 April 2019, paras. 126-127.

a Ukrainian company and the Republic of Moldova.<sup>229</sup>

- The CJEU's findings concerning the ECT were not made in response to the legal inquiries referred to by the Paris Court of Appeals.<sup>230</sup>
- In contrast to the *Achmea* Judgement, where the compatibility of intra-EU investor-state arbitrations with EU law were the core of the CJEU's *ratio decidendi*, in the *Komstroy* Judgement, it is merely *obiter dicta*.<sup>231</sup>

334. Therefore, Claimant argues that the *Komstroy* Judgment has no binding force on this Tribunal for the issue of the compatibility of intra-EU state-investor arbitrations under the ECT with EU law.<sup>232</sup>

335. However, Claimant notes that the CJEU's interpretation of Article 1(6)(c) of the ECT (*i.e.* that a mere claim to money arising from a commercial contract cannot be treated as an investment if it is not associated with the investment) is in line with Claimant's position in this arbitration.<sup>233</sup>

### c) Rules of Treaty Interpretation

336. Claimant rejects the statement in the EC Submission that there is no "*hierarchy between the interpretative elements*" under the VCLT.<sup>234</sup> In Claimant's view, the Commission tries to mix the primary rules of interpretations (Article 31 of the VCLT) with the supplementary means of interpretations (Article 32 of the VCLT).

337. In particular, Claimant contends that the Commission attempts to include for "context" the alleged "intentions" of the EU and its Member States as an indication of the proper interpretation of the ECT.<sup>235</sup> Claimant submits that the "preparatory work of the treaty and the circumstances of its conclusion" are to be treated as supplementary means of interpretation only when absolutely necessary in accordance with Article 32 of the

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<sup>229</sup> Claimant's Comments to the Judgment in *Moldova vs. Komstroy*, para. 5.

<sup>230</sup> Claimant's Comments to the Judgment in *Moldova vs. Komstroy*, paras. 6-7.

<sup>231</sup> Claimant's Comments to the Judgment in *Moldova vs. Komstroy*, paras. 8-11.

<sup>232</sup> Claimant's Comments to the Judgment in *Moldova vs. Komstroy*, para. 12.

<sup>233</sup> Claimant's Comments to the Judgment in *Moldova vs. Komstroy*, paras. 16-17.

<sup>234</sup> Claimant's comments on the EC Submission, para. 23.

<sup>235</sup> Claimant's comments on the EC Submission, para. 24.



VCLT.<sup>236</sup>

338. Claimant further claims that both the EU and the EU Member States (could but) did not "opt out" from the intra-EU application of the ISDS mechanism of the ECT, nor did they include a "disconnection clause" (which was proposed by the EC but ultimately not included).<sup>237</sup> Claimant refers to the following statement from a commentary on the *Achmea* Judgement and the intra-EU applicability of the ECT: "*the EU and its member States furthermore reiterated in a unilateral political declaration their general consent to investment arbitration under the ECT without explicitly limiting it to extra-EU relations and disputes.*"<sup>238</sup>
339. Moreover, Claimant affirms that, according to the *pacta sunt servanda* principle (Article 27 of the VCLT), a party to an international treaty cannot invoke the provisions of its internal laws as a justification for its failure to perform the treaty.<sup>239</sup> Therefore, in Claimant's view, neither the EU nor its Member States (as Contracting Parties) can invoke the provisions of their own laws, including EU law, as a reason for not fulfilling their obligations assumed under the ECT.<sup>240</sup>
340. In other words, Claimant submits that in practice, the EC Submission's proposal and opinions expressed therein, lead to the derogation of the principle of *pacta sunt servanda*, an international principle on which public law stands.<sup>241</sup>

#### **d) EU as a Contracting Party to the ECT**

341. Claimant argues that the impact of the ECT extends far beyond the EU with 52 States as signatory parties (Contracting Parties), including all EU Member States, in addition to other 37 States as observers to the ECT, and most of the Contracting Parties have ratified it with the exception of Australia, Belarus, Norway and Russia.<sup>242</sup>

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<sup>236</sup> Claimant's comments on the EC Submission, para. 25.

<sup>237</sup> Statement of Claim para. 29.

<sup>238</sup> Statement of Claim para. 29; **Exhibit CL-3**, J. R. Basedow, "*The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration*", Journal of International Economic Law, dated 31 January 2020;

<sup>239</sup> Statement of Claim para. 32.

<sup>240</sup> Statement of Claim para. 33.

<sup>241</sup> Claimant's comments on the EC Submission, para. 26.

<sup>242</sup> Statement of Claim para. 27.

342. Furthermore, Claimant rejects both Respondent's and the Commission's attempt to transform the political Declaration of some EU Member States into a "binding" legal document, while ignoring the opposing declarations of other Member States on the same subject (*i.e.* Finland, Luxembourg, Malta, Slovenia, Sweden, and Hungary).<sup>243</sup> According to Claimant, the so-called *Achmea* Declaration signed by 22 (out of 27) EU Member States, including Poland, is only an expression of political notions and future actions.<sup>244</sup> In light of these conflicting declarations, Claimant states that the Commission itself has acknowledged the necessity to deal with the problem properly.<sup>245</sup>
343. Claimant also contends that, on 5 May 2020, 23 EU Member States signed an agreement to terminate their intra-EU BITs ("**Termination Agreement**"),<sup>246</sup> stating the opposite view to the EC Submission, as follows:

*"CONSIDERING that this Agreement addresses intra-EU bilateral investment treaties; it does not cover intra-EU proceedings on the basis of Article 26 of the Energy Charter Treaty. The European Union and its Member States will deal with this matter at a later stage."*<sup>247</sup>

344. On this basis, Claimant's rejects the argument advanced by Respondent and the Commission that the applicability of Article 26 of the ECT (between Member States) has already been determined by the "binding interpretation" of the *Achmea* Declaration, when in the Termination Agreement, the EU Member States declared the exact opposite.<sup>248</sup>

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<sup>243</sup> Claimant's comments on the EC Submission, paras. 16, 31-33; **Exhibit CL-13**, Declaration of the Representatives of the Governments of the Members States on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, dated 16 January 2019, signed on behalf of Finland, Luxembourg, Malta, Slovenia and Sweden; **Exhibit CL-14**, Declaration of the Representative of the Government of Hungary on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, dated 16 January 2019.

<sup>244</sup> Statement of Claim para. 21; **Exhibit C-12**, Declaration of the Representatives of the Governments of the Members States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, dated 15 January 2019.

<sup>245</sup> Statement of Claim para. 24; **Exhibit C-15**, EU Commission's statement: "EU Members agree on a plurilateral treaty to terminate bilateral investment treaties", dated 24 October 2019.

<sup>246</sup> Save for Austria, Finland, Ireland and Sweden.

<sup>247</sup> **Exhibit C-115**, the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, dated 5 May 2020, Official Journal of the European Union (L 169/1), para. 10 of the Preamble.

<sup>248</sup> Claimant's comments on the EC Submission, para. 37.

345. Furthermore, Claimant rejects the EC's position that the EU and its Member States should be treated as a single entity, since the EU acted as a REIO under the ECT, inferring that all Member States speak as one voice and should be treated as one collective party.<sup>249</sup> Claimant submits that the EU Member States have never unanimously agreed on the issue of Article 26 of the ECT as evidenced by the different Declarations amongst them.<sup>250</sup>

#### **4. Tribunal's Analysis**

##### **a) Law Governing Tribunal's Jurisdiction**

346. In order to determine whether this Tribunal has jurisdiction to hear the present dispute, the Tribunal must first determine the law governing its jurisdiction.

347. In that connection, the Tribunal recalls the distinction between the law governing the merits of a dispute and the law governing the jurisdiction of a tribunal, including the validity and scope of the arbitration agreement.

##### **(i) Public International Law Framework**

348. The Tribunal is conscious of the fact that the matters discussed below have proven to be quite divisive in the recent years. Leaving political discussions aside, this Tribunal is limited in its mandate to the existing legal provisions, which it must examine with diligence. While the matter of legal framework is, almost by definition, a rather general one, it is decisive for the subsequent determination of the scope and limits of the Tribunal's mandate.

349. This Tribunal's legal framework is, first and foremost, the international law one. The Tribunal derives its mandate from a public international law instrument, namely the ECT,<sup>251</sup> so its jurisdictional analysis must be based on the ECT itself as well as other instruments and principles of public international law. In this regard, the Tribunal finds itself on a similar footing as other investment arbitration tribunals:

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<sup>249</sup> Claimant's comments on the EC Submission, para. 30.

<sup>250</sup> Claimant's comments on the EC Submission, paras. 32-33.

<sup>251</sup> Request for Arbitration, paras. 16-18.

*"[T]his Tribunal is placed in a public international law context and not a national or regional context. [...] [T]his Tribunal is required to operate in the international legal framework of the ECT and the ICSID Convention, outside the European Union."*<sup>252</sup> (*Electrabel v. Hungary*)

*"The Tribunal's jurisdiction is derived from the express terms of the ECT, a binding treaty under international law. The Tribunal is not an institution of the European legal order, and is not subject to the requirements of that legal order."*<sup>253</sup> (*Eiser v. Spain*)

*"This Tribunal [...] derives its authority not from national or EU law but from an international agreement and from the rules of public international law. [...] The Tribunal [...] is concerned – for purposes of determining the existence and extent of its jurisdiction – not with the possible effect of the ECT within the national legal orders of States but with its legal effect in international law."*<sup>254</sup> (*LBBW v. Spain*)

(ii) Article 26 of the ECT as a Starting Point

350. From the standpoint of public international law, the Tribunal must first look at the existence and scope of the Parties' consent to arbitrate pursuant to the ECT.<sup>255</sup>

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<sup>252</sup> **Exhibit CL-6**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.112.

<sup>253</sup> *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 199.

<sup>254</sup> *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, paras. 102, 178.

<sup>255</sup> See **Exhibit RL-170**, *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, para. 336; **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 124: "The Tribunal's competence to decide the present dispute is derived from consent of the Parties to arbitrate pursuant to the ECT. In the absence of any choice of law clause for the law applicable to the Tribunal's jurisdiction, it follows that questions of the Tribunal's jurisdiction must be answered under the terms of the ECT itself, and in particular Article 26 thereof."

351. As the ICSID tribunal in *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain* ("**LBBW v. Spain**") noted:

*"Where a claimant seeks to bring a case on the basis of an arbitration provision contained, not in a contract to which it and the respondent are parties, but in a treaty between the respondent and another State or States, it is well established that the arbitration provision in the treaty acts as an offer by the respondent which is accepted by the claimant filing its request for arbitration. In the present case, the issue which has to be decided in the present phase of the proceedings is whether Article 26 of the ECT constitutes a valid offer by Spain to the Claimants which they are able to accept."*<sup>256</sup>

352. Article 26 of the ECT provides in the pertinent parts as follows:

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

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

*a. to the courts or administrative tribunals of the Contracting Party party to the dispute;*

*b. in accordance with any applicable, previously agreed dispute settlement procedure; or*

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<sup>256</sup> *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 88.

*c. in accordance with the following paragraphs of this Article.*

*3.*

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

*b.*

*i. The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).*

*[...]*

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

*a.*

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

*ii. The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the 'Additional Facility*

*Rules’), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;*

*b. a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as ‘UNCITRAL’); or*

*c. an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.*

5.

*a. The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:*

*i. written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;*

*ii. an ‘agreement in writing’ for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the ‘New York Convention’); and*

*iii. ‘the parties to a contract [to] have agreed in writing’ for the purposes of Article 1 of the UNCITRAL Arbitration Rules.*

*b. Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of that Convention.*

*6. A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law. [...]"*

353. The plain reading of Article 26(6) of the ECT suggests that it determines the law applicable to the merits of the dispute – not to issues concerning the dispute settlement.
354. In particular, the Tribunal notes that Article 26 of the ECT applies to "*disputes*" or "*issues in dispute*" relating to alleged breaches of obligations under Part III of the ECT which sets out the substantive standards of treatment and protection of investments. It does not include the dispute settlement clause in Article 26, which appears in Part V of the ECT. This understanding is confirmed by ample authority and can indeed be considered uncontroversial.<sup>257</sup>
355. The Tribunal must therefore proceed to interpret Article 26(1)-(5) of the ECT in accordance with the principles of public international law – guided by Articles 31 and 32 of the VCLT – in order to determine whether it has jurisdiction over the present dispute.<sup>258</sup>

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<sup>257</sup> See e.g. **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 116: "Thus, as described in Article 26(1) ECT, the 'dispute' or 'issues in dispute' in Article 26(6) ECT, or in any other part of Article 26 ECT, are those that concern Part III of the ECT. Part III of the ECT sets out the substantive standards of treatment and protection to which investments are entitled. It does not include the provisions on dispute settlement, which appear in Part V of the ECT. Accordingly, the provision concerning the applicable law set out in Article 26(6) is not relevant to issues concerning the dispute settlement clause in Article 26 ECT."; *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 620: "Article 26(6) is indeed concerned with the law applicable to the merits, as is made clear by sub-paragraph (1) of Article 26 [...]."; *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 159: "[T]he Tribunal agrees with the tribunals in *Vattenfall* and *Greentech* that Article 26(6) indicates the law which the Tribunal must apply to the merits of the dispute before it, and has no relevance to its jurisdiction, which is derived from the ECT and Article 25 of the ICSID Convention."; **Exhibit RL-170**, *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, para. 157: "[...] Article 26(6) ECT only contains a choice of law rule for the merits of the dispute, and not for the jurisdictional assessment."

<sup>258</sup> See **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 125: "In order to derive meaning from Article 26 ECT, like all treaties, it must be interpreted in accordance with international law. These are the principles of international law relating to treaty interpretation, application, and other aspects of treaties, which render the ECT workable. They are reflected in the VCLT, and provide the framework through which all treaties are interpreted and applied."; *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 620: "[T]he question whether the Tribunal has jurisdiction under Article 26 of the ECT must



(iii) *Lex Arbitri*

356. The Tribunal recognizes that the present arbitration is conducted under the SCC Rules with the seat of arbitration in Sweden. This seat – and the corresponding *lex arbitri* – was selected by Claimant upon submitting its Request for Arbitration.
357. It is not lost on the Tribunal that the case-law upholding the jurisdiction of investment tribunals to hear the so-called "intra-EU" disputes under the ECT to date is predominantly reflective of arbitrations conducted under the ICSID Convention.<sup>259</sup> The Tribunal does not consider that distinction in the seat of arbitration renders those decisions irrelevant to the case at hand.
358. The Tribunal is also aware that another tribunal seated in Stockholm has recently refused to exercise jurisdiction based on the intra-EU objection by a respondent party. The Parties have submitted the *Green Power v. Spain* award into the record of this arbitration and have commented on its findings, albeit only in general terms.<sup>260</sup>
359. The Tribunal notes that it is bound by neither the *Green Power v. Spain* award nor by the arbitral decisions upholding jurisdiction over the intra-EU objection. It must assess the case at hand in light of the submissions of the Parties, instruments of public international law (as laid out above) and with due consideration of *lex arbitri*.
360. As to the latter, Section 48 of the Swedish Arbitration Act provides:

*"Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of*

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*be established first and foremost pursuant to the terms of Article 26(1)-(5) of the ECT as interpreted pursuant to Articles 31 and 32 of the VCLT."*

<sup>259</sup> Some tribunals have explicitly noted the special nature of the ICSID proceedings. *See e.g. Exhibit CL-8, Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 127; **Exhibit RL-170, Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain**, SCC Case No. V2016/135, Award, 16 June 2022, para. 161; **Exhibit CL-6, Electrabel S.A. v. The Republic of Hungary**, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.122.

<sup>260</sup> **Exhibit RL-170, Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain**, SCC Case No. V2016/135, Award, 16 June 2022; Respondent's Submission on New Evidence dated 18 July 2022.

*the country in which, by virtue of the agreement, the proceedings have taken place or shall take place."* (emphasis added)

361. As established above, the Tribunal considers that the law agreed upon by the Parties is the ECT and the broader public international law framework. In the context of investment treaty arbitration – as opposed to commercial arbitration, where parties’ agreement (or its absence) is most clearly reflected in their contracts, – the parties’ agreement to arbitrate, as well as their choice of law, are to be derived from a treaty mechanism, which is more often than not a unilateral offer to arbitrate accepted by a claimant at a later stage.
362. Consequently, when Article 26 of the ECT is applied as an arbitration agreement, it cannot be said that the parties have not agreed on the governing law, since Article 26 of the ECT – and, by extension, public international law of which it is a part – *is* the governing law.
363. However, even if the Tribunal were to accept that no agreement by the Parties in the meaning of Section 48 of the Swedish Arbitration Act had been reached and Swedish law was applicable, it would not change the Tribunal’s conclusion. In the latter scenario, the ECT and public international law as a part of Swedish law would still be the first port of call for the Tribunal’s determination of its jurisdiction. While EU law is also part of Swedish law, the Tribunal finds no support for the proposition that EU law has primacy over public international public law in determining the Tribunal’s jurisdiction under Article 26 of the ECT. Consequently, this Tribunal does not share the view of its esteemed colleagues on the *Green Power v. Spain* tribunal that the primacy of EU law precludes the unilateral offer to arbitrate contained Article 26 of the ECT, as will be discussed below.<sup>261</sup> Similarly, the Tribunal is not convinced that the decisions of the Swedish courts setting aside intra-EU arbitral awards, as discussed by the Parties and carefully reviewed by the Tribunal, alter the findings of this Tribunal.

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<sup>261</sup> See **Exhibit RL-170**, *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, para. 476.

**b) Interpretation of Article 26 of the ECT According to the VCLT**

**(i) Rules of Interpretation**

364. The principles of international law relating to treaty interpretation and application, which render the ECT operable, are contained in the VCLT. The Tribunal will base its analysis primarily on Articles 31 and 32 of the VCLT.

365. Article 31 of the VCLT is entitled "General rule of interpretation" (emphasis added) and provides that:

*"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

366. Article 32 of the VCLT further provides that:

*"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."* (emphasis added)

367. From the outset, the Tribunal notes that its mandate is not to alter or supplement the terms of the ECT – but merely to interpret their meaning using the general rule of interpretation of Article 31 of the VCLT and – if necessary – the supplementary means of interpretation of Article 32 of the VCLT. It is an approach that is generally accepted and uncontroversial.

368. The Tribunal finds the ILC Report on Draft VCLT as cited by the *RREEF Infrastructure v. Spain* Annulment Committee helpful in this regard:

*"This starting point of interpretation of treaty provision as in any agreement is 'to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the*

*relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter' (ILC Report on Draft VCLT, Commentary on Article 27, para. 12 (plus paras. 11 and 14) quoting I.C.J Advisory Opinion Competence of the General Assembly for the Admission of a State to the United Nations (I.C.J. Reports 1950), p. 8.)."*<sup>262</sup>

369. The Tribunal disagrees with the position of the EC that there is "*no pre-eminence for the ordinary meaning*"<sup>263</sup>. Rather, the ordinary meaning of the terms of Article 26 is "*the obvious place to begin*" the interpretation of the ECT.<sup>264</sup>

(ii) Ordinary Meaning of Article 26 of the ECT

370. According to Article 26(1)-(3) of the ECT, an arbitration may be initiated for the resolution of "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III [...]".

371. The Tribunal will now analyse the ordinary meaning of the individual terms of this dispute resolution clause.

(1) "Contracting Party"

372. According to Article 1(2) of the ECT, "*'Contracting Party' means a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force.*"

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<sup>262</sup> **Exhibit CL-61, RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain**, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, para. 79.

<sup>263</sup> EC Written Submission on the Interpretation of Article 26 ECT, 12 March 2021, para. 33.

<sup>264</sup> *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 116: "*The Tribunal considers that Article 31 of the VCLT, as its title suggests, states a single, general rule of interpretation with the result that all of its provisions have to be applied together. Nevertheless, it is necessary to start somewhere and the obvious place to begin is with the ordinary meaning of the terms of the treaty.*" See also **Exhibit RL-170, Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain**, SCC Case No. V2016/135, Award, 16 June 2022, para. 338.

373. The Tribunal notes that this provision has generated a great deal of controversy as to whether the references to "*Contracting Party*" in Article 26 of the ECT can be read as excluding EU Member States in the context of intra-EU arbitrations. Concerned with reading the ordinary meaning of the terms of Article 26 of the ECT, the Tribunal finds no ground for such exclusion.

374. The Tribunal sides with a long line of tribunals that have found that the fact that the EU itself is a Contracting Party to the ECT as a REIO does not affect the individual standing of EU Member States, such as Poland and Cyprus, as Contracting Parties to the ECT. Nothing in Article 26 – or elsewhere in the ECT – suggests that "*Contracting Party*" means something different in the context of an intra-EU arbitration. As the tribunal in *Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss and others v. Kingdom of Spain* put it:

"[N]othing in the wording of ECT Article 26 points to the conclusion that because the EU is itself a Contracting Party, [EU Member States] cease to be distinct Contracting Parties vis-a-vis another."<sup>265</sup>

375. Even the tribunal in *Green Power v. Spain* reached the same conclusion regarding the standing of individual EU Member States for the purposes of Article 26 of the ECT:

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<sup>265</sup> *Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, 19 April 2021, para. 288. *See also Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, para. 453: "[E]ven though the EU itself is a Contracting Party of the ECT, this does not eliminate the EU Member States' individual standing as respondents under the ECT."; *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 632: "Thus, the fact that EU is a party to the ECT as a REIO does not deprive Spain and the Netherlands of their status as Contracting Parties and as potential parties to a dispute that may be initiated pursuant to Article 26."; **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 172: "The question for the Tribunal is whether the references to 'Contracting Party' in Article 26 ECT can be read as excluding EU Member States in so far as intra-EU ECT arbitrations are concerned. Considering the ordinary meaning of the terms of Article 26, the Tribunal finds no basis in the wording for the exclusion sought to be read into the provision by Respondent."; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, paras. 194-195; **Exhibit CL-30**, *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, SCC Case No. 062/2012, Final Award, 21 January 2016, paras. 429-430; **Exhibit RL-031**, *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC Case No. V2013/153, Award, 12 July 2016, paras. 634-635.

*"The fact that the EU itself, as a REIO, is also a Contracting Party to the ECT and that Denmark and Spain are EU Member States, does not affect the reality that Denmark and Spain are also Contracting Parties to the ECT in their own right."*<sup>266</sup>

(2) *"Investor of another Contracting Party"*

376. According to Article 1(7) of the ECT, an *"Investor"* is *"a company or other organization organized in accordance with the law applicable in that Contracting Party"*.

377. The Tribunal will address Respondent's separate jurisdictional objection as to whether Claimant is an *"Investor"* below in Section G.III.1.

(3) *"Investment"*

378. According to Article 1(6) of the ECT, an *"Investment"* means *"every kind of asset, owned or controlled directly or indirectly by an Investor and includes: [...] a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise [...]"*.

379. The Tribunal will address Respondent's separate jurisdictional objection as to whether the parent-company loan to Claimant constitutes an *"Investment"* below in Section G.III.2.

(4) *"Area of the [Contracting Party]"*

380. According to Article 1(10) of the ECT, *"'Area' means with respect to a state that is a Contracting Party: (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea [...]. With respect to a Regional Economic Integration Organization which is a Contracting Party, Area means the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization."*

381. The Tribunal considers that the two definitions of *"Area"* contained in Article 1(10) of

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<sup>266</sup> **Exhibit RL-170**, *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, para. 186.

the ECT co-exist and do not operate to exclude one another. The ordinary meaning of this provision does not suggest that the EU's "Area" as a REIO somehow 'absorbs' the respective "Areas" of its Member States. This is supported by the use of the capitalized term "Areas of the member states" to define the "Area" of the REIO.<sup>267</sup>

382. The Tribunal notes that Respondent raised an alternative argument that both Parties are from the same "Area" in the meaning of the Article 1(10) of the ECT. The Tribunal is not convinced by such reading of the ECT for the reasons explained above.

(5) Breach of an Obligation under Part III of the ECT

383. It is undisputed between the Parties that the claims in the present arbitration are made for the alleged breaches of Respondent's substantive obligations under Part III of the ECT. These will be addressed in the Merits Section of this Award, should the Tribunal find that it has jurisdiction to hear said claims.

384. As a result, the Tribunal concludes that the terms of Article 26 of the ECT establish an unconditional offer made by Respondent as a Contracting Party to the ECT to any Investor of another Contracting Party to the ECT to submit the disputes arising out of an alleged breach of its obligation under Part III ECT regarding an Investment in the Area of such Contracting Party to arbitration. The Tribunal finds no support in the ordinary meaning of the ECT for an intra-EU carve-out, as suggested by Respondent and the EC.<sup>268</sup>

(iii) Disconnection Clause

385. The ordinary meaning of the terms *contained* in Article 26 of the ECT is further supported

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<sup>267</sup> See also **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 181: "Article 1(10) contains two definitions of 'Area', neither of which operates to exclude the other. The EU as an REIO has an 'Area', and States have an 'Area'. Within the EU's 'Area', the Contracting Parties being members of the REIO do not cease to have their own Area. This is evident from the provision itself which uses the defined, capitalised term 'Area' even for Member States of REIOs: an REIO's Area 'means the Areas of the member states of such Organisation'."

<sup>268</sup> See also **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 172: "Specifically, Article 26(3)(a) mentions that each Contracting Party gives 'its unconditional consent to the submission of a dispute to international arbitration . . . in accordance with the provisions of this Article'. The offer to arbitrate in this provision appears unqualified by any carve-out for intra-EU investor-State arbitrations, and is indeed 'unconditional'."

by the terms *not contained* in Article 26 or elsewhere in the ECT.

386. As multiple tribunals have observed, the ECT lacks a so-called "disconnection clause" that would serve to exclude the disputes between the members of the REIO, *i.e.* the EU, from the scope of Article 26 of the ECT.<sup>269</sup> In the words of the *FREIF Eurowind Holdings Ltd v. Kingdom of Spain* tribunal:

*"The lack of any express carve out is of particular note given that the ECT allows [REIOs] such as the EU to become Contracting Parties [...]. If the ECT intended to exclude the jurisdiction of arbitral tribunals when competence over certain matters governed by the ECT has been transferred to [a REIO], [respondent]’s complaints ought to have been front of mind in the drafting of Article 26."*<sup>270</sup>

387. This Tribunal considers that the absence of an express – and commonly used – provision that would exempt the EU Member States from the application of certain provisions of the ECT *inter se* is telling. The Tribunal tends to agree with the *RREEF Infrastructure v. Spain* Annulment Committee’s observation that, given the very nature of a disconnection clause, "*it is [...] rather odd to suggest that disconnection could be implicit because doing*

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<sup>269</sup> *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 629: "[T]here is no provision that would exempt the rules established by the regional organization, the EU, from the application of the rules established by the ECT. In the Tribunal’s view, this is important. Given the EU’s participation in the drafting of the ECT, the absence of such a clause suggests that at the time of the ECT’s signing the EU did not consider Article 26 of the ECT inapplicable as between the EU Member States."; (1) *Foresight Luxembourg Solar 1 S.À.R.L.*, (2) *Foresight Luxembourg Solar 2 S.À.R.L.*, (3) *Greentech Energy Systems A/S*, (4) *GWM Renewable Energy I S.P.A.*, (5) *GWM Renewable Energy II S.P.A. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018, para. 207: "The ECT does not contain a disconnection clause. Further, the Tribunal can discern no attempt in the ECT’s provisions to carve out ‘intra-EU’ investor State disputes from the protections afforded by the treaty." See also *AES Solar and others (PV Investors) v. Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction, 14 October 2014, para. 187; **EC Annex 05**, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, para. 247; *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, paras. 117, 123; *Stadtwerke München GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, para. 129; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 280.

<sup>270</sup> *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award, 8 March 2021, para. 316



so would instead promote ambiguity." <sup>271</sup>

388. This is all the more so given EU's participation in the drafting process, which the EC itself described as being the "*driving force behind the ECT*"<sup>272</sup>. The only reasonable conclusion that this Tribunal can draw from it is that the EU simply did not consider the dispute resolution provisions of the ECT inapplicable as between its Member States at the time of the Treaty's conclusion.
389. Even assuming that a disconnection clause could, in principle, be implicit, the Tribunal does not see any room for such implicit disconnection clause in the ECT given the Treaty's *travaux préparatoires*. The latter reveal that during the ECT drafting negotiations, the EU had proposed a disconnection clause to be included into the text of the Treaty. Such proposal was, however, ultimately not adopted.<sup>273</sup>

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<sup>271</sup> **Exhibit CL-61**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, para. 62. See also **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, paras. 202, 204, 206: "In light of the ordinary meaning of the words in Article 26 ECT, read together with the other provisions of the ECT, and also taking into account the EU Statement and the object and purpose of the ECT, as discussed above, the Tribunal agrees with Claimants that the absence of a disconnection clause in the ECT is telling. Article 26 ECT grants Investors from Contracting Parties, without exclusion, a right to dispute settlement, and Article 16 prohibits the terms of another agreement from being construed to derogate from that right to dispute resolution. In these circumstances, if it was intended that intra-EU arbitration would not be available to Investors, it would have been necessary to make such an intention explicit, either in the ECT itself or through the adoption of a supplementary instrument. [...] Moreover, the ECT includes other similar such provisions which limit its application in certain respects. For example, there is a provision for potential conflicts between the Svalbard Treaty and the ECT, excluding the operation of Article 16 in such a scenario. [...] In these circumstances, the Tribunal can only conclude that a disconnection clause was intentionally omitted from the ECT. The absence of such a clause confirms that the ECT was intended to create obligations between Member States of the EU, including in respect of potential investor-State dispute settlement."

<sup>272</sup> EC Written Submission on the Interpretation of Article 26 ECT, 12 March 2021, para. 26.

<sup>273</sup> See *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 123: "What the *travaux préparatoires* do make clear is that the EU proposed that a disconnection clause be included in a Ministerial Declaration to be attached to the ECT. The draft proposed that a declaration include the following provision: 'In their mutual relations, Contracting Parties which are Members of the European Communities shall apply Community rules and shall not therefore apply the rules arising from this Agreement except insofar as there is no Community rule governing the particular subject concerned.' While we do not know why this proposal was not adopted, the fact is that it was not and, to the extent that reference to the *travaux préparatoires* is permissible, the fact that it was proposed and yet not adopted militates against the interpretation advanced by the Respondent."; **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 205: "[T]he *travaux préparatoires* of the ECT reveal that during negotiation of the ECT, the EU had proposed the insertion of a disconnection clause. However, that clause was ultimately dropped from the draft treaty."

(iv) Object and Purpose of Article 26 of the ECT

390. The general rule of Article 31 of the VCLT further directs the Tribunal to consider the ECT's object and purpose, in light of which the ordinary meaning of the provisions should be read.

391. The purpose of the ECT is easily discernible as it is stated in its Article 2:

*"This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [1991 European Energy Charter]."*

392. The Tribunal considers that the object and purpose of the ECT do not shed different light on the interpretation of the ordinary terms of Article 26 of the ECT, as laid out above. If anything, the object and purpose of the ECT would call for a uniform interpretation of a dispute resolution provision for the purposes of promotion of *"long-term cooperation"*.

393. In this regard, the Tribunal concurs with the ICSID tribunal in *Vattenfall AB and others v. Federal Republic of Germany (II)* ("**Vattenfall v. Germany**"), which held that:

*"In sum, the ECT aims to promote cooperation and the flow of international investment in the energy field to serve the ultimate goal of creating and maintaining a stable and efficient energy market. Granting the right to Investors based in the EU to avail themselves of investor-State dispute resolution is entirely consistent with that goal. On the other hand, depriving EU Investors of the right to invoke the arbitration provision of the ECT, where the respondent State is an EU Member State, would be counter-productive to the flow of international investment in the energy field."*<sup>274</sup>

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<sup>274</sup> **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 198.

(v) Conclusion on Article 26 of the ECT as Interpreted Using Article 31 of the VCLT

394. In conclusion, the Tribunal considers that the ordinary meaning of Article 26 of the ECT read together with Articles 1(2), 1(3), and 1(10) of the ECT is clear and simple. Article 26 operates as an unconditional offer by the Contracting Parties to the ECT, including the EU and its Member States (all of whom are Contracting Parties to the ECT), to submit to international arbitration, should an investor from another Contracting Party choose to accept it. Nothing in the ECT can be read to exclude disputes between the EU Member States from the scope of Article 26 of the ECT.<sup>275</sup>
395. The language that Respondent and the EC want to read into the ECT is simply not there. This Tribunal cannot take it upon itself to add such language to the Treaty almost thirty years after its conclusion at the urge of some of the Contracting Parties. As the *Vattenfall v. Germany* tribunal observed:

*"It would have been a simple matter to draft the ECT so that Article 26 does not apply to disputes between an Investor of one EU Member State and another EU Member State as respondent. That was not done; and the Tribunal has been shown no indication in the language of the ECT that any such exclusion was intended. The Tribunal's responsibility is to interpret and apply the ECT, which defines the Tribunal's jurisdiction."*<sup>276</sup>

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<sup>275</sup> See also *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 117: "In the case of Article 26, there is no difficulty in concluding that the ordinary meaning of the terms used is that each Contracting Party to the ECT, including the EU and its Member States (all of whom are Contracting Parties to the ECT), makes the same offer of arbitration to investors from any other Contracting Party. There is nothing in the language of Article 26 to suggest that the offer by the EU and the EU Member States is limited to investors from non-EU States."; **Exhibit CL-61**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, para. 75: "The Committee is of the view that properly construed, Article 26 of the ECT applies to claims by any investor from a Contracting Party (including an investor from an EU member State) against another EU member State. If indeed the EU had not so intended, it did not make clear its position at the time of or shortly after ratifying the ECT as it did in the 1997 Statement in relation to the matters which investors bring before the CJEU. Article 26(7) of the ECT";

<sup>276</sup> **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 187.

**c) Instruments Relating to the ECT**

396. Despite reaching the conclusion that Article 26 of the ECT is clear on its face and does not require interpretation beyond the ordinary meaning given to the words of the treaty, as per Article 31(1) of the VCLT, this Tribunal cannot ignore the position of part of the ECT Contracting Parties, including the EU and the majority of the EU Member States, that advocate for a different interpretation of Article 26 of the ECT – to the exclusion of the intra-EU arbitration.
397. To disregard the ordinary meaning of a treaty as established under Article 31(1) of the VCLT, the Tribunal must inquire whether there are any instruments outside of the text of the treaty so unequivocal as to alter its interpretation.

**(i) 1998 EC Statement**

398. Article 31(2)(b) of the VCLT provides that, in addition to the text, the context for the purposes of interpretation of a treaty includes "*any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*".
399. The Tribunal understands that the EC seeks to invoke the Statement submitted by the European Communities to the Secretariat of the ECT pursuant to Article 26(3)(b)(ii) of the ECT of 9 March 1998 (the "**1998 EC Statement**")<sup>277</sup> as an instrument made in connection with the conclusion of the ECT. However, the Tribunal is hard-pressed to read anything more into the Statement than is contained therein. In its pertinent part, the 1998 EC Statement reads:

*"[2] The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences.*

*[3] The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration*

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<sup>277</sup> Annex EC 42, Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(iii) of the Energy Charter Treaty.

*proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days.*

[...]

*[5] Any case brought before the Court of Justice of the European Communities by an investor of another Contracting Party in application of the forms of action provided by the constituent treaties of the Communities falls under Article 26(2)(a) of the Energy Charter Treaty. Given that the Communities' legal system provides for means of such action, the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation."*<sup>278</sup>

400. The 1998 EC Statement does nothing more than to acknowledge that the European Union (then, the European Communities) and its Member States have both entered into the ECT and thereby assumed public international law obligations – contrary to the EC proposition in the current arbitration that the EU and its Member States act as a "*single entity of public international law*"<sup>279</sup>. Accordingly, the Statement proceeds to specify in paragraph [3], that the specific respondent party, be it the EU or its Member State(s), will be determined between the EU and its Member States. This assumes that the Member States can be respondent parties and imposes no limitation whatsoever on their capacity to act as respondent parties depending on the country of origin of the investor.

401. Paragraph [5] of the 1998 EC Statement concerns a case brought by an investor before the CJEU that "*falls under Article 26(2)(a)*" ECT, *i.e.* the option for an investor to submit a dispute for resolution "*to the courts or administrative tribunals of the Contracting Party party to the dispute*". This option is an alternative to the submission of a dispute to arbitration under Article 26(2)(c) of the ECT and does not function to exclude an investor's right to choose arbitration against an EU Member State.

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<sup>278</sup> Annex EC 42, Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(iii) of the Energy Charter Treaty (emphasis added).

<sup>279</sup> EC Written Submission on the Interpretation of Article 26 ECT, 12 March 2021, Section 3.1.1.

402. The Tribunal, therefore, cannot agree with the esteemed colleagues on the *Green Power v. Spain* tribunal that have found the 1998 EC Statement to suggest that investor-State arbitration under the ECT was envisaged as operating between, on the one hand, the EU and EU Member States, and on the other hand, other ECT Contracting States.<sup>280</sup>
403. Instead, the Tribunal concurs with the *RREEF Infrastructure v. Spain* Annulment Committee, which found that:

"[The Statement] makes clear that any investor (whether from an EU member State or from outside the EU) retains the right to choose the mode and path of dispute resolution given to it under Article 26(2) of the ECT.

*It appears to the Committee that the EU could have at that time made a similar statement to the effect that investors from EU States could only bring their claims before the CJEU or such available dispute settlement within the EU. Absent such, the unconditional consent by each Contracting Party to arbitration should therefore remain undisturbed by any 'implicit' disconnection clause.*"<sup>281</sup>

404. Therefore, the Tribunal does not consider that the 1998 EC Statement can serve as an instrument made in connection with the conclusion of the ECT to exclude intra-EU arbitration from the scope of Article 26 of the ECT.

(ii) Declarations of the EC and the EU Member States

405. Respondent and the EC have also invited the Tribunal to consider instruments envisaged by Article 31(3) of the VCLT:

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<sup>280</sup> **Exhibit RL-170**, *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V 2016/135, Award of 16 June 2022, para. 362.

<sup>281</sup> **Exhibit CL-61**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, paras. 67-68. See also **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 189: "[I]t is expressly contemplated that either the EU or an EU Member State may be party to an arbitration initiated by an Investor of 'another Contracting Party'. There is no basis to read a qualification that 'another' Contracting Party only includes non-EU Member States."

*"There shall be taken into account, together with the context:*

*(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

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

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

406. Respondent and the EC seek to invoke a series of "*interpretative declarations*" pertaining to the ECT to introduce an interpretation of Article 26 that goes against the ordinary meaning of the provisions contained therein. Specifically, Respondent and the EC rely on (i) Declaration of the representatives of the governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the CJEU in *Achmea* and on investment protection in the European Union (the "**2019 Declaration**"), (ii) EU statement accompanying the signing of the International Energy Charter, and (iii) EC Communication of 19 July 2018. The EC also invokes submissions filed in the actions for enforcement of arbitration awards before U.S. courts to the same effect. It appears that the EU-Member States acting as respondents and the EC have invoked these – and other – statements in other investment arbitration cases involving intra-EU objections.
407. The Tribunal cannot deny that these declarations do speak to the EC's and the majority of EU Member States' current position with regard to intra-EU investment arbitration. The Tribunal is not convinced, however, that the declarations, taken individually or together, can have legal implications on the pre-existing obligations of the Contracting Parties under the ECT. This is for two reasons.
408. *First*, Article 31(3) of the VCLT is not a starting (or end) point for the interpretation of the ECT. All that it directs is that the subsequent instruments be "*taken into account*" together with the context of the treaty.
409. *Second*, subparagraphs (a) and (b) of Article 31(3) of the VCLT require either a "*subsequent agreement between the parties*" or "*subsequent practice [...] which establishes the agreement of the parties*" to the relevant treaty. The key detail is the "agreement" between

the parties to a treaty. However characterized, the declarations relied on by the EC and Respondent cannot be said to establish such an agreement. Even the 2019 Declaration cannot constitute an agreement between *all* the EU Member States parties to the ECT regarding its interpretation, let alone between *all* the Contracting Parties to the ECT.

410. *Third*, the Tribunal observes that the 2019 Declaration more closely resembles a declaration as to the position and intentions than a definitive agreement amongst signatories to the ECT. Here, the Tribunal concurs with the *RREEF Infrastructure v. Spain* Annulment Committee, which noted that:

*"[T]he signatory States acknowledge that they would [...] henceforth 'disapply' such obligations to arbitrate under Article 26 of the ECT in order to give primacy to their TFEU obligations. Nothing in the Declaration of 15 January 2019 indicates that it is an interpretation of Article 26 of the ECT or that it was never the intention of the EU member States for Article 26 to apply to intra-EU investor-State arbitrations. If indeed that was the intention of the EU member States when it concluded the ECT, there would then be no necessity to 'disapply'.*

*In the Committee's view, the Declaration of 15 January 2019 would at its highest serve as an express reservation limiting its applicability prospectively. To allow it to apply retrospectively would prejudice investors (as third-party beneficiaries of such promises made by host States) who had relied on them when they made their investments."*<sup>282</sup>

411. The Tribunal deems other purportedly "*interpretative*" declarations even less convincing to construct an agreement between the ECT Contracting Parties that Article 26 of the ECT means something different from what it appears to say on its face.

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<sup>282</sup> **Exhibit CL-61**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, paras. 85-86.



(iii) Modernization of the ECT

412. The Contracting Parties' clear and unconditional consent to arbitration cannot be dispelled by anything short of a modification of the dispute resolution mechanism of the ECT or EU's and EU Member States' withdrawal from the treaty. Both mechanisms are available to the Contracting Parties under the ECT itself, as well as under the VCLT. Neither mechanism has yet been properly effected.
413. For the avoidance of doubt, the Tribunal has not been presented with any instrument that can function as an *inter-se* modification of the ECT under Article 41 of the VCLT to exclude the application of the ECT as between EU Member States. First, it is unclear on what specific terms an alleged modification of the ECT has taken place. Second, what is clear is that there has been no notice, as required by Article 41(2) of the VCLT.<sup>283</sup> Finally, the Tribunal is by no means convinced that the abrogation of the arbitration available to the investors in the intra-EU context would be compatible "*with the effective execution of the object and purpose of the [ECT] as a whole*", as per Article 41(1)(b)(ii) of the VCLT. The Tribunal concurs with the similar view adopted by the tribunal in *BayWa v. Spain*:

*"Article 16 of the ECT suggests that [such abrogation] is not [compatible with the effective execution of the object and purpose of the ECT as a whole], since it evinces an intent, even as between treaties on the same subject matter, to preserve the rights of*

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<sup>283</sup> See e.g. *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 650: "[T]he Tribunal was not presented with any proof that, as required by Article 41(2) of the VCLT, the EU Member States notified the other parties to the ECT of their intention to conclude an agreement that would modify the terms of the ECT as between the EU Member States."; **EC Annex 05**, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, para. 276; *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 186: "[I]t is completely unclear what modification of the ECT is deemed to have taken place and there has been no notice to the other Contracting Parties to the ECT as required by Article 41(2) of the VCLT."; **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 221: "[I]t is unclear what precise modification of the ECT is alleged to have taken place. Moreover, the Tribunal considers that the modification proposed by the EC would be 'prohibited by the treaty', contrary to Article 41(1)(b) VCLT. Specifically, Article 16 ECT prevents the EU Treaties from being construed so as to derogate from more favourable rights of the Investor in Parts III and V ECT, including the right to dispute resolution."

*investors and investments, which constitute a major plank of that multilateral treaty.*"<sup>284</sup>

414. Moreover, the ongoing negotiations over the modernization of the ECT, including over explicit wording of the intra-EU carve-out<sup>285</sup>, further underscore that there has been no clear exclusion of the intra-EU arbitration under the ECT at the time of its conclusion. This Tribunal is not venturing to and could not deny the Contracting Parties their sovereign power to change that prospectively and in accordance with the applicable international law of treaties. However, the Tribunal is bound by the legal framework of public international law as it stands today.
415. To find otherwise would put the investors – who are not the Contracting Parties but who stand protected under the ECT – in a precarious legal uncertainty and would undermine the effectiveness of a binding instrument of international law.

**d) Compatibility of the ECT with EU Law**

416. Although the Tribunal considers the ordinary meaning of Article 26 of the ECT sufficiently clear and could stop its analysis there, the Tribunal cannot ignore the matters of EU law that have been raised by Respondent and echoed by the EC – both in these proceedings and in other *fora*.
417. Therefore, the Tribunal will first look at whether there is a conflict between EU law and the provisions of the ECT and, in case it determines that such conflict exists, the Tribunal will determine which law should prevail for the purposes of its jurisdictional assessment.

**(i) Is There a Conflict between the ECT and EU Law?**

418. Over the past years, being presented with a question of a potential conflict between the provisions of the ECT and the provisions of EU law, international tribunals and national

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<sup>284</sup> **EC Annex 05**, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, para. 276. *See also Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 650.

<sup>285</sup> Respondent's Submission on New Evidence, dated 18 July 2022, paras. 8-9.

courts have reached diverging conclusions.

419. While this Tribunal shares the sentiment of those who call for harmonious interpretation, it concurs with those tribunals who have held that Articles 267 and 344 of the TFEU do not cover the same subject matter as Article 26 of the ECT.<sup>286</sup> These provisions are capable of – and have been – operating independently without creating conflict. More generally, it is natural for investment arbitration to co-exist with other modes of dispute resolution, including national courts, without undermining one another.
420. However, the Tribunal cannot ignore the fact that the EC and the majority of the EU Member States have advocated for a different conclusion. The Tribunal will therefore consider whether – in case a conflict existed – it would mandate a different interpretation of Article 26 of the ECT than the one laid out above.

(ii) How Should a Conflict between the ECT and EU Law Be Resolved?

421. Assuming that the dispute resolution provisions of the ECT are in conflict with EU law, the Tribunal must determine which set of rules prevails under the generally accepted international law principles.

(1) *Lex Superior*

422. The Tribunal notes that the central argument that Respondent and the EC seem to rely on to establish this Tribunal's lack on jurisdiction is the alleged primacy of EU law in relation to the ECT. This also seems to be a critical piece of legal reasoning for the tribunal

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<sup>286</sup> **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 212: "The Tribunal does not consider it established that Articles 267 and 344 TFEU, as interpreted in the ECJ Judgment, are in conflict with Article 26 ECT. In principle, these provisions do not have the same subject matter or scope. They are capable of operating in their separate spheres without conflict, as has been found by several arbitral tribunals in previous cases."; *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 155; *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 638; **Exhibit CL-6**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.176; **Exhibit CL-13**, *Stadtwerke München GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, para. 135; *AES Solar and others (PV Investors) v. The Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction, 14 October 2014, para. 189.

in *Green Power v. Spain*, having placed EU law, as *lex superior*, hierarchically above the ECT:

*"Seen from a lex superior perspective, the ECT could only override EU law in intra-EU relations if the ECT, including its Article 16, could be considered as lex superior with respect to the relevant norms of EU law, including Articles 267 and 344 TFEU and the principle of primacy. The Tribunal considers that there are no grounds on which the ECT could have such an overriding character in the circumstances of this case."*<sup>287</sup>

423. The Tribunal finds this line of reasoning unconvincing on several levels.
424. *First*, it is rather questionable from the standpoint of international law (which is the standpoint of this Tribunal, as discussed above) that EU law can be placed hierarchically above an instrument of international law based on EU law's own principle of primacy. Taken to the extreme, that argument would serve to undermine any international law obligation the EU or an EU Member State has.
425. *Second*, the ECT contains a clause that specifically and explicitly addresses the external hierarchy of its norms *vis-à-vis* an international agreement with the same subject matter, namely Article 16. Pursuant to Article 16(2) of the ECT, *"nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment."* Notably, the right to dispute resolution is specifically mentioned, leaving no doubt as to whether it is covered by this provision.
426. Taking Respondent's case at its highest and provided that the Article 26 of the ECT and Articles 267 and 344 of the TFEU concern the same subject matter, this would make Article 16 of the ECT not only applicable, but determinative.<sup>288</sup>

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<sup>287</sup> **Exhibit RL-170**, *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, para. 470.

<sup>288</sup> See also **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, paras. 192-196; *SolEs Badajoz GmbH v.*

427. This is because the Tribunal is convinced that the right enjoyed by investors under the ECT to bring claims directly against the Contracting Party in neutral international arbitration proceedings should be understood as "*more favourable to the Investor*", insofar as EU law is interpreted to prohibit that avenue of dispute resolution. The Tribunal concurs with the *LBBW v. Spain* tribunal, which also found the ECT dispute resolution provisions to be "*more favourable*" for the purposes of Article 16 of the ECT:

*"EU law does not afford a right for an Investor to bring arbitration proceedings against a State under international law. The Tribunal thus concludes that Article 16 of the ECT is applicable and that its effect is that the ECT cannot be interpreted in such a way as to run counter to the ordinary meaning of the terms of Article 26, in order to give effect to any rule of EU law that might prohibit an EU Member State from making an offer of arbitration by way of Article 26 to an Investor from another EU Member State."*<sup>289</sup>

428. While the ordinary meaning of Article 26 of the ECT was already clear, Article 16 of the ECT further confirms that depriving certain investors of their right to dispute resolution, whether against an EU Member State or otherwise, would run against the meaning of the ECT as it was intended by the Contracting Parties.

429. Therefore, by the virtue of Article 16 of the ECT, Article 26 of the ECT should be understood to be *lex superior vis-à-vis* any conflicting provisions of EU law.

(2) *Lex Posterior*

430. Another principle that Respondent and the EC invoke in order to establish the prevalence of EU law over the dispute resolution provisions of the ECT, is the *lex posterior* rule, as reflected in Article 30 of the VCLT.

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*Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, para. 250; **Exhibit RL-029**, *Masdar v. Kingdom of Spain*, ICSID ARB 14/1, Award, 16 May 2018, para. 332; **Exhibit RL-115**, *Jan Oostergetel and Theodora Laurentius v. the Slovak Republic*, UNCITRAL Decision on Jurisdiction, 30 April 2010, para. 77.

<sup>289</sup> *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 175.

431. The Tribunal is unconvinced that EU law should prevail as *lex posterior* in the present case, even if the assumption stands that the ECT and Articles 267 and 344 of the TFEU concern the same subject matter – which is a precondition for applying Article 30 of the VCLT.<sup>290</sup>
432. *First*, it is unclear whether the provisions of EU law, on which Respondent relies, are *lex posterior*. While the TFEU, indeed, post-dates the ECT, Articles 267 and 344 of the TFEU were taken *verbatim* from earlier versions of the EU Treaties that pre-date the ECT and are merely renumbered.<sup>291</sup>
433. *Second*, the Tribunal agrees with *Vattenfall v. Germany* and *LBBW v. Spain* tribunals that *lex posterior* as contained in Article 30 of the VCLT is a subsidiary rule of interpretation and "[w]here a treaty includes specific provisions dealing with its relationship to other treaties, such as appear in Article 16 ECT, the *lex specialis* will prevail."<sup>292</sup>
434. *Finally*, Article 16 of the ECT is broad in scope and applies to the situations "[w]here two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement". The Tribunal therefore considers the effect of Article 16 of the ECT conclusive and rejects Respondent's *lex posterior* argument.

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<sup>290</sup> See e.g. *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 647: "If the ECT and EU law are considered as having different subject matters [...] neither Article 16 of the ECT, nor Article 30 of the VCLT is applicable."

<sup>291</sup> See *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 182: "[I]t is by no means clear that the provisions of EU law on which the Respondent relies are *lex posterior*. While the TFEU post-dates the ECT, the provisions on which the Respondent relies – Articles 267 and 344 – are taken *verbatim* from earlier versions of the EU Treaties which pre-date the ECT. Indeed, these earlier provisions are invoked by the Respondent in support of its argument that Spain lacked the capacity to make the offer to arbitrate when it concluded the ECT."; **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 218: "[I]t is by no means clear that the EU Treaties are the 'later treaty' under Article 30 VCLT. The current Articles 267 and 344 TFEU have existed in substantively similar form since a time prior to the conclusion of the ECT, and have only been renumbered in the successive versions of the EU Treaties."

<sup>292</sup> **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 217; *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 18. See also *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 647.

(3) *Lex Specialis*

435. Similarly, the Tribunal considers Article 16 of the ECT to be determinative as a *lex specialis* conflict of laws rule in the present case. The Tribunal concurs with the tribunal in *Vattenfall v. Germany* that:

*"Article 16 poses an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT. The application of Article 16 confirms the effectiveness of Article 26 and the Investor's right to dispute resolution, notwithstanding any less favourable terms under the EU Treaties. If the Contracting Parties to the ECT intended a different result, and in particular if they intended for EU law to prevail over the terms of the ECT for EU Member States, it would have been necessary to include explicit wording to that effect in the Treaty. The need for such a provision is reinforced by the existence of Article 16 ECT, since it points to the opposite result."*<sup>293</sup>

436. As a result, even assuming that a conflict between the dispute resolution provisions of the ECT and EU law exists, the former should prevail and govern the mandate of this Tribunal. As the tribunal in *RREEF Infrastructure v. Spain* established and the Annulment Committee confirmed:

*"In case of any contradiction between the ECT and EU law, the Tribunal would have to insure [sic] the full application of its 'constitutional' instrument upon which its jurisdiction is founded. Para. 87: EU law does not and cannot 'trump' public international law."*<sup>294</sup> (*RREEF Infrastructure v. Spain* Decision on Jurisdiction)

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<sup>293</sup> **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 229.

<sup>294</sup> **Exhibit CL-7**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 75.

*"The underlying basis and logic advanced by the EC is again that EU law and treaties have primacy over the ECT [...], a view the Tribunal had quite correctly rejected and with which the Committee agrees."*<sup>295</sup> (*RREEF Infrastructure v. Spain* Decision on Annulment)

**e) CJEU Judgements**

437. The Parties have introduced a number of the CJEU Judgements that touch upon the relationship between the ECT dispute resolution mechanism and EU law.
438. From the outset, the Tribunal notes that it is not bound by the judgements of the CJEU, including those that interpret the ECT in the context of EU law. As discussed above, this Tribunal derives its mandate from public international law and must make its own independent assessment of the matters in dispute.<sup>296</sup>
439. However, the Tribunal has taken careful consideration of the decisions of the CJEU presented by the Parties as well as the Parties' comments thereto. Below, the Tribunal will focus on the two most pertinent judgements, namely the *Achmea* Judgement and *Komstroy* Judgment of the CJEU.

**(i) Achmea Judgement**

440. Before considering the *Achmea* Judgement of the CJEU, the Tribunal notes that the arguments presented by the Parties in this arbitration, as well as the decisions of the arbitral tribunals issued before the *Komstroy* Judgement, have been largely speculative as to the CJEU's position on the applicability of the ECT dispute resolution provisions to the intra-

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<sup>295</sup> **Exhibit CL-61**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, para. 153. See also *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 194. See also **Exhibit RL-029**, *Masdar v. Kingdom of Spain*, ICSID ARB 14/1, Award, 16 May 2018, para. 314.

<sup>296</sup> See *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits, 1 February 2022, para. 107: "From the outset, the Tribunal makes it clear that, as it affirmed in the Decision, EU law is not applicable to jurisdiction. As a result, the *Komstroy* Judgment is irrelevant to the question of jurisdiction. The applicable law to jurisdiction and the merits of the dispute is international law, and not principles of subsystems of international law such as EU treaties."



EU disputes. This is no longer the case. CJEU has made its position clear, whether or not this Tribunal accepts it.

441. However, the Tribunal considers that the *Achmea* Judgement of the CJEU merits a separate analysis, not the least because it laid a foundation for the later *Komstroy* Judgement.
442. The Tribunal notes that the overwhelming majority of arbitral tribunals faced with the *Achmea* Judgement of the CJEU have refused to apply it in the context of the ECT. While this alone would be insufficient grounds to dismiss Respondent's argument based on *Achmea* Judgement, the Tribunal concurs with the reasoning adopted by the majority of the tribunals and summarized by the tribunal in *Sevilla Beheer B.V. and others v. Kingdom of Spain* ("*Sevilla v. Spain*"):

*"The Tribunal has not been persuaded that the Achmea Judgment's reasoning is 'applicable' to ECT-based investor-State arbitrations. A fortiori, the Tribunal is not convinced that the Achmea Judgment's reasoning implies an incompatibility of the ECT's investor-State dispute settlement regime with EU law."*<sup>297</sup>

443. This Tribunal is not convinced that *Achmea* Judgement's reasoning has implications for the intra-EU investor-state arbitrations under the ECT. This is for the following reasons.
444. *First*, unlike the Netherlands Slovakia BIT, which was analysed by the CJEU in the *Achmea* Judgement, the ECT is a mixed agreement concluded both by the EU and by its Member States. The EU's status as a Contracting Party to the ECT, as well as its active participation in drafting of the Treaty, eliminates any possibility of the dispute resolution provision having been included without EU's knowledge and endorsement. As established above, should the EU have considered such provision to be inapplicable as between the EU Member States, this would have been reflected in the ECT.<sup>298</sup>
445. The distinction between a bilateral treaty between EU Member States and a multilateral

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<sup>297</sup> *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 658.

<sup>298</sup> *See Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 147.

treaty to which EU itself is a party is acknowledged by the CJEU itself:

*"It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected."*<sup>299</sup>

446. The above shows that the CJEU has not ruled out the possibility of a dispute resolution mechanism rooted in public international law settling a dispute involving an EU Member State, application of EU law notwithstanding. The Tribunal acknowledges the disclaimer "*provided that the autonomy of the EU and its legal order is respected*", however, it finds no guidance from the CJEU as to how that was to be done.<sup>300</sup>
447. *Second*, the ECT is a single legal instrument of multilateral nature, as opposed to a BIT, and should be interpreted accordingly.
448. The Tribunal cannot agree with the position of Respondent and the EC that describe the ECT as merely a "*bundle of bilateral obligations*". In the context of each individual

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<sup>299</sup> **Exhibit RL-007**, Judgement of the CJEU (Grand Chamber) in *Slovak Republic v. Achmea BV*, CJEU Case No. C-284/16, 6 March 2018, para. 57 (emphasis added).

<sup>300</sup> See also *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 152; *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 659; **Exhibit RL-029**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 679; *Foresight Luxembourg Solar 1 S.À.R.L., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018, para. 220; *Operafund Eco-Invest Sicav Plc. and another v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Final Award, 6 September 2012, paras. 381-385; **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, paras. 161-162.

arbitration, the obligations allegedly violated by a specific Contracting Party towards a specific investor from another Contracting Party are, of course, bilateral. However, for the purposes of treaty interpretation and operation, ECT very much remains a single multilateral instrument containing obligations each Contracting Party has towards all others.

449. The Tribunal concurs with the *LBBW v. Spain* tribunal in this regard:

*"[T]he ECT, as a multilateral treaty, involves obligations by each Contracting Party towards all other Contracting Parties; it is more than just a network of bilateral relationships and is therefore quite different from a BIT. The nature of the ECT as a single legal instrument in force in the same terms and to the same effect between all its Contracting Parties is reinforced by the fact that reservations to the ECT are expressly prohibited by Article 46 of the ECT."*<sup>301</sup>

450. *Third*, and as established above, the governing law in the present case, as in all cases established under the ECT, is the ECT itself as well as the larger framework of public international law. In contrast, the Netherlands Slovakia BIT makes the national law of an EU Member State the starting point for a tribunal. Specifically, Article 8(6) of the BIT directs an arbitral tribunal to decide on the basis of the following:

*"the law in force of the Contracting Party concerned;  
the provisions of this Agreement, and other relevant Agreements  
between the Contracting Parties;  
the provisions of special agreements relating to the investment;  
the general principles of international law"*<sup>302</sup>

451. *Fourth*, the Tribunal observes that – on the logic advanced by Respondent and the EC – EU law would be equally implicated in the disputes with only *one* EU party, yet the

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<sup>301</sup> *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 148.

<sup>302</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, adopted on 29 April 1991, Article 8(6).

autonomy of the EU legal order would not be undermined.

452. That is, unlike under an intra-EU BIT setting where every arbitration is, by definition, an intra-EU arbitration, the ECT presents several different scenarios:

- arbitration between a non-EU Member State and an Investor from another non-EU Member State;
- arbitration between an EU Member State and an Investor from another EU Member State; and
- arbitration involving *either* an EU Member State *or* an Investor from an EU Member State.

453. Leaving the first scenario aside, the second and third scenarios may both involve interpretation and application of EU law as part of a national law. However, neither Respondent nor the EC suggest that, based on the CJEU judgements, this Tribunal would not be able to exercise jurisdiction over claims brought against Respondent by an investor from North Macedonia or Ukraine, currently not Member States of the EU, even if such dispute would involve the same legal questions and would be based on the same applicable law as the dispute at hand.<sup>303</sup> In the Tribunal's view, that defeats the logic of protection of the autonomy of EU law.

454. As a result, the Tribunal concurs with a long line of cases that have disregarded the effect of the *Achmea* Judgment to the arbitrations established under Article 26 of the ECT.<sup>304</sup>

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<sup>303</sup> See *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, para. 149: "[I]n a BIT between two EU Member States, the only arbitration proceedings which can usually occur are between a national of one of the EU Member States which is party to the BIT and the other EU Member State which is party; i.e. all proceedings will necessarily have an intra-EU character. That is not the case with the ECT. Leaving aside proceedings which have no connection with the EU at all, it is common ground between the Parties that the ECT can furnish a basis for jurisdiction in proceedings between an Investor from outside the EU and an EU Member State or the EU itself, or between an Investor from an EU Member State and a State outside the EU. Thus, Spain does not contest that, even on its own view of EU law, EU law would be no obstacle to the jurisdiction of this Tribunal if the Claimants were from Japan or Australia rather than from Germany. Yet in such a case, issues of EU law (as part of the law of Spain) would be just as likely to arise and yet could not be referred to the CJEU for a preliminary ruling."

<sup>304</sup> See e.g. *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018; *Foresight and others v. Kingdom of Spain*, SCC Case No. V2015/150, Final Award, 14 November 2018; *Athena Investments A/S (formerly Greentech Energy Systems A/S), NovEnergia II Energy & Environment (SCA) SICAR and NovEnergia II Italian Portfolio SA v.*

(ii) *Komstroy* Judgement

455. The Tribunal is equally unconvinced that the *Komstroy* Judgement of the CJEU should alter the analysis of the Article 26 of the ECT for the following reasons.
456. First, the ECJ's finding regarding the incompatibility between Article 26(2)(c) of the ECT with EU law in *Komstroy* Judgement is an *obiter dictum*.<sup>305</sup>
457. Even on its face, the paragraphs of the Judgement on which Respondent and the EC rely are not contained in the operative part of the Judgement. This is because these findings do not pertain to the underlying case, where claimant was a Ukrainian investor and respondent was a non-EU Member State. These findings also go beyond the questions for which the judgement was referred to the CJEU.<sup>306</sup>

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*Italian Republic*, SCC Case No. V(2015/095), Final Award, 23 December 2018; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019; *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection, 25 February 2019; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent Request for Immediate Termination and Respondent Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019; *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection, 26 June 2019; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019; *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019; *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019; *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020; *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020; *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020; *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021; *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award, 08 March 2021; *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021; *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021.

<sup>305</sup> See *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 667.

<sup>306</sup> The Tribunal recalls that the *Cour d'Appel de Paris* referred the following questions to the CJEU for a preliminary ruling "[ (1) ] Must [Article 1(6) ECT] be interpreted as meaning that a claim which arose

458. *Second*, the Tribunal concurs with the tribunal in *Sevilla v. Spain* which ruled that it "cannot accept the CJEU's interpretation of Article 26(2)(c) of the ECT as persuasive, as the reasoning of the *Komstroy Judgment* does not provide any analysis of this provision and its alleged inapplicability in an intra-EU context from the perspective of international law."<sup>307</sup>
459. As a result, the Tribunal endorses the *RREEF Infrastructure v. Spain* Annulment Committee's reading of the *Komstroy Judgment* in the wider legal and political context:

"[T]he Court is not in fact dealing with a case whose facts had required it to consider the specific question of the scope of Article 26 and its application to intra-EU investor-State claims. The Committee is fully conscious of the desire of the CJEU to state that EU law should be interpreted and applied consistently and that it is so charged with that responsibility. However, that objective could, in the Committee's view, only be achieved by a subsequent amendment to the ECT provisions, adding a disconnection clause or by permitting other customarily acceptable declarations and acceptances by other parties to the ECT. It should not, with respect, be made by a unilateral judicial assertion by the CJEU that it alone has the monopoly to finally interpret the ECT provisions which has a direct impact on third-party investors who have relied on the plain and clear provisions of the ECT and unconditional consent to arbitration given by the Contracting States."

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from a contract for the sale of electricity and which did not involve any economic contribution on the part of the investor in the host State can constitute an 'investment' within the meaning of that article?

[(2)] Must [Article 26(1) ECT] be interpreted as meaning that the acquisition, by an investor of a Contracting Party, of a claim established by an economic operator which is not from one of the States that are Contracting Parties to that treaty constitutes an investment?

[(3)] Must [Article 26(1) ECT] be interpreted as meaning that a claim held by an investor, which arose from a contract for the sale of electricity supplied at the border of the host State, can constitute an investment made in the area of another Contracting Party, in the case where the investor does not carry out any economic activity in the territory of that latter Contracting Party?"

<sup>307</sup> *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 668.

460. Therefore, the judgements of the CJEU relied on by Respondent and the EC cannot serve to alter the Tribunal's analysis, given that the Tribunal is neither bound by them nor considers them applicable to the arbitration established under and in accordance with a valid international law instrument, namely the ECT.

**f) Enforceability of the Award**

461. The Tribunal notes Respondent's argument that an award issued contrary to the findings of the CJEU and the position of the EU, would be set aside in the courts of Sweden, the seat of arbitration and an EU-Member State. To that end, Respondent relies, *inter alia*, on the latest Swedish Supreme Court decision in *PL Holdings v. Poland* and the Svea Court of Appeal decision in *Novenergia II v. Spain*.

462. In short, it is not in the purview of the Tribunal to look into potential enforcement issues to decide on its jurisdiction. The Tribunal concurs with the *Vattenfall v. Germany* tribunal that held that:

*"While the Tribunal is mindful of the duty to render an enforceable decision and ultimately an enforceable award, the Tribunal is equally conscious of its duty to perform its mandate granted under the ECT. [...] The enforceability of this decision is a separate matter which does not impinge upon the Tribunal's jurisdiction."*<sup>308</sup>

463. For all the reasons outlined above, the Tribunal is compelled to uphold jurisdiction over Respondent's EU law objection.

**III. ECT Objections**

464. The Tribunal will now turn to Respondent's remaining objections to the Tribunal's jurisdiction and the admissibility of Claimant's claims, as follows: Claimant is not an Investor

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<sup>308</sup> **Exhibit CL-8**, *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para. 230. See also **EC Annex 05**, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, para. 568.

under Article 1(7)(a)(ii) of the ECT (1.); Claimant did not make an Investment under the ECT (2.); Respondent denied Claimant benefits under Article 17(1) of the ECT (3.); Claimant's claims are precluded by the fork in the road clause under Article 26(2) of the ECT (4.); Claimant's claims in this arbitration constitute an abuse of process (5.); Claimant's claims are premature and not ripe for arbitration (6.); and, finally, Claimant's claims are inadmissible under the principle of clean hands (7.).

## **1. Claimant Is Not an Investor under Article 1(7)(a)(ii) of the ECT**

465. Respondent objects to the Tribunal's jurisdiction *ratione personae*, on the basis that Claimant has failed to demonstrate that it is an investor within the meaning of Article 1(7)(a)(ii) of the ECT.

### **a) Respondent's Position**

466. It is Respondent's position that Claimant has failed to demonstrate that it is an "*Investor*" within the meaning of Article 1(7)(a)(ii) of the ECT and to satisfy the burden of proof in regard to the Tribunal's jurisdiction *ratione personae*.<sup>309</sup> According to Respondent, there are strong indications that Mercuria is a non-Cypriot shell company managed from outside of Cyprus (probably from Geneva), whose beneficiaries hold passports issued by a State that is not a Contracting Party to the ECT or not eligible for the protection granted by the ECT.<sup>310</sup>

467. *First*, Respondent submits that Claimant has failed to prove that Mercuria is a Cypriot company under the incorporation theory, that is, "*a company or other organization in accordance with the law applicable in that Contracting Party*" in accordance with Article 1(7)(a)(ii) of the ECT.<sup>311</sup> Respondent contends that this provision requires that Claimant is not only formally incorporated in Cyprus, but also "organized" according to the requirements of Cypriot law.<sup>312</sup> In this regard, Respondent contends that Claimant has not provided all the documents to prove it was properly incorporated under Cypriot Companies Law, such as (i) a certificate of the names of directors and secretary; (ii) the first

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<sup>309</sup> Statement of Defence, para. 294.

<sup>310</sup> Statement of Defence, para. 300; Rejoinder, para. 174.

<sup>311</sup> Statement of Defence, para. 295.

<sup>312</sup> Rejoinder, para. 172.



resolution of the board of directors and of the shareholders appointing the first director;  
(iii) share certificates; and (iv) the company's seal.<sup>313</sup>

468. With reference to Claimant's statement that Respondent's expert, Mr. Stavros Pavlou, confirmed as a Cypriot barrister that Claimant was duly registered as a Cypriot limited liability company, Respondent submits that Mr. Pavlou only referred to Claimant's formal incorporation and did not analyse whether Claimant held the status of an Investor under the ECT.<sup>314</sup>
469. *Second*, Respondent submits that there are grounds to suspect that Claimant may not be controlled by citizens or legal persons of Cyprus or any Contracting Party to the ECT.<sup>315</sup> In particular, Respondent notes that two of Mercuria's beneficiaries are Polish citizens, Messrs. Jankilevitsch and Smolokovski, and two shareholders owning a significant number of Claimant's shares are located in Lichtenstein, the Jankilevitsch Foundation and the Smolokovski Foundation.<sup>316</sup> Respondent also contends that the Beneficial Owners' Declaration dated 15 May 2020 submitted by Claimant concerns Mercuria Energy Holding Group Limited, a company incorporated in the territory of the British Virgin Islands, which is not a Contracting Party to the ECT.<sup>317</sup>
470. *Third*, it is Respondent's position that Claimant has not provided any factual evidence demonstrating any real business activity in or that it is effectively managed from Cyprus.<sup>318</sup> Respondent contends that Mercuria is widely recognised as a Swiss company, noting that Claimant's website indicates that its main and central office is in Geneva, Switzerland, and that Claimant's Power of Attorney was signed in Geneva.<sup>319</sup>
471. Respondent further submits that the documents presented by Claimant do not demonstrate

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<sup>313</sup> Statement of Defence, para. 295, Rejoinder, para. 172 with reference to **Exhibit R-001**, Cypriot Companies Law, Articles 83, 90, 105, 140, 141, 192, 209.

<sup>314</sup> Rejoinder, para. 173.

<sup>315</sup> Rejoinder, para. 174.

<sup>316</sup> Rejoinder, para. 174.

<sup>317</sup> Statement of Defence, paras. 296-297 with reference to **Exhibit C-16**, Beneficial Owners' Declaration, dated 15 May 2020 and **Exhibit R-002**, Mercuria Energy Group Holding Limited profile on DNB.

<sup>318</sup> Statement of Defence, para. 299; Rejoinder, para. 169.

<sup>319</sup> Statement of Defence, para. 299; Rejoinder, para. 170 with reference to **Exhibit R-003**, Mercuria's official website [www.mercuria.com/contact-us](http://www.mercuria.com/contact-us); **Exhibit R-004**, Mercuria Energy Group Limited's entry on Wikipedia; **Exhibit R-005**, Mercuria Energy Group Ltd's entry on SWFI; **Exhibit R-006**, Mercuria Energy Group's entry on Crunchbase; **Exhibit C-2**, Power of Attorney.

its business activity in Cyprus.<sup>320</sup> With reference to Claimant's table of expenses for the years 2009-2019, Respondent contends that this cannot serve as evidence because its authenticity is doubtful and it does not indicate that Claimant undertook specific economic activities as part of business activities conducted in Cyprus.<sup>321</sup> Respondent also contends Claimant's reference to the Witness Statement of Mr. Jarek Astramowicz is insufficient because this statement does not contain specific facts or examples of business activity in Cyprus, aside from administrative activities, nor is it supported by any evidence confirming the statements made therein.<sup>322</sup>

472. *Finally*, Respondent submits that its objections in these proceedings are broader than those covered by the 2009 MEG Award on jurisdiction, the *res judicata* effect of which is contested by Respondent.<sup>323</sup> More specifically, Respondent contends that only the challenges related to the source of capital and the nationality of Claimant's ultimate beneficial owner find analogy in the First Arbitration and that, in these proceedings, Respondent has also questioned whether Claimant was organized and operated in accordance with Cypriot law and whether its actual seat was located in Cyprus.<sup>324</sup> In this regard, Respondent contends that Claimant has failed to substantiate that it pursues genuine activity in Cyprus and submits that, during the Hearing, Claimant's witness Mr. Astramowicz admitted that a substantive part of Claimant's management (including Claimant's CFO) had continuously resided outside of Cyprus.<sup>325</sup>

## **b) Claimant's Position**

473. Claimant submits that its status as an "*Investor*" within the meaning of Article 1(7)(ii) of the ECT was dealt with in the MEG Award on Jurisdiction and that there have been no changes since the rendering of the MEG Award on Jurisdiction in December 2009 that would affect Claimant's status as an Investor.<sup>326</sup> In particular, Claimant submits

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<sup>320</sup> Rejoinder, para. 171 with reference to **Exhibit C-21**, Transfer confirmation of 30 June 2008; **Exhibit C-22**, Transfer confirmation of 1 July 2008; **Exhibit C-23**, Transfer confirmation of 11 July 2008; **Exhibit C-83**, JSE's bank statement of 30 November 2009.

<sup>321</sup> Rejoinder, para. 169 with reference to **Exhibit C-114**, Mercuria Energy Group Ltd.'s expense analysis 2006–2019.

<sup>322</sup> Rejoinder, para. 170 with reference to **CWS-1**, Witness Statement of Mr. Jarek Astramowicz, paras. 5-6.

<sup>323</sup> Respondent's Post-Hearing Brief, para. 6.

<sup>324</sup> Respondent's Post-Hearing Brief, para. 7.

<sup>325</sup> Respondent's Post-Hearing Brief, para. 7.

<sup>326</sup> Statement of Claim, para. 57; Claimant's Post-Hearing Brief, paras. 5-6.

that it has kept its "*Investor*" status as defined in Article 1(7)(ii) of the ECT and its investment as defined in Article 1(6)(b)(c) of the ECT in light of the facts that it was organised in accordance with Cypriot law on 10 February 2004 and has remained a limited liability company with its registered seat in Larnaca, Cyprus; that Claimant remains the sole shareholder of JSE; and that the Loan Agreement has been in place since 23 June 2008 without amendment (except for the Revaluation Agreement).<sup>327</sup> Recognising that the MEG Award on Jurisdiction does not have a *res judicata* effect, Claimant refers to a judgement by the Federal Court in Lausanne dated 19 June 2019 and states that, regardless of any *res judicata* issues, "*the fact that one arbitral tribunal refers to the findings of another regarding a dispute between the same parties could not be a surprise but rather an obvious point*".<sup>328</sup>

474. It is Claimant's position that it has presented more than sufficient evidence to establish the Tribunal's jurisdiction *ratione personae*, demonstrating that Mercuria Energy Group Limited is a privately-owned limited liability company organized in accordance with the laws of the Republic of Cyprus. In particular, Claimant states that it has provided: (i) its Certificate of Incorporation; (ii) two Certificates of a Change of Name; (iii) a Certificate of Registered Address; and (iv) Certificate of Good Standing.<sup>329</sup>
475. Claimant contends that, as the ultimate operational parent company of the global Mercuria energy and commodity trading group (operating in more than 50 countries and employing over 1,000 people over 38 offices), Claimant is not and has never been a shell company designed to hide its ultimate beneficiaries who would otherwise not have enjoyed the status of Investor eligible for protection under the ECT.<sup>330</sup>
476. With regard to Respondent's allegations regarding the nationality of Claimant's ultimate beneficiaries, Claimant submits that these allegations are irrelevant in light of Article 1(7)(ii) of the ECT, as confirmed in the MEG Award on Jurisdiction, in which the tribunal

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<sup>327</sup> Claimant's Post-Hearing Brief, para. 7.

<sup>328</sup> Statement of Claim, para. 56 with reference to **Exhibit CL-16**, judgment of the Federal Court in Lausanne, Switzerland, dated 19 June 2019 (Case ref. No. 4A\_628/2018), para. 3.3.

<sup>329</sup> Request for Arbitration, para. 5; Statement of Claim para. 59 with reference to **Exhibit C-1**, Certificate of Incorporation of Mercuria Energy Group, two Certificates of Change of Name, Certificate of Registered Office and Certificate of Good Standing; Reply to the Statement of Defence, para. 140.

<sup>330</sup> Statement of Claim, paras. 62, 68.

concluded that the test of incorporation was recognized by all legal systems and that the authors of the ECT had not inserted any criterion based on economic circumstances, such as where the capital used to acquire the investment originated from citizens residing in the State where the investment was made.<sup>331</sup>

477. Claimant submits that it has presented its shareholder structure according to which 79.8228% of the share capital of Claimant (and 100% of its voting rights) is owned indirectly through Mercuria Energy Holding Group Limited, while the remaining 20.1772% of shares are non-voting and are held by the Claimant's Employee Stock Ownership Plan Trust (ESOP Trust) and certain key employees, as follows:<sup>332</sup>

- Hannos Investment Holdings Limited (2.83% of shares),
- Linetskiy Foundation (2.27% of shares),
- Smolokowski Foundation (4.54% of shares),
- Jankilevitsch Trust (4.54% of shares),
- CCPC (Hong-Kong) Limited (12.16% of shares),
- The MEG Trust (8.05% of shares),
- The ESOP Trust (20.61% of shares), and
- MDJ Oil Trading Limited (45% of shares).

478. Claimant further submits that Respondent's expert witness and Cypriot barrister, Mr. Pavlou, confirmed that Claimant is duly registered as a Cypriot limited liability company and that Mr. Pavlou's research did not result in any doubts as to Claimant's incorporation.<sup>333</sup> Moreover, Claimant contends that its Articles of Association meet the criteria established by Mr. Pavlou by restricting the right of transfer of shares and the number of members to 50 (excluding shares acquired during employment by employees or ex-employees of the

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<sup>331</sup> Statement of Claim, para. 60 with reference to **Exhibit CL-17**, MEG Award on Jurisdiction, para. 84.

<sup>332</sup> Statement of Claim para. 61 with reference to **Exhibit C-16**, Beneficial Owners' Declaration, dated 15 May 2020.

<sup>333</sup> Reply to the Statement of Defence, para. 141 with reference to **Exhibit RER-4** First Expert Report of Stavros Pavlou, para. 15.

company, or its parent, subsidiary, or sister company) and prohibiting any invitation to the public for subscription to its shares or debentures.<sup>334</sup>

479. On this basis, Claimant contends that it has provided sufficient evidence of its business activity in Cyprus, with specific reference to the Witness Statement of Mr. Jarek Astramowicz and Claimant's expense analysis for 2006 to 2009.<sup>335</sup>

**c) Tribunal's Analysis**

480. The definition of "*Investor*" is contained in Article 1(7) of the ECT as follows:

*"(7) 'Investor' means:*

*(a) with respect to a Contracting Party:*

*(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;*

*(ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party*

*(b) with respect to a 'third state', a natural person, company or other organisation which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party."*

481. On the basis of the evidence submitted by Claimant, the Tribunal is satisfied that Claimant is a company organised in accordance with the law applicable in Cyprus meeting the definition of an "*Investor*" in Article 1(7)(a)(ii) of the ECT. In particular, Claimant has

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<sup>334</sup> Reply to the Statement of Defence, para. 142 with reference to **Exhibit C-113**, Articles of Association of Mercuria Energy Group Ltd., Article 2 (C-113.1\_ENG – part 1 and C-113.2\_ENG – part 2).

<sup>335</sup> Reply to the Statement of Defence, paras. 143-144 with reference to **Exhibit CSW-1** Witness statement made by Jarek Astramowicz, paras. 5-6, **Exhibit C-114**, Mercuria Energy Group Ltd.'s Expense Analysis 2006–2019; **Exhibit C-3**, Certified extract of Mercuria's board resolution; **Exhibit C-21**, Transfer confirmation of 30 June 2008; **Exhibit C-22**, Transfer confirmation of 1 July 2008; **Exhibit C-23**, Transfer confirmation of 11 July 2008; **Exhibit C-83**, JSE's bank statement of 30 November 2009.

submitted various certificates demonstrating its due incorporation under the Cypriot Companies Law.<sup>336</sup> The Tribunal further notes that Respondent's expert witness, Mr. Pavlou, confirmed that Claimant is a private limited liability company registered under the laws of the Republic of Cyprus.<sup>337</sup>

482. Accordingly, Respondent's challenges as to whether Claimant was organized and operated in accordance with Cypriot law and whether its actual seat was located in Cyprus do not convince the Tribunal that Claimant is not to be considered an Investor under the ECT.
483. Respondent has also challenged Claimant's status as an investor based on the source of its capital and the nationality of its ultimate beneficiaries. In this regard, the Tribunal makes reference to the following reasoning of the tribunal in the MEG Award on Jurisdiction:

*"Even if the test of incorporation is a formalistic one, it is a test recognized by all legal systems. If the authors of the ECT had wished to insert a criterion based on economic considerations, they would have done so expressly. The proof of this is to be found in Article 17(1) ECT, which expressly states that, in certain situations, a Contracting Party may – but only if it declares it – deny the advantages of Part III of the ECT in circumstances where a legal entity is owned or controlled by citizens or nationals of a third state. The same reasoning could have been made applicable for the case where the capital used to acquire the investment originated from citizens residing in the State where the investment was made; but it was not.*

*The Tribunal thus concludes that there is no indication in the ECT that the proximate or ultimate origin of capital is relevant in this context; and it observes that, in any event, there appears to be no manageable way of determining the national 'origin' of capital.*

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<sup>336</sup> **Exhibit C-1**, Certificate of Incorporation of Mercuria Energy Group, two Certificates of Change of Name, Certificate of Registered Office and Certificate of Good Standing.

<sup>337</sup> **Exhibit RER-4**, First Expert Report of Stavros Pavlou, para. 15.

*This being said, it does not mean that the principle of incorporation does not have any exceptions. In that regard, there may be circumstances in which the presumed validity and effectiveness of the nationality acquired by incorporation can be overturned and the veil of incorporation can be lifted (see Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 3 at para. 58). For instance, a tribunal would not necessarily be bound to accept a nationality acquired by a claimant after a dispute had arisen and for the sole purpose of giving the claimant a procedural or substantive advantage in arbitration under the ECT or a BIT.*

*This Arbitral Tribunal agrees with Professor Weil and with the decisions rendered on this issue by other tribunals that where a corporate investor has been artificially organized in order to have a link with another Contracting Party for the sole purpose of benefiting from the ECT's provisions, it is possible that the protection afforded by Part III of the ECT may be denied to that investor."*<sup>338</sup>

484. While the MEG Award on Jurisdiction does not have a *res judicata* effect for the current proceedings, this Tribunal agrees with the reasoning cited above in that the test of incorporation is recognized by all legal systems and that the definition of "Investor" in the ECT does not contain any criteria as to the origin of capital.
485. This approach is uncontroversial and has been followed by arbitral jurisprudence, including by the tribunal in *Saluka Investments BV v. The Czech Republic* ("**Saluka v. Czech Republic**"):

*"[T]he 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*

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<sup>338</sup> Exhibit CL-17, MEG Award on Jurisdiction, para. 84.

*have agreed upon who is an investor who may become a claimant 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."*<sup>339</sup>

486. The Tribunal concurs with the tribunal in *Hulley Enterprises Ltd. v. Russian Federation* citing Professor Crawford:

*"On its face, Article 1(7)(a)(ii) of the ECT contains no requirement other than that the claimant company be duly organized in accordance with the law applicable in a Contracting Party. The Tribunal agrees with Professor Crawford that in order to qualify as a protected Investor under Article 1(7) of the ECT, a company is merely required to be organized under the laws of a Contracting Party. As Professor Crawford rightly points out:*

*The Treaty imposes no further requirements with respect to shareholding, management, siège social or location of its business activities (...). Companies incorporated in Contracting Parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or the nationality of directors or management."*<sup>340</sup>

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<sup>339</sup> *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, para. 241. See also **Exhibit RL-028**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 116; *AIIY LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017, para. 125; *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, para. 148; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum, 12 March 2019, para. 209.

<sup>340</sup> *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 411 citing Professor James Crawford, SC, *Energy Charter Treaty Arbitration: Jurisdiction Issues*, 22 June 2006, para. 126.



487. Further, the Tribunal also agrees that the protection afforded by Part III of the ECT may be denied to a corporate investor organized in order to have a link with another Contracting Party for the sole purpose of benefitting from the ECT's provisions. In this regard, Respondent argues that Claimant has failed to provide sufficient evidence of real business activities in Cyprus and submits that Claimant could be a shell company managed from outside of Cyprus.

488. The Tribunal, however, does not take the view that Claimant was organized for the sole purpose of benefitting from the ECT's provisions. In particular, the Tribunal notes that Claimant is a global energy and commodity group operating in more than 50 countries with over 1,000 employees that has been incorporated under Cypriot law since February 2004. Based on the evidence before it, there is no reason for the Tribunal to doubt the validity of Claimant's incorporation under Cypriot law and its corresponding status as an Investor under Article 1(7)(a)(ii) of the ECT.

## **2. Claimant Did Not Make an Investment under the ECT**

489. Respondent objects to the Tribunal's jurisdiction *ratione materiae* on the basis that Claimant has not made an "*Investment*" within the meaning of Article 1(6) of the ECT.

### **a) Respondent's Position**

490. Respondent contends that JSE and Mercuria are in fact the same entity, and that the transfer of money within the same entity cannot be considered an Investment.<sup>341</sup>

491. More specifically, Respondent submits that the Loan Agreement was an intra-group capital injection, a form of recapitalization of a formally distinct but in fact the same entity (*i.e.* JSE) due to the imposition of the Penalty by the State and which would be immediately repaid upon the return of the Penalty from the State.<sup>342</sup> According to Respondent, its position is supported by the terms of the Loan Agreement, according to which JSE undertook to assign all its rights, title, and interest in the receivable to Claimant up to the Repayment Amount (Clause 3.2), and that Claimant expected the money to be returned

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<sup>341</sup> Rejoinder, para. 176.

<sup>342</sup> Rejoinder, para. 176; Respondent's Post-Hearing Brief, para. 8.

or transformed into equity by way of share capital or premium (Clause 3.4).<sup>343</sup>

492. Respondent rejects Claimant's identification of its Investment as the "*receivable arising out of the Loan Agreement*", and submits that this does not constitute an Investment under Article 1(6) of the ECT.<sup>344</sup>
493. *First*, Respondent submits that the Loan Agreement was a one-off commercial transaction that cannot qualify as an Investment.<sup>345</sup> In particular, Respondent refers to the fact that the Loan Agreement was concluded under highly exceptional circumstances for the exclusive purpose of payment of the Penalty by JSE and was to be repaid immediately following the reimbursement of the Penalty with interest by the State.<sup>346</sup>
494. *Second*, Respondent submits that purely commercial transactions are to be excluded from the scope of protection of investment treaties, including the ECT, and that this has been implicitly acknowledged by Claimant.<sup>347</sup>
495. Respondent submits that claims to money can only fall within the scope of Article 1 of the ECT, if they are "*associated with an Investment*" understood as "*any investment associated with an Economic Activity in the Energy Sector*".<sup>348</sup> It is Respondent's position that the Loan Agreement does not meet these criteria because it was concluded as a commercial agreement strictly belonging to the field of financial services and cannot be classified as associated with an Economic Activity in the Energy Sector.<sup>349</sup>
496. *Third*, Respondent submits that it is widely recognised by investment arbitration tribunals that not every economic activity may be qualified as an investment and that the vested jurisprudence provides three criteria for the ordinary meaning of the concept of an investment, namely: (i) contribution of resources, (ii) duration and (iii) assumption of risk (*i.e.* the *Salini* criteria).<sup>350</sup> According to Respondent, the Loan Agreement does not meet these

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<sup>343</sup> Rejoinder, para. 177.

<sup>344</sup> Statement of Defence, para. 301; Rejoinder, para. 178.

<sup>345</sup> Statement of Defence, para. 302.

<sup>346</sup> Statement of Defence, para. 302.

<sup>347</sup> Statement of Defence, para. 303.

<sup>348</sup> Statement of Defence, para. 304.

<sup>349</sup> Statement of Defence, para. 304.

<sup>350</sup> Statement of Defence, para. 305 with reference to **Exhibit RL-023**, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, para 207 and

criteria and does not amount to an investment.<sup>351</sup>

497. In regard to (i) of the *Salini* criteria, Respondent contends that the Loan Agreement did not contribute to the Polish economy or the development of the State as it was only concluded to provide JSE with the means to pay the Penalty and continue litigation before the Polish courts.<sup>352</sup> According to Respondent, the possibility of turning the debt into equity would be simply a bookkeeping operation that would not contribute to JSE's operations in Poland.<sup>353</sup>
498. Respondent contends that the Loan Agreement does not satisfy (ii) of the *Salini* criteria because it is a one-off transaction of no duration at all, particularly because the loan was repaid on 10 November 2009 immediately following the return the Penalty to JSE.<sup>354</sup>
499. In regard to the (iii) of the *Salini* criteria, Respondent contends that Claimant did not assume any operational risk when signing the Loan Agreement under which Claimant would receive any and all sums refunded to JSE or, in the event JSE would have been unsuccessful in having the Penalty overturned by the Polish courts, JSE undertook to pass a resolution converting the loan amount into equity in JSE in the form of an increase in share capital and share premium pursuant to Articles 3.3 and 3.4 of the Loan Agreement.<sup>355</sup>
500. *Fourth*, Respondent submits that the activities of JSE have been of little significance to the Polish economy since the restructuring activities of Mercuria Energy Group Holding Ltd in 2013 and, therefore, Claimant's shareholding in JSE alone cannot amount to an Investment as of the date Claimant initiated this arbitration.<sup>356</sup>
501. Respondent therefore concludes that Claimant failed to address Respondent's argument that an asset does not automatically qualify as an Investment just because it falls within one of the categories listed in Article 1(6) of the ECT, and that Claimant's references to

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**Exhibit RL-028**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 173.

<sup>351</sup> Statement of Defence, para. 308.

<sup>352</sup> Statement of Defence, para. 307.

<sup>353</sup> Respondent's Post-Hearing Brief, para. 12.

<sup>354</sup> Statement of Defence, para. 308.

<sup>355</sup> Statement of Defence, para. 307.

<sup>356</sup> Statement of Defence, para. 309.

the PCA case *Manchester Securities Corp. v. The Republic of Poland* ("**Manchester v. Poland**") are irrelevant because an "inherent investment" was made in that case.<sup>357</sup> Further, Respondent maintains that *Manchester v. Poland* cannot be applied to the present case because the underlying facts are completely different.<sup>358</sup>

502. *Finally*, Respondent also advanced the position that JSE is a mere intermediary of Claimant with the consequence that both entities should be treated as one entity.<sup>359</sup> In its Post-Hearing Brief, Respondent submitted that the "pure intermediary" standard must be assessed case by case and in consideration of several factors.<sup>360</sup>

503. According to Respondent, Claimant's internal documents recognize that JSE is an intermediary of Claimant and Respondent has further proven that JSE should be qualified as an intermediary because it is effectively controlled by Claimant as its sole owner, acting according to Claimant's interests and instructions, has partially the same personnel as Claimant, and uses the same law firm and counsel.<sup>361</sup> In addition, Respondent contends that, under the terms of the Loan Agreement, any money received from Respondent would immediately be transferred from JSE to Claimant and that JSE assigned all its rights, title, and interest in the receivable of the Loan Agreement to Claimant up to the repayment amount.<sup>362</sup> Further, Respondent argues that the claims in this arbitration and JSE's domestic proceedings both originate from the decision of the imposition of the Penalty on JSE, which resulted in the conclusion of the Loan Agreement, have the same factual predicates, and call for the same relief, with the sum due on the basis of the Loan Agreement mirroring the compensation sought by JSE before the Polish courts.<sup>363</sup>

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<sup>357</sup> Rejoinder, para. 179.

<sup>358</sup> Rejoinder, para. 179.

<sup>359</sup> Rejoinder, paras. 34, 40.

<sup>360</sup> Respondent's Post-Hearing Brief, para. 24.

<sup>361</sup> Rejoinder, paras. 30-40; Respondent's Post-Hearing Brief, para. 25

<sup>362</sup> Respondent's Post-Hearing Brief, para. 25

<sup>363</sup> Respondent's Post-Hearing Brief, para. 25

**b) Claimant's Position**

504. Claimant rejects Respondent's objection *ratione materiae*, since it has made an "Investment" within the meaning of Articles 1(6)(b) and (c) of the ECT.<sup>364</sup> Claimant submits that the same objection was also analysed in the previous arbitration between the Parties.<sup>365</sup>
505. *First*, Claimant contends that by acquiring 100% of shares in JSE as a company incorporated under the laws of Respondent and with its registered seat in the territory of Respondent, Claimant made an Investment protected by the ECT in accordance with Articles 1(8) and 1(6)(b) of the ECT.<sup>366</sup>
506. *Second*, Claimant submits that the Loan Agreement qualifies as an Investment as a contribution of capital under Article 1(6)(c) of the ECT, especially "*as it is associated with the shares the Claimant holds in JSE*".<sup>367</sup> In particular, it is Claimant's position that the receivables arising out of the Loan Agreement qualify as "*claims to money*" within the meaning of Article 1(6)(c) of the ECT.<sup>368</sup> In Claimant's view, there is no provision in the ECT that excludes loans from being treated as claims to money, such as the explicit limitation on claims to money in Article 1139 of the NAFTA, and that the absence of any further explanatory guidelines on the "*claims to money*" in the ECT must be interpreted in good faith and in accordance with its ordinary meaning having regard to its context and the object and purpose of the ECT pursuant to Article 31(1) of the VCLT.<sup>369</sup>
507. With reference to the decision in the SCC case *Petrobart Limited v. The Kyrgyz Republic* ("*Petrobart v. Kyrgyzstan*"), Claimant acknowledges that there is some ambiguity in the wording of Article 1(6)(c) of the ECT due to an *ignotum per ignotum* concerning the definition of Investment with respect to claims to money.<sup>370</sup> However, Claimant submits that even if Article 1(6)(c) of the ECT is held to require a connection between claims to money and other forms of investment, it would not have an adverse effect on the

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<sup>364</sup> Statement of Claim, para. 79.

<sup>365</sup> Statement of Claim, paras. 63, 66 with reference to **Exhibit CL-18**, MEG Award on Jurisdiction, para. 81.

<sup>366</sup> Statement of Claim, para. 65.

<sup>367</sup> Statement of Claim, para. 75; Reply, para. 148.

<sup>368</sup> Statement of Claim, para. 68.

<sup>369</sup> Statement of Claim, paras. 69-72.

<sup>370</sup> Statement of Claim, para. 74 with reference to **Exhibit CL-20**, *Petrobart Limited vs. The Kyrgyz Republic* (SCC Case No. 26/2003), Award of 29 March 2005, p. 72.

jurisdiction of the Tribunal because a claim to money is not Claimant's only Investment.<sup>371</sup>

508. Claimant asserts that the terms of the Loan Agreement, concluded to provide JSE with the funds to pay the Penalty and avoid insolvency, demonstrate that it is not a commercial transaction.<sup>372</sup> Claimant contrasts the terms and circumstances of conclusion of the Loan Agreement with the usual terms and circumstances of a financing transaction.<sup>373</sup>
509. *First*, with reference to the Preamble of the Loan Agreement, Claimant submits that the money had to be used for the purpose of paying the Penalty and thus could only be invested in territory of Respondent as a Contracting Party to the ECT.<sup>374</sup>
510. *Second*, Claimant contends that there was no repayment schedule in the Loan Agreement and that, in accordance with Clause 3.1 of the Loan Agreement, the Loan would be repaid after JSE recovered the amount of the Penalty with interest from Respondent.<sup>375</sup>
511. *Third*, Claimant submits that it undertook not to claim repayment of the Loan Agreement (under its Clause 3.4) if the penalty was not overturned by the Polish courts and instead the Loan would be converted into equity in JSE by an increase in share capital and share premium.<sup>376</sup> In this context, Claimant disputes Respondent's assertion that there was no operational risk in concluding the Loan Agreement, submitting that equity in a company is essentially a debt towards the shareholders and therefore, in the event the Polish courts did not overturn the Penalty, Clause 3.4 of the Loan Agreement would have replaced debt in the form of the Loan with debt in the form of share capital.<sup>377</sup>
512. Claimant further contends that Respondent's objections in this respect were unsuccessful in the previous arbitration between the Parties, as well as in *Manchester v. Poland*.<sup>378</sup> Claimant submits that the tribunal in *Manchester v. Poland* considered bonds to be an

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<sup>371</sup> Statement of Claim, para. 74.

<sup>372</sup> Statement of Claim, paras. 75-76.

<sup>373</sup> Claimant's Post-Hearing Brief, para. 10.

<sup>374</sup> Statement of Claim, para. 76.

<sup>375</sup> Statement of Claim, para. 77.

<sup>376</sup> Statement of Claim, para. 78.

<sup>377</sup> Reply to the Statement of Defence, para. 148.

<sup>378</sup> Reply to the Statement of Defence, para. 148 with reference to **Exhibit CL-39**, *Manchester Securities Corp. vs. The Republic of Poland*, PCA Case No. 2015-18, Award, dated 18 December 2018, paras. 367-375.

investment under the narrower definition of the Poland-USA BIT, even if judged under the *Salini* criteria.<sup>379</sup> In this context, Claimant submits that bonds are a form of lending money that do not differ from a loan and thus the Loan Agreement constitutes an "*Investment*" within the meaning of Article 1(6)(c) of the ECT.<sup>380</sup>

513. Claimant maintains that there are no grounds for the Tribunal to deviate from the wording of Article 1(6)(c) of the ECT in defining an "*Investment*".<sup>381</sup> Claimant specifically submits that "contribution to development of host state's economy" is an additional criterion developed by the tribunals adjudicating cases under the ICSID Convention and, therefore, inapplicable in the present case.<sup>382</sup> Claimant also submits, however, that if the Tribunal were to apply the *Salini* criteria, which are not contained in the ECT, the Tribunal would find that the Loan Agreement was associated with the shares in JSE and executed in "furtherance of a venture" leading to the conclusion that Claimant made an Investment within the meaning of the ECT in line with the decision in *Manchester v. Poland*.<sup>383</sup> Moreover, according to Claimant, its Investment did contribute to Poland's economy.<sup>384</sup>
514. Claimant further submits that the Tribunal has jurisdiction *ratione temporis* because the transfer of shares in JSE and the Loan Agreement were concluded prior to the actions of Respondent that gave rise to this dispute.<sup>385</sup> It is Claimant's position that at the time the Loan Agreement was concluded, Claimant strongly believed that the administrative court system was independent and that Respondent's authorities would follow the court rulings.<sup>386</sup> Claimant states that if this were not the case, it would not have provided JSE with the Loan because there would have been no prospect of recovery.<sup>387</sup> Claimant concludes that there was no reason to question its beliefs prior to November 2009, especially in light of the rulings of the PAC and SAC in JSE's favour and repealing the Penalty.<sup>388</sup>

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<sup>379</sup> Reply to the Statement of Defence, para. 148 with reference to **Exhibit CL-39**, *Manchester Securities Corp. vs. The Republic of Poland*, PCA Case No. 2015-18, Award, dated 18 December 2018, paras. 367-375.

<sup>380</sup> Reply to the Statement of Defence, para. 148.

<sup>381</sup> Reply to the Statement of Defence, para. 148.

<sup>382</sup> Claimant's Post-Hearing Brief, paras. 8-9.

<sup>383</sup> Reply to the Statement of Defence, para. 148.

<sup>384</sup> Claimant's Post-Hearing Brief, paras. 14-16.

<sup>385</sup> Statement of Claim, para. 80.

<sup>386</sup> Statement of Claim, para. 81.

<sup>387</sup> Statement of Claim, para. 81.

<sup>388</sup> Statement of Claim, para. 81.

515. In response to Respondent's assertion that JSE is a "pure intermediary", Claimant submits that the decisions in *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain* ("**Charanne v. Spain**") and *Supervision y Control S.A. v. Republic of Costa Rica* ("**Supervision v. Costa Rica**") concerned situations in which an investment arbitration was initiated by a company that was in fact the same entity as its affiliate party to domestic court proceedings in the respective host state.<sup>389</sup> Claimant contends that, while the ECT does not contain any provisions for this situation, the approach could be acceptable if the foreign investor effectively operates the domestic subsidiary from afar, if the appointment of the domestic subsidiary's board members, who are not the same persons as the officers or the foreign investor and do not enjoy any business independence, is a fictional process, and if the subsidiary's operations are performed under strict instructions from the foreign investor.<sup>390</sup>
516. According to Claimant, JSE cannot be considered a "pure intermediary" of Claimant: it does not make any decisions on behalf of JSE or in its stead; it did not take part in the domestic proceedings in Poland; and it did not impose legal representation on JSE.<sup>391</sup> In any event, Claimant submits that Respondent would bear the burden to prove that JSE is a "pure intermediary" of JSE and that all subsidiaries of foreign investors would have to be treated as intermediaries if the mere fact that the companies belong the same capital group, as is the case for Claimant and JSE, would be enough to satisfy this burden.<sup>392</sup>

### c) Tribunal's Analysis

517. Article 1(6) of the ECT provides the following definition of "*Investment*":

*" 'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*

*a. tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;*

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<sup>389</sup> Claimant's Post-Hearing Brief, para. 26.

<sup>390</sup> Claimant's Post-Hearing Brief, para. 26.

<sup>391</sup> Claimant's Post-Hearing Brief, para. 27.

<sup>392</sup> Claimant's Post-Hearing Brief, para. 27.



- b. *a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;*
- c. *claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;*
- d. *Intellectual Property;*
- e. *Returns;*
- f. *any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.*

[...]

*'Investment' refers to any investment associated with an Economic Activity in the Energy Sector [...]."*

518. The Tribunal notes both the breadth of this definition as well as the non-exhaustive nature of the enumerated investments. In fact, the broad definition of "*Investment*" under the ECT – as a reflection of a prevailing trend for the BITs and multilateral investment treaties concluded in the 1990s – was noted, *inter alia*, by the tribunals in *FEDAX N.V. v. The Republic of Venezuela* and *Petrobart v. Kyrgyzstan*.<sup>393</sup> In the words of the *Limited Liability Company Amto v. Ukraine* ("***Amto v. Ukraine***") tribunal:

*"The definition of investment in the first part of Article 1(6) is broad and inclusive, and the energy sector restriction in the final part of Article 1(6) is open-textured. The drafters of the Energy Charter Treaty did not require an Investment to be an Economic*

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<sup>393</sup> **Exhibit RL-026**, *FEDAX N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, para. 35; **Exhibit RL-027**, *Petrobart Limited v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, 29 March 2005, paras. 393, 397.

*Activity in the Energy Sector, but only to be ‘associated with’ such an activity.*"<sup>394</sup>

519. Similarly, in reference to the last paragraph of Article 1(6) of the ECT, the tribunal in *Yukos Capital SARL v. Russian Federation* ("**Yukos v. Russian Federation**") held that:

*"The connecting factor ‘associated with’ is relevantly defined in the Oxford English Dictionary as ‘connected with an organization or business.’ The consequence of the use of this phrase by the treaty drafters is that it suffices that the contribution made by way of loan in turn contributes to an enterprise that is itself engaged in an Economic Activity in the Energy Sector."*<sup>395</sup>

520. Proceeding on these notions, the Tribunal will analyse whether the Loan Agreement constitutes an Investment under the ECT.

(i) JSE Shares as Investment

521. In the MEG Award on Jurisdiction, the tribunal concluded that the purchase of the shares in JSE constitutes an Investment pursuant to Articles 1(6) and 1(8) of the ECT:

*"According to the Claimant, on July 2, 2004, it entered into an agreement to purchase all of the shares of the Polish company J&S Energy from its former shareholders. It cannot be denied that the Claimant has, by this purchase, made an investment. The Claimant has purchased all the shares that already existed in J&S Energy. As these shares already existed at the time that they were purchased by the Claimant, the Arbitral Tribunal rejects the Claimant’s contention that Article 1(8) of the ECT is irrelevant. Furthermore, the ECT does not require that an ‘existing investment’ be an investment that was made by foreign nationals.*

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<sup>394</sup> **Exhibit CL-24**, *Limited Liability Company Amtol v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 42.

<sup>395</sup> *Yukos Capital SARL v. Russian Federation*, PCA Case No. 2013-31, Interim Award on Jurisdiction, 18 January 2017, para. 439.

*Therefore, the Arbitral Tribunal does not admit the Respondent's argument that would hinder the Claimant's investment in J&S Energy because the previous owners were Polish nationals. Thus, the Claimant has made an 'Investment' in accordance with the ECT by acquiring an 'existing investment', in the form of shares in the company J&S Energy."*<sup>396</sup>

522. As mentioned above, this finding has no *res judicata* effect for the purposes of this Tribunal's analysis. However, this Tribunal concurs that Claimant's shares in JSE constitute an Investment under Article 1(6) of the ECT. The Tribunal cannot agree with Respondent that JSE and Claimant are the "*same entity*"<sup>397</sup> – this goes against the simple realities of the corporate structure established between Claimant and its subsidiary, as well as against the factual background laid out above in Section E.I.
523. On assessment of the evidence before it, the Tribunal is satisfied that JSE and Claimant are two distinct entities and does not agree with Respondent's argument that JSE is a "pure intermediary" of Claimant. The arguments put forward by Respondent as to why JSE should be qualified as a pure intermediary of Claimant are unconvincing given that Claimant is the operational parent company of the global Mercuria Energy Group. The Tribunal notes that Respondent did not dispute that JSE has been operating in the Polish energy market following its incorporation in 1995 (*see* Section E.I. above), which speaks against JSE being a pure intermediary of Claimant. Overall, the Tribunal finds that the evidence on record demonstrates that JSE cannot be considered a pure intermediary of Claimant.

(ii) Loan Agreement as Investment

524. The Tribunal agrees with Respondent that an asset does not automatically qualify as an "*Investment*" just because it falls within one of the categories listed in Article 1(6) of the ECT. Instead, the Tribunal considers that the analysis of whether there has been an Investment must be a holistic one. For guidance, the Tribunal turns to Articles 31

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<sup>396</sup> **Exhibit CL-17**, MEG Award on Jurisdiction, para. 81.

<sup>397</sup> Rejoinder, para. 176.

and 32 of the VCLT.

525. The Tribunal appreciates the somewhat circular definition of "*claims to money*" under Article 1(6)(c) of the ECT, which has been noted by other arbitral tribunals and discussed by the Parties in their submissions.<sup>398</sup> Specifically, it is unclear whether "*pursuant to contract having an economic value*" and "*associated with an Investment*" refer to "*claims to money*" as well as "*claims to performance*".
526. Accepting Respondent's interpretation of Article 1(6)(c) of the ECT, the Loan Agreement must (i) constitute claims to money that are (ii) associated with an Investment.
527. *First*, the Tribunal finds it uncontroversial that the Loan Agreement constitutes "*claims to money*". The Tribunal has been presented with no evidence to suggest that debt instruments are excluded from the scope of Article 1(6)(c) of the ECT. Absent such evidence, the Tribunal finds the ordinary meaning of "*claims to money*" within the broad scope of "*any asset*" to be controlling.<sup>399</sup>
528. *Second*, the Loan Agreement was not a "*one-off transaction*"<sup>400</sup> – it was issued by an Investor to its subsidiary in the wider context of the latter's operational activity. The fact that it was a *single* agreement does not make it Claimant's and JSE's *singular* transaction in the Polish energy market.
529. To the contrary, it is undisputed between the Parties that JSE, in fact, had been continuously operating in the Polish energy sector. It is equally undisputed that it was precisely JSE's activities in the Polish energy sector that gave rise to and could not continue without the Loan Agreement. In the Tribunal's view, the Loan Agreement's direct connection to Claimant's shareholding in JSE, which this Tribunal has held to be an Investment,

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<sup>398</sup> See e.g. **Exhibit RL-027**, *Petrobart Limited v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, 29 March 2005, para. 397; *State Enterprise Energorynok v. the Republic of Moldova*, SCC Case No. 2012/175, Final Award, 29 January 2015, para. 84.

<sup>399</sup> See also **Exhibit RL-027**, *Petrobart Limited v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, 29 March 2005, paras. 392, 396: "*In various BITs and MITs, claims to money are mentioned among as-sets which are to be regarded as investments. There is also case-law dealing with the interpretation of such treaty clauses. It follows from such case-law that investment is often a wide concept in connection with investment protection and that claims to money may constitute investments even if they are not part of a long-term business engagement in another country. [...] It is thus not unusual that claims to money, even if not based on any long-term involvement in a business in another country, are included in treaties within the concept of 'investment'.*"

<sup>400</sup> Statement of Defence, para. 302.

suffices to satisfy the second prong of Article 1(6)(c) of the ECT.

530. As to the requirement of Article 1(6) of the ECT that the Investment needs to be "*associated with an Economic Activity in the Energy Sector*", the position of this Tribunal accords with the position of the tribunal in *Electrabel S.A. v. Hungary* ("***Electrabel v. Hungary***"), which concluded that the claims arising out of a power purchase agreement constituted an "*Investment*" under Article 1(6)(c) of the ECT as they were "*associated with*" the claimant's overall investment, primarily its shareholding interest in a Hungarian subsidiary (owner and operator of a power plant).<sup>401</sup>
531. What the *Amto v. Ukraine* tribunal described as a theoretical "*mere contractual relationship [...] where the subject matter of the contract has no functional relationship with the energy sector*"<sup>402</sup>, which would be insufficient to attract investment protection, is simply not an appropriate description of the Loan Agreement.
532. Moreover, the Tribunal notes that the Loan Agreement provided that, in a scenario of non-repayment of the Penalty, the loan would be converted into equity in JSE. Not only is this reflective of the connection between the Loan Agreement and Claimant's activity in the Polish energy sector through its subsidiary, but it would also trigger the application of Article 1(6)(b) of the ECT, which specifically refers to "*equity participation in a company or business enterprise*".
533. Therefore, in the Tribunal's view, even a restrictive reading of Article 1(6)(c) of the ECT covers the Loan Agreement.

(iii) *Salini* Test

534. As discussed above in the context of the EU Law Objection, this Tribunal is cautious of reading additional jurisdictional requirements into the ECT where the Treaty provisions are sufficiently clear. However, Respondent asks the Tribunal to engage in exactly that exercise when it introduces the three additional criteria to disqualify the Loan Agreement from being an Investment under the ECT. Assuming but not deciding that customary

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<sup>401</sup> **Exhibit CL-6**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.53.

<sup>402</sup> **Exhibit CL-24**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 42.

international law provides further qualifications for Claimant's investment, the Tribunal will examine what those qualifications are and whether they have been satisfied in the present case.

535. Generally, the question of whether the *Salini* criteria or the so-called three objective criteria reflect customary international law and are determinative for a tribunal's jurisdiction is far from settled.<sup>403</sup> At the very least, the Tribunal notes that the *Salini* criteria have been developed and applied primarily in the context of the ICSID Convention, which is not an applicable instrument for the present dispute. Instead, the definition contained in Article 1(6)(c) of the ECT and analysed above is authoritative.
536. The Tribunal also notes that it is unclear which criteria Respondent calls upon the Tribunal to apply. Specifically, the confusion seems to stem from the "contribution" criterion.
537. The original *Salini* test included (i) *contributions*, (ii) a certain duration of performance of the contract, (iii) participation in the risks of the transaction, and (iv) *contribution to the economic development*.<sup>404</sup> The last criterion had often been criticised as vague and has been disregarded in favour of the three objective criteria by some of the later jurisprudence, including the *Romak S.A. v. The Republic of Uzbekistan* ("**Romak v. Uzbekistan**") tribunal, on which Respondent relies.<sup>405</sup>
538. Respondent also seems to identify only three criteria to define the concept of "investment": (i) contribution of resources, (ii) duration, and (iii) assumption of risk.<sup>406</sup>

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<sup>403</sup> See e.g. **Exhibit CL-46**, *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, para. 294; *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania II*, ICSID Case No. ARB/15/41, Award of the Tribunal, 11 October 2019, para. 200; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, paras. 238-242; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, para. 206; **Exhibit CL-39**, *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018, para. 370.

<sup>404</sup> *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, para. 52.

<sup>405</sup> Statement of Defence, para. 305.

<sup>406</sup> Statement of Defence, para. 305; **Exhibit RL-023**, *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, para 207. See also *Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005, para. 13; **Exhibit RL-130**, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 36; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 110.

However, in discussing the "contribution" criterion, Respondent argues that:

*"[T]he Loan Agreement did not contribute to the economy of the State as it was designed to provide JSE with means to be used for the purposes of the Fine payment and continuing the litigation before the Polish courts, and not for any economic activity contributing to the development of the economy of the State."*<sup>407</sup>

539. For the purposes of a complete analysis, the Tribunal will proceed to discuss all four of the original *Salini* criteria.

540. As regards "contributions", the Tribunal concurs with the *Romak v. Uzbekistan* tribunal's broad interpretation:

*"Any dedication of resources that has economic value, whether in the form of financial obligations, services, technology, patents, or technical assistance, can be a 'contribution.' In other words, a 'contribution' can be made in cash, kind or labor."*<sup>408</sup>

541. The Tribunal finds no difficulty in establishing that Claimant made a "contribution" under the Loan Agreement, given that it provided financial resources to its subsidiary, which enabled the latter to further operate in the Polish energy sector.

542. As to the durational criterion, the Tribunal considers that there is no fixed minimum duration that would qualify certain assets as investments. Instead, duration must be analysed in light of the investor's overall commitment.<sup>409</sup>

543. JSE operated in Poland as a subsidiary of Claimant since 2004 and the legal proceedings in relation to the Penalty – which triggered the need for the Loan Agreement – have been

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<sup>407</sup> Statement of Defence, para. 308.

<sup>408</sup> **Exhibit RL-023**, *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, para 214.

<sup>409</sup> See **Exhibit RL-023**, *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, para 225; *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019, para. 228; **Exhibit CL-39**, *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 18 December 2018, para. 377; *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019.

ongoing for over a decade. The Tribunal finds that this should satisfy the "duration" requirement.

544. As to the "risk" criterion, the Tribunal agrees in principle that an investment risk should carry a more significant meaning than a simple commercial risk, which is inherent in any commercial transaction. As the *Romak v. Uzbekistan* tribunal put it:

*"An 'investment risk' entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is 'risk' of this sort, the investor simply cannot predict the outcome of the transaction."*<sup>410</sup>

545. The Tribunal cannot agree with Respondent that Claimant undertook no commercial, let alone investment risk in concluding the Loan Agreement with JSE. The risk was not just that the Loan would not be repaid, but that it would be converted into equity, as discussed above, with all the associated uncertainties.
546. Finally, as regards "contribution to the economic development", this Tribunal considers this requirement to be an outcome of a successful investment, not its prerequisite. Therefore, even assuming the *Salini* test is applicable to determine whether Claimant made an Investment in the territory of Respondent, contribution to the economic development of Poland would not be a qualifying consideration.
547. As a conclusion, in light of the wide concept of "*Investment*" contained in Article 1(6) of the ECT as well as the inherent connection of the Loan Agreement to JSE's operation in the Polish energy sector, the Tribunal decides that the Claimant holds an Investment in Poland. This conclusion would not be affected by the application of the *Salini* criteria.

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<sup>410</sup> **Exhibit RL-023**, *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, para 230. See also **Exhibit RL-032**, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, para. 145; **Exhibit RL-162**, *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 370.



### 3. Denial of Benefits under Article 17(1) of the ECT

548. It is Respondent's position that the Tribunal does not have jurisdiction over this dispute because Respondent has validly denied Claimant benefits in accordance with Article 17(1) of the ECT.

#### a) Respondent's Position

549. It is Respondent's position that it has denied ECT advantages to the Claimant on 18 May 2009 in the course of the previous arbitration between the Parties, as well as in its Reasons for the Request for Bifurcation submitted in this arbitration on 5 June 2020.<sup>411</sup>

550. Respondent submits that Article 17(1) of the ECT expressly reserves the rights of Contracting Parties to deny the advantages of the investment protection provisions contained in Part III of the ECT to a foreign company incorporated in the territory of a Contracting Party but (i) has no substantial business activity in that Contracting Party, and (ii) is owned and controlled by nationals of a third State.<sup>412</sup> It is Respondent's position that these criteria have been fulfilled and that Claimant has failed to discharge its burden to prove that these criteria do not apply.<sup>413</sup>

551. *First*, Respondent submits that Claimant has not submitted any documents proving that it conducts any activity in Cyprus and has not satisfied the high threshold of "substantial business activity" that excludes companies with only minor activities in a Contracting Party.<sup>414</sup> With reference to the decision in *Gran Colombia Gold Corp. v. Republic of Colombia*, Respondent contends that the "substantial business activity" threshold requires a genuine connection by the Company to its home State and cannot be satisfied by merely some business activity.<sup>415</sup>

552. It is Respondent's position that Claimant has not provided evidence of business activity

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<sup>411</sup> Rejoinder, paras. 122-124 with reference to **Exhibit RL-141**, Respondent's Jurisdictional Objections, 19 May 2009, *Mercuria v. RP (I)*, para 2.2.

<sup>412</sup> Reasons for Request for Bifurcation, para. 50.

<sup>413</sup> Rejoinder, para. 126.

<sup>414</sup> Reasons for Request for Bifurcation, para. 52; Rejoinder, para. 132; Respondent's Post-Hearing Brief, paras. 15-19.

<sup>415</sup> Rejoinder, paras. 132-133; **Exhibit RL-142**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 137.

constituting a genuine connection to Cyprus such as any activity in the energy sector or otherwise, the employment of personnel, audit reports or financial statements, service agreements, national insurance or tax certificates, law firm invoices demonstrating the investor's main activity, or documents certifying the lease of office premises.<sup>416</sup> With regard to the table of expenses submitted by Claimant for the years 2009-2019, Respondent contends it constitutes entirely unverifiable and unreliable evidence and that it is not even clear if this table relates to Claimant.<sup>417</sup> Further, Respondent asserts that this table can't be replaced by the testimony of Claimant's witness Mr. Astramowicz that Mercuria Energy Group is a real operation centre requiring the physical presence of its managers and employees given that this testimony is not supported by documentary evidence proving Claimant was managed and operated from Cyprus at the time the Loan Agreement was executed.<sup>418</sup>

553. Respondent submits that Claimant is a Swiss company operating from Geneva, as supported by the fact that its representative was present in Mercuria's offices in Geneva during the Hearing, and that Claimant has not provided any evidence concerning the location of its headquarters.<sup>419</sup>
554. *Second*, Respondent contends that Claimant is controlled by third-State nationals (not Cypriot nationals), and it should therefore be denied standing to bring claims under the ECT.<sup>420</sup>
555. It is Respondent's position that Poland is also a "third State" for the purposes of Article 17(1) of the ECT, because the ECT does not protect investments made by Polish or third-State investors in Poland and that it is in line with the objectives of the ECT for States to deny benefits to domestic investors making investments through shell companies incorporated in ECT Contracting States, as well as investors from non-Contracting

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<sup>416</sup> Rejoinder, para. 132; Respondent's Post-Hearing Brief, para. 19 with reference to **Exhibit C-114**, Mercuria Energy Group Ltd.'s expense analysis 2006-2019.

<sup>417</sup> Respondent's Post-Hearing Brief, paras. 15-19.

<sup>418</sup> Respondent's Post-Hearing Brief, para. 19; Hearing Transcript, Day 1, 4:8-11.

<sup>419</sup> Rejoinder, para. 132 with reference to **Exhibit R-004**, Mercuria Energy Group Limited's entry on Wikipedia; **Exhibit R-005**, Mercuria Energy Group Ltd's entry on SWFI; **Exhibit R-006**, Mercuria Energy Group's entry on Crunchbase; **Exhibit C-2**, Power of Attorney; Respondent's Post-Hearing Brief, paras. 18, 22-23.

<sup>420</sup> Reasons for Request for Bifurcation, paras. 53-54; Rejoinder, paras. 129, 131; Respondent's Post-Hearing Brief, para. 21.

States that invest through shell companies in Contracting States for convenience.<sup>421</sup>

556. In this context, Respondent submits that in July 2004, *i.e.* at the time of Claimant's incorporation and the acquisition of shares in JSE, Claimant's shares were held by two Polish nationals and four further natural persons whose nationality is not known by Respondent.<sup>422</sup> With reference to Claimant's Articles of Association, Respondent further notes that the two Polish nationals, Messrs. Jankilevitsch and Smolokowski, may still directly or indirectly (through Lichtenstein entities) hold a significant amount of the shares in Claimant and the majority of the voting rights.<sup>423</sup>

557. Respondent contends that the evidence on record shows Claimant is currently owned or controlled as follows:<sup>424</sup>

Shareholder (Class A Shares)	Nationality	Ownership	Voting control
Jankilevitsch Foundation	Liechtenstein	10%	25.31%
Smolokowski Foundation	Liechtenstein	10%	25.31%
Linetskiy Foundation	Liechtenstein	5%	12.35%
MDJ OIL Trading Limited	England	15%	37.03%
Non-voting and no-dividend B1 and C1 class shares are held by the remaining owners. The owners of these two classes of shares include MDJ Oil Trading Limited and 125 natural and legal persons principally having the nationality of the Marshall Islands, Switzerland, Singapore, China, Russia, the Netherlands and France. <sup>449</sup>			

558. With regard to the timing of the denial of benefits, Respondent submits that there is no *rationae temporis* limitation in Article 17(1) of the ECT and that benefits may be denied with both prospective and retrospective effect.<sup>425</sup> It is Respondent's position that investors seeking to benefit from the ECT should be aware of the possibility that the State may deny benefits and that the State should do so within a reasonable period of time after a

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<sup>421</sup> Reasons for Request for Bifurcation, paras. 53-54; Rejoinder, para. 129.

<sup>422</sup> Rejoinder, para. 128 with reference to **Exhibit CL-17**, Award on Jurisdiction of 17 December 2009, para. 85; Respondent's Post-Hearing Brief, para. 20a.

<sup>423</sup> Rejoinder, para. 130.

<sup>424</sup> Rejoinder, para. 127 with reference to **Exhibit C-113**, Articles of Association of Mercuria Energy Group Ltd; Respondent's Post-Hearing Brief, para. 20b.

<sup>425</sup> Rejoinder, para 135 with reference to **Exhibit RL-142**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 137.

dispute is known to both parties.<sup>426</sup>

559. On this basis, Respondent submits that its denial of benefits to Claimant was timely because it was indicated in the first communication to the Tribunal and exercised in the first written submission (*i.e.* the Request for Bifurcation).<sup>427</sup> With reference to arbitral precedents, in particular the award rendered by a tribunal in *Littop Enterprises Limited, Bridgemont Ventures Limited, Borda Management Limited v. Ukraine*, as well as legal scholars, Respondent submits that it validly exercised its right by denying benefits after the commencement of these proceedings.<sup>428</sup>

560. In the alternative, Respondent submits that its denial of benefits to Claimant under Article 17(1) of the ECT made on 19 May 2009 undoubtedly had a prospective effect denying Claimant protection under Part III of the ECT.<sup>429</sup> It is Respondent's position that its declaration of 19 May 2009 validly deprives this Tribunal of jurisdiction and maintains that it gave no indication that it would renege the legal effects of its declaration of 19 May 2009 or avail itself of a right to file a denial-of-benefits objection in this arbitration.<sup>430</sup>

#### **b) Claimant's Position**

561. It is Claimant's position that there are no grounds to accept Respondent's objection based on Article 17 of the ECT.<sup>431</sup>

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<sup>426</sup> Rejoinder, para. 135.

<sup>427</sup> Rejoinder, para. 136.

<sup>428</sup> Rejoinder, paras. 137-138 with reference to **Exhibit RL-144**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, Award, 31 January 2014, paras. 375-377: "The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is 'activated' when the benefits are being claimed."; **Exhibit RL-145**, *Ulysseas, Inc. v. The Republic of Ecuador*, Final Award, 12 June 2012, para 173; **Exhibit RL-034**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para 4.83; **Exhibit RL-142**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 129: "Absent any evidence that particular States intended to impose a particular limitation on a right which they granted or reserved in a particular treaty, it is not within a tribunal's remit to impose such an additional limitation"; **Exhibit RL-143**, *Littop Enterprises Limited, Bridgemont Ventures Limited, Borda Management Limited v. Ukraine*, SCC Arbitration V 2015/092, Final Award, 4 February 2021, paras. 605-606; **Exhibit RL-146**, *Baltag C., The Energy Charter Treaty: The Notion of Investor*, (Kluwer Law International, 2012); **Exhibit RL-147**, *Mistelis L., Baltag C., "Denial of Benefits and Article 17 of the Energy Charter Treaty."*

<sup>429</sup> Rejoinder, paras. 139-140.

<sup>430</sup> Rejoinder, para. 141.

<sup>431</sup> Claimant's Post-Hearing Brief, para. 23.

562. *First*, Claimant contends Respondent has never expressed any reservations under Article 17(1) of the ECT.<sup>432</sup> With reference to the decision in *Plama Consortium Ltd. v. Republic of Bulgaria* ("**Plama v. Bulgaria**"), Claimant submits a denial of benefits can only be applied if a respondent State made a public statement to inform investors of their rights prior to investing.<sup>433</sup>
563. *Second*, Claimant submits that Respondent waived its right to deny the benefits of Part III of the ECT to Claimant by withdrawing its objection based on Article 17 of the ECT in the First Arbitration, as confirmed by the MEG Award on Jurisdiction.<sup>434</sup> According to Claimant, Respondent cannot decide arbitrarily whether the same claimant can arbitrate under the ECT depending on its concurrent assessment of the claims against it.<sup>435</sup>
564. *Third*, Claimant submits that Respondent cannot exercise its right under Article 17(1) of the ECT with retroactive effect and, therefore, any exercise of this right would not apply to Claimant in this arbitration.<sup>436</sup> According to Claimant, a retrospective denial of benefits would be inconsistent with investors' legitimate expectations and the purpose of the ECT is to establish a legal framework to promote long-term cooperation pursuant to its Article 2.<sup>437</sup>
565. As a matter of precaution, Claimant further submits that Article 17(1) of the ECT cannot be applied in the case at hand in light of the following:
- Claimant has a genuine connection with Cyprus as evidenced by the witness statement and oral testimony of Mr. Astramowicz in conjunction with the documents showing Claimant's activities in Cyprus, such as Claimant's expense analysis for the years 2006 through 2019.<sup>438</sup>
  - Although the majority of Claimant's beneficial owners come from Switzerland,

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<sup>432</sup> Reply to Request for Bifurcation, para. 37.

<sup>433</sup> Reply to Request for Bifurcation, para. 37 with reference to **Exhibit CL-32**, *Plama Consortium Ltd. vs. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, par. 157; Claimant's Post-Hearing Brief, para. 20.

<sup>434</sup> Claimant's Post-Hearing Brief, para. 22.

<sup>435</sup> Claimant's Post-Hearing Brief, para. 22.

<sup>436</sup> Reply to Request for Bifurcation, para. 38; Claimant's Post-Hearing Brief, para. 21.

<sup>437</sup> Claimant's Post-Hearing Brief, para. 21.

<sup>438</sup> Claimant's Post-Hearing Brief, para. 24; **Exhibit CWS-1**, paras. 5-6, Hearing Transcript, Day 1, pages 154-156; **Exhibit C-114**, Mercuria Energy Group Ltd.'s expense analysis 2006-2019.

Claimant is a multinational corporation with beneficial owners from the USA, the UK, Cyprus, Russia, China, Poland, and France.<sup>439</sup>

- Claimant's board meetings were typically held in Larnaca, Cyprus, for the years 2004 to 2009, but are currently organised virtually due to the fact that Claimant's officers are located all over the world.<sup>440</sup>

**c) Tribunal's Analysis**

566. Respondent objects to the jurisdiction of this Tribunal under Article 17(1) of the ECT, which provides that each Contracting Party reserves the right to deny the advantages of Part III of the ECT to:

*"a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised".*

567. On this basis, Respondent would, in principle, be entitled to deny the advantages of Part III of the ECT to Claimant if both of the following requirements were met:

- i) Claimant is owned and controlled by nationals of a third State, and
- ii) Claimant has no substantial business activities in Cyprus.

568. Respondent alleges that both of these conditions are met in the case at hand and that Respondent denied ECT advantages to the Claimant on 18 May 2009 in the course of the previous arbitration between the Parties, as well as in its Reasons for the Request for Bifurcation submitted in this arbitration on 5 June 2020.

569. The Tribunal is not satisfied, however, that the requirements of Article 17(1) of the ECT are met in the case at hand.

570. With regard to the "substantial business activities" requirement, this Tribunal agrees with

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<sup>439</sup> Claimant's Post-Hearing Brief, para. 25.

<sup>440</sup> Claimant's Post-Hearing Brief, para. 25.

the threshold set by the tribunal in *Amto v. Ukraine*:

*"The ECT does not contain a definition of 'substantial', nor does the Final Act of the European Energy Charter Conference that would serve as guidance for interpretation. As stated above, the purpose of Article 17(1) is to exclude from ECT protection investors which have adopted a nationality of convenience. Accordingly, 'substantial' in this context means 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question."*<sup>441</sup>

571. Of note is also an observation of the *9REN Holding S.a.r.l v. Kingdom of Spain* tribunal that "[t]he test of substantial business activities must take its colour from the nature of the business. Bricks and mortar are not of the essence of a holding company, which is typically preoccupied with paperwork, board meetings, bank accounts and cheque books."<sup>442</sup>
572. On the balance of the evidence before it, the Tribunal does not agree with Respondent that Claimant has no "substantial business activity" or "genuine connection" with Cyprus. In particular, the Tribunal makes reference to the evidence of Claimant's witness Mr. Astramowicz, Group CEO of Claimant from 2004 to 2008, to the effect that Claimant was "*a real operational centre requiring physical presence of its managers and employees*".<sup>443</sup> At the Hearing, Mr. Astramowicz, further explained in this regard that:

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<sup>441</sup> **Exhibit CL-24**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 69. See also **Exhibit CL-9**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 253; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, para. 260: "*The Tribunal notes that although there has not been a significant jurisprudence on the question of 'substantial business activities,' the tribunals that have found such activities to exist have been prepared to do so on the basis of a relatively small number of activities both in terms of quantity and quality.*"

<sup>442</sup> **Exhibit CL-12**, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, para. 182.

<sup>443</sup> **Exhibit CWS-1**, Witness Statement of Mr. Jarek Astramowicz, para. 5.

*"Mercuria Energy Group Limited based in Cyprus was a typical capital holding company charged with all related 14 functions of consolidated accounting — or consolidation for the group, group accounting, group governance, also was involved in negotiating the Group Financing facilities, and arranging for and holding regular shareholders' meetings that were taking place in Cyprus."*<sup>444</sup>

573. According to Mr. Astramowicz, during his time as Group CEO, he resided in Cyprus, as did Claimant's Chief Accounting Officer and Company Secretary, operating out of Claimant's office in Larnaca.<sup>445</sup>
574. The Tribunal also notes that Claimant has submitted an expense analysis for the years 2006 through 2019, indicating that it does have substantial business activity and is not a mere shell company.<sup>446</sup>
575. Given that the evidence does not indicate that Claimant has no "substantial business activity" in Cyprus and given that the two requirements of Article 17(1) of the ECT are cumulative, this would be sufficient to preclude Respondent from denying the advantages of Part III of the ECT to Claimant.
576. The Tribunal further notes, however, that it is not satisfied that Claimant is owned or controlled by nationals of a third state. Although Claimant has submitted that the majority of its beneficial owners come from Switzerland, it has submitted that, along with the USA, the UK, Russian Federation, China, Poland, and France, it also has beneficial owners from Cyprus.<sup>447</sup> Thus, the Tribunal could not conclude that Claimant is owned or controlled by nationals of a third state pursuant to Article 17(1) of the ECT.
577. In the view of the Tribunal, as Claimant is not owned or controlled exclusively by Cypriot nationals and operates as a multinational corporation, this is insufficient for a denial of

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<sup>444</sup> Hearing Transcript, Day 1, 155:12-18.

<sup>445</sup> Hearing Transcript, Day 1, 156:6-13.

<sup>446</sup> **Exhibit C-114**, Mercuria Energy Group Ltd.'s expense analysis 2006-2019.

<sup>447</sup> Claimant's Post-Hearing Brief, para. 25; **Exhibit C-16**, Beneficial Owners' Declaration, dated 15 May 2020.



benefits under the ECT.

578. On this basis, the Tribunal finds that the requirements of Article 17(1) of the ECT have not been met so that Respondent would not be entitled to deny Claimant the advantages of Part III of the ECT. As a result, the Tribunal does not need to determine the remaining issues disputed between the Parties, namely whether Respondent denied ECT advantages to the Claimant on 18 May 2009 or 5 June 2020 as alleged, whether Respondent waived its right to deny the benefits of Part III of the ECT to Claimant by withdrawing its objection based on Article 17 of the ECT in the First Arbitration, or when can Respondent exercise its right under Article 17(1) of the ECT.

579. The Tribunal therefore rejects Respondent's objection to its jurisdiction on the basis of a denial of benefits under Article 17(1) of the ECT.

#### **4. Fork in the Road under Article 26(2) of the ECT**

580. Respondent objects to the jurisdiction of this Tribunal on the basis that Claimant activated the fork-in-the-road clause in Article 26(2) of the ECT by initiating proceedings in the Polish civil and administrative courts.<sup>448</sup>

##### **a) Respondent's Position**

581. It is Respondent's position that the claims in this arbitration are made on the same basis as the claims pursued in the proceedings before the SAC, that is, the imposition of the Penalty which resulted in the conclusion of the Loan Agreement.<sup>449</sup> On this basis, Respondent argues that Claimant has activated the fork in the road provision depriving this Tribunal of jurisdiction.<sup>450</sup>

582. Respondent notes that the Republic of Poland is listed in Annex ID of the ECT as having made a reservation to the unconditional consent to arbitration in Article 26(3)(a) of the ECT, referring to the following declaration made by Poland in 2001 under Article 26(3)(b)(ii) of the ECT:

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<sup>448</sup> Statement of Defence, para. 310.

<sup>449</sup> Statement of Defence, para. 311; Rejoinder, para. 141.

<sup>450</sup> Statement of Defence, para. 312.

*"The Republic of Poland has opted to be included in Annex ID of the Treaty and thus not to allow unconditionally a dispute between a foreign investor and the Republic of Poland to be submitted to international arbitration or conciliation, if that dispute has already been submitted to a competent court or an administrative tribunal in Poland or to a previously agreed arbitration procedure for the settlement of the dispute."*<sup>451</sup>

583. On this basis, Respondent submits that it exercises its right not to consent to the submission of Claimant's claims to arbitration pursuant to Article 26(3)(b)(ii) of the ECT.<sup>452</sup>

584. It is Respondent's position that Claimant submitted its claims with respect to the Penalty and statutory interest through JSE (as its fully controlled intermediary)<sup>453</sup> before the Polish civil courts and Polish administrative courts and that the fundamental subject matter of the Parties' dispute before the Polish courts and in this arbitration is identical.<sup>454</sup> On this basis, Respondent contends that Claimant is precluded from re-litigating the matter in investment arbitration.<sup>455</sup>

585. In particular, Respondent contends that:

*"1) The Claimant's ECT Claims and the claims raised at the national level (e.g. civil claims brought thrice before the Polish civil courts in 2009 and 2011) are fundamentally the same (compensation for the harm suffered as the result of the decision on the Fine), since they have the same factual predicates and request the same relief. Consequently, the same dispute has been brought before the Polish courts and this Tribunal;*

*2) JSE is an intermediary of Mercuria;*

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<sup>451</sup> Statement of Defence, paras. 313-315 with reference to **Exhibit RLA-0023**, Statement sent by the Polish Embassy in Brussels on 6 March 2001.

<sup>452</sup> Statement of Defence, para. 315.

<sup>453</sup> Rejoinder, Section IV.

<sup>454</sup> Statement of Defence, para. 316.

<sup>455</sup> Statement of Defence, para. 321.

3) *The sum due to Mercuria on the basis of the Loan Agreement mirrors the compensation sought by JSE before the Polish courts;*

4) *The Claimant already proved that any money received from Poland by JSE, after being paid out, would be immediately transferred to Mercuria, which corresponds with the content of the Loan Agreement.*"<sup>456</sup>

586. Respondent submits that this Tribunal should follow the "fundamental basis test".<sup>457</sup> Referring to the customary rule of interpretation in Article 31 of the VCLT, Respondent contends that Article 26 of the ECT only allows for arbitration to the extent that the dispute has not been submitted to dispute settlement procedures agreed between the ECT parties or to competent domestic courts, as has occurred in the present case.<sup>458</sup>
587. Referring to the decision in *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* ("**H&H Enterprises v. Egypt**"), Respondent submits that where what is essentially the same relief is sought in two disputes relating to the same factual background, it is to be assumed that the disputes serve to protect the same interest and that it would be artificial to formally distinguish between international and domestic legal orders.<sup>459</sup> Further, Respondent contends that parties that are two formally distinct legal entities with fully or partly congruent interest can be substantially related.<sup>460</sup>
588. Respondent rejects Claimant's arguments concerning the different wording of the fork-in-the-road clause between the Egypt-US BIT (applicable in *H&H Enterprises v. Egypt*) and the ECT (applicable in this case). In Respondent's view, the scope of the two clauses remains effectively the same since both refer to disputes between a host State and an alleged investor.<sup>461</sup> Respondent also states that Claimant omitted to analyse the most relevant provisions of the two treaties that provide for the fork-in-the-road clause and

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<sup>456</sup> Rejoinder, para. 144.

<sup>457</sup> Statement of Defence, para. 317; Rejoinder, para. 148; Respondent's Post-Hearing Brief, para. 26.

<sup>458</sup> Rejoinder, para. 151.

<sup>459</sup> Statement of Defence, paras. 318-319 with reference to **Exhibit RLA-0019**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, Award (Excerpts), 6 May 2014, para. 382; **Exhibit RLA-0020**, *Pantechniki SA Contractors & Engineers v. The Republic of Albania*, Award, 30 July 2009, paras. 53-67.

<sup>460</sup> Statement of Defence, para. 318.

<sup>461</sup> Rejoinder, para. 146.

contain virtually the same wording, that is, Article VIII.3(a) of the Egypt-US BIT and Article 26(2) of the ECT.<sup>462</sup>

589. Referring to the decision in *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, Respondent contends that the purpose of the fork-in-the-road provision is to prevent an investor from advancing the same claims before domestic and international tribunals and risking the occurrence of contradictory findings in such parallel proceedings.<sup>463</sup> Respondent maintains that these risks materialize in the present case because there is (at least) a significant overlap between the claims submitted before the Polish courts and this Tribunal.<sup>464</sup>
590. Respondent contends that the "triple identity test" (identity of parties, cause of action, and object of dispute) is not the relevant test and that this test would defeat the purpose of the Article 26(3)(b) of the ECT to prevent the same dispute from being litigated in different *fora*.<sup>465</sup> Respondent contends that Article 26(3)(b) of the ECT does not require the parties to be the same, but rather that the dispute at hand has not been submitted to another forum.<sup>466</sup> Respondent submits that it is the subject matter and fundamental basis of the dispute that are important, rather than whether the causes of action are identical or the parties are exactly the same, as supported by the decision in *H&H Enterprises v. Egypt*.<sup>467</sup>
591. Respondent submits that the "fundamental basis test" forms part of investment jurisprudence and is used to verify whether the fundamental basis of a claim brought before an international forum is autonomous of claims to be heard in another forum.<sup>468</sup> In particular, Respondent states that the key issue is whether the same dispute has been submitted to

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<sup>462</sup> Rejoinder, para. 146.

<sup>463</sup> Rejoinder, para. 152 with reference to **Exhibit RL-149**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014 [Spanish], paras. 357-358.

<sup>464</sup> Rejoinder, para. 152.

<sup>465</sup> Respondent's Post-Hearing Brief, para. 27.

<sup>466</sup> Respondent's Post-Hearing Brief, para. 27.

<sup>467</sup> Rejoinder, para. 153 with reference to **Exhibit RLA-0019**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, Award (Excerpts), 6 May 2014, paras. 367-368.

<sup>468</sup> Rejoinder, para. 154; **Exhibit RL-150**, *Woodruff Case, Opinion of Barge*, umpire, 1 January 1903, IX UNRIAA 221, para. 223; **Exhibit RL-151**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 100-101.

both a national forum and an international forum.<sup>469</sup>

592. It is Respondent's position that the claims sought in this arbitration derive from the same factual predicates and result in the same requested relief as the claims commenced at the domestic level.<sup>470</sup> Respondent contends that the Loan Agreement cannot be treated as an independent basis for Claimant's claims because it simply transfers the public law receivable to Claimant, elevating the Polish administrative law claim to an international level.<sup>471</sup> According to Respondent, had the prayer in JSE's Statement of Claim of 17 November 2009 submitted in the District Court in Warsaw (**Exhibit R-49**) been accepted, Claimant would have been granted the relief it is seeking in this arbitration.<sup>472</sup> On this basis, Respondent maintains that, having chosen to take the matter to the Polish courts, Claimant is no longer permitted to use the same fundamental basis as the foundation for treaty claims in ECT arbitration.<sup>473</sup>
593. Respondent further contends that, in any case, even the "triple identity test" would be met in the present case because (i) Claimant's subsidiary initiated the domestic proceedings; (ii) the harm resulting from the Penalty is the measure at stake in both the domestic and international proceedings; and (iii) the claims are based on the same facts, that is, the imposition of the Penalty and resulting conclusion of the Loan Agreement.<sup>474</sup>
594. Regarding the identity of the parties, Respondent maintains that JSE is an intermediary company of Mercuria.<sup>475</sup> In particular, Respondent contends that JSE's financial reports demonstrate that Claimant and JSE are "*in fact the same entity*" for the purposes of the Loan agreement, citing the following statement contained therein repetitively, from 2009 to 2019: "[i]n compliance with the text of the loan contract signed with [Mercuria], [JSE] is the '*intermediary*' responsible for transferring the due amount, including the interest, derived from the paid penalty".<sup>476</sup> For Respondent, the text of the Loan Agreement and

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<sup>469</sup> Rejoinder, para. 154 with reference to **Exhibit RL-130**, *Pantechniki SA Contractors & Engineers v. The Republic of Albania*, Award, 30 July 2009, para. 61.

<sup>470</sup> Rejoinder, para. 155; Respondent's Post-Hearing Brief, para. 33.

<sup>471</sup> Respondent's Post-Hearing Brief, paras. 28-34.

<sup>472</sup> Rejoinder, para. 156 with reference to **Exhibit R-49**, Statement of Claim of J&S Energy S.A.

<sup>473</sup> Rejoinder, para. 156.

<sup>474</sup> Rejoinder, para. 157.

<sup>475</sup> Rejoinder, Section IV.

<sup>476</sup> Rejoinder, para. 15 with reference to **Exhibit R-066**, JSE Financial Report of 2009; **Exhibit R-067**, JSE Financial Report of 2010; **Exhibit R-068**, JSE Financial Report of 2011; **Exhibit R-069**, JSE Financial

other internal documents reflect the intermediary role of JSE, as the proxy entrusted only to transfer any and all sums received from Poland.<sup>477</sup>

595. Respondent requests the Tribunal to draw negative inferences from Claimant's refusal to produce relevant evidence in the document production phase in this arbitration,<sup>478</sup> that JSE is a mere intermediary of Mercuria with the consequence that both entities should be treated as one entity.<sup>479</sup>
596. With respect to the cause of action, Respondent submits that the claims sought in this arbitration have "the same normative source" in that they all stem from the imposition of the Penalty that was subsequently overturned, and the Loan Agreement that was concluded as a direct result of the Penalty.<sup>480</sup> In addition, Respondent contends that the relevant Polish tax law provisions are mirrored in the Loan Agreement and are thus the normative source of both claims.<sup>481</sup>
597. Respondent claims that the object is the same in both disputes, since Claimant is seeking to recover in the domestic proceedings and in this arbitration the alleged interest on the Loan Agreement that the Polish authorities are allegedly unwilling to pay.<sup>482</sup>
598. Finally, Respondent argues that as to the identity of the parties, tribunals expand the notion of the same claimant to include its controlled subsidiaries.<sup>483</sup> In the same vein, Respondent submits that the tribunal in *Supervision v. Costa Rica* endorsed the view that the domestic proceedings initiated by a local company controlled by an investor must be considered as initiated by the same investor, and similarly, the tribunal in *Charanne v.*

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Report of 2012; **Exhibit R-070**, JSE Financial Report of 2013; **Exhibit R-071**, JSE Financial Report of 2014; **Exhibit R-072**, JSE Financial Report of 2015; **Exhibit R-073**, JSE Financial Report of 2016; **Exhibit R-074**, JSE Financial Report of 2017; **Exhibit R-075**, JSE Financial Report of 2018; **Exhibit R-035**, JSE Financial Report of 2019; **Exhibit CL-30**, *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, 21 January 2016, para. 406.

<sup>477</sup> Rejoinder, paras. 32, 35-37.

<sup>478</sup> Rejoinder, paras. 33-35 (*i.e.* internal documents relating to the Loan Agreement (Requests Nos. 4 and 6) and other requests of Respondent concerning internal documents explaining the relationship between Mercuria and JSE).

<sup>479</sup> Rejoinder paras. 34, 40.

<sup>480</sup> Rejoinder, para. 159 with reference to **Exhibit RL-130**, *Pantechniki SA Contractors & Engineers v. The Republic of Albania*, Award, 30 July 2009, para. 62.

<sup>481</sup> Rejoinder, para. 159.

<sup>482</sup> Rejoinder, para. 160.

<sup>483</sup> Statement of Defence, para. 320.

*Spain* accepted that an investor and its fully controlled subsidiary had the same identity.<sup>484</sup>

**b) Claimant's Position**

599. It is Claimant's position that it has not submitted any dispute to the Polish courts or administrative tribunals pursuant to Article 26(2)(a) of the ECT and that the disputes to which JSE is a party cannot be considered as submitted by Claimant, because (i) they are not the same type of dispute; (ii) JSE does not act on behalf of Claimant; and (iii) JSE has never relied on any kind of investment protection, including the ECT.<sup>485</sup>
600. Relying on legal commentary, Claimant submits that the definition of dispute under Article 26(1) of the ECT is narrow and limited to alleged breaches of Part III of the ECT.<sup>486</sup> Claimant further argues that the fork-in-the-road estoppel should be applied strictly in cases concerning the alleged breach of Article 10(12) of the ECT to avoid the situation in which an investor would be precluded from initiating investor-state arbitration after having pursued its claims in the flawed and ineffective judicial system of a host state.<sup>487</sup>
601. Claimant submits that there are no factual or legal similarities between this case and *H&H Enterprises v. Egypt*, the latter being based on the Egypt-USA BIT which contains a much broader definition of a dispute triggering its respective fork-in-the-road provision in its Article VII(1) and – as opposed to Article 26(3)(b)(i) of the ECT – does not contain a limitation to breaches of the BIT itself:

*"For purposes of this Article, a legal investment dispute is defined as a dispute involving (i) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; or (ii) an alleged breach of any right conferred or created by this Treaty with respect to an*

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<sup>484</sup> Statement of Defence, para. 320 with reference to **Exhibit RLA-0018**, *Supervision y Control S.A. v Republic of Costa Rica*, Final Award, 18 January 2017, para. 329; **Exhibit CL-30**, *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, SCC Case No. 062/2012, Final Award, 21 January 2016, (Mena Chambers translation), para. 408.

<sup>485</sup> Reply to the Statement of Defence, para. 65.

<sup>486</sup> Reply to the Statement of Defence, para. 65 with reference to **Exhibit CL-35**, Rafael Leal-Arcas "Commentary on the Energy Charter Treaty" (Edward Elgar Publishing, UK/USA 2018, para. 26.18); Claimant's Post-Hearing Brief, para. 28.

<sup>487</sup> Claimant's Post-Hearing Brief, para. 29.

*investment.*"<sup>488</sup>

602. Claimant submits that Respondent has not relied on case law concerning the ECT and disputes Respondent's assertion that the tribunal in *Charanne v. Spain* interpreted the fork-in-the-road provision in Article 26(3)(b)(i) of the ECT so as to adopt more flexible requirements.<sup>489</sup> Claimant also submits that, in any event, Respondent failed to demonstrate that the alleged requirements had been met in this arbitration.<sup>490</sup> According to Claimant, Respondent has not asserted that the stricter but more commonly applied "triple identity test" would be satisfied in the case at hand.<sup>491</sup>
603. Claimant further contends that even if the more flexible "fundamental basis test" were applied, as referred to by the tribunal in *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania* and focusing on the subject matter of the dispute or normative source of the claims brought before the different courts or tribunals, the Tribunal could easily identify that the prayers of relief submitted by Claimant and JSE in their respective proceedings are completely different.<sup>492</sup> Claimant submits that the normative source of Claimant's claim is the ECT and a private-law relationship between a parent company and its subsidiary, whereas JSE's claims arise from a legal statute, *i.e.* the Tax Ordinance, and are based on Polish law.<sup>493</sup>

### c) Tribunal's Analysis

604. The dispute settlement mechanism in Articles 26(1) and (2) of the ECT reads as follows:

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

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<sup>488</sup> Reply to the Statement of Claim, para. 67.

<sup>489</sup> Reply to the Statement of Claim, paras. 69-70 with reference to **Exhibit CL-30**, *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, SCC Case No. 062/2012, Final Award, 21 January 2016, (Mena Chambers translation), para. 408.

<sup>490</sup> Reply to the Statement of Claim, para. 70.

<sup>491</sup> Claimant's Post-Hearing Brief, paras. 30-31.

<sup>492</sup> Claimant's Post-Hearing Brief, para. 33 with reference to **Exhibit CL-48**, *Pantechniki S.A. Contractors & Engineers vs. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 28 July 2009, para. 62.

<sup>493</sup> Claimant's Post-Hearing Brief, para. 33.



*amicably.*

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

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

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

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

605. The dispute mechanism also includes a so-called fork-in-the-road provision in Article 26(3)(b)(i) of the ECT, which provides:

*"(3)*

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

*(b)*

*(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)."*

606. The Parties are in dispute as to whether the fundamental basis test or the stricter triple identity test should be applied to determine if the Tribunal is to decline jurisdiction over the claims in this arbitration pursuant to Article 26(3)(b)(i) of the ECT. In the view of the Tribunal, however, it is not necessary to decide this issue given that neither test would be

satisfied in the case at hand because the claims in the current arbitration are distinct from those brought by JSE before the Polish courts.

607. *First*, the Tribunal notes that the fact that claims in this arbitration and the domestic proceedings have both arisen from the imposition of the Penalty does not mean that they are parallel proceedings that should be prevented by the fork-in-the-road provision in Article 26(3)(b)(i) of the ECT.
608. *Second*, Claimant's claims in this arbitration are based on the protection provided in Part III of the ECT, whereas JSE's claims before the Polish courts are rooted in Polish law, in particular the Tax Ordinance. The Tribunal is not convinced by Respondent's contention that the relevant Polish tax law provisions are mirrored in the Loan Agreement and are thus the normative source of the claims in this arbitration and in the domestic proceedings. The Loan Agreement concluded between Claimant and JSE is relevant to Claimant's entitlement to seek protection under the ECT, but it cannot be considered the normative source of the claims in this arbitration, which is the ECT itself.
609. Even if, as argued by Respondent, the claims sought in this arbitration derived from the same factual predicates and result in the same requested relief as the claims commenced at the domestic level, this would not change the fact that obligations under the ECT are distinct from those underlying JSE's claims in the domestic proceedings. This remains true even if the Loan Agreement were considered to have the function of elevating the Polish administrative law claim to an international public law by transferring the public law receivable to Claimant, as argued by Respondent. The Tribunal takes the same view as expressed in the MEG Award on Jurisdiction, that an identical sum being sought for a breach of a treaty obligation as under Polish domestic law does not mean that these are the same claims.<sup>494</sup>
610. *Third*, the domestic proceedings in Poland form a significant part of the basis for the claims in this arbitration that Respondent has breached its obligations under the ECT. This is particularly the case for Claimant's claim that Respondent does not provide effective means to enforce administrative court judgements, such as those obtained by JSE in

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<sup>494</sup> **Exhibit CL-17**, Mercuria Energy Group Limited vs. Minister of Economy (SCC Case No. V 096/2008), Award on Jurisdiction, made on 17 December 2009. para. 92.

the domestic proceedings, against the administrative authorities in violation of Article 10(12) of the ECT. However, Claimant also refers to the domestic proceedings initiated by JSE in relation to its claim under the fair and equitable treatment provision in Article 10(1) of the ECT.

611. On this basis, the Tribunal takes the view that there is no basis to invoke Article 26(3)(b)(i) of the ECT to deny jurisdiction over the claims in this arbitration.

## **5. Abuse of Process**

612. In the alternative to Respondent's fork-in-the-road objection, should the Tribunal consider the conditions for activating the fork-in-the-road are not met, Respondent submits that resorting to international arbitration constitutes an abuse of rights by Claimant.<sup>495</sup>

### **a) Respondent's Position**

613. It is Respondent's position that the prohibition of abuse of rights is a general principle of international law that encompasses investor's rights and applies to both procedural and substantive rights.<sup>496</sup> On this basis, Respondent maintains that "*an investor that controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host State measures and claims for the same harm at various levels of the chain*".<sup>497</sup>
614. Respondent submits that the application of the doctrine of abuse of process is justified in cases, such as the case at hand, where an investor seeks the same redress in a domestic forum and an international forum.<sup>498</sup> With reference to the decision in *Orascom TMT Investments v. People's Democratic Republic of Algeria*, Respondent contends that forum shopping and multiplication of proceedings weaken the credibility of international law by increasing costs, leading to inconsistent decisions, and risking double recovery.<sup>499</sup>

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<sup>495</sup> Statement of Defence, para. 322.

<sup>496</sup> Rejoinder, para. 162 with reference to **Exhibit RL-152**, A. Kiss, Abuse of Rights, in: Max Planck Encyclopedia of Public International Law, para. 1.

<sup>497</sup> Rejoinder, para. 162 with reference to **Exhibit RL-132**, *Orascom TMT Investments v Algeria*, Final Award, 31 May 2017, para. 542.

<sup>498</sup> Statement of Defence, para. 324.

<sup>499</sup> Statement of Defence, para. 323 with reference to **Exhibit RLA-0025**, *Orascom TMT Investments v Algeria*, Final Award, 31 May 2017, paras. 543, 548, 587(a).

615. Turning to the present arbitration, Respondent contends that Claimant seized this Tribunal to claim the interest it is also seeking before the Polish administrative courts, leading to a risk of inconsistent decisions and double recovery.<sup>500</sup> Referencing the judgement which at the time was to be rendered by the SAC, Respondent states:

*"Should the Claimant prevail in the Administrative Court Proceedings, the Respondent will pay the interest Mercuria seeks in this arbitration. Should the SAC decide in favour of Poland, Mercuria will obtain no interest."*<sup>501</sup>

616. Respondent refers to the finding in *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* that three shareholders of a company were precluded from litigating on a separate legal basis an issue that had already been decided in other proceedings initiated by their fully controlled subsidiary.<sup>502</sup> Quoting from the decision in the aforementioned case, Respondent states that the doctrine of "collateral estoppel" in investment arbitration precludes tribunals from deciding disputed issues where "(a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal."<sup>503</sup>

617. On this basis, Respondent maintains that this Tribunal should deny its jurisdiction and avoid the existence of multiple decisions pertaining to the same issue. With reference to the decision in *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, Respondent states that it is not possible to oblige Claimant to choose a venue to pursue its claims because Polish law does not allow JSE to abandon its claims before the administrative courts, nor does Polish law allow Respondent to deny the payment of compensation to JSE if its shareholders were awarded the corresponding sum of money by an

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<sup>500</sup> Rejoinder, paras. 163-164.

<sup>501</sup> Rejoinder, para. 163.

<sup>502</sup> Statement of Defence, para. 325 with reference to **Exhibit RLA-093**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.1.6.

<sup>503</sup> Statement of Defence, paras. 325-326 with reference to **Exhibit RLA-093**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.1.1.

investment tribunal.<sup>504</sup>

618. Respondent submits that conducting this arbitration in parallel to the Polish court proceedings poses perceived threats to legal stability and consistency, and may lead to awarding Claimant double compensation, especially in light of the fact that Claimant estimated its probability of success before the Polish courts at 80%.<sup>505</sup> Respondent further submits that any damages awarded to Claimant in this arbitration could not be taken into account by the Polish courts because JSE would not be considered to benefit from such relief, yet Claimant would be the real beneficiary if JSE were awarded damages under Polish law due to the terms of the Loan Agreement and the fact that JSE is an intermediary directly controlled by Claimant.<sup>506</sup>
619. Finally, Respondent contends that Claimant initiated this arbitration to exert pressure on the administrative body, speed up the domestic proceedings, and have a decision issued in Claimant's favour, which is not the intended purpose of ECT arbitration.<sup>507</sup>

#### **b) Claimant's Position**

620. Claimant submits that the administrative court proceedings initiated by JSE in Poland cannot be qualified as submitted by Claimant, nor as the same type of dispute as this arbitration.<sup>508</sup> According to Claimant, JSE has not acted on behalf of Claimant, let alone invoked any investment protection under the ECT.<sup>509</sup>
621. In Claimant's view, a dispute under Article 26(1) of the ECT is limited to breaches of investment protection obligations under Part III of the Treaty; therefore, Article

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<sup>504</sup> Statement of Defence, para. 327 with reference to **Exhibit RL-094**, *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, paras. 328-339.

<sup>505</sup> Statement of Defence paras. 9, 328 with reference to with reference to **Exhibit R-035**, JSE Financial Report for 2019, at 3.

<sup>506</sup> Statement of Defence paras. 9, 328.

<sup>507</sup> Rejoinder, para. 165 with reference to **Exhibit R-097**, Drzewiecki Tomaszek's Memorandum of 13 February 2020, p. 5: *Mercuria "rightly assumes that once the case is reverted to the [MRA] the public authorities will look at it differently facing the arbitration. They may be more willing to issue a decision which would follow [2016 RAC Judgment] (and the previous judgments) knowing that denying the payment further may have consequences in the arbitration."*

<sup>508</sup> Reply, para. 65.

<sup>509</sup> Reply, para. 65.

26(3)(b)(i) of the ECT only bars a prior (domestic) dispute in which the claimant alleges a breach of the ECT and not "*other source of law*", as supported by a commentator.<sup>510</sup>

622. Claimant contends that Respondent's argument that there is a risk of double recovery is circular because this arbitration was initiated due to the administrative authorities failing to satisfy JSE's claims despite the numerous administrative court judgements in JSE's favour.<sup>511</sup> According to Claimant, if the Tribunal dismissed these claims due to a risk of double recovery, Claimant would be left with no avenue for remedy.<sup>512</sup> Claimant further argues that, in any event, the risk of double recovery is theoretical because any compensation from the administrative authorities paid to JSE can be taken into account as a matter of quantum or in the course of recognition and/or annulment proceedings, depending on whether payment was effected before or after the Tribunal issues its final award in this arbitration.<sup>513</sup>

623. Finally, Claimant also submitted the following as a part of the relief sought in its Reply:

*"The request does not exclude, however, that the Tribunal and the Parties work together on a mechanism which would further decrease the risk of double recovery as emphasised by the Claimant. Such mechanism was proposed in Manchester vs. Poland and it might serve as guidance in these arbitral proceedings."*<sup>514</sup>

624. In its Post-Hearing Brief, Claimant suggested the following:

*"If the Tribunal were to design its ruling in a way that is similar to Manchester vs. Poland, the time and the risk of double recovery could be incorporated in the award. The Claimant is of the opinion that if the Tribunal awards the Claimant the amounts sought in par. 229(a)(b) of the SoC, any mechanism addressing the aforementioned issues would have to be perceived as a limitation*

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<sup>510</sup> Reply, para. 65; **Exhibit CL-35**, Rafael Leal-Arcas "*Commentary on the Energy Charter Treaty*" (Edward Elgar Publishing, UK/USA 2018, par. 26.18)

<sup>511</sup> Reply, para. 131.

<sup>512</sup> Reply, para. 132.

<sup>513</sup> Reply, para. 133.

<sup>514</sup> Reply, para. 152.

*of the Claimant's claims. Thus, introducing such a mechanism would be a decision made infra petita, and this Tribunal is authorised to do that.*

*Except for the decision on costs, the Tribunal's ruling could be as follows: 'For the reasons set out herein, the Tribunal has decided:*

*(a) order the Respondent to pay the Claimant the aggregate amount of PLN 152,862,917.25;*

*(b) order the Respondent to pay the Claimant interest accrued on the amount of 75,372,118.98, at the rate applied to tax arrears in accordance with the Polish Tax Ordinance, as from time to time announced by the Polish Minister of Finances, from 16 May 2020 until the day on which the amount stipulated in (a) is paid to the Claimant;*

*(c) order the Claimant to make JSE refrain from pursuing its claim for the repayment of the outstanding part of the penalty with interest as described in the letter dated 10 November 2010, provided that the amounts stipulated in (a) and (b) are paid to the Claimant within six months from the date of this award;*

*(d) order the Claimant to make JSE withdraw its claim for the repayment of the outstanding part of the penalty with interest as described in the letter dated 10 November 2010 within three days from the day on which the amounts stipulated in (a) and (b) are paid to the Claimant.'*<sup>515</sup>

### **c) Tribunal's Analysis**

625. From the outset, the Tribunal notes that, while the abuse of process defence or objection often arises in the context of corporate restructuring, which is not the case here, the rules

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<sup>515</sup> Claimant's Post-Hearing Brief, paras. 87-88.

established by the arbitral jurisprudence are helpful for Tribunal's analysis.

626. As a general rule, the burden of proof for the abuse of process is on a respondent party and the threshold to establish such abuse is high. The Tribunal concurs with the tribunal in *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*:

*"As for any abuse of right, the threshold for a finding of abuse of process is high, as a court or tribunal will obviously not presume an abuse, and will affirm the evidence of an abuse only 'in very exceptional circumstances'."*<sup>516</sup>

627. The Tribunal has three main considerations in relation to Respondent's submission that Claimant's act in commencing this arbitration constitutes an abuse of rights by Claimant.
628. *First*, the Tribunal is not of the view that Claimant is seeking the same redress in this arbitration and before the Polish courts as set out in Section G.II.5.c) above.
629. *Second*, with regard to Respondent's assertion concerning double recovery, the Tribunal notes that the administrative authorities have not yet paid JSE any of the amount subject to the dispute before the Polish courts. In the view of the Tribunal, the risk of double recovery in this case is not significant enough to justify declaring Claimant's claims inadmissible, especially considering that these claims are brought on the basis of, *inter alia*, Article 10(12) of the ECT following an alleged failure of the administrative authorities to comply with the judgements rendered by the Polish court. Further, the Tribunal considers that it would be possible to include a mechanism mitigating the risk of double recovery in this Final Award, in the event Claimant succeeds on the merits.
630. *Third*, in light of the fact that the dispute has been ongoing for over a decade at the domestic level, the Tribunal takes the view that Claimant's attempt to seek redress against

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<sup>516</sup> *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, para. 186. *See also Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, 4 March 2020 [Redacted], para. 6.9: "As a preliminary matter, it is recognized, and the Tribunal agrees, that the threshold for finding an abusive initiation of an investment claim is high." *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, para. 139.



Respondent under the ECT cannot be considered an abuse of process.

631. On this basis, the Tribunal concludes that there are no "*exceptional circumstances*" to deny its jurisdiction over the claims in this arbitration due to an abuse of process by Claimant.

## **6. Claims Are Premature and Not Ripe for Arbitration**

632. Respondent submits that Claimant's claims are premature and not ripe for adjudication due to the cassation proceedings before the SAC.

### **a) Respondent's Position**

633. Respondent contends that Claimant's claims under Articles 10(1) and 10(12) of the ECT are premature and thus inadmissible, as they can only be reasonably assessed after all remedies under Polish procedural law (*i.e.* administrative and civil pathways) have been exhausted.<sup>517</sup>

634. In this regard, Respondent states that the factual and legal basis for Claimant's claims, which are founded on the alleged obligation to pay statutory interest to JSE, are uncertain. Respondent makes specific reference to the following facts:<sup>518</sup>

- JSE has been successful in overturning both the MRA's decision of 16 October 2017 and the ME's decision of 18 January 2018 not to pay statutory interest in the proceedings before the PAC.
- The PAC's judgment of 14 September 2018 is currently subject to cassation proceedings before the SAC.
- JSE has declared that there is a "*very high (above 80%)*" chance of recovering interest on the basis of the proceedings pending before the SAC.<sup>519</sup>

635. In particular, in its Statement of Defence, Respondent submitted that Claimant's claims would not be ripe for adjudication until the cassation claim proceedings before the SAC

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<sup>517</sup> Statement of Defence, para. 293.

<sup>518</sup> Statement of Defence, para. 285.

<sup>519</sup> **Exhibit R-041**, JSE Financial Report for 2019, at 19.

was decided, stating that international courts and tribunals "*have routinely declined to hear cases where a claim is not yet ripe for review*".<sup>520</sup> In this regard, Respondent relies on the finding in *Mariposa Development Company and others v. Panama*:

*"Practical common sense indicates that the mere passage of an [expropriatory] act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country... claims should arise only when actual confiscation follows."*<sup>521</sup>

636. On this basis, Respondent submitted that a refusal to pay statutory interest could only occur once the SAC cassation proceedings were complete, and in the event that the SAC found that statutory interest is due.<sup>522</sup>

637. Respondent further relies on the following findings of two NAFTA tribunals to support the view that there can be no "actual" denial of the payment of interest until the cassation process is complete:

i) *Metalclad Corporation v. The United Mexican States*:

*"a case may not be initiated on the basis of an anticipated breach, and therefore a claimant must ensure that its claim is 'ripe' at the time it is filed";*<sup>523</sup> and

ii) *Apotex Holdings Inc. and Apotex Inc. v. United States of America ("Apotex v. USA")*:

*"domestic proceedings subject to an appeal process have not*

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<sup>520</sup> Statement of Defence, paras. 286-287 with reference to **Exhibit RLA-0016**, *Achmea B.V. v. Slovak Republic II*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, paras. 233-237.

<sup>521</sup> Statement of Defence, para. 287, with reference to **Exhibit RLA-0021**, *Mariposa Development Company and Others (United States) v. Panama*, Decision of 27 June 1933, 6 UNRIAA 338, at 341.

<sup>522</sup> Statement of Defence, para. 288.

<sup>523</sup> Statement of Defence, para. 288 with reference to **Exhibit RLA-0024**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, para. 66.

*ripened to an act that triggers State liability".*<sup>524</sup>

638. Based on the above, Respondent submits that it is premature for the Claimant to seek legal remedy from this Tribunal under both Articles 10(1) and 10(12) of the ECT and that the assessment of such claims would require a review of the Polish system in total and not isolated parts of stages thereof.<sup>525</sup> In Respondent's view, Claimant "*still enjoys the freedom to reinitiate civil proceedings which are the proper venue for its claims*".<sup>526</sup>

**b) Claimant's Position**

639. It is Claimant's position that Respondent cannot invoke Article 26(3)(b)(i) of the ECT because the proceedings before the SAC are not an investor-state arbitration under the ECT. Relying on Leal-Arca's *Commentary on the Energy Charter Treaty*, Claimant submits that in principle "[t]he investor's right to initiate arbitration proceedings arises directly from the ECT and is not subject to the exhaustion of local remedies or any other forms of dispute resolution possibly agreed with the host state".<sup>527</sup>

640. Claimant submits that, more importantly, a requirement to exhaust local remedies does not apply to a breach of Article 10(12) of the ECT, noting that, if it were a requirement, investors could be prevented from using the ISDS mechanism provided for in the ECT by a State's judicial system allowing the proceedings to go on indefinitely.<sup>528</sup>

**c) Tribunal's Analysis**

641. As set out in Section E.IV.6. above, the SAC rendered its judgement concluding the cassation proceedings on 15 March 2022.<sup>529</sup>

642. In its Post-Hearing Brief, Respondent made the following submission with regard to this

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<sup>524</sup> Statement of Defence, para. 288 with reference to **Exhibit RL-092**, *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility of 14 June 2013, paras. 281-282, 284.

<sup>525</sup> Statement of Defence, paras. 289-291.

<sup>526</sup> Statement of Defence, para. 289.

<sup>527</sup> Reply to the Statement of Defence, para. 72 with reference to **Exhibit CL-35**, Rafael Leal-Arcas "*Commentary on the Energy Charter Treaty*" (Edward Elgar Publishing, UK/USA 2018) para. 26.15.

<sup>528</sup> Reply to the Statement of Defence, para. 73.

<sup>529</sup> **Exhibit C-118**, Judgement of the Supreme Administrative Court, dated 15 March 2022 (Case ref. No. II GSK 349/19).

judgement, which had not been rendered at the time:

*"There can be no doubt that the expected SAC judgment will be final as there will be no possibility of challenging it before any other instances. Furthermore, this Hearing clearly demonstrated that, in all likelihood, it will clarify all the outstanding legal issues."*<sup>530</sup>

643. Therefore, in the view of the Tribunal, Respondent's objection that Claimant's claims are premature and not ripe for adjudication due to the cassation proceedings before the SAC is now moot and cannot be upheld.

## **7. Claims Are Inadmissible under the Principle of Clean Hands**

644. It is Respondent's position that Claimant cannot invoke the protection of the ECT because its alleged investment was made in direct connection with a breach of Polish law provisions.<sup>531</sup>

### **a) Respondent's Position**

645. Respondent submits that Claimant's alleged right to interest is based on its subsidiary's breach of domestic and international law and that investment case law widely recognises that an alleged breach of the host State's laws either sets the relevant claims out of the scope of the tribunal's jurisdiction or renders them inadmissible.<sup>532</sup>

646. Respondent maintains that it is a well-established principle of international investment law that access to international arbitration is barred for investors who have acted in contravention of the law of the host State, commonly referred to as the principle of clean hands or the legality requirement.<sup>533</sup>

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<sup>530</sup> Respondent's Post-Hearing Brief, para. 98.

<sup>531</sup> Statement of Defence, para. 329.

<sup>532</sup> Reasons for Request for Bifurcation, paras. 60-61.

<sup>533</sup> Statement of Defence, para. 329 with reference to **Exhibit RL-095**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 273; **Exhibit RL-096**, *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, paras. 646-647; **Exhibit RL-097**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award of 10 December 2014, para. 328.

647. Respondent contends that the principle of clean hands is a general principle of international law that, by extension, can be applied to claims brought directly by a private person against a State under a treaty as it is enshrined in the clause that requires the investment to be made and conducted in conformity with the domestic law of the host State.<sup>534</sup>
648. With reference to the decision in *Plama v. Bulgaria*, Respondent submits that investment tribunals accept that the principle of clean hands is applicable under the ECT even though it does not include a specific provision thereto.<sup>535</sup> Respondent contends that the ECT contains an implicit condition of conformity of the alleged investment with the law of the host State and that the application of this principle requires two elements: (i) investor's non-compliance with the law of host State and (ii) a connection between the investment and the violation of the host State's law.<sup>536</sup>
649. *First*, in regard to requirement (i) above, Respondent submits that Claimant needs to have abided by the provisions of Polish law in order to invoke the protection of investment law.<sup>537</sup> It is Respondent's position that there is ample case law confirming the fundamental importance and universal recognition of the principle of clean hands and the legality requirement with specific reference to the decisions of the tribunals in *Sanum Investments Limited v. Lao People's Democratic Republic*, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, and *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* ("**Fraport v. Philippines**").<sup>538</sup> Respondent alleges that these principles have been recognised by countless other investment tribunals, including under the ECT, and that the illegality must be regarded as contrary to international or transnational *ordre*

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<sup>534</sup> Reasons for Request for Bifurcation, para. 59.

<sup>535</sup> Reasons for Request for Bifurcation, para. 60 with reference to **Exhibit RL-040** *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2009, paras. 138-139.

<sup>536</sup> Statement of Defence, para. 330 with reference to **Exhibit RL-098**, *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 17 August 2008, paras. 138-140; **Exhibit RL-099**, *SAUR International SA v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, ICSID Case No. ARB/04/4, para. 308.

<sup>537</sup> Statement of Defence, paras. 330-331.

<sup>538</sup> Statement of Defence, paras. 331-334 with reference to **Exhibit RL-100**, *Sanum Investments Limited and the Government of the Lao People's Democratic Republic*, UNCITRAL, Award of 6 August 2019, para. 104; **Exhibit RL-101**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, para 492; **Exhibit RL-097**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award of 10 December 2014, para. 328 (footnotes omitted), *see also* para 332.

*public*.<sup>539</sup>

650. Respondent also contends that the legal basis for the imposition of the Penalty was the relevant provisions of the MRA Act and that the Penalty was repealed only due to minor procedural mistakes of the Polish administration, in particular due to a one-day difference in the calculation of the Penalty, and that no substantive issues were raised by JSE in the 2008 proceedings before the PAC.<sup>540</sup> In this context, Respondent maintains that it has submitted ample documentary and witness evidence that the Penalty was imposed to sanction the breach of domestic and international law that endangered Poland's energy security, for which Claimant seeks to benefit in this arbitration.<sup>541</sup>
651. *Second*, in regard to the requirement (ii) above, Respondent submits that Claimant's alleged investment was inseparably linked to JSE's violation of its obligation to create and maintain mandatory stocks of liquid fuels, posing a threat to the energy security of Poland and the EU.<sup>542</sup> Respondent contends that the sole purpose of the Loan Agreement was to provide JSE with the means to pay the fine, as stated by Claimant, and that, under the terms of the Loan Agreement, JSE could only use the money for the purpose of paying the Penalty and was to repay Claimant immediately after recovering the Penalty from the MRA, which is what happened when JSE received the refund in November 2009.<sup>543</sup> In this context, Respondent further states that the loan amount mirrors the Penalty imposed on JSE and the interest was calculated to mirror the expected interest on return of the

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<sup>539</sup> Statement of Defence, para. 335 with reference to **Exhibit BSOL 6** *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 10 June 2018, paras. 123-124; **Exhibit BSOL 9** *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, paras. 115-116; **Exhibit BSOL 10** *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 248; **Exhibit BSOL 7** *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, paras. 294, 359; **Exhibit RL-098**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 140-146; **Exhibit BSOL VI**, *Krederi v. Ukraine*, Award 2 July 2018, para. 385.

<sup>540</sup> Rejoinder, paras. 48-49 with reference to Statement of Defence, para. 125, **Exhibit R-024**, Articles 63(1)(1), 63(2)(2), 63(16)(1), 64(1)(2) of the MRA Act. RER-3, First Expert Report of Professor Piątek, para. 71.

<sup>541</sup> Rejoinder, para. 49 with reference to **Exhibit R-038**, JSE's Non-Compliance with Mandatory Stocks Requirement; **Exhibit R-039**, Ad hoc Audit Report of 2 August 2007; **Exhibit RWS-1**, First Witness Statement of Piotr Bieńkowski, paras. 26-31; **Exhibit RWS-4**, First Witness Statement of Miłosz Karpiński, paras. 27-28; **Exhibit RWS-3**, First Witness Statement of Elżbieta Piskorz, para. 17; **Exhibit RER-3**, First Expert Report of Professor Piątek, para. 75.

<sup>542</sup> Statement of Defence, para. 336.

<sup>543</sup> Statement of Defence, para. 336 with reference to the Statement of Claim, para. 76.

Penalty, and that Claimant even justifies the high interest rates by reference to the allegedly applicable provisions of the TO.<sup>544</sup>

652. Respondent submits that Claimant's alleged investment was made to mitigate the Penalty for its subsidiary's violation of Poland's fuel market regulations, posing a threat to Polish and EU energy security, and that it was designed to allow Claimant to capitalize on the wrongdoing by imposing high interest rates.<sup>545</sup> Respondent submits that JSE escaped the financial consequences of its breach and that Claimant received the Loan amount back and now seeks to make a profit corresponding to interest on the Penalty.<sup>546</sup>
653. On this basis, Respondent maintains that Claimant, who was fully aware of JSE's breach of its obligations under Polish law, is barred from bringing its case to the international forum as supported by investment case law.<sup>547</sup> Respondent makes reference to *Fraport v. Philippines* where the investor was deprived from protection under the relevant BIT because the investment was made in violation of the Philippines' "Anti-Dummy-Law" designed to protect market functioning.<sup>548</sup> Respondent also refers to the decision in *Phoenix Action Ltd v. Czech Republic* that denied protection to an investor who had disregarded national law provisions aimed at safeguarding and regulating economic sectors.<sup>549</sup>
654. Respondent contends that Claimant's misconduct with regard to the mandatory stock provisions and the resulting Penalty are indispensable for the assessment of its claims in this arbitration.<sup>550</sup> It is Respondent's position that Claimant cannot argue that Respondent's clean hands objection was dealt with in the previous arbitration because the proceeding did not concern how the imposition of the Penalty could impact a subsequent claim to interest, including:
- i) the lawfulness of the Penalty in the context of the interest claimed in this arbitration;

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<sup>544</sup> Statement of Defence, para. 336 with reference to the Statement of Claim, para. 220.

<sup>545</sup> Statement of Defence, para. 337.

<sup>546</sup> Statement of Defence, paras. 337-339.

<sup>547</sup> Statement of Defence, paras. 339-340.

<sup>548</sup> Statement of Defence, para. 340 with reference to **Exhibit RL-097**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award of 10 December 2014, paras. 467-468.

<sup>549</sup> Statement of Defence, para. 340 with reference to **Exhibit BSOL 11**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 111.

<sup>550</sup> Rejoinder, para. 44.

- ii) the 2008 PAC judgement and 2009 SAC judgement repealing the Penalty;
- iii) the impact of Claimant's misconduct on the interest claimed in the context of its failure to create mandatory stocks; or
- iv) Respondent's conduct (allegedly in breach of the ECT) in response to JSE's breach of mandatory stock provisions in light of the argument that Claimant came to this Tribunal in the present arbitration with unclean hands.<sup>551</sup>

655. Respondent submits that the Tribunal is to consider the overall conduct of Claimant in Poland as it is a general rule of international investment law that a tribunal is to consider the overall conduct of the investor both prior to making and while maintaining an investment, with specific reference to the decision of the tribunal in *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. The Republic of Albania*.<sup>552</sup> Respondent maintains that Claimant's prior conduct, also deemed relevant by Claimant's witness Mr. Astramowicz, affecting responsive action from Respondent and the circumstances concerning the imposition of the Penalty should be assessed by the Tribunal *in toto*.<sup>553</sup>

656. Based on the foregoing, Respondent submits that the Tribunal should declare the lack of jurisdiction or admissibility of Claimant's claims or dismiss them on the merits.<sup>554</sup> In the alternative, in a scenario where the Tribunal finds a breach of the ECT, Respondent submits that the Tribunal should consider Claimant's misconduct and contribution to the alleged injury in the causation and quantum phase.<sup>555</sup>

#### **b) Claimant's Position**

657. It is Claimant's position that the applicability of the principle of clean hands in investment arbitration is debatable, but that it in any case must refer to the investment itself and not

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<sup>551</sup> Rejoinder, paras. 44-45.

<sup>552</sup> Rejoinder, para. 46 with reference to **Exhibit RL-105**, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, paras. 630, 634.

<sup>553</sup> Rejoinder, para. 47 with reference to **Exhibit CWS-1**, Witness Statement of Jarek Astramowicz, paras. 19-21.

<sup>554</sup> Rejoinder, para. 41.

<sup>555</sup> Rejoinder, para. 41.



a "one-off event" taking place in the course of the investor's business activity.<sup>556</sup> Further, Claimant maintains that the principle of clean hands can only be applied in situations where investors acts unethically, manifestly wrong or in bad faith to launder money, commit fraud or breach strict laws regarding human rights or investment in certain sectors.<sup>557</sup>

658. Claimant submits that its investment, both in the form of shares in JSE and the Loan Agreement, has always been legal and that Claimant used legitimate financial resources and obtained all licenses and paid all taxes as required by Polish law.<sup>558</sup>

659. It is Claimant's contention that a penalty imposed by the State authorities would in any event not undermine the legality of an investment.<sup>559</sup> Moreover, Claimant remarks that in this case "*there was no legal basis for the Penalty*"<sup>560</sup> and it was declared illegal by the PAC and SAC.<sup>561</sup>

### c) Tribunal's Analysis

660. The Tribunal notes that the issue of the applicability of the clean hands doctrine is far from being settled in international investment law. Leaving aside the matter of which procedural stage the doctrine should be considered at, the Tribunal is mindful that – absent an express ECT provision – the threshold of a disqualifying misconduct by an investor cannot be a low one. On the latter point, the *Yukos v. Russian Federation* tribunal observed that:

*"There is some doubt as to whether the clean hands doctrine exists as a separate doctrine of general international law outside the express provisions of particular treaties. The authorities that have been cited all consider categories of serious wilful wrongdoing in the context of the international public policy plea. They all address cases where there was something more than mere*

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<sup>556</sup> Reply to Request for Bifurcation, para. 39 with reference to **Exhibit CL-33**, P. Dumberry and G. Dumas-Aubin, The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law, Transnational Dispute Management, January 2013.

<sup>557</sup> Reply to the Request for Bifurcation, para. 40.

<sup>558</sup> Reply to the Request for Bifurcation, para. 40.

<sup>559</sup> Reply to the Request for Bifurcation, para. 41.

<sup>560</sup> Reply, para. 8.

<sup>561</sup> Reply to the Request for Bifurcation, para. 41.

*failure to comply with domestic law. In international law, the clean hands doctrine is closely linked to the principle of good faith, which is concerned with wilful wrongdoing, such as corruption, fraud or deceitful conduct or conduct that constitutes a breach of international as opposed to domestic law.*"<sup>562</sup>

661. Without deciding whether the principle of clean hands can be applied to an investment arbitration under the ECT, the Tribunal will first consider whether there is evidence of Claimant failing to comply with Polish law in the first place.
662. As set out in Section E.II. above, it is undisputed that this arbitration has arisen in connection with a Penalty imposed on Claimant's subsidiary, JSE, by the President of the MRA mid-2008 for an alleged breach of Polish regulations regarding the mandatory stocks of liquid fuels. The Tribunal does not agree with Respondent's argument that the alleged breach of the mandatory stock provisions and the resulting Penalty is indispensable for the assessment of the claims in this arbitration.
663. *First*, the basis for the claims in this arbitration is the undisputed repayment of the Penalty to JSE without interest and the related domestic proceedings in Poland (*see* Sections E.V.-VII. above). The imposition of this Penalty is not the subject of the dispute between the Parties.
664. *Second*, it is undisputed that the decisions imposing the Penalty were repealed by the PAC in its judgement of 23 December 2008, which was subsequently upheld by the SAC in its judgement of 20 October 2009 (*see* Section E.IV. above).
665. Therefore, in the view of the Tribunal, any alleged violation of the Polish law by JSE connected to the imposition of the Penalty cannot be used as a basis to argue that Claimant

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<sup>562</sup> *Yukos Capital Limited (formerly Yukos Capital S.A R.L.) v. Russia*, PCA Case No. 2013-31, Final Award, 23 July 2021, para. 524. *See also Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para. 468: "[T]his Tribunal shares the opinion with others that, in the absence of an express provision in the relevant treaty requiring legitimacy of the investment to afford protection, only an investment that was the direct result of an illegal wrongdoing that is so egregious (e.g., fraudulent misrepresentations or corruption) as to be found to breach international public policy norms would impede the jurisdiction of the tribunal or the admissibility of the claim."

cannot invoke the protection of the ECT.

666. Respondent further argues that Claimant cannot invoke the protection of the ECT for its claims because its alleged investment was made in direct connection with a breach of Polish law provisions. As discussed in Section G.III.2. above, Claimant's Investment is its shares in JSE in combination with the Loan Agreement. There is no evidence before the Tribunal to suggest that there is an issue concerning the legality of Claimant's shares in JSE or the Loan Agreement.
667. With regard to the Loan Agreement, however, Respondent contends that its sole purpose was to provide JSE with the means to pay the Penalty and that it is thus inseparably linked to the alleged violation of the Polish law on mandatory stocks. The Tribunal notes, however, that JSE has appealed the Penalty since its imposition, and that the Penalty was repealed by the Polish administrative courts. Therefore, the Tribunal does not consider that there is a connection between the Loan Agreement and any alleged violation of Polish law.
668. In conclusion, the Tribunal is not convinced that Claimant's conduct was in violation of Polish law so that it could be denied the protection of the ECT. As a result, it is not necessary for the Tribunal to make any determination on the applicability of the principle of clean hands to the current proceedings. The Tribunal rejects Respondent's request for the Tribunal to declare the lack of jurisdiction or admissibility of Claimant's claims.

## **H. MERITS**

669. In this section, the Tribunal will analyse Claimant's claims that Respondent has breached the effective means standard under Article 10(12) of the ECT (**I.**) and the fair and equitable treatment standard under Article 10(1) of the ECT (**II.**).

670. The Tribunal is of the view that the focus of the present dispute is the alleged breach of the effective means standard and will therefore address the claims in the inverse order as they were presented by Claimant.

## **I. Breach of the Effective Means Standard**

### **1. Claimant's Position**

671. Claimant seeks relief claiming that Respondent breached Article 10(12) of the ECT due to a lack of proper legislation,<sup>563</sup> referring to the following standard laid down by the tribunal in *Amto v. Ukraine*:

*"The fundamental criteria of an 'effective means' for the assertion of claims and the enforcement of rights within the meaning of Article 10(2) is law and the rule of law. There must be legislation for the recognition and enforcement of property and contractual rights. This legislation must be made in accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires secondary rules of procedure so that the principles and objectives of the legislation can be translated by the investor into effective action in the domestic tribunals."*<sup>564</sup>

672. Claimant submits that the Tribunal should not revisit the proceedings conducted before the PAC and the SAC, as the Claimant is not pursuing a classic denial-of-justice claim. Instead, Claimant's actual claim stems from: (i) the way the MRA and ME has been

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<sup>563</sup> Statement of Claim, paras. 191-192.

<sup>564</sup> Statement of Claim, para. 191 with reference to **Exhibit CL-24**, *Limited Liability Company Amto vs. Ukraine*, SCC Case No. 080/2005, Final Award of 26 March 2008, para. 87.

treating JSE (*i.e.* breach of the FET clause, which will be addressed below) and (ii) the ineffectiveness of the system of administrative judiciary (*i.e.* breach of the effective means).<sup>565</sup> Claimant maintains that the failure to provide effective means within Polish administrative judiciary is a systematic problem, not a problem of erroneous judgements causing damage to Claimant or JSE.<sup>566</sup> To the contrary, Claimant submits that the Polish court judgements were in favour of JSE but that the issue is that, despite these judgements, the administrative authorities were coming up with new arguments to deny JSE's claims.<sup>567</sup>

673. Claimant refers to the interpretation of "effective means" (in the context of the Ecuador-United States BIT) by the tribunal in *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* ("***Chevron v. Ecuador***"):

*"For any 'means' of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay. Undue delay in effect amounts to a denial of access to those means. The Tribunal therefore finds that Article II(7) applies to the Claimants' claims for undue delay in their seven cases in the Ecuadorian courts. The Ecuadorian legal system must thus, according to Article II(7), provide foreign investors with means of enforcing legitimate rights within a reasonable amount of time. The limit of reasonableness is dependent on the circumstances of the case. As with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake in the case, and the behavior of the courts themselves. The Tribunal must thus come to a conclusion about if and*

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<sup>565</sup> Claimant's Post Hearing Brief, para. 62.

<sup>566</sup> Reply to the Statement of Defence, paras. 76-77.

<sup>567</sup> Reply to the Statement of Defence, para. 77.

*when the delay exceeded the allowable threshold under Article II(7) in light of all such circumstances.*"<sup>568</sup>

674. Claimant submits that the caveats listed by the tribunal in *Chevron v. Ecuador* do not apply in these arbitral proceedings and that the assertion of claims in relation to Claimant's investment in Poland has been delayed beyond any standard of reasonableness.<sup>569</sup>
675. In this regard, Claimant submits that, firstly, the merits of the case are not complex (as discussed in more detail below) and that the application of the Tax Ordinance to penalties imposed by the MRA was never a real issue, as evidenced by the fact that the MRA had no doubts that it applied when demanding payment of the Penalty with interest.<sup>570</sup> Secondly, Claimant contends that its investment, JSE, has never caused any delays (as discussed in more detail below), demanding action from the administrative authorities and expediting the administrative and court proceedings where possible, whereas the authorities attempted to avoid commencing proceedings, rendering decisions that could be subject to appeal, and were even fined by the PAC for protracting proceedings.<sup>571</sup> Thirdly, Claimant contends that the attempted prosecution of claims of claims for over ten years must be considered unreasonably long for any civilized judiciary.<sup>572</sup>
676. Claimant further relies on the items of the *Chevron v. Ecuador* test for establishing effective means for the assertion of claims and enforcement of rights as summarized by the tribunal (in the context of Australia-India BIT) in *White Industries Australia Limited v. The Republic of India* ("**White Industries v. India**"), comprising:

*"(a) the 'effective means' standard is lex specialis and is a distinct and potentially less demanding test, in comparison to denial of justice in customary international law;*

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<sup>568</sup> Statement of Claim, para. 207 with reference to **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company vs. The Republic of Ecuador*, UNCITRAL ad hoc arbitration, Partial Award on the Merits dated 30 March 2010, para. 250.

<sup>569</sup> Statement of Claim, para. 208.

<sup>570</sup> Statement of Claim, para. 209.

<sup>571</sup> Statement of Claim, para. 210.

<sup>572</sup> Statement of Claim, para. 211.

- (b) the standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case;*
- (c) a claimant alleging a breach of the effective means standard does not need to establish that the host State interfered in judicial proceedings to establish a breach;*
- (d) indefinite or undue delay in the host State's courts dealing with an investor's 'claim' may amount to a breach of the effective means standard;*
- (e) court congestion and backlogs are relevant factors to consider, but do not constitute a complete defence. To the extent that the host State's courts experience regular and extensive delays, this may be evidence of a systemic problem with the court system, which would also constitute a breach of the effective means standard;*
- (f) the issue of whether or not 'effective means' have been provided by the host State is to be measured against an objective, international standard;*
- (g) a claimant alleging a breach of the standard does not need to prove that it has exhausted local remedies. A claimant must, however, adequately utilise the means available to it to assert claims and enforce rights. It will be up to the host State to prove that local remedies are available and the claimant to show that those remedies were ineffective or futile;*
- (h) whether or not a delay in dealing with an investor's claim breaches the standard will depend on the facts of the case; and*
- (i) as with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behaviour of the litigants involved, the significance*

*of the interests at stake in the case and the behaviour of the courts themselves.*"<sup>573</sup>

677. Claimant submits that the objective, international standard of effective means for the assertion of claims and enforcement of rights requires an assessment of the length of the proceedings (a)) and the effectiveness of local remedies in any given case (b)), in addition to further requirements such as those established by the tribunal in *Chevron v. Ecuador* (c)).<sup>574</sup>

**a) Length of Proceedings**

678. With regard to the first prong of the standard, as proposed by Claimant, the length of the proceedings, Claimant submits that there is no universal method of deciding whether certain proceedings are subject to undue delay because this issue is analysed *ad casu* in international arbitration case law.<sup>575</sup> However, given that the ECHR often deals with this issue, Claimant submits that the ECHR's approach can be treated as the international standard of assessing the length of proceedings designed to end with a judgement addressing a non-state party.<sup>576</sup>

679. Claimant contends that ECHR case law uses the term "reasonable duration" of proceedings and further refers to the following commentary:

*"[A] given lapse of time demands particular scrutiny if it seems at first sight 'considerable', 'surprising' and 'serious', 'unreasonable', 'excessive', 'exceptional' or 'inordinate'. The respondent state must then 'give satisfactory explanations', otherwise it will be found in breach of the reasonable-time requirement. There is something of a presumption against the state that the proceedings are unreasonably long, requiring that it show that it is not*

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<sup>573</sup> Reply to the Statement of Defence, para. 75 with reference to **Exhibit CL-37**, *White Industries Australia Limited vs. The Republic of India*, UNCITRAL ad hoc arbitration, Final Award dated 30 November 2011, para. 11.3.2.

<sup>574</sup> Reply to the Statement of Defence, para. 94.

<sup>575</sup> Reply to the Statement of Defence, para. 95

<sup>576</sup> Reply to the Statement of Defence, para. 96.



*responsible for the time lapse.*"<sup>577</sup>

680. Claimant maintains that Respondent has not given any explanation which would exonerate it from a breach of the reasonable time requirement.<sup>578</sup>

681. Further, Claimant submits that a well-known criterion taken into account by the ECHR in assessing the reasonable-time requirement is complexity of the case<sup>579</sup>. Claimant states that although Respondent attempts to make JSE's case look complex, the length of JSE's proceedings was caused by the will of administrative authorities and not by complexity or extraordinary nature of legal issues, as evidenced by the judgements of the administrative court.<sup>580</sup>

682. In this context, Claimant refers to two letters from the Polish Minister of Finance dated 30 September 2004 and 6 February 2006 provided to Respondent during the document production phase.<sup>581</sup> Claimant submits that, in these letters, the Minister of Finance confirmed without reservation that an unduly imposed administrative penalty is to be repaid with interest at the rate applied to tax arrears.<sup>582</sup> On the basis of these two letters, Claimant submits that the proceedings with JSE were not complex, as the arguments raised by JSE were developed by the Minister of Finance years before. This is based on the following:

- Prior to the dispute with JSE, Respondent had a clear view on the application of the Tax Ordinance and the interest on pecuniary penalties imposed by various administrative authorities other than the tax authorities,
- The MRA and the ME chose to litigate because the dispute may last many years and administrative court judgments are unenforceable, and

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<sup>577</sup> Reply to the Statement of Defence, paras. 96-97 with reference to **Exhibit CL-38**, Frédéric Edel "*The length of civil and criminal proceedings in the case law of the European Court of Human Rights*" (Human Rights file No. 16, pp. 35-36).

<sup>578</sup> Reply to the Statement of Defence, para. 98.

<sup>579</sup> Reply to the Statement of Defence, para. 98 with reference to **Exhibit CL-38**, Frédéric Edel "*The length of civil and criminal proceedings in the case law of the European Court of Human Rights*" (Human Rights file No. 16, pp. 39-43).

<sup>580</sup> Reply to the Statement of Defence, para. 98.

<sup>581</sup> Reply to the Statement of Defence, paras. 99-100 with reference to **Exhibit C-99**, letter of the Minister of Finance, dated 30 September 2004 and **Exhibit C-100**, letter of the Minister of Finance, dated 6 February 2006.

<sup>582</sup> Reply to the Statement of Defence, para. 100.

- Respondent presented arguments in the administrative courts and in this arbitration that contradict Respondent's own views as expressed by the letters from the Minister of Finance.<sup>583</sup>

683. Claimant contends that the MRA and ME chose to retain as many experts as possible to find excuses to protract the proceedings, instead of following the well-developed interpretation of law from Minister of Finances.<sup>584</sup> Claimant submits that in the PAC 1<sup>st</sup> Judgement 13 June 2011, as well as its judgement dated 15 May 2014, and the SAC 1<sup>st</sup> Judgement of 28 February 2015, the courts found the administrative authorities liable for extending the dispute.<sup>585</sup> With reference to the PAC 2<sup>nd</sup> Judgement dated 14 September 2018, Claimant states that the PAC confirmed that the then nine-year history of the dispute amounted to a violation by the MRA and the ME of the good faith principles of the administrative procedure.<sup>586</sup>
684. Claimant also submits that the ECHR takes into account what is at stake in a given case and that ECHR case law indicates that the higher the stakes, the less leniency should be afforded to the State's liability.<sup>587</sup> In this context, Claimant states that the Penalty imposed on JSE is the highest penalty paid by a single entity and is significant enough to gain political attention and to make Claimant enter the Loan Agreement with JSE whose existence was at stake.<sup>588</sup>
685. Claimant does not contest that, according to the ECHR, the State cannot be held liable for the delays caused by the parties, but states that it is confident that JSE's actions cannot be characterized as causing delays.<sup>589</sup> In particular, Claimant submits the administrative

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<sup>583</sup> Reply to the Statement of Defence, paras. 100-101.

<sup>584</sup> Reply to the Statement of Defence, para. 102.

<sup>585</sup> Reply to the Statement of Defence, para. 103 with reference to **Exhibit C-48**, Judgment of the Provincial Administrative Court in Warsaw, dated 13 June 2011 (Case ref. No. VI SAB/Wa 6/11); **Exhibit C-49**, Judgment of the Supreme Administrative Court, dated 28 February 2013 (Case ref. No. II GSK 2172/11); **Exhibit C-56**, Judgment of the Provincial Administrative Court in Warsaw, dated 15 May 2014 (Case ref. No. VI SAB/Wa 12/14).

<sup>586</sup> Reply to the Statement of Defence, para. 103 with reference to **Exhibit C-75**, Judgment of the Provincial Administrative Court in Warsaw, dated 14 September 2018 (Case ref. No. VI SA/Wa 540/18).

<sup>587</sup> Reply to the Statement of Defence, paras. 104 with reference to **Exhibit CL-38**, Frédéric Edel "*The length of civil and criminal proceedings in the case law of the European Court of Human Rights*" (Human Rights file No. 16, pp. 43).

<sup>588</sup> Reply to the Statement of Defence, paras. 105 with reference to Statement of Claim paras 103-104 and **Exhibit CWS-1**, Witness Statement of Mr. Jarek Astramowicz, paras. 20-21.

<sup>589</sup> Reply to the Statement of Defence, para. 107.

proceedings were not affected by JSE's civil action initiated on 17 November 2009 because JSE filed three letters in parallel on 13, 18 and 20 November 2009 demanding payment in accordance with the Tax Ordinance and the civil action was discontinued a month after it had been filed.<sup>590</sup> Claimant also submits that JSE's refusal to have the cassation claim heard *in camera* by the SAC was not unreasonable and that, in any event, the rendering of a judgement by the SAC will not change the situation because Respondent will use its new argumentation to deny JSE's rights.<sup>591</sup>

686. Claimant refers to the conduct of the relevant authorities as the fourth criterion in ECHR case law and states that the administrative court judgements are sufficient in this respect. In particular, the PAC 2<sup>nd</sup> Judgement dated 14 September 2018 provided an unbiased and objective assessment of the conduct of the authorities.<sup>592</sup>
687. Claimant concludes that the hearing of JSE's claim for the repayment of the outstanding part of the Penalty with interest has been excessively, unreasonably and exceptionally lengthy compared to the objective, international standard.<sup>593</sup>
688. Claimant maintains that while JSE has suffered an undue delay in the proceedings related to the recovery of the outstanding part of the Penalty with interest, the more profound problem is that it is likely that the proceedings will never end with a definite resolution due to the features of the Polish legal system and policies of the Polish government.<sup>594</sup> Claimant submits that Poland is not a democracy in which court judgments are observed and executed without any need for recourse to enforcement proceedings as foreseen by the rule of law.<sup>595</sup>

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<sup>590</sup> Reply to the Statement of Defence, para. 107 with reference to **Exhibit R-46**, Request of J&S Energy S.A. for payment of 13 November 2009; **Exhibit R-47**, Corrected request of J&S Energy S.A. for payment of 18 November 2009; **Exhibit R-49**, Statement of Claim of J&S Energy S.A.; **Exhibit R-50**, Expert Opinion of Professor Modzelewski of 21 December 2009; **Exhibit R-53**, Court decision to discontinue proceedings of 18 December 2009.

<sup>591</sup> Reply to the Statement of Defence, para. 108.

<sup>592</sup> Reply to the Statement of Defence, paras. 109-110 with reference to **Exhibit C-75**, Judgment of the Provincial Administrative Court in Warsaw, dated 14 September 2018 (Case ref. No. VI SA/Wa 540/18).

<sup>593</sup> Reply to the Statement of Defence, para. 111.

<sup>594</sup> Reply to the Statement of Defence, paras. 88-89.

<sup>595</sup> Reply to the Statement of Defence, para. 89

689. In its response to the Tribunal's question as to the finality of the SAC 3<sup>rd</sup> Judgement,<sup>596</sup> Claimant submitted that Respondent's statement at the Main Hearing that "[...] *we believe that this would be the final judgment*" was not credible.<sup>597</sup> According to Claimant, the SAC 3<sup>rd</sup> Judgment will not be final, as confirmed at the Main Hearing by both Respondent's fact witness Mr. Tomasz Błażej, as well as Respondent's expert witness, Ms Izabela Jędrzejewska-Czernek,<sup>598</sup> with the latter testifying that if the SAC dismissed the ME's cassation Claim, "*the authority [i.e. the ARM] [would] be obliged to reconsider the case thoroughly from scratch. In other words, to see whether the overpayment occurred.*"<sup>599</sup>
690. In its Post-Hearing Brief, Claimant submitted that if the SAC dismissed the ME's cassation claim, the case file would be remanded to the MRA and the case would be re-examined pursuant to Article 286 of the Law on Administrative Court Procedure ("**LACP**" also referred to by Respondent as "**LPBAC**"), which could reinitiate "*the whole decision-appeal-decision-appeal-judgment-cassation claim-judgment*" process.<sup>600</sup>
691. Claimant submitted in its Reply (*i.e.* before the SAC 3<sup>rd</sup> Judgment was rendered) that even if the SAC dismissed the ME's third cassation claim (as in fact occurred), the MRA and the ME would use this new argumentation to deny JSE's claim, which would result in another "revolution" of proceedings in that JSE would appeal this decision to the ME, the ME would uphold the MRA's decision, and JSE would have to again bring an appeal before the PAC.<sup>601</sup>
692. According to Claimant, the ME's pleading before the SAC on 10 December 2020 in relation to the ME's cassation claim contains a whole new argumentation developed on the basis of the opinion of Respondent's expert Dr. Izabela Andrzejewska-Czernek in her first

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<sup>596</sup> Tribunal's List of Questions to the Parties dated 15 July 2021, question 8(a): "*To what extent can this decision be considered determinative and final in relation to JSE's claim for refund of the outstanding interest?*"

<sup>597</sup> Claimant's Post Hearing Brief, para. 76; Hearing Transcript, Day 1, p. 44.

<sup>598</sup> Claimant's Post Hearing Brief, para. 76.

<sup>599</sup> Claimant's Post Hearing Brief, para. 76.

<sup>599</sup> Claimant's Post Hearing Brief, para. 76 with reference to Hearing Transcript, Day 4, pp. 29-37, expert I. Andrzejewska-Czernek.

<sup>600</sup> Claimant's Post Hearing Brief, para. 76.

<sup>601</sup> Reply to the Statement of Defence, paras. 80, 84.

expert report of 2 November 2020 filed in this arbitration as Exhibit RER-1.<sup>602</sup> It is Claimant's position that the ME filed the pleading in full knowledge that the SAC could not take into account new arguments at that stage of the proceedings.<sup>603</sup> Further, Claimant submits that the pleading is *contra legem*, contradicting the final and non-appealable judgements of the PAC and SAC and is in any event procedurally inadmissible so will not be taken into account by the SAC.<sup>604</sup>

693. In its submission of 25 May 2022 (*i.e.* after the SAC 3<sup>rd</sup> Judgment was rendered dismissing the ME's cassation claim), Claimant submitted that it was clear from Respondent's Submission on the 2022 SAC Judgement dated 23 May 2022 that Respondent did not consider the SAC 3<sup>rd</sup> Judgement final and that JSE's public-law claims would be subject to another round of administrative proceedings.<sup>605</sup>

#### **b) Effectiveness of Local Remedies**

694. With regard to the second prong of the standard of effective means for the assertion of claims and enforcement of rights, as proposed by Claimant, the effectiveness of local remedies, Claimant contends that it has presented its position concerning the ineffectiveness of the Polish administrative system and how it stands against international standards.<sup>606</sup>
695. Specifically, it is Claimant's position that Poland does not provide effective means to enforce administrative court judgements against the administrative authorities.<sup>607</sup> Claimant submits that the legal statutes governing the judicial control of the administrative courts over the activities of public administrative bodies, such as the Code of Administrative Procedure (the "**CAP**") and the Law on Administrative Court Procedure ("**LACP**"), do not empower the administrative courts to render enforceable judgements.<sup>608</sup> Claimant

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<sup>602</sup> Reply to the Statement of Defence, paras. 79-82 with reference to **Exhibit RER-1**, First Expert Report of Dr Izabela Andrzejewska-Czernek, para. 26 and **Exhibit C-96**, ME's submission, dated 10 December 2020 (Case ref. No. II GSK 349/19).

<sup>603</sup> Reply to the Statement of Defence, para. 82.

<sup>604</sup> Reply to the Statement of Defence, paras. 79, 82 with reference to **Exhibit C-97**, JSE's submission, dated 3 February 2021 (Case ref. No. II GSK 349/19).

<sup>605</sup> Claimant's letter to the Tribunal dated 25 May 2022, with reference to Respondent's Submission on the 2022 SAC Judgment dated 23 May 2022.

<sup>606</sup> Reply to the Statement of Defence, para. 112 with reference to Statement of Claim, paras. 191-211.

<sup>607</sup> Statement of Claim, para. 193.

<sup>608</sup> Statement of Claim, para. 193.

contends that while an administrative court can repeal administrative decisions and determine that money is owed by the authorities, the courts cannot order an administrative authority to pay a specific amount of money to the other party, with the result that this payment is subject to the authorities' willingness to adhere to the court's judgement.<sup>609</sup>

696. In support of this position, Claimant refers to a ruling of the SAC dated 9 June 2016, which declared a request to have an enforcement clause in an administrative court judgement inadmissible, stating:

*"It should be noted that (...) [the LACP] does not contain any regulations concerning the enforcement-clause procedure.*

*The scope of activities undertaken by administrative courts is defined (...) [as the courts' power to] exercise justice by controlling the activities of public administration in terms of legality. In the event of failure to enforce a judgement, for example, reversing a decision in the part concerning the subject matter of the appeal, the party may (...) apply for a fine to be imposed on the authority.*  
(...)

*(...) Supreme Administrative Court concludes that the applicant's motion is inadmissible and that it does not fall within the competence of the Supreme Administrative Court or the Provincial Administrative Court in K., since the enforceability clauses for administrative court rulings are granted by district courts only in the case of awarded court costs, as defined above."*<sup>610</sup>

697. On this basis, Claimant contends that even if the Polish administrative judicial system is considered to provide effective means for the assertion of claims, the SAC's ruling above confirms that there are no effective means for the enforcement of rights. Claimant presents three case examples:

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<sup>609</sup> Statement of Claim, para. 193.

<sup>610</sup> Statement of Claim, para. 195 with reference to **Exhibit CL-25**, ruling of the Supreme Administrative Court, dated 9 June 2016 (Case ref. No. II GSK 2045/15).

- *First*, Claimant submits that the judgements rendered by the PAC on 29 August 2019 and by the SAC on 28 June 2019 respectively, declaring that the information about candidates selected for the National Council of the Judiciary in Poland should be publicly available, were unable to be enforced and that the secretariat openly refused to publish this information.<sup>611</sup> Claimant submits that this information became available on 14 February 2020 but not as a result of the enforcement of the aforementioned judgements.<sup>612</sup>
- *Second*, Claimant contends that rulings by the PAC and the SAC that the finances of a new state committee investigating the plane crash in April 2010 – killing almost a hundred people, including the Polish President, members of parliament and high-ranking military commanders – should be public, have been ignored because the Polish legal system does not allow administrative court judgements to be enforced.<sup>613</sup>
- *Third*, Claimant refers to a judgement of the PAC from 16 May 2017 repealing a decision by the tax authorities refusing to refund value added tax that was unduly paid by a Polish limited liability company, submitting that this was the fifth judgement in this case that had been ongoing almost 20 years.<sup>614</sup> Claimant submits that in this case and in the case of JSE and Claimant, with both cases being about the repayment of an unduly paid public law tribute with interest, several administrative court judgements were ignored in breach of Article 153 of the LACP and the relevant authorities invoked the statute of limitation after lengthy court

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<sup>611</sup> Statement of Claim, paras. 198-201 with reference to **Exhibit C-78**, judgment of the Provincial Administrative Court in Warsaw, dated 29 August 2018 (Case ref. No. II SA/Wa 484/18); **Exhibit C-79**, judgment of the Supreme Administrative Court, dated 28 June 2019 (Case ref. No. I OSK 4282/18); and **Exhibit C-80**, information of the Polish Commissioner for Human Rights available at <https://www.rpo.gov.pl/pl/content/wsa-nie-wstrzyma%C5%82-decyzji-puodo-o-zablokowaniu-wyroku-nsa-wslist-poparcia-do-krs>, accessed on 4 May 2020.

<sup>612</sup> Statement of Claim, para. 109.

<sup>613</sup> Statement of Claim, paras. 202-203 with reference to **Exhibit C-81**, Mateusz Ratajczak "Antoni Macierewicz and the Smolensk subcommittee will send me PLN 100. They still do not want to reveal their financial secrets.", available at <https://www.money.pl/gospodarka/antonimacierewicz-i-podkomisja-smolenska-wysla-mi-100-zl-tajemnic-finansowych-ujawnic-wciaz-nie-chca-6463445637343361a.html>, accessed on 4 May 2020.

<sup>614</sup> Statement of Claim, para. 204 with reference to **Exhibit C-82**, Patrycja Dudek "After losing a case the tax office should return what was taken. Statute of limitation does not apply." *Dziennik Gazeta Prawna*, dated 18 May 2017.

proceedings.<sup>615</sup>

698. Claimant further contends that the understanding of "effective means" under Article 10(12) of the ECT should be interpreted according to its ordinary meaning as per Article 31(3) of the VCLT.<sup>616</sup> In this regard, Claimant submits that the term "means" refers to an instrument or remedy available to the investor to defend its rights, to appeal and to be heard by an independent judicial body.<sup>617</sup> Claimant refers to the Oxford Dictionary definition of "*effective*" as "*producing the result that is wanted or intended; producing a successful result*" and further states that there is no need to add any further language to this definition.<sup>618</sup> On this basis, Claimant submits that the term "effective means" describes a legal instrument that results in the assertion of claims and enforcement of rights and within a reasonable timeframe, as described above.

699. In this context, Claimant submits that the Polish legislation, including the CAP, the Tax Ordinance, LACP, and the Act on the Enforcement Procedure in Administration ("**AEPA**"), provides "*means*" within the meaning of Article 10(12) of the ECT.<sup>619</sup> It is Claimant's position, however, that these means cannot be deemed effective because the system has not been able to produce a successful result in over a decade.

700. Claimant contends that a legal system must work effectively "*in any given case*" and that Respondent's attempt to demonstrate that the administrative courts can oblige the administrative authorities to act in exceptional circumstances must fail because Respondent has not demonstrated that the exceptional mechanism worked in JSE's case.<sup>620</sup> Claimant maintains that Respondent did not deny that the administrative court judgements could not be enforced, and that Respondent is aware that the SAC 3<sup>rd</sup> Judgement will also not be enforceable.<sup>621</sup>

701. On this basis, Claimant contends that the Polish legal system favours the administrative

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<sup>615</sup> Statement of Claim, para. 205.

<sup>616</sup> Reply to the Statement of Defence, para. 113.

<sup>617</sup> Reply to the Statement of Defence, para. 114.

<sup>618</sup> Reply to the Statement of Defence, para. 115 with reference to <https://www.oxfordlearnersdictionaries.com/definition/english/effective>.

<sup>619</sup> Reply to the Statement of Defence, para. 114.

<sup>620</sup> Reply to the Statement of Defence, para. 83.

<sup>621</sup> Reply to the Statement of Defence, para. 84.



authority and ultimately fails because the administrative courts may rule in favour of a party, but this party cannot make the respective administrative authorities execute the court rulings.<sup>622</sup>

702. As to Respondent's allegation that Claimant failed to invoke Article 145a of the LACP (*i.e.* to oblige an authority to render a decision and indicate a manner in which the case should be dealt with), it is Claimant's position that that is not required and is irrelevant.<sup>623</sup> According to the Claimant, JSE did apply for the PAC to declare the ME's decision of 18 January 2018 invalid, which would have allowed the Court to apply said Article 145a of the LACP.<sup>624</sup> Moreover, the application of this Article is irrelevant since administrative court judgments cannot be enforced against the authorities.<sup>625</sup>
703. As to the nature of the guidelines provided in the administrative court judgements and the consequences if they are not followed, Claimant submits that "[t]he state and administrative authorities do not incur any real consequences if they choose, for whatever reason, not to follow the said guidelines and interpretation of law."<sup>626</sup>
704. In this respect, Claimant agrees with the testimony of Respondent's legal expert, Prof. Piątek, at the Main Hearing that if the authorities ignored the administrative court's guidelines and legal assessment, the whole system ("*jigsaw puzzle*") would fall apart.<sup>627</sup> According to the Claimant, this meant that the system would stop working, and thus it could not be perceived as providing effective means for the assertion of claims and the enforcement of rights.<sup>628</sup>
705. Referring to the *lex specialis* of Article 10(12) of the ECT, Claimant submits that it is not required to show that the Polish government interfered in the court cases to which JSE was a party and that Respondent's arguments to the contrary are irrelevant because

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<sup>622</sup> Reply to the Statement of Defence, para. 85.

<sup>623</sup> Claimant's Post Hearing Brief, paras. 45-49, 52.

<sup>624</sup> Claimant's Post Hearing Brief, para. 48.

<sup>625</sup> Claimant's Post Hearing Brief, para. 52.

<sup>626</sup> Claimant's Post Hearing Brief, para. 55.

<sup>627</sup> Claimant's Post Hearing Brief, paras. 53-54.

<sup>628</sup> Claimant's Post Hearing Brief, para. 54.

Claimant relies on the effective means standard and not on the denial of justice.<sup>629</sup> Claimant states that, although the MRA and the ME did not try to influence the PAC or the SAC in the past, this is changing as the Polish government is attempting to make the courts dependent on the executive branch, so the situation can only get worse for JSE and Claimant.<sup>630</sup>

**c) Other Requirements**

706. Claimant concludes that it also addressed the following elements of the test established in *Chevron v. Ecuador* and *White Industries v. India*:

- The lack of obligation to exhaust local remedies (as addressed in Respondent's objection that Claimant's claims are premature);
- The necessity to consider the facts of the case when deciding if a delay of proceedings breaches the international standard;
- The necessity to take into account the complexity of the case;
- The behaviour of litigants involved;
- The significance of the interests at stake in the case; and
- The behaviour of the courts/Respondent's institutions in general.<sup>631</sup>

707. Claimant submits that it is not necessary to address the remaining three elements of the test established in *Chevron v. Ecuador* and *White Industries v. India* because these elements are intertwined with the arguments already presented.<sup>632</sup>

708. In response to the Tribunal's questions following the Hearing related to the civil law proceedings initiated by JSE,<sup>633</sup> Claimant submits as follows:

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<sup>629</sup> Reply to the Statement of Defence, paras. 86-87 with reference to **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company vs. The Republic of Ecuador*, UNCITRAL ad hoc arbitration, Partial Award on the Merits dated 30 March 2010, para. 248.

<sup>630</sup> Reply to the Statement of Defence, para. 87.

<sup>631</sup> Reply to the Statement of Defence, para. 118.

<sup>632</sup> Reply to the Statement of Defence, para. 118.

<sup>633</sup> Tribunal's List of Questions to the Parties dated 15 July 2021, questions 5 (a)-(d).

- i. The claim pursued by JSE in the administrative court proceedings is of public-law nature and thus it cannot be subject to any civil action.<sup>634</sup>
- ii. By filing the first civil claim on 17 November 2009, JSE "*tried its luck*", but it was fully aware of the claim's inadmissibility.<sup>635</sup> Any such civil suit would be rejected as inadmissible, as confirmed by the Supreme Court and the SAC judgements of 2002, 2004 and 2014.<sup>636</sup>
- iii. JSE initiated this first civil action to obtain interim relief in the form of a court order to seize Respondent's assets, even though it would most likely have been deemed inadmissible.<sup>637</sup>
- iv. Since the civil court did not issue the court order, JSE withdrew the civil claim and focused on the administrative court proceedings, as it did not want to waste time and money on other actions.<sup>638</sup>
- v. At a later stage of the proceedings, the civil court would have analysed the legal nature of JSE's claim and rejected the action on formal grounds.<sup>639</sup> According to Claimant, Articles 1 and 2 of the Civil Procedure Code determine the boundaries of civil courts' jurisdiction as being limited to civil matters.<sup>640</sup> This position is confirmed by Polish jurisprudence.<sup>641</sup>

709. On this basis, Claimant contends that the only forum for having pursued public-law claims were the administrative courts.<sup>642</sup>

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<sup>634</sup> Claimant's Post Hearing Brief, para. 34.

<sup>635</sup> Claimant's Post Hearing Brief, para. 35.

<sup>636</sup> Claimant's Post Hearing Brief, para. 34; **Exhibit CL-31**, Judgment of the Supreme Court, dated 24 May 2002 (Case ref. No. II CKN 892/00); **Exhibit CL-32**, Judgment of the Supreme Court, dated 10 March 2004 (Case ref. No. IV CK 113/ 03); **Exhibit CL-33**, Judgment of the Supreme Administrative Court, dated 27 March 2014 (Case ref. No. II FSK 979/12).

<sup>637</sup> Claimant's Post Hearing Brief, paras. 35-36.

<sup>638</sup> Claimant's Post Hearing Brief, para. 37.

<sup>639</sup> Claimant's Post Hearing Brief, para. 38.

<sup>640</sup> Claimant's Post Hearing Brief, para. 39.

<sup>641</sup> Claimant's Post Hearing Brief, para. 40; **Exhibit CL-50**, Joanna Bodio [in:] Andrzej Jakubecki (ed.), Joanna Bodio, Tomasz Demendecki, Olimpia Marcewicz, Przemysław Telenga, Mariusz P. Wójcik "Code of Civil Procedure. Updated commentary. Volume I. Articles 1-729" (published: LEX/el. 2019, commentary on § 1 CCP).

<sup>642</sup> Claimant's Post Hearing Brief, para. 37.

## 2. Respondent's Position

710. Respondent submits that the arguments presented by Claimant as an effective means claim are actually a claim for denial of justice.<sup>643</sup> According to Respondent, Claimant's case is about Polish administrative authorities frustrating JSE's court victories rather than legal deficiencies of the remedies in Poland.<sup>644</sup>
711. Respondent maintains that there is no compelling reason to analyse the effective means standard separately from the denial of justice standard.<sup>645</sup>
712. Referring to Claimant's reliance on *White Industries v. India*, Respondent submits that there is no reason to adopt this reasoning because Claimant did not present any ECT tribunals that have done so.<sup>646</sup> In particular, Respondent submits that none of the tribunals presented by Claimant had affirmed a breach of the effective means standard in Article 10(12) of the ECT in the absence of a denial of justice finding, nor did they assert a lower standard for the breach of effective means as opposed to the denial of justice.<sup>647</sup>
713. Respondent contends that the findings in the cases relied on by Claimant are of little use for understanding the standard of protection under the ECT because they are based on other treaties that neither Poland nor Cyprus are party to and, in any case, cannot be relied on to detract from the jurisprudence of ECT tribunals.<sup>648</sup>
714. Respondent states that Claimant's sole reliance on *White Industries v. India* is due to the fact that it is the only case where the tribunal provided an explanation for differentiating between the effective means standard and the denial of justice. Respondent submits that scholars observed that, even in *White Industries v. India*, the tribunal did not justify the differentiation.<sup>649</sup>

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<sup>643</sup> Statement of Defence, para. 342.

<sup>644</sup> Statement of Defence, para. 342.

<sup>645</sup> Rejoinder, para. 182.

<sup>646</sup> Rejoinder, paras. 182-183.

<sup>647</sup> Rejoinder, para. 183.

<sup>648</sup> Rejoinder, para. 184 with reference to **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL ad hoc arbitration; Partial Award on the Merits, dated 30 March 2010 and **Exhibit CL-37**, *White Industries Australia Limited vs. The Republic of India*, UNCITRAL ad hoc arbitration, Final Award, dated 30 November 2011.

<sup>649</sup> Rejoinder, para. 184 with reference to **Exhibit RL-154**, Berk Demirkol, *Judicial Acts and Investment Treaty Arbitration*, CUP 2018, pp 45-48, 111.

715. On this basis, Respondent contends that Claimant's attempt to frame an effective means claim to avoid the high threshold for the denial of justice is an attempt to obtain benefits not foreseen in the ECT. Therefore, Respondent maintains that the Tribunal should not depart from the denial of justice test.<sup>650</sup>

716. Respondent further submits that it is clear Claimant mischaracterized its claim even on a *prima facie* basis because, even if the effective means standard existed separately, ECT tribunals have understood Article 10(12) of the ECT as an obligation to create a legal framework for asserting claims and Poland has fulfilled this obligation as acknowledged by Claimant in its Reply:

*"The means referred to in Art. 10(12) ECT is nothing more than an instrument, a remedy which should be available to the investor. . . . Polish legislation, including the CAP, LACP, Tax Ordinance, AEPA, provide such remedies."*<sup>651</sup>

717. It is Respondent's position, however, that JSE was neither denied justice (a)) nor denied access to effective legal remedies (b)) and (c))<sup>652</sup>:

**a) No Denial of Justice**

718. Respondent contends that JSE was not denied justice, asserting that Claimant seeks relief in relation to alleged miscarriage of justice in an individual case, referring to the performance of the Polish authorities and the alleged inability of the Polish courts to render enforceable judgements, rather than discussing the Polish system judicial system as a whole.<sup>653</sup> Further, Respondent states that Claimant's effective means claim is based on an accusation that Respondent deprived JSE of legal remedies in an individual case and that Claimant did not meet the high threshold of denial of justice.<sup>654</sup> On this basis, Respondent contends that Claimant's claim must fail for want of (i) exhaustion of local remedies or

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<sup>650</sup> Rejoinder, para. 186.

<sup>651</sup> Rejoinder, para. 187 with reference to the Reply to the Statement of Defence, paras. 343-347.

<sup>652</sup> Statement of Defence, Section IV.A.

<sup>653</sup> Statement of Defence, para. 348 with reference to Statement of Claim, paras. 173-183.

<sup>654</sup> Statement of Defence, para. 349 with reference to **Exhibit BSOL XII** Alexandra Diehl, *The Core Standard of International Investment Protection, International Arbitration Law*, 2012, pp. 455-56, 503.

(ii) an outcome of domestic proceedings that offends a sense of judicial propriety.<sup>655</sup>

719. With regard to (i) the exhaustion of local remedies, Respondent contends that Claimant cannot accuse Respondent of depriving it of access to justice when Claimant failed to meet the substantive requirement of exhausting local remedies by failing to initiate a damages action before an ordinary court.<sup>656</sup>

720. Respondent contends that the existence of a substantive requirement to exhaust local remedies is acknowledged by public internal law, including investment jurisprudence.<sup>657</sup> Respondent refers to the decision in *Apotex v. USA*, which reads:

*"[A]n act of a domestic court that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate State responsibility - unless such recourse is obviously futile."*<sup>658</sup>

721. Referring to the decision in *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* ("**Loewen v. USA**"), Respondent states that it is a matter of international law that:

*"[t]he purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision."*<sup>659</sup>

722. Respondent submits that, in any case, the availability of a remedy is understood to

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<sup>655</sup> Statement of Defence, para. 349.

<sup>656</sup> Statement of Defence, para. 350.

<sup>657</sup> Statement of Defence, para. 353 with reference to **Exhibit BSOL X** Jan Paulsson, Denial of Justice, CUP 2005, p. 130; **Exhibit BSOL II** ICJ Judgment of 21 March 1959 in case *Interhandel (Switzerland v. United States of America)*, p. 27.

<sup>658</sup> Statement of Defence, para. 350 with reference to **Exhibit BSOL III** *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility of 14 June 2013, para. 281, *see also* paras. 282, 284.

<sup>659</sup> Statement of Defence, para. 351 with reference to **Exhibit BSOL IV** *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 154.

encompass remedies available within the State's legal system, as opposed to those only available in particular proceedings.<sup>660</sup>

723. With regard to the (ii) threshold for the denial of justice, Respondent submits that, even if Claimant's claims were ripe for adjudication, the threshold for denial of justice was not met and the conduct of the domestic proceedings in Poland does not violate international standards.<sup>661</sup> It is Respondent's position that only the most egregious acts of the judiciary are to be considered a denial of justice, referring to the traditional understanding as per Article 9 of the 1929 Harvard Draft Convention on Responsibilities of States that "[a]n error of a national court that does not produce a manifest injustice is not a denial of justice".<sup>662</sup> Respondent maintains that standard was adopted by investment tribunals, with reference, for example, to the definition of denial of justice in *Loewen v. USA*, as "*manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough*".<sup>663</sup>

724. Respondent further contends that the threshold for denial of justice has been set even higher in more recent jurisprudence, citing the following decisions:

- *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*:

*"For a denial of justice to exist under international law there must be 'clear evidence of [...] an outrageous failure of the judicial system' or a demonstration of 'systemic injustice' or that 'the impugned decision was clearly improper and discreditable'."*<sup>664</sup>

- *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of*

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<sup>660</sup> Statement of Defence, para. 352 with reference to **Exhibit BSOL IV** *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 154.  
<sup>661</sup> Statement of Defence, para. 354.

<sup>662</sup> Statement of Defence, para. 355 with reference to **Exhibit BSOL XI** DRAFT CONVENTION ON "RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS " 2S3 PREPARED BY HARVARD LAW SCHOOL (1929), p. 58.

<sup>663</sup> Statement of Defence, para. 356 with reference to **Exhibit BSOL IV** *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 132.

<sup>664</sup> Statement of Defence, para. 356 with reference to **Exhibit BSOL XIII** *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 500.

*Kazakhstan:*

*"Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice."*<sup>665</sup>

- *Krederi Ltd. v. Ukraine ("Krederi v. Ukraine"):*

*"[I]t is equally accepted that only a serious deficiency and failure to accord due process will reach the threshold of such a fair and equitable treatment violation, as exemplified by the NAFTA tribunal in Waste Management v. Mexico which required national court decisions to be '[...] either ex facie or on closer examination, evidently arbitrary, unjust or idiosyncratic' in order to amount to a violation of the fair and equitable treatment standard."*<sup>666</sup>

725. On this basis, Respondent submits that imperfections in the administration do not necessarily qualify as a denial of justice. Respondent contends that arbitral tribunals regularly dismiss denial of justice claims resulting from the excessive length of proceedings because there are many factors beyond the States' control that can affect the length of the proceedings, such as the behaviour of the parties, the complexity of the proceeding, and the political climate.<sup>667</sup> Respondent refers to the decision in *Krederi v. Ukraine*, in which the tribunal stated: *"investment tribunals should be very reluctant to impose their own*

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<sup>665</sup> **Exhibit RL-111**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010.

<sup>666</sup> **Exhibit RL-112**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, para. 442. Statement of Defence, para. 360 with reference to **Exhibit BSOL VIII** *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012 paras. 167-168; **Exhibit**

<sup>667</sup> **BSOL VII** *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 203-204; **Exhibit BSOL IX** *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Decision on Jurisdiction, 30 April 2010, para. 290.



*views on swift and efficient judicial proceedings on domestic courts".*<sup>668</sup>

726. It is Respondent's position that Claimant did not meet the required threshold of manifest injustice because the standards of impartiality, equality of the parties, and due process have been met. Moreover, Claimant does not contest the substance of the judicial decisions or the procedural history, but even relies on the alleged successes in the judicial proceedings to support its case in this arbitration.<sup>669</sup> Respondent contends that Claimant's allegations concerning the actions of the MRA and the ME are *prima facie* irrelevant because their actions did not influence the court proceedings.<sup>670</sup>
727. In addition, and independent of the above, Respondent submits that Claimant failed to prove bad faith on the part of Respondent, and maintains that the MRA and the ME acted with due diligence in handling the case.<sup>671</sup> Respondent claims that ECT tribunals have determined that a respondent State may not be held liable for preferring one procedure over another where the law is not clear as to which procedural avenue should be taken.<sup>672</sup> Therefore, Respondent contends that the MRA's indication that the proper remedy was a claim for damages under Article 417 of the Civil Code was legitimate and reasonable.<sup>673</sup>
728. Respondent contends that Claimant's assertion that the allegedly excessive length of the court proceedings should result in JSE receiving interest on the Penalty is wrong for two reasons: First, none of the administrative proceedings could have resulted in JSE being paid the Penalty plus interest. Second, each of the administrative judgements could have been used as a basis for a civil court claim for damages, but Claimant chose not to make such claim.<sup>674</sup>
729. On this basis, Respondent maintains that the length of the proceedings in this case, lasting three years from the initiation of the proceedings before the MRA to the second instance court judgement, does not meet the threshold required for denial of justice, especially not

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<sup>668</sup> Statement of Defence, para. 361 with reference to **Exhibit RL-112**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, para. 457.

<sup>669</sup> Statement of Defence, para. 362.

<sup>670</sup> Statement of Defence, para. 362.

<sup>671</sup> Statement of Defence, para. 362.

<sup>672</sup> Statement of Defence, para. 362 with reference to **Exhibit BSOL VI** *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, para. 505.

<sup>673</sup> Statement of Defence, para. 362 with reference to Statement of Defence, para. 174.

<sup>674</sup> Statement of Defence, para. 363.

the threshold for complex cases (as in the case at hand) set in *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*.<sup>675</sup> Respondent further submits that even the combined length of all proceedings still does not amount to denial of justice because investment case law provides that a State can only be held liable for denial of justice when it has not remedied the violation domestically.<sup>676</sup>

**b) No *Prima Facie* Breach of Article 10(12) of the ECT**

730. Respondent maintains that Poland's system of laws and institutions provides effective mechanisms of judicial redress, and that Claimant does not seek redress for a wrong suffered in connection with the adjudicative process. It is Respondent's position that Claimant has failed to present even a *prima facie* breach of Article 10(12) of the ECT, with reference to the effective means standard as per the decision in *Charanne v. Spain*, which reads as follows:

*"[t]he standard of effective mechanisms as foreseen in Article 10 (12) of the ECT requires States to provide a legal framework that guarantees effective remedies to investors for realization and protection of their investments. To verify whether such requirements are met, tribunals must examine the legal system in question as a whole. The standard, however, does not impose any obligation on States regarding the way in which it organizes its judicial system. It is sufficient that an adequate system of laws and institutions is established and that it functions effectively."*<sup>677</sup>

731. Turning to Claimant's reliance on *Amto v. Ukraine*, Respondent submits that the tribunal in this case concluded that the "*existence of a general legal framework*" for vindicating the claimant's debts met the threshold of Article 10(12) of the ECT, while emphasizing

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<sup>675</sup> Statement of Defence, para. 364 with reference to **Exhibit BSOL VII** *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para 204.

<sup>676</sup> Statement of Defence, para. 364 with reference to **Exhibit BSOL VIII** *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012 para. 164 and **Exhibit R-041**, JSE Financial Report for 2019, at 19.

<sup>677</sup> Statement of Defence, paras. 343-333 with reference to **Exhibit BSOL I** *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, SCC Case No. 062/2012, Final Award, 21 January 2016, (Mena Chambers translation), para. 470.

that this conclusion was to be upheld even if:

*"There are some problems with the law, which have been exploited by both creditors and debtors to their own advantage, and it seems that Ukrainian economic procedure, or the customs of thought of its lawyers and judges, have not succeeded in finding solutions to these problems. [...] [to the result that claimant's entity] has had a frustrating experience in the collection of its debts [...]."*<sup>678</sup>

732. *First*, Respondent submits that, in the present case, it cannot be asserted that Respondent does not have an adequate system of laws and institutions because Claimant could have challenged the unfavourable decisions in administrative proceedings and requested financial compensation in civil court proceedings.<sup>679</sup>
733. Respondent rejects Claimant's examples of ineffectiveness of the remedies under Polish law, in that these are not pertinent because they relate to situations where an applicant seeks to force public authorities to undertake particular action, such as releasing certain information to the public, that was not exchangeable for monetary compensation.<sup>680</sup> Respondent asserts that JSE is seeking monetary relief from the Polish authorities and that Respondent's legal experts have demonstrated that this could be obtained before the Polish civil courts.<sup>681</sup>
734. *Second*, Respondent alleges that Claimant's claim for the deprivation of access to justice fails because it has not demonstrated that it was granted any right to interest under Polish law that it could enforce.<sup>682</sup> As submitted in its Rejoinder, it is Respondent's position that it is controversial whether the Tax Ordinance applies to penalties imposed under the MRA. Consequently, Respondent hired external experts who confirmed that it did not

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<sup>678</sup> Statement of Defence, para. 345 with reference to **Exhibit CL-24**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 89.

<sup>679</sup> Statement of Defence, para. 346.

<sup>680</sup> Statement of Defence, para. 347 with reference to Statement of Claim, paras. 198-204.

<sup>681</sup> Statement of Defence, para. 347.

<sup>682</sup> Rejoinder, paras. 193-194.

apply.<sup>683</sup> In addition, Respondent maintains that Claimant has no right to interest because no overpayment exists.<sup>684</sup> In this context, Respondent further submits that the Tribunal is not empowered to decide whether Claimant is entitled to interest under Polish law.<sup>685</sup>

735. *Third*, Respondent submits that Claimant is not seeking redress for a wrong suffered in connection with the adjudication process.<sup>686</sup> Instead, Claimant claims that the violation stems from the alleged wrongdoing of the administrative authorities.<sup>687</sup>

736. Respondent submits that Claimant complains of the MRA's refusal to initiate administrative proceedings rather than the conduct or outcome of the judicial proceedings and that, even if one were to agree that the administrative court judgements declared the ME or the MRA's actions as unlawful, those decisions would still not replace the authorities' own decisions.<sup>688</sup> Respondent contends that, to the contrary, in quashing a decision of the ME or the MRA, the administrative courts requested the administrative authorities to reconsider the case and issue a new administrative decision.<sup>689</sup>

737. Specifically, Respondent submits that a SAC judgment does not constitute an enforcement title, but merely obliges national authorities to reconsider the case.<sup>690</sup> According to Respondent, the Claimant's alleged non-fulfilment of the SAC decisions fall out of the scope of the effective means standard.<sup>691</sup>

738. With regard to the SAC 3<sup>rd</sup> Judgement issued on 15 March 2022, Respondent submits as follows:

- i. The SAC 3<sup>rd</sup> Judgement was expected to render instructions for the

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<sup>683</sup> Rejoinder, para. 194 with reference to Statement of Defence paras. 68-72; **Exhibit RER-1**, First Expert Report of Dr Izabela Andrzejewska-Czernek, paras. 4-10; **Exhibit R-124**, Legal opinion for the Material Reserves Agency; **Exhibit R-050**, Expert Opinion of Professor Modzelewski of 21 December 2009.

<sup>684</sup> Rejoinder, para. 194.

<sup>685</sup> Rejoinder, para. 194, fn. 209 with reference to Statement of Defence para. 14; **Exhibit RL-160**, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, para. 161; **Exhibit RL-161**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 283.

<sup>686</sup> Rejoinder, para. 190.

<sup>687</sup> Rejoinder, para. 190 with reference to Reply to the Statement of Defence, para. 93; Respondent's Post Hearing Brief, para. 61.

<sup>688</sup> Rejoinder, para. 191.

<sup>689</sup> Rejoinder, para. 191.

<sup>690</sup> Respondent's Post Hearing Brief, para. 62.

<sup>691</sup> Respondent's Post Hearing Brief, para. 62.

administrative authorities on how to proceed with three main issues: (i) whether JSE instituted the proceedings on a proper legal basis; (ii) whether the provisions on the time limitation were applicable to the JSE case; and (iii) when the amount of the Penalty was in fact due. The SAC 3<sup>rd</sup> Judgment contains no instructions on said matters.<sup>692</sup>

- a. As to the issue (i), Respondent submits that JSE applied incorrectly for the determination of tax overpayment under Article 75(1) of the Tax Ordinance, and thus, the JSE's Request of 10 November 2010 should be dismissed.<sup>693</sup>
  - b. As to the issue (ii), the SAC left open the question whether JSE's Request was time-barred and whether there were grounds interrupting the limitation period. According to Respondent, these questions are to be assessed by the MRA.<sup>694</sup>
  - c. As to the issue (iii), Respondent submits that in its submission before the SAC of 10 December 2020, the ME claimed that the correct date at which to examine the case is the date at which the 2009 SAC Judgment was handed down and became binding. It is Respondent position that, given that the SAC remained silent on this point, *"it now remains within the remit of the MRA's competence to assess whether the above submission of the [ME] was correct or not."*<sup>695</sup>
- ii. After receiving the file from the SAC, the MRA should decide on the matter within the prescribed time limit (the deadline for which is currently set at 30 November 2022).<sup>696</sup>

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<sup>692</sup> Respondent's Submission on the 2022 SAC Judgment, dated 23 May 2022, paras. 4-5.

<sup>693</sup> Respondent's Submission on the 2022 SAC Judgment, dated 23 May 2022, para. 6; **Exhibit C-71**, MRA President decision of 16 October 2017; **Exhibit C-72**, ME decision of 18 January 2018.

<sup>694</sup> Respondent's Submission on the 2022 SAC Judgment, dated 23 May 2022, para. 10.

<sup>695</sup> Respondent's Submission on the 2022 SAC Judgment, dated 23 May 2022, paras. 11-12.

<sup>696</sup> Respondent's Submission on the 2022 SAC Judgment, dated 23 May 2022, paras. 13-14; **Exhibit C-121**, Ruling No. BPI – 5P/22 (BPIzo.520.117.2022/914), dated 25 July 2022.

739. In response to the Tribunal's questions relating to the nature of the guidelines provided in administrative court judgements,<sup>697</sup> Respondent submits the following:

- i. State organs are bound by the abovementioned instructions; however, administrative authorities still have the competence to "*examine a case thoroughly*", especially when there are deficiencies in the justification of a court's judgment.<sup>698</sup>
- ii. In such cases, administrative organs can render a decision discontinuing the proceedings, which is in line with SAC case law.<sup>699</sup>
- iii. In any event, in JSE's case, the administrative organs have complied with the courts' instructions to re-examine the case. According to Respondent, neither the MRA nor the ME evaded the enforcement of the administrative courts' judgments concerning the existence of the overpayment or the obligation to refund it, because such judgments (and "guidelines") have not been issued so far.<sup>700</sup>
- iv. The PAC 1<sup>st</sup> Judgement and the SAC 1<sup>st</sup> Judgement concerned the administrative authorities' inaction and prejudged the applicability of the Tax Ordinance. The PAC 2<sup>nd</sup> Judgement and the SAC 2<sup>nd</sup> Judgement concentrated on the interpretation of the Tax Ordinance provisions but did not provide any specific guidelines with respect to the MRA and the ME's decisions. Given

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<sup>697</sup> Tribunal's List of Questions to the Parties dated 15 July 2021, Question 6(b): "*What is the nature of the guidelines provided in administrative court judgements and where are they to be found? Are they generally followed in practice? What are the consequences if they are not followed? How are the following statements of Professor Piqtek at the Hearing to be interpreted?*"

<sup>698</sup> Respondent's Post Hearing Brief, paras. 80-81.

<sup>699</sup> Respondent's Post Hearing Brief, para. 81; **Exhibit R-108**, Judgment of the SAC dated 30 October 2012, case no. I FSK 945/12 ("*The fact that the authority is bound by the indications as to the further course of action, expressed in the court's decision, obliges it to comply with those indications, but does not mean that, in the context of the reconsideration of the case, the authority must confine itself to complying with those indications only if, in order to resolve the case correctly, it turns out to be necessary to go beyond the indications as to the further course of action specified by the court.*"); **Exhibit R-109**, Judgment of the SAC dated 30 January 2002, case no. II SA 2465/01 ("*The impact of the judgment of the Supreme Administrative Court on reconsideration administrative proceedings does not mean that they acquire any special character. When examining the case in the reconsideration proceedings, the administrative authority has the same possibilities to resolve the matter as it had in the original proceedings, with the limitations arising from the principle of being bound by the legal assessment of the Supreme Administrative Court. This means that it is possible to issue the same ruling as before the decision was annulled.*").

<sup>700</sup> Respondent's Post Hearing Brief, para. 84.

the above, the administrative courts' judgments were executed by the administrative authorities within their competence to independently re-examine an administrative case.<sup>701</sup>

740. As to the question of the legal consequence if an SAC judgment is not followed by an administrative authority (and the enforcement action in Poland, if any),<sup>702</sup> Respondent submits that *"the enforcement of the administrative court judgments is in principle about the re-examination of the administrative case by the State organs in accordance with the legal assessment and guidelines included in the courts' judgments."*<sup>703</sup> Respondent further submits that if an administrative authority does not comply with the judgment, this constitutes a ground for filing an administrative complaint under Article 153 of the LACP.<sup>704</sup>

741. Moreover, Respondent contends that, while it is improbable that administrative authorities would not execute a decision by an administrative court issued in accordance with Article 145a of the LACP, an affected party could file a complaint for inactivity of the administrative authorities pursuant to Article 6 §1a of the AEPA.<sup>705</sup>

742. In the context of this dispute, Respondent submits that *"[i]t is inconceivable that following the dismissal of the cassation claim by the SAC, the MRA would not issue any administrative decision. The MRA is obliged to issue a decision."*<sup>706</sup>

743. In response to the Tribunal's question regarding the legal effects to be drawn from the statements made by the Respondent's counsel during the Hearing,<sup>707</sup> Respondent submits

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<sup>701</sup> Respondent's Post Hearing Brief, para. 84.

<sup>702</sup> Tribunal's List of Questions to the Parties dated 15 July 2021, Question 6(d): *"What is the consequence if an administrative body does not follow a decision of the SAC? If enforcement action can be taken, who has the power to determine and administer such action and how is it initiated? What is the relevant provision of the Administrative Enforcement Proceedings Act or other statute?"*

<sup>703</sup> Respondent's Post Hearing Brief, para. 89.

<sup>704</sup> Respondent's Post Hearing Brief, para. 90.

<sup>705</sup> Respondent's Post Hearing Brief, paras. 91-92.

<sup>706</sup> Respondent's Post Hearing Brief, para. 119.

<sup>707</sup> Tribunal's List of Questions to the Parties dated 15 July 2021, Question 8(j): *"Can any legal effects be drawn from the following statements made by Counsel for Respondent during the Hearing? 'if the court decides that the overpayment existed and interest is due to JSE, that Poland should execute the judgment and repay the interest' and 'if there is a judgment to the effect that clearly say JSE needs to be paid interest, Poland will surely, I mean the government, execute the judgment and repay the interest, and that is beyond any, I would say, it is quite obvious for us, I mean Respondents' (Transcript, Day 1, p. 45). 'if the SAC will conclude in the same manner as the Regional Administrative Court, they simply would consider*

that these statements:

*"constitute an unequivocal declaration that the administrative organ will conform to the directions of the Supreme Administrative Court included in the future SAC judgment. In particular, the Republic of Poland, acting through its administrative organs, will execute the judgment based on Article 145(a) LPBAC (if such judgment is rendered) or any judgment to the effect that the overpayment should be declared by the State organs, and the tax interest should be paid."*<sup>708</sup>

744. It is Respondent's position that the actions of the administrative authorities are part of the adjudicative process and cannot form the basis for a denial of justice or effective means claim, which pertain solely to wrongs of the judicial branch within the framework of the judicial process under international investment law.<sup>709</sup> Respondent submits that the refusal of the administrative authority to render a decision falls out of the scope of application of denial of justice and effective means (even if treated as separate standards).<sup>710</sup>

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*paying back the interest as the SAC would perhaps order us to do, right? This is the issue here' (Transcript, Day 2, p. 18). 'first, Poland repays its debt, and, if there is a decision to that effect, ... second, Poland adopted a semi-cassational model of administrative court proceedings, which, in some justified proceedings, entrusted court with competence to issue merits-based decision, and there is no need to obtain 50 judgments, as Mr Kolkowski said, but only one judgment under Article 145(a) would be enough' (Transcript, Day 1, p. 51). 'First is general, and I would like to – for the sake of repeating myself – Polish administration, Polish State, executes court's decision. If there is a court decision to the effect that the overpayment should be declared by the State organs in their decision and the tax interest should be paid, Poland will certainly execute the judgment' (Transcript, Day 1, p. 54/55). '... we called this SAC 2021 judgment final' (Transcript, Day 4, p. 72)."*

<sup>708</sup> Respondent's Post Hearing Brief, para. 120.

<sup>709</sup> Rejoinder, paras. 191-192 with reference to **Exhibit RL-155**, Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, ICLQ 2014, pp. 869,900; **Exhibit RL-156**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 Award on the Respondent's expedited preliminary objections, paras 251, 262, 264; **Exhibit RL-157**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, paras. 138-140.

<sup>710</sup> Rejoinder, para. 192 with reference to **Exhibit RL-158**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, para. 9.70; *Analysis: El-Jaouni v. Lebanon tribunal declines jurisdiction over domestic claimant in light of BIT definition of "investment"; FET breach results in "tiny fraction" of sums sought, as claimant can't prove preferred but-for scenario*, IAREporter <https://www.iareporter.com/articles/analysis-el-jaouni-v-lebanon-tribunal-declines-jurisdiction-over-domestic-claimant-in-light-of-bit-definition-of-investment-fet-breach-results-in-tiny-fraction-o/>; **Exhibit RL-155**, Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, ICLQ 2014, p. 870.



c) **Further Local Remedies**

745. Respondent maintains that it carries no blame for Claimant's failure to use the legal remedies available to it. Respondent submits that, even if the effective means clause was to be treated as a standard separate from the denial of justice, an alleged investor has to exhaust the remedies available to it or effectively use the means available in local courts.<sup>711</sup> Respondent argues that any exceptions from the finality rule are to be narrowly construed.<sup>712</sup> It is Respondent's position that Claimant has not discharged its burden of proof and has failed to present any evidence supporting its case.<sup>713</sup>
746. With regard to tribunals considering the host State's responsibility for acts of the judicial branch, Respondent maintains that the investor is considered responsible for its actions throughout the proceedings, including in relation to protracted proceedings.<sup>714</sup>
747. In any case, Respondent submits that an investor is to bear responsibility for its unwise decisions in its recourse to legal remedies offered by the host State's legal system, with reference to the decision of the ECT tribunal in *Amtó v. Ukraine*:

*"The investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law."*<sup>715</sup>

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<sup>711</sup> Statement of Defence, para. 366.

<sup>712</sup> Rejoinder, para. 195 with reference to Statement of Defence paras. 350-353; **Exhibit RL-154**, Berk Demirkol, *Judicial Acts and Investment Treaty Arbitration*, CUP 2018, pp. 45-48, 160-161, 112; **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company vs. The Republic of Ecuador*, UNCITRAL ad hoc arbitration; Partial Award on the Merits, 30 March 2010, paras. 324, 326; **Exhibit CL-37**, *White Industries Australia Limited vs. The Republic of India*, UNCITRAL ad hoc arbitration, Final Award, 30 November 2011, paras. 11.4.10-14; **Exhibit RL-155**, Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, ICLQ 2014, pp. 878, 887, 894-895; **Exhibit RL-092**, *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility of 14 June 2013, paras. 281, 282, 284.

<sup>713</sup> Rejoinder, para. 196; Respondent's Post Hearing Brief, para. 63.

<sup>714</sup> Statement of Defence, para. 367 with reference to **Exhibit BSOL VIII** *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, paras. 167-168; **Exhibit BSOL VII** *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 203-204; **Exhibit BSOL IX** *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Decision on Jurisdiction, 30 April 2010, para. 290.

<sup>715</sup> Statement of Defence, para. 368 with reference to **Exhibit CL-24** *Limited Liability Company Amtó v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 76 and **Exhibit BSOL VI** *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, paras. 458-460.

748. Respondent submits that the actions of JSE were neither reasonable nor diligent because, *inter alia*, it abandoned its claims before the civil courts, filed several contradictory applications with the MRA, initiated various administrative proceedings without a sufficient legal background check, as well as contributed to the prolongation of the proceedings by not agreeing to *in camera* proceedings before the SAC.<sup>716</sup>
749. Respondent maintains that Claimant could have brought public law claims based on the Tax Ordinance or civil law damages claims based on the Civil Code. Thus, Claimant would have needed to demonstrate that it could not have sought a civil law damage claim in order to substantiate its argument that it could not access civil courts.<sup>717</sup> It is Respondent's position that its experts demonstrated that Claimant could have effectively pursued its claims in both administrative and civil law proceedings and maintains that it was Claimant's choice not to utilize them.<sup>718</sup>
750. Respondent submits that its position is supported by JSE's Statement of Claim dated 17 November 2009 filed in the District Court of Warsaw, containing civil law damages claim for a civil law loss suffered as a result of the revoked Penalty, and asserts that the damages in this Statement of Claim are mirrored in the present proceedings.<sup>719</sup> Respondent submits that its experts Prof. Bagińska and Prof. Flejszar confirmed that this civil law claim by JSE had *prima facie* a viable chance of success – an assessment that Respondent asserts was shared by JSE.<sup>720</sup> In any case, Respondent submits that it is not responsible for Claimant's choice not to use the effective procedural venue of civil law proceedings.<sup>721</sup>
751. In response to the Tribunal's questions related to the civil law proceedings initiated by

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<sup>716</sup> Statement of Defence, para. 369 with reference to Statement of Defence, para. 171. Respondent's Post Hearing Brief, para. 60.

<sup>717</sup> Rejoinder, para. 196.

<sup>718</sup> Rejoinder, para. 197.

<sup>719</sup> Rejoinder, para. 198 with reference to **Exhibit R-049**, Statement of Claim of J&S Energy S.A. of 17 November 2009.

<sup>720</sup> Rejoinder, para. 198 with reference to Rejoinder, paras. 77-82; **Exhibit RER-6**, Second Expert Report of Professor Ewa Bagińska, para. 22; **Exhibit RER-7**, First Expert Report of Professor Radosław Flejszar, para. 38.

<sup>721</sup> Rejoinder, para. 198 with reference to Statement of Defence, paras. 344-345, 366-369; **Exhibit RL-130**, *Pantechniki SA Contractors & Engineers v. The Republic of Albania*, Award, 30 July 2009, para 102. **Exhibit RL-155**, Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, ICLQ 2014, p. 900.

JSE,<sup>722</sup> Respondent submits the following:

- i. The civil proceedings were the proper avenue for JSE's claims and constituted the only means of obtaining a "*binding judgment*" as recognised by Claimant itself.<sup>723</sup>
- ii. Mercuria, acting through JSE, should have pursued compensatory claims before civil courts under Articles 417(1) and 417(2) of the Polish Civil Code, which were the legal basis of JSE's First and Second Civil Actions.<sup>724</sup>
- iii. JSE was well aware of the availability of the civil path opened after the 2008 PAC and the 2009 SAC Judgments.<sup>725</sup>
- iv. All civil proceedings were nevertheless discontinued by JSE without explanation.<sup>726</sup>
- v. There were no objective legal impediments that would have prevented a civil court from handling JSE's case, which would have been considered admissible and not premature.<sup>727</sup>
- vi. JSE could have pursued civil and administrative actions either in parallel or independently, given that they are autonomous from each other despite deriving from the same factual basis.<sup>728</sup>
- vii. Had JSE continued the civil proceedings and had it been able to prove its case, it likely would have received its alleged damage redressed by now.<sup>729</sup>

752. In addition to the civil court proceedings, Respondent submits that Claimant did not use all available means to assert its alleged right in the administrative court proceedings and

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<sup>722</sup> Tribunal's List of Questions to the Parties dated 15 July 2021, Questions 5 (a)-(d).

<sup>723</sup> Respondent's Post Hearing Brief, para. 60; *See* Claimant's Opening Statement, Hearing Transcript, Day 1, 9:24-10:4.

<sup>724</sup> Respondent's Post Hearing Brief, paras. 39-41.

<sup>725</sup> Respondent's Post Hearing Brief, paras. 43, 45.

<sup>726</sup> Respondent's Post Hearing Brief, para. 45.

<sup>727</sup> Respondent's Post Hearing Brief, paras. 50-51, 53, 55-56; **Exhibit RER-6**, Second Expert Report of Professor Ewa Bagińska, paras 3-4; **Exhibit RER-7**, First Expert Report of Professor Radosław Flejszar, paras 15-19.

<sup>728</sup> Respondent's Post Hearing Brief, paras. 55-56.

<sup>729</sup> Respondent's Post Hearing Brief, para. 45.

that Polish administrative law prevents the administrative authorities from abusing the system.<sup>730</sup> In particular, Respondent alleges that Claimant never requested to use Article 145a(1) of the LACP that empowers an administrative court to oblige an authority to render a decision and indicate a manner in which the case should be dealt with, nor did Claimant invoke Articles 149 or 154(2) of the LACP.<sup>731</sup>

### 3. Tribunal's Analysis

753. In its analysis, the Tribunal will address the standard of effective means within the meaning of Article 10(12) of the ECT (a)), before analysing the facts of the present dispute (b)) and reaching its finding on the alleged breach (c)).

#### a) The Effective Means Standard

754. At the outset, the Tribunal notes that there is no uniform approach to the effective means standard. This is, at least in part, explained by the relative rarity of the effective means provisions in the international investment treaties, as noted by the tribunal in *Chevron v. Ecuador*.<sup>732</sup>

755. The Tribunal has carefully considered the Parties' positions and the jurisprudence discussing the effective means standard. As regards the latter, the Tribunal is mindful that there is not much case law discussing the effective means standard, as contained in the ECT. However, many tribunals have analysed the language of the effective means standard contained in BITs that was very similar to the language of Article 10(12) of the ECT as applicable in the case at hand and which reads:

*"Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations."*

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<sup>730</sup> Rejoinder, para. 199.

<sup>731</sup> Rejoinder, para. 199 with reference to Statement of Defence, para 41; **Exhibit RER-3**, First Expert Report of Professor Wojciech Piątek, para. 28.

<sup>732</sup> **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, para. 241.

756. In comparison, in *Chevron v. Ecuador*, the language of the effective means provision in the U.S.-Ecuador BIT referred to "*effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations*"<sup>733</sup>. Similarly, in *White Industries v. India*, the language of the India-Kuwait BIT (which the claimant sought to incorporate into the applicable BIT via the most favoured nation clause) referred to "*effective means of asserting claims and enforcing rights with respect to investments*"<sup>734</sup>. These awards can therefore be helpful for this Tribunal's analysis of Article 10(12) of the ECT.
757. Before proceeding to its analysis of the effective means standard to be applied in the present case, the Tribunal will make two general observations with regard to Article 10(12) of the ECT.
758. *First*, the Tribunal considers that the effective means standard under the ECT is formulated as a separate obligation of the host state and must be treated as such. Neither the fact that some other international investment treaties do not contain such separate standard, nor the fact that some other legal standards, such as the denial of justice or fair and equitable treatment, may be interpreted to create some overlap in investment protection is sufficient to override the clear language of the ECT. Any other interpretation would, in the Tribunal's view, undermine the *effet utile* of Article 10(12) of the ECT.
759. The Tribunal concurs with the similar outlook taken by the tribunal in *Chevron v. Ecuador*:

*"Article II(7) [...] appears in the BIT as an independent, specific treaty obligation and does not make any explicit reference to denial of justice or customary international law. The Tribunal thus finds that Article II(7), setting out an 'effective means' standard, constitutes a lex specialis and not a mere restatement of the law on denial of justice. Indeed, the latter intent could have been easily expressed through the inclusion of explicit language to that*

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<sup>733</sup> **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, para. 241.

<sup>734</sup> **Exhibit CL-37**, *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, para. 11.1.4.

*effect or by using language corresponding to the prevailing standard for denial of justice at the time of drafting. The Tribunal notes that this interpretation accords with the approach taken in Amto v. Ukraine [...] which considered the identically worded provision found at Article 10(12) of the Energy Charter Treaty.*

[...]

*In view of the above considerations and the language of Article II(7), the Tribunal agrees with the Claimants that a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law."*<sup>735</sup>

760. In the present case, Claimant relied on the effective means standard of protection for the lack of enforcement of decisions rendered by the Polish administrative judiciary and has not presented a claim based on denial of justice.<sup>736</sup> Correspondingly, the Tribunal will consider its claim under the effective means standard as contained in Article 10(12) of the ECT, in addition to carefully considering Respondent's arguments pertaining to the denial of justice to the extent that they can inform its analysis of Article 10(12) of the ECT.<sup>737</sup>

761. *Second*, the two elements of the standard, namely "*assertion of claims*" and "*enforcement of rights*", merit a further general observation regarding the scope of the effective means standard. The Tribunal is not convinced by the arguments presented by Respondent – in reliance on, *inter alia*, the award in *Apotex v. USA* – that the effective means standard is limited to the actions of the judiciary and does not apply to non-adjudicatory proceedings, such as those before the administrative authorities in the present case. The plain reading of the words "*assertion of claims*" and, especially, "*enforcement of rights*" under Article 31(1) of the VCLT does not result in such restrictive interpretation. Further, in the context

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<sup>735</sup> **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, paras. 242, 244.

<sup>736</sup> Reply, para. 77.

<sup>737</sup> Statement of Defence, paras. 343-347; Rejoinder, para. 182.

of a national legal system, the enforcement of investor's rights often relies on an interaction between judicial and administrative organs and restricting the effective means standard to just the actions of the former would constitute a significant limitation to its effectiveness. In the view of the Tribunal, providing "*effective means for the assertion of claims and the enforcement of rights*" pursuant to Article 10(12) of the ECT extends to the compliance of administrative bodies with the rulings of domestic courts.

762. Moving to the elements of the effective means standard, the starting point was aptly pointed out by the *Amto v. Ukraine* tribunal as follows:

*"The fundamental criteria of an 'effective means' for the assertion of claims and the enforcement of rights within the meaning of Article 10(12) is law and the rule of law. There must be legislation for the recognition and enforcement of property and contractual rights. This legislation must be made in accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires secondary rules of procedure so that the principles and objectives of the legislation can be translated by the investor into effective action in the domestic tribunals."*<sup>738</sup>

763. The tribunal in *Charanne v. Spain*, in an award cited by Respondent, similarly put the focus of Article 10(12) of the ECT on the "*legal framework that guarantees effective remedies to investors for realization and protection of their investments*". The tribunal went on to specify that:

*"To verify whether such requirements are met, tribunals must examine the legal system in question as a whole. The standard, however, does not impose any obligation on States regarding the way in which it organizes its judicial system. It is sufficient that an adequate system of laws and institutions is established and that it*

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<sup>738</sup> **Exhibit CL-24**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 87.

*functions effectively.*"<sup>739</sup>

764. This Tribunal notes that a standard described in broad terms of ‘efficiency’ and ‘adequacy’ does not translate into a custom-fit rule as long as it is entirely detached from the legal system’s effects on an individual case. This is all the more so given that this Tribunal’s mandate stems from and is limited to specific claims brought by Claimant against Respondent, as opposed to the mandate of some international bodies, like the Venice Commission, whose very *raison d’être* is to assess the national legal framework and provide states with legal advice regarding their legislation.

765. This Tribunal therefore considers that it is to assess the system of effective means under Polish administrative law not in abstract – but in relation to the specific circumstances of Claimant’s “*assertion of claims*” and “*enforcement of rights*” within such system.

766. The tribunal in *Chevron v. Ecuador* similarly acknowledged this interdependency:

*"While such a dichotomy can theoretically be made, one cannot fully divorce the formal existence of the system from its operation in individual cases. [...] While Article II(7) clearly requires that a proper system of laws and institutions be put in place, the system's effects on individual cases may also be reviewed."*<sup>740</sup>

767. Whether the State has provided effective means to an Investor can be measured against several yardsticks. Claimant argues that the test for effective means comprises (i) length of proceedings and (ii) effectiveness of local remedies. As to the first prong, the duration of the proceedings can, indeed, be indicative of the overall effectiveness of the system. While the second prong suggested by Claimant may seem circular, the ability to produce a certain result – the definition of “effectiveness” – is an appropriate measure of “effective” means, in the Tribunal's view.

768. The Tribunal also finds no difficulty in agreeing with the proposition that the effective means standard is an objective international one and does not require active or malicious

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<sup>739</sup> **Exhibit BSOL I**, *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, SCC Case No. 062/2012, Final Award (Mena Chambers translation), 21 January 2016, para 470.

<sup>740</sup> **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, paras. 246, 247.



interference on the part of the State in the proceedings.<sup>741</sup>

769. Claimant further relies on the summary of the *Chevron v. Ecuador* reasoning on effective means standard by the tribunal in *White Industries v. India* to lay down additional "elements" of the legal standard. While the Tribunal finds the summary contained in the *White Industries v. India* award illustrative, it does not consider it a formal test to establish the compliance of the State with the effective means standard. The Tribunal will, therefore, consider this summary to the extent it is applicable to the case at hand.
770. Turning to the length of the proceedings, the Tribunal considers that an undue delay in dealing with Investor's claims or enforcement of Investor's right may amount to a lack of effective means.<sup>742</sup> At which point the delay becomes undue or – in effect – indefinite is a fact-based inquiry. As noted by the tribunal in *Chevron v. Ecuador*:

*"As with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake in the case, and the behavior of the courts themselves."*<sup>743</sup>

771. An issue related to the length of the proceedings and invoked by Respondent as a bar to the claim of the lack of effective means is the exhaustion of local remedies. The Tribunal is, indeed, not looking to insert itself into the national system and assume a role of an appellate international body against unfavourable decisions of national bodies. This Tribunal affords a high level of deference to the decisions of the Polish judicial and administrative bodies within the scope of their competence. However, the very nature of the effective means standard presupposes that the means provided by a national system may

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<sup>741</sup> **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, paras. 244, 248, 263; **Exhibit CL-37**, *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, para. 11.3.2.

<sup>742</sup> See e.g. **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, para. 250; **Exhibit CL-37**, *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, para. 11.3.2.

<sup>743</sup> **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, para. 250.

not provide an investor a viable opportunity to enforce its rights. In that light, imposing a strict requirement of exhaustion of local remedies may trap an Investor in a legal quagmire.

772. The Tribunal concurs with the standard laid out by the *Chevron v. Ecuador* tribunal in this regard:

*"Although the Tribunal is amply satisfied that a requirement of exhaustion of local remedies applies generally to claims for denial of justice, the Claimants' claims for BIT violations and Article II(7) in particular are not subject to that same strict requirement of exhaustion. [...]"*

*"[I]n the consideration of whether the means provided by the State to assert claims and enforce rights are sufficiently 'effective' [...], the Tribunal must consider whether a given claimant has done its part by properly using the means placed at its disposal. A failure to use these means may preclude recovery if it prevents a proper assessment of the 'effectiveness' of the system for asserting claims and enforcing rights."*<sup>744</sup>

773. In the same vein, the *White Industries v. India* tribunal held that claimant "*appeared to do everything that could reasonably be expected of it to have the Supreme Court deal with its appeal in a timely manner*" in relation to the set-aside proceedings. And while the tribunal refused to hold India liable for the denial of justice regarding those proceedings, it held that "*the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court's inability to hear White's jurisdictional claim appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White with 'effective means' of*

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<sup>744</sup> **Exhibit CL-26**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, paras. 321, 324; **Exhibit CL-37**, *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, para. 11.3.2.

*asserting claims and enforcing rights".*<sup>745</sup>

774. Therefore, while a claimant cannot be expected to have exhausted all available local remedies, it must demonstrate that it has done everything that "*could reasonably be expected of it*" or, conversely, that the other avenues to enforcing its rights would have been futile.

**b) Administrative Proceedings**

775. The present dispute is related to domestic proceedings between Claimant's subsidiary, JSE, and the Polish administrative authorities concerning the repayment of the Penalty without interest. These proceedings, for which there is still no final outcome, have been ongoing for 12 years.

776. In the view of the Tribunal, there is no question that the Polish judiciary provided effective means for the assertion of JSE and Claimant's claims in the case at hand, such as the opportunity to challenge the decisions of the administrative authorities, including those related to the Penalty itself and the repayment of the Penalty without interest. The problem rather rests on the failure of the administrative authorities to comply in a timely fashion – if at all – with the decisions rendered by the Polish administrative courts. This is also what Claimant has put to the Tribunal, stating at the Main Hearing that:

*"[...] all the courts in this case confirmed the Claimant's position. It's the state authorities who are able – who are enabled by the law to ignore judgements of those courts that is a problem in this case."*<sup>746</sup>

777. The absence of an effective means for enforcement in this context resulted in an endless loop of proceedings for JSE and Claimant between the various Polish courts and the administrative authorities.

778. Since the repayment of the Penalty without interest on 9 November 2009, there have been three rounds of administrative proceedings related to this dispute, resulting in three judgements in JSE's favour rendered by the PAC and three judgements from the SAC

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<sup>745</sup> **Exhibit CL-37**, *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, paras. 11.4.18-11.4.19.

<sup>746</sup> Hearing Transcript, Day 1, 33:9-13.

dismissing cassation claims from the MRA. It is undisputed that the administrative authorities are bound by the legal assessments and indications as to the further course of action contained in a decision rendered by the administrative courts pursuant to Article 153 of the LACP.<sup>747</sup>

*aa) First Round of Administrative Proceedings*

779. In the first round of administrative proceedings, the PAC 1<sup>st</sup> Judgement rendered 13 June 2011 ordered the MRA to resolve JSE's Application of 10 November 2010. The Tribunal refers to the following excerpts from the undisputed translation of the PAC 1<sup>st</sup> Judgement:

*"In the light of the foregoing, pursuant to Article 75.4 in conjunction with Article 2.2 of the Tax Ordinance and Article 11.9 of the Act on Freedom of Economic Activity, the President of the Material Reserves Agency is required to reimburse the overpayment of the fine, together with interest, to the applicant's account without it being necessary to issue a decision determining the overpayment."*<sup>748</sup>

*"In the view of the Court, the matter referred for consideration by the party is a matter subject to decision, i.e. the authority, rejecting the applicant's application, should have issued a relevant decision, instead of handling the case by expressing its negative position in writing, as has been done in the present case. Otherwise, the party is deprived of the right to pursue its claims by appealing to a higher-level authority and then lodging an appeal with the Administrative Court."*<sup>749</sup>

780. Subsequently, the President of the MRA filed a cassation claim to overturn the PAC 1<sup>st</sup>

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<sup>747</sup> Claimant's Post-Hearing Brief, para. 54; Respondent's Post-Hearing Brief, paras. 79-80.

<sup>748</sup> **Exhibit C-48**, Judgment of the Provincial Administrative Court in Warsaw, dated 13 June 2011 (Case ref. No. VI SAB/Wa 6/11), page 4.

<sup>749</sup> **Exhibit C-48**, Judgment of the Provincial Administrative Court in Warsaw, dated 13 June 2011 (Case ref. No. VI SAB/Wa 6/11), page 10.

Judgement. On 28 February 2013, the SAC 1<sup>st</sup> Judgement was issued dismissing this cassation claim. The Tribunal refers to the following excerpts from the undisputed translation of the SAC 1<sup>st</sup> Judgement:

*"The Court of First Instance has rightly found that the administrative body was inactive in handling the company's request for an overpayment to be recognised including interest. [...] In accordance with Article 66(1) of the Act of 16 February 2007, it is revenue of the State budget and it constitutes the domain of public law, as it is a sanction of a kind for non-compliance with the provisions of public law imposed by an authorised body other than the tax authority and its stems from public law relations. It should therefore be considered that, as a non-taxable budgetary receivable, it meets the conditions specified in Article 2(2) of the Tax Ordinance, which means that it is justified to apply the provisions of Section III of the Tax Ordinance thereto."*<sup>750</sup>

*"Therefore, it would be reasonable to assume that the examination of the Company's request contained in the application of 10 November 2010 and determination of whether it is justified falls within the decision-making competence of the President of the Material Reserves Agency and should take the form of an administrative decision (positive or negative for the party), rather than that of an information letter with a brief statement of the authority finding the Company's request contained in the application unjustified. Accordingly, the Court of First Instance rightly held that this finding justifies the claim that the President of MRA has failed to act in the case derived from said request of J&S Energy S.A."*<sup>751</sup>

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<sup>750</sup> **Exhibit C-49**, Judgment of the Supreme Administrative Court, dated 28 February 2013 (Case ref. No. II GSK 2172/11), p. 6.

<sup>751</sup> **Exhibit C-49**, Judgment of the Supreme Administrative Court, dated 28 February 2013 (Case ref. No. II GSK 2172/11), p. 7.

781. A few months after the SAC 1<sup>st</sup> Judgement, the MRA refused JSE's Application in a decision dated 6 June 2013 that was subsequently upheld by the ME in a decision dated 13 May 2014.<sup>752</sup> The Tribunal also notes that the deadline for the ME's decision was extended four times and, following a complaint filed by JSE, the PAC imposed a fine on the ME in its decision on 15 May 2014 after finding that the ME had prolonged the appellate proceedings.<sup>753</sup>

*bb) Second Round of Administrative Proceedings*

782. In the second round of administrative proceedings, the PAC repealed the President of the MRA's decision of 6 June 2013 and the ME's decision of 13 May 2014. The Tribunal refers to the following excerpt from the undisputed translation of the 2<sup>nd</sup> Judgement rendered on 12 December 2014:

*"Following the same reasoning, however, the Court agreed with the Applicant that, under Article 78 § 3 Item 1 of the Tax Ordinance, the Applicant is entitled to interest accrued from the date when the overpayment arose. It must also be noted that Article 78 § 3 Item 1 of the Tax Ordinance applies only when Article 78 § 3 Item 2 thereof does not apply, as stated directly in the text of the provision: "subject to Item 2" (cf. the judgment of the Supreme Administrative Court in Warszawa of 13 August 2009, case file no. II FSK 429/08, LEX No. 526970).*

*To summarise the above, the Court observes that the highly complex legal considerations of the authority regarding the interpretation of the Tax Ordinance, did not lead to proper conclusions.*

*Given the above and under Article 145 § 1 Item 1 (a) of the Law,*

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<sup>752</sup> **Exhibit C-57**, Decision No. 5/05/2014, dated 13 May 2014; **Exhibit C-50**, Decision No. BRI-5c/13, dated 6 June 2013; **Exhibit C-51**, Notice L.Dz. 1713/13, dated 26 July 2013; **Exhibit C-52**, Notice L.Dz. 2161/13, dated 26 September 2013; **Exhibit C-53**, Notice L.Dz. 2395/13, dated 29 October 2013; **Exhibit C-54**, Notice L.Dz. 2636/13, dated 28 November 2013; **Exhibit C-55**, Notice L.Dz. 623/13, dated 31 March 2014.

<sup>753</sup> **Exhibit C-56**, Judgment of the Provincial Administrative Court in Warsaw, dated 15 May 2014 (Case ref. No. VI SAB/Wa 12/14).

*the Court ruled as in the judgment. Enforceability is settled under Article 152 of the Law, whereas costs of proceedings are settled under Article 200 of the Law.*

*In reconsidering the case, the authority will be bound by the legal assessment expressed herein (Article 153 of the Law)."* <sup>754</sup>

783. On 29 November 2016, the SAC dismissed the ME's cassation claim to have the PAC 2<sup>nd</sup> Judgement overturned. The Tribunal refers to the following excerpt from the undisputed translation of the SAC 2<sup>nd</sup> Judgement:

*"In the opinion of the Supreme Administrative Court, the Court of First Instance correctly determined that Article 78(3)(1) of the TO should be applied in the case according to which the interest is due "in the cases provided for in Article 77(1)(1) (a-d), subject to item 2, and in the case referred to in Article 77(1)(3) from the date of occurrence of the overpayment." This provision has been correctly interpreted. Since Article 78(1)(3) of the TO should have been applied in the case under consideration, as discussed above, it was therefore necessary to apply Article 78(3)(1) of the TO Therefore, there is no legal basis to the position of the appellant according to which Article 77(1)(2) of the TO should apply in the case, and exhaustive arguments regarding the authority's failure to contribute to the premise for amending or repealing the decision did not affect the outcome of the case.*

*In view of the foregoing, the assessment made by the Court of First Instance according to which the contested decision and the preceding decision of the authority of first instance were issued in breach of substantive law must be deemed to be legitimate. Therefore, the Court of First Instance did not violate procedural rules or substantive law provisions, as it was claimed in the*

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<sup>754</sup> **Exhibit C-58**, Judgment of the Provincial Administrative Court in Warsaw, dated 12 December 2014 (Case ref. No. VI SA/Wa 2437/14), page 14.

*cassation appeal, as the Court has properly admitted the complaint.*"<sup>755</sup>

784. On 16 May 2017, the President of the MRA issued two administrative decisions that refused JSE's Application and discontinued the proceedings: the May 2017 Ruling and the May 2017 Decision, respectively.<sup>756</sup> Both of these administrative decisions were abrogated by the ME on 7 August 2017.<sup>757</sup>

785. On 16 October 2017, the President of the MRA issued another decision discontinuing the proceedings related to JSE's Application.<sup>758</sup> This decision was upheld by the ME on 18 January 2018.<sup>759</sup>

*cc) Third Round of Administrative Proceedings*

786. In the third round of administrative proceedings, the PAC revoked the President of the MRA's decision of 16 October 2017 and the ME's decision of 18 January 2018.<sup>760</sup> The Tribunal refers to the following excerpts from the undisputed translation of the PAC 3<sup>rd</sup> Judgement:

*"Pointing out that the pecuniary penalty imposed on the Applicant is a public-legal duty within the meaning of Art. 60 of the Public Finance Act, the court of first instance took the position on the appropriate application of the provisions of the Tax Ordinance (Section III) to the claim covered by the party's application of 10 November 2010, and the NSA approved the above view. Secondly - in the judgments cited above, the administrative courts corrected the erroneous legal view of the authorities that the obstacle to the repayment of the amount of overpayment requested was to*

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<sup>755</sup> **Exhibit C-64**, Judgment of the Supreme Administrative Court, dated 29 November 2016 (Case ref. No.II GSK 1166/15), page 10.

<sup>756</sup> **Exhibit C-65**, Ruling No. BPI-3C/17, dated 16 May 2017; **Exhibit C-66**, Decision No. BPI-4C/17, dated 16 May 2017.

<sup>757</sup> **Exhibit C-69**, Ruling No. 1/08/2017, dated 7 August 2017; **Exhibit C-70**, Decision No. 17/08/2017, dated 7 August 2017.

<sup>758</sup> **Exhibit C-71**, Decision No. BPI-35C/17, dated 16 October 2017.

<sup>759</sup> **Exhibit C-72**, Decision No. 1/01/2018, dated 18 January 2018.

<sup>760</sup> **Exhibit C-75**, Judgment of the Provincial Administrative Court in Warsaw, dated 14 September 2018 (Case ref. No. VI SA/Wa 540/18).



*be Art. 77 § 3 of the Tax Ordinance. (in the version in force on the date of submission of the application initiating proceedings in the case - 10 November 2010)."*<sup>761</sup>

*"Further statement (after 9 years of proceedings) that the application was based on an incorrect legal basis, despite the fact that its content (demand of payment of interest on late refund of the amount of a pecuniary penalty with interest) has never given rise to any such doubts, contradicts the legal opinions included in the aforementioned judgments as well as the principle laid down in CAP Art. 8, whereunder public administration bodies are required to conduct proceedings in a manner giving the parties confidence in public authority, in line with the principles of proportionality, impartiality and equal treatment."*<sup>762</sup>

*"[...] The discontinuation of the proceedings was particularly unfounded in the light of the judgments rendered in the cases: file no.: VI SA/Wa 1567/08 - judgment of 23 December 2008 and the Supreme Administrative Court (case file number: II GSK 380/09 - judgment of 20 October 2009 as well as of the Voivodship Administrative Court in Warsaw of 12 December 2014 (file no.: VI SA/Wa 2437/14) and the judgment of the Supreme Administrative Court of 29 February 2016 (file no.: II GSK 1166/15) - binding in the present case pursuant to Art. 153 of the Act - Law on Proceedings before Administrative Courts, which - in the opinion of the Court - determined the existence of a legal basis for pursuing the request contained in the Company's application of 10 November 2010.*

*When re-examining a case as a result of this judgment, the*

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<sup>761</sup> **Exhibit C-75**, Judgment of the Provincial Administrative Court in Warsaw, dated 14 September 2018 (Case ref. No. VI SA/Wa 540/18), page 15.

<sup>762</sup> **Exhibit C-75**, Judgment of the Provincial Administrative Court in Warsaw, dated 14 September 2018 (Case ref. No. VI SA/Wa 540/18), page 18.

*authority will take into account all legal assessments and indications contained in the above judgments and will make a full, re-examination of the case taking into account the need to treat the application of 10 November 2010 in all the circumstances surrounding its submission, including also the judgment of 3 November 2010 (VI SA/Wa 1484/10), actually obliging the party to submit an application for an overpayment.*

*The administrative body shall take into account the current jurisprudence relating to the interest rate on the repayment of amounts overpaid to the body in matters to which the provisions of Section III of the Tax Ordinance. First and foremost, however, it will take into account the content of administrative court judgments issued in this case (Article 153 of the Act - Law on Proceedings before Administrative Courts)."*<sup>763</sup>

787. In the SAC 3<sup>rd</sup> Judgement issued on 15 March 2022, the cassation appeal filed by the ME was dismissed and the PAC 3<sup>rd</sup> Judgement was upheld. The Tribunal refers to the following excerpts of the undisputed translation of the SAC 3<sup>rd</sup> Judgement:

*"The case law of the Constitutional Tribunal indicates that the primary objective of the refund of an overpayment is to restore the balance affected by the benefit to which the individual was not obliged (restitution) by returning what was taken or was not included in the property of the provider without a legal basis. The institution of overpayment is intended to re-establish the substantive law and to burden the taxpayer only within the limits set by the law. The consequence of the existence of an overpayment is a claim for its refund by the taxpayer. In this way, the institution of tax overpayment refers to the fundamental principle of equity, which requires that the benefit collected without legal basis*

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<sup>763</sup> **Exhibit C-75**, Judgment of the Provincial Administrative Court in Warsaw, dated 14 September 2018 (Case ref. No. VI SA/Wa 540/18), pages 19-20.

*should be returned (cf. judgements of the Constitutional Tribunal of 6 March 2002, P 7/00 and 10 March 2009, P 80/08)."*<sup>764</sup>

*"[I]n general the purpose of the overpayment interest rate is to provide compensation to entities (taxpayers and entrepreneurs) which, as a result of defective actions by the public authorities, were deprived of the possibility of using their funds which they had to pay on account of undue public levy. If it were not for the obligation to pay, which ultimately turned out to exist but to a lesser extent, the entrepreneur could freely dispose of the amount and receive income on that account.*

[...]

*From the perspective of the Constitution it should also be noted that the interest on an overpayment, as with the overpayment of tax or other public levy itself, is a property right subject to constitutional protection under Article 64 of the Constitution .*

[...]

*It should be further noted that limiting the right to interest on an overpayment undermines the principle of a democratic state under the rule of law and the protection of citizens' trust in the state and its law (Article 2 of the Constitution). The principle, fundamental to the entire legal system, of returning unjust enrichment to the person at whose expense the enrichment took place, cannot be limited at the statutory level by the institution of a tax overpayment and the accompanying right to claim interest (cf. judgement of the Constitutional Tribunal of 6 March 2002, P 7/00).*

*The rule of law is not only a state in which the authorities abide by the law, but also a state in which legal regulations protect*

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<sup>764</sup> **Exhibit C-118**, Judgement of the Supreme Administrative Court, dated 15 March 2022 (Case ref. No. II GSK 349/19), page 9.

*citizens from unlawful actions by prohibiting the benefits of such actions. It is unacceptable that, as a result of an illegal action by the authorities, the state has had citizens' undue financial resources at its disposal. It would therefore be contrary to the principle of legality for such amounts to be refunded by granting the taxpayer/entrepreneur a refund of the overpayment without interest. The State cannot benefit from the wrongful conduct of its authorities and the citizen should be able to claim compensation where they suffer damage as a result of the wrongful decisions of the authorities."*<sup>765</sup>

*"In Article 78 §1 of the Tax Ordinance, the legislator did not introduce the principle of full compensation—the taxpayer is entitled to interest on the overpayment at the rate of interest on default interest charged on tax arrears, regardless of the actual amount of the damage suffered. This method of confirming the overpayment is intended to compensate the taxpayer/entrepreneur on a flat-rate basis for lost profits due to the inability to benefit from the overpaid tax'*

[...]

*Referring to the pleas in law in the cassation appeal, the essence of which consists in questioning—after nine years of proceedings—that the party in the motion of 10 November 2010 indicated an improper legal basis for the claim, one cannot overlook an important issue noted by the Court of First Instance ex-officio; namely, the violation by the authorities of the principle of conducting proceedings in a manner inspiring the confidence of its participants in public authority, expressed in Article 8 of the CAP. This principle has long been recognised by the Constitutional*

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<sup>765</sup> **Exhibit C-118**, Judgement of the Supreme Administrative Court, dated 15 March 2022 (Case ref. No. II GSK 349/19), page 10.

*Tribunal as an obvious feature of the democratic rule of law (see: judgement of the Constitutional Tribunal of 30 November 1988, K. 11/88, OTK 1988, item 6). The principle contained in Article 8 of the CAP defines what is implicit in the rule of law. Indeed, the principle set out in Article 8 of the CAP is primarily based on the requirement of lawful and fair conduct of proceedings and settlement of a case by a public administration body, which is an essential part of the principle of the rule of law. Only proceedings which comply with these requirements and decisions resulting from such proceedings can inspire citizens' trust in the public authority even if administrative decisions do not take their claims into account.*

*Article 8 of the CAP imposes obligations on the administrative authority concerning the manner of conducting the proceedings, which go beyond the need to follow the principles of proportionality, impartiality and equal treatment. Administrative bodies should therefore act in a transparent, fair and equitable manner. The administrative body should strive to ascertain the actual intentions of a party if the content and character of the letters submitted by the party give rise to doubts (see, e.g. judgement of the Supreme Administrative Court in Łódź of 26 November 1999, I SA/Łd 159297, LEX No. 40547)."*<sup>766</sup>

*"The Supreme Administrative Court hearing the case fully shares the views in the abovementioned judgements and the position of the Court of First Instance on the appropriate application in the present case of the provisions of Section III of the Tax Ordinance and, given the specificity of the proceedings on the grounds of the applicable statutory provisions, the possibility of claiming interest on the basis of Article 78 §3.1 of the Tax Ordinance. This was*

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<sup>766</sup> **Exhibit C-118**, Judgement of the Supreme Administrative Court, dated 15 March 2022 (Case ref. No. II GSK 349/19), page 11.

*already determined in the judgement of the Supreme Administrative Court of 29 November 2016".*<sup>767</sup>

788. The SAC 3<sup>rd</sup> Judgement should have represented the final stage of the administrative proceedings in Poland. This was unequivocally recognised by Respondent in these arbitral proceedings. In particular, the Tribunal refers to the following statements made on behalf of Respondent at the Main Hearing:

*"[I]f the court decides that the overpayment existed and interest is due to JSE, that Poland should execute the judgment and repay the interest. That is our position."*<sup>768</sup>

*"[I]f there is a judgment to the effect that clearly say JSE needs to be paid interest, Poland will surely, I mean the government, execute the judgment and repay the interest, and that is beyond any, I would say, it is quite obvious for us, I mean Respondents."*<sup>769</sup>

*"[F]irst, Poland repays its debt, and, if there is a decision to that effect, [...] second, Poland adopted a semi-cassational model of administrative court proceedings, which, in some justified proceedings, entrusted court with competence to issue merits-based decision, and there is no need to obtain 50 judgments, as Mr Kolowski said, but only one judgment under Article 145(a) would be enough."*<sup>770</sup>

*"[F]irst is general, and I would like to – for the sake of repeating myself – Polish administration, Polish State, executes court's decision. If there is a court decision to the effect that the overpayment should be declared by the State organs in their decision and the tax interest should be paid, Poland will certainly execute the*

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<sup>767</sup> **Exhibit C-118**, Judgement of the Supreme Administrative Court, dated 15 March 2022 (Case ref. No. II GSK 349/19), p. 14.

<sup>768</sup> Hearing Transcript, Day 1, 45:4-6.

<sup>769</sup> Hearing Transcript, Day 1, 45:15-19.

<sup>770</sup> Hearing Transcript, Day 1, 51:9-17.

*judgment.*"<sup>771</sup>

*"[I]f the SAC will conclude in the same manner as the Regional Administrative Court, they simply would consider paying back the interest as the SAC would perhaps order us to do, right? This is the issue here."*<sup>772</sup>

*"[T]his shows why we called this SAC 2021 judgment final, because we believe that all the issues would be discussed by the SAC, so no other issue will be discussed further after the SAC decision [...]."*<sup>773</sup>

789. In its Post-Hearing Brief, Respondent submitted that it would ensure that the administrative authorities comply with the SAC 3<sup>rd</sup> Judgement, stating that the above statements:

*"constitute an unequivocal declaration that the administrative organ will conform to the directions of the Supreme Administrative Court included in the future SAC judgment. In particular, the Republic of Poland, acting through its administrative organs, will execute the judgment based on Article 145(a) LPBAC (if such judgment is rendered) or any judgment to the effect that the overpayment should be declared by the State organs, and the tax interest should be paid. These statements, read in conjunction with: (a) the Respondent's expert opinion that executing the administrative court judgments is not a systemic problem in Poland, and (b) the numerous declarations of the Claimant's Counsel that, in this particular dispute, the chance of recovering the Fine is over 80%, effectively leave no space for the Tribunal to come to a conclusion that the Republic of Poland will not abide by the Polish law."*<sup>774</sup>

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<sup>771</sup> Hearing Transcript, Day 1, 54:24 – 56:5.

<sup>772</sup> Hearing Transcript, Day 2, 119:4-8.

<sup>773</sup> Hearing Transcript, Day 4, 72:20-23.

<sup>774</sup> Respondent's Post-Hearing Brief, para. 120.

790. In this regard, Respondent also submitted that "*there can be no doubt that the expected SAC judgment will be final*" and that the SAC 3<sup>rd</sup> Judgement would "*hopefully resolve all controversial legal matters left (such as if and when the overpayment arose), which will bring JSE's administrative case to an end*".<sup>775</sup>
791. In reliance on these assurances made by Respondent, and at the request of Respondent in its Post-Hearing Brief,<sup>776</sup> the Tribunal suspended these arbitral proceedings for almost seven months awaiting the SAC 3<sup>rd</sup> Judgement, on the explicit understanding that "*Respondent will ensure the Polish administrative authorities comply with the SAC's judgment in the event the SAC rules in JSE's favour*".<sup>777</sup>
792. It is, however, far from clear that the administrative body of Respondent will comply with the SAC 3<sup>rd</sup> Judgment that has since been rendered. Most notably, after initially extending the deadline for its decision to 25 July 2022, the President of the MRA on this date then further extended the deadline to 30 November 2022 due to "*the need to perform in-depth analyses of the extensive evidence gathered in the present proceedings, including the evidence related to the scope and degree of the Authority's obligation to be bound by the rulings indicated by the [various Polish courts]*".<sup>778</sup>
793. In the view of the Tribunal, this is inconsistent with the ruling of the SAC and represents a further delay in JSE's proceedings. Respondent contends that the SAC 3<sup>rd</sup> Judgement "*left open the question whether JSE Request is time-barred and whether there are grounds interrupting the limitation period*" and that this question would need "*to be assessed, in the context of the 2018 RAC Judgment and the latest SAC Judgment, by the MRA*".<sup>779</sup> According to Claimant, however, this issue was addressed in JSE's favour in the SAC 3<sup>rd</sup> Judgement.<sup>780</sup>
794. Even if the limitation issue were to still be considered open, the Tribunal finds that this would not justify any further delay in the MRA's decision to be rendered – with the

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<sup>775</sup> Respondent's Post-Hearing Brief, paras. 98-103.

<sup>776</sup> Respondent's Post-Hearing Brief, para. 153 2).

<sup>777</sup> Procedural Order No. 11 (*see* para. 31); Procedural Order No. 12; Procedural Order No. 13 and Procedural Order No. 14.

<sup>778</sup> **Exhibit C-121**, Ruling No. BPI – 5P/22 (BPIzo.520.117.2022/914), dated 25 July 2022.

<sup>779</sup> Respondent's Submission on the 2022 SAC Judgment dated 23 May 2022, para. 10.

<sup>780</sup> Claimant's Second Submission on the Resumption of Proceedings dated 25 April 2022, para. 14.



current deadline set nine months since the SAC 3<sup>rd</sup> Judgment – in a case that has seen three rounds of administrative proceedings spanning over a decade.

**c) Availability of Further Local Remedies**

795. Respondent has argued that there were further remedies available to JSE and Claimant within the Polish legal system, and that this would preclude a finding that the effective means standard in Article 10(12) of the ECT has been breached.

*aa) Civil Proceedings*

796. As set out in Section E.VI above, JSE initiated three civil proceedings in Poland which it subsequently discontinued. The fact that JSE's claims were not pursued in the civil courts, however, has no bearing on the Tribunal's decision in the case at hand regarding the alleged breach of Article 10(12) of the ECT. This is true even if – as argued by Respondent – there was no legal impediment that would have prevented the civil courts from hearing JSE's case.<sup>781</sup>

797. Although the Parties are in dispute as to the extent to which JSE and Claimant should and could have pursued the claims in the civil courts, the Tribunal notes that there is a general consensus between the Parties' legal experts that both the civil and the administrative routes were possible.

798. The Tribunal refers to the testimony of Claimant's legal expert Professor Wierzbowski at the Main Hearing that civil actions would have also been possible under the given circumstances:

*"Mr Kaldunski: If you draw a loan in order to pay the fine , could you seek or pursue compensation for that cost before a civil court?"*

*Professor Wierzbowski: Yes. Yes. Yes. Of course."*<sup>782</sup>

799. Professor Wierzbowski further testified that the decision of where to file claims is a

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<sup>781</sup> Respondent's Post-Hearing Brief, paras. 45; 50-54.

<sup>782</sup> Hearing Transcript, Day 3, 36:10-13.

"question of strategy" for legal counsel.<sup>783</sup>

800. The Tribunal also refers to the testimony of Respondent's legal expert Professor Piatek at the Main Hearing, acknowledging that the claim pursued by JSE for repayment of an overpayment of a pecuniary penalty with or without interest under the Tax Ordinance is a public law claim and not a civil law claim:

*"Mr Kolkowski: Professor Piatek, a general question now. A claim for repayment of an overpayment of a pecuniary penalty with interest or without interest is a public law claim, is it not?"*

*Professor Piatek: An overpayment is regulated in the tax ordinance. It is a public law claim.*

*Mr Kolkowski: It cannot be qualified as a civil law damage, can it?*

*Professor Piatek: An overpayment is something different, and requesting reimbursement in public law, and requesting damages for any loss caused in public law, private law – correction of the speaker -- private law situation. You can demand damages for the illegal actions of a public body. Article 77, paragraph 1 of the constitution and Article 417.1, paragraph 2 of the Civil Code, so an overpayment cannot be claimed in civil law."*<sup>784</sup>

801. As stated above, the tribunal in *White Industries v. India* placed emphasis on the investor doing "everything that could be reasonably expected of it" in the assessment of the effective means standard.<sup>785</sup> In the view of the Tribunal, JSE and Claimant did what could be reasonably expected to pursue their claims at a domestic level, *i.e.* to put questions of administrative law before the administrative courts, which accepted jurisdiction over and decided JSE's claims. There is no evidence to suggest that the administrative courts ever indicated that they were not the correct venue for JSE's claims, nor did the administrative

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<sup>783</sup> Hearing Transcript, Day 3, 55:17.

<sup>784</sup> Hearing Transcript, Day 3, 103:11-25.

<sup>785</sup> **Exhibit CL-37**, *White Industries Australia Limited vs. The Republic of India*, UNCITRAL ad hoc arbitration, Final Award dated 30 November 2011, para. 11.4.18.

authorities object to the jurisdiction of the administrative courts.

802. On this basis, the Tribunal concludes that, even if further remedies would have been available, it could not be reasonably expected for JSE and Claimant to seek additional relief before the civil courts. Therefore, the Tribunal does not find it necessary, for the purposes of this Award, to determine whether or not further remedies were available to JSE and Claimant before the Polish civil courts.

*bb) Further Administrative Possibilities*

803. The Parties are also in dispute as to whether JSE and Claimant should have taken further action before the administrative courts. As set out above, the administrative courts have rendered six judgements predominantly in favour of JSE and it is undisputed that administrative authorities are bound by the legal assessments contained in these judgements. On this basis, the Tribunal takes the view that, even if further remedies would have been available, it could not be reasonably expected for JSE and Claimant to seek additional relief before the administrative courts.

804. In particular, the Tribunal is not convinced by Respondent's argument that JSE should have requested the administrative courts to oblige the authority to render a decision or order pursuant to Article 145(a) of the LACP, noting that it is undisputed that this provision is applied *ex officio* at the discretion of the court.<sup>786</sup> Further, Claimant has submitted a ruling by the SAC dated 9 June 2022, indicating that enforceability clauses for administrative court rulings are only granted by district courts in cases of awarded court costs.<sup>787</sup>

805. The Tribunal also does not consider that – as argued by Respondent – JSE and Claimant contributed to the prolongation of the proceedings by not agreeing to *in camera* proceedings before the SAC in the third round of administrative proceedings. Without commenting on whether this decision was justified, the Tribunal notes that the resulting prolongation – if any – would, in any event, be minimal when viewed in the context of proceedings that have remained unresolved for 12 years, largely due to the conduct of administrative

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<sup>786</sup> Claimant's Post-Hearing Brief, paras. 45-46; Respondent's Post-Hearing Brief, para. 70.

<sup>787</sup> **Exhibit CL-25**, ruling of the Supreme Administrative Court, dated 9 June 2016 (Case ref. No. II GSK 2045/15), page 2.

authorities.

**d) Clean Hands**

806. In the alternative to its jurisdictional objection based on the same principle and in a scenario where the Tribunal finds a breach of the ECT, Respondent submits that the Tribunal should dismiss the claims on the merits in light of Claimant's misconduct and contribution to the alleged injury.<sup>788</sup>
807. With reference to its analysis in Section G.III.7. above, the Tribunal notes that there is no evidence of Claimant failing to comply with Polish law. To the contrary, this dispute pertains largely to proceedings before the Polish administrative courts, which would have been best placed to determine if a breach of Polish law had occurred.
808. Further, the Tribunal takes the view that any alleged violation of the Polish law by JSE connected to the imposition of the Penalty is not relevant for the purposes of this arbitration, given that the Penalty was undisputedly repealed by the PAC and repaid by the MRA.
809. On this basis, the Tribunal finds that there is no room to apply the clean hands doctrine in its decision on the merits or quantum.

**e) Tribunal's Finding**

810. On the basis of the foregoing, the Tribunal finds that although JSE and Claimant were in a position to assert their claims, the local enforcement remedies have proven to be ineffective in the present case, contrary to the requirements of Article 10(12) of the ECT.
811. In the view of the Tribunal, JSE and Claimant did everything that could be reasonably expected of them in order to have the administrative authorities resolve JSE's Application in an effective manner and within reasonable time. This is evidenced by the three rounds of administrative court proceedings spanning over a decade.
812. The resulting length of the domestic proceedings is already significant and is on par with the duration of the set-aside proceedings in *White Industries v. India*, which the tribunal

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<sup>788</sup> Rejoinder, para. 41.

found to be in violation of the effective means standard. Given that neither the complexity of the case, nor the behaviour of JSE and Claimant, nor other circumstances speak to justify such significant duration, this Tribunal concludes that the proceedings were unduly delayed by Respondent.

813. However, this Tribunal places even greater weight in its decision on the indication that there is no guarantee of a final outcome of the case in the future, making the means offered to Claimant by Respondent truly ineffective. Specifically, the lack of enforcement mechanism that could be utilized by JSE and Claimant in relation to the six administrative court judgements against the MRA and the ME resembles a situation in which the Polish administrative courts and the administrative authorities engage in a back-and-forth at the expense of legal certainty and finality for JSE and Claimant.
814. Despite the assurances made by Respondent to the Tribunal in these arbitral proceedings with regard to the finality of and its compliance with the SAC 3<sup>rd</sup> Judgement rendered on 15 March 2022, the Tribunal notes that the deadline for the MRA's new decision on JSE's Application was extended until 30 November 2022, and subsequently again until 31 January 2023, to allow the administrative authorities more time to once again re-examine the case. In the view of the Tribunal and in light of the previous actions of the administration, this is not an indication that the administrative authorities intend to re-examine JSE's Application in line with the legal assessment contained in the administrative court judgements.
815. More importantly, however, in the event that the MRA renders a decision that does not follow the legal assessment contained in the PAC 3<sup>rd</sup> Judgement and SAC 3<sup>rd</sup> Judgement, there is no mechanism to rectify such decision. Rather, JSE and Claimant would be required to begin another cycle of domestic proceedings with the same risk of not obtaining a final and enforceable decision.
816. The Tribunal therefore finds that Claimant was not afforded effective local remedies to enforce its rights in the case at hand. Whether that was caused by a judicial or an administrative body is not determinative – what matters is the overall result (or lack thereof).
817. On this basis, the Tribunal concludes that the lack of an enforcement mechanism for administrative court judgements *vis-à-vis* the corresponding administrative authority

constitutes a breach of Respondent's obligation in Article 10(12) of the ECT to provide Claimant with effective means of asserting claims and enforcing rights.

## **II. Breach of the Fair and Equitable Treatment Standard**

### **1. Claimant's Position**

818. Claimant submits that the right to fair and equitable treatment is an overriding principle comprising all guarantees that arise therefrom, with reference to the decision of the tribunal in *Petrobart v. Kyrgyzstan*.<sup>789</sup>

819. It is Claimant's position that the FET standard is not defined in the ECT, nor in any other international treaty and an alleged breach of the FET standard is to be determined on a case-by-case basis.<sup>790</sup> Claimant refers to the FET standard established by the tribunal in *Joseph Charles Lemire v. Ukraine*:

*"It requires an action or omission by the State which breaches a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm. The threshold must be defined by the Tribunal, on the basis of the wording of Article II.3 of the BIT, and bearing in mind a number of factors, including the following:*

- whether the State has failed to offer a stable and predictable legal framework;*
- whether the State made specific representations to the investor;*
- whether due process has been denied to the investor;*
- whether there is an absence of transparency in the legal procedure or in the actions of the State;*
- whether there has been harassment, coercion, abuse of power*

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<sup>789</sup> Statement of Claim, para. 173 with reference to **Exhibit CL-20**, *Petrobart Limited vs. The Kyrgyz Republic* (SCC Case No. 126/2003), Award of 29 March 2005, p. 75.

<sup>790</sup> Statement of Claim, para. 173.

*or other bad faith conduct by the host State;*

*– whether any of the actions of the State can be labelled as arbitrary, discriminatory or inconsistent.*

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

*– the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors;*

*– the legitimate expectations of the investor, at the time he made his investment;*

*– the investor's duty to perform an investigation before effecting the investment;*

*– the investor's conduct in the host country."<sup>791</sup>*

820. On the assumption that JSE's position in the domestic litigation was correct as established in the administrative court judgements obtained, Claimant submits that the abstract legal regime in Poland can be viewed as stable and predictable and that it is rather the lack of compliance of the Polish administrative authorities that amounts to a breach of FET.<sup>792</sup> On the opposite assumption, *i.e.* that the position of the MRA and ME in the domestic litigation is correct, Claimant submits that the Polish legal regime cannot be considered stable and predictable because the administrative court judgements would suddenly become incorrect even though there had been no changes to the law or the facts of the

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<sup>791</sup> Statement of Claim, para. 174 with reference to **Exhibit CL-22**, *Joseph Charles Lemire vs. Ukraine*, IC-SID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010, paras. 284-285.

<sup>792</sup> Statement of Claim, para. 176-177.

case.<sup>793</sup>

821. Claimant submits that, while the Polish administrative procedure appears fair, the issue lies with the compliance of the Polish administrative authorities with the law.<sup>794</sup> It is Claimant's position that Respondent acted in a manner that diverges from standard legal procedures and was thus not transparent – by first ignoring JSE's legitimate claims and subsequently responding with an ordinary letter on 3 December 2009 (**Exhibit C-31**) that did not take the prescribed form of an administrative decision or ruling.<sup>795</sup> Claimant maintains that the letter of 3 December 2009 left JSE in an uncertain position as to the consequences of this letter and the potential remedies available.<sup>796</sup> According to Claimant, the letter also appeared to be politically motivated because it did not explain the legal basis of Respondent's position.<sup>797</sup>

822. It is Claimant's position that Respondent's actions were also inconsistent.<sup>798</sup> In particular, Claimant references the following positions taken by Respondent between 2009 and 2018:

*"a) In December 2009, the ARM refused to issue any formal administrative decision regarding the disputed overpayment of the penalty and, instead, it sent JSE the letter.*

*b) In February 2010, the ARM changed its mind and argued that the letter was in fact an administrative decision against which JSE did not appeal.*

*c) In April 2010, the ME made another twist stating that the letter was not a decision.*

*d) From December 2009 to June 2013, the authorities argued that the Tax Ordinance did not apply to pecuniary penalties imposed*

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<sup>793</sup> Statement of Claim, para. 176-177.

<sup>794</sup> Statement of Claim, para. 178.

<sup>795</sup> Statement of Claim, para. 179-180.

<sup>796</sup> Statement of Claim, para. 180-181.

<sup>797</sup> Statement of Claim, para. 180-181.

<sup>798</sup> Statement of Claim, para. 183.



*as a result of administrative proceedings.*

*e) From June 2013 to November 2016, they claimed the Tax Ordinance did apply but JSE's motion for the declaration and repayment of the overpayment of the penalty was unjustified, although admissible in principle.*

*f) In May 2017, they took another turn and started arguing that the motion had been inadmissible in the first place.*

*g) From December 2009 to November 2016, the President of the ARM and the ME unanimously contended that the overpayment never arose.*

*h) In January 2018, the ME finally admitted (and then repeated twice) that the overpayment did arise, although it could not be repaid due to procedural obstacles."<sup>799</sup>*

823. Claimant submits that the facts of the case demonstrate that Respondent's actions were not in good faith.<sup>800</sup> Claimant refers to the fact that the MRA ordered JSE to pay the Penalty plus interest in accordance with the Tax Ordinance, yet took the position that the Tax Ordinance was no longer applicable when the MRA was to reimburse the Penalty.<sup>801</sup> Further, Claimant submits that Respondent's officials attempted to induce JSE to make a mistake or create a situation where JSE's claim would be time-barred and JSE would not have access to an independent court.<sup>802</sup>

824. Claimant contends that all disputes between private entities and administrative authorities must be conducted in a manner that inspires trust and is driven by the principles of proportionality, impartiality and equal treatment in accordance with Article 8 of the CAP.<sup>803</sup> Referring to the PAC's judgement of 14 September 2018 (**Exhibit C-75**), Claimant submits that the conduct of Respondent's administrative authorities was so contrary to Article

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<sup>799</sup> Statement of Claim, para. 182.

<sup>800</sup> Statement of Claim, para. 184.

<sup>801</sup> Statement of Claim, para. 185.

<sup>802</sup> Statement of Claim, para. 187-188.

<sup>803</sup> Statement of Claim, para. 189.

8 of the CAP, that the PAC took this provision into account *ex officio*, something which is rarely done by administrative court judges and only in cases of exceptionally dishonest conduct by public authorities.<sup>804</sup>

## 2. Respondent's Position

825. It is Respondent's position that it did not violate the ECT, and that Poland has accorded fair and equitable treatment to Claimant at all times, granted Claimant full protection and security, treated Claimant in a non-discriminatory manner, and has not imposed any unreasonable or discriminatory measures on Claimant.<sup>805</sup>

826. Further, Respondent submits that even if the Tribunal were to find Respondent had breached the ECT, Claimant is precluded from invoking the protection of the FET standard due to the fact that its investment is linked to a breach of fuel storage provisions essential for energy security in Poland and the EU.<sup>806</sup>

827. Respondent maintains that investment tribunals have long recognized that, in order to invoke FET protection, an investor must act with due diligence and know the law and procedure of the host State.<sup>807</sup>

## 3. Tribunal's Analysis

### a) The Fair and Equitable Treatment Standard

828. Along with most other international investment treaties, the ECT offers investors the

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<sup>804</sup> Statement of Claim, para. 190.

<sup>805</sup> Answer to the Request for Arbitration, para 39.

<sup>806</sup> Statement of Defence, para. 370 with reference to **Exhibit RL-096**, *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, paras. 647, 654.

<sup>807</sup> Statement of Defence, para. 367 with reference to **Exhibit BSOL XII**, Alexandra Diehl, *The Core Standard of International Investment Protection*, International Arbitration Law, 2012, Assumption 42 on p.421: "Investors must show a high level of due diligence which is inferred and considered part of their professionalism.". See also **Exhibit BSOL XIV**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 352; **Exhibit BSOL XV** *David R. Aven and others v. Costa Rica* (ICSID Case No. UNCT/15/3), Final Award of 18 September 2018, paras. 282 and 460; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 164, 167; **Exhibit RL-098**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 268; **Exhibit RL-20** *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, para. 258.

generally recognized protection of the FET standard in Article 10(1), which provides:

*"Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."*

829. The Tribunal notes that the ordinary meaning of the "fair and equitable treatment" – as per Article 31(1) of the VCLT – adds little specificity to the scope of the standard, which *"can only be defined by terms of almost equal vagueness"*.<sup>808</sup> Other tribunals have elaborated on the ordinary meaning of the terms "fair" and "equitable" through the terms "just", "even handed", "unbiased", and "legitimate".<sup>809</sup> As the tribunal in *Saluka v. Czech Republic* rightfully pointed out:

*"On the basis of such and similar definitions, one cannot say much more than the tribunal did in S.D. Myers by stating that an infringement of the standard requires treatment in such an unjust or arbitrary manner that the treatment rises to the level that is*

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<sup>808</sup> *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, para. 297.

<sup>809</sup> See e.g. *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 360; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 290;

*unacceptable from the international perspective.*"<sup>810</sup>

830. This Tribunal does, however, note that the ordinary meaning of the term "*treatment*" indicates that the States' pattern of behaviour towards an investment is usually to be considered rather than a single act or omission.<sup>811</sup>

831. The relative vagueness of the FET standard is remedied by the fact that it has been interpreted and applied under international investment treaties by multiple international investment tribunals in the recent years, thereby creating a considerable body of jurisprudence. This has contributed significantly to shaping the content of the standard and providing guidance to ascertain its elements.

832. The Tribunal concurs with the tribunal in *Anatolie Stati and others v. The Republic of Kazakhstan*, which emphasized the inherently contextual determination of the FET standard:

*"[T]he application of the FET standard can only be case specific, taking into account: the specific factual circumstances of the present case, and that these have to be evaluated in the present case in the legal context of the ECT."*<sup>812</sup>

833. As to the legal context of the ECT, this Tribunal does not deem it necessary to address an overlap (if any) between the protection standards of Article 10(1) of the ECT.<sup>813</sup> Given that Claimant only relied on the FET standard, the other sentences of Article 10(1) of the ECT can merely serve to provide helpful context for this Tribunal. Of particular note is the first sentence of Article 10(1) of the ECT, which imposes an obligation on the

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<sup>810</sup> *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, para. 297 quoting *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Merits), 13 November 2000, para. 263.

<sup>811</sup> See also *Anatolie Stati and others v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, para. 945.

<sup>812</sup> *Anatolie Stati and others v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, para. 944. See also *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 118; *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 99; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 181; *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, para. 281.

<sup>813</sup> See e.g. **Exhibit CL-24**, *Limited Liability Company Amtto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 73.

Contracting Parties to "*encourage and create stable, equitable, favourable and transparent conditions*". Whether or not it is an independent obligation, the Tribunal notes that it is intrinsically connected in the ECT to the FET and can inform the interpretation of the latter.<sup>814</sup>

834. As to the scope of the FET standard, the Tribunal shares the view of the *Electrabel v. Hungary* tribunal, which – in reference to other awards and scholarly opinions – held that:

*"[T]he obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment."*<sup>815</sup>

835. Similarly, the tribunal in *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. The Republic of Kazakhstan* listed the following illustrative elements of the FET:

*"- the State must act in a transparent manner;*  
*- the State is obliged to act in good faith;*  
*- the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;*  
*- the State must respect procedural propriety and due process.*  
*The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate*

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<sup>814</sup> See also **Exhibit CL-6**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.73.

<sup>815</sup> **Exhibit CL-6**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.74. See also *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 543: "[T]he Tribunal is of the view that FET comprises, inter alia, protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency. The Tribunal believes that the state's conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard."

*expectations.*"<sup>816</sup>

836. Some arbitral tribunals have also included inconsistency in actions of a State among factors to be considered for the violation of the FET.<sup>817</sup> For example, the tribunal in *Garanti Koza LLP v. Turkmenistan* established breach of the FET standard by Turkmenistan based, *inter alia*, on inconsistent behaviour of different branches of the Turkmenistan government towards the investor.<sup>818</sup>

#### **b) Tribunal's Finding**

837. In line with the fact-specific nature of the inquiry into the alleged violation of the FET standard by Respondent, the Tribunal recalls the detailed account of the judicial and administrative proceedings in Poland described above in Sections E.VI. and VII. and analysed in the context of the effective means standard in Section H.I.3. of this Award.

838. The conduct of Respondent that led this Tribunal to establish the violation of the effective means standard of Article 10(12) of the ECT gives this Tribunal grounds to establish the violation of the FET standard of Article 10(1) of the ECT.

839. Specifically, the Tribunal holds that the treatment of Claimant by Respondent's administrative authorities over the past decade lacked transparency and respect for procedural propriety. In the face of multiple administrative court rulings in favour of JSE (referred to in Section E.VII. above), the lack of enforcement of Claimant's rights was non-transparent, inconsistent, and arbitrary.

840. The Tribunal recalls the following excerpt from the PAC 3<sup>rd</sup> Judgement to the same effect:

*"Further statement (after 9 years of proceedings) that the application was based on an incorrect legal basis, despite the fact that its content (demand of payment of interest on late refund of the*

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<sup>816</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 609.

<sup>817</sup> *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 284; *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 184; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 252.

<sup>818</sup> *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, para. 382.

*amount of a pecuniary penalty with interest) has never given rise to any such doubts, contradicts the legal opinions included in the aforementioned judgments as well as the principle laid down in CAP Art. 8, whereunder public administration bodies are required to conduct proceedings in a manner giving the parties confidence in public authority, in line with the principles of proportionality, impartiality and equal treatment.*"<sup>819</sup>

841. These findings were upheld and elaborated upon in SAC 3<sup>rd</sup> Judgement as follows:

*"Referring to the pleas in law in the cassation appeal, the essence of which consists in questioning—after nine years of proceedings—that the party in the motion of 10 November 2010 indicated an improper legal basis for the claim, one cannot overlook an important issue noted by the Court of First Instance ex-officio; namely, the violation by the authorities of the principle of conducting proceedings in a manner inspiring the confidence of its participants in public authority, expressed in Article 8 of the CAP. This principle has long been recognised by the Constitutional Tribunal as an obvious feature of the democratic rule of law (see: judgement of the Constitutional Tribunal of 30 November 1988, K. 11/88, OTK 1988, item 6). The principle contained in Article 8 of the CAP defines what is implicit in the rule of law. Indeed, the principle set out in Article 8 of the CAP is primarily based on the requirement of lawful and fair conduct of proceedings and settlement of a case by a public administration body, which is an essential part of the principle of the rule of law. Only proceedings which comply with these requirements and decisions resulting from such proceedings can inspire citizens' trust in the public authority even if administrative decisions do not take their claims*

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<sup>819</sup> **Exhibit C-75**, Judgment of the Provincial Administrative Court in Warsaw, dated 14 September 2018 (Case ref. No. VI SA/Wa 540/18), page 18.

*into account.*

*Article 8 of the CAP imposes obligations on the administrative authority concerning the manner of conducting the proceedings, which go beyond the need to follow the principles of proportionality, impartiality and equal treatment. Administrative bodies should therefore act in a transparent, fair and equitable manner. The administrative body should strive to ascertain the actual intentions of a party if the content and character of the letters submitted by the party give rise to doubts (see, e.g. judgement of the Supreme Administrative Court in Łódź of 26 November 1999, I SA/Łd 159297, LEX No. 40547)."*<sup>820</sup>

842. The Tribunal finds these judgements of the Polish courts underpin the Tribunal's finding that Respondent has indeed breached its obligations to Claimant under both Article 10(12) and Article 10(1) of the ECT. This does not mean, however, that Claimant is entitled to more than one recovery for the same injury, as will be discussed below in the Section I. of this Award.

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<sup>820</sup> **Exhibit C-118**, Judgement of the Supreme Administrative Court, dated 15 March 2022 (Case ref. No. II GSK 349/19), page 11.



## **I. DAMAGES**

### **I. Claimant's Position**

843. It is Claimant's position that the amount of damages to be awarded by the Tribunal should be determined with reference to the Loan Agreement concluded between JSE and Mercuria and not the amount of the Penalty.<sup>821</sup>
844. Considering the amount of the Penalty was returned to JSE, Claimant submits that Clause 4.2 of the Loan Agreement should be applied, meaning that the loan amount is subject to interest at the same rate as the interest accrued on the Penalty in accordance with the Tax Ordinance.<sup>822</sup>
845. According to Claimant, the loan amount being subject to interest at the same rate as the interest accrued on the Penalty does not mean that both the loan amount and the Penalty should be repaid in accordance with the same rules.<sup>823</sup>
846. In Claimant's view, the relationship between JSE and Respondent is governed by Article 78a of the Tax Ordinance, whereas the relationship between Mercuria and JSE is subject to common law, specifically the Clayton rule, which is codified in Articles 59-61 of the Cypriot Contract Law and also applies when there is only one debt to be settled.<sup>824</sup>
847. Claimant submits that the Clayton rule was applied to the repayment of the loan that took place immediately after the partial recovery of the unduly paid Penalty, when JSE paid Mercuria PLN 450,049,810.00.<sup>825</sup>
848. As a result, as of 10 November 2009, JSE's debt towards Mercuria was PLN 525,421,928.98 (the loan amount plus interest).<sup>826</sup> In Claimant's view, the payment of PLN 450,049,810.00 was allocated in accordance with the Clayton rule, leaving PLN 75,372,118.98 of outstanding principal amount.<sup>827</sup>

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<sup>821</sup> Claimant's Post Hearing Brief, para. 89

<sup>822</sup> Statement of Claim, para. 214.

<sup>823</sup> Claimant's Post Hearing Brief, para. 89.

<sup>824</sup> Statement of Claim, paras. 214-215.

<sup>825</sup> Statement of Claim, para. 216.

<sup>826</sup> Statement of Claim, para. 218.

<sup>827</sup> Statement of Claim, para. 218.

849. In addition, Claimant submits that after the loan was partially repaid by JSE to Mercuria, the interest kept accruing on the outstanding (principal) amount, as follows:<sup>828</sup>

Loan amount	450,049,310.00
Interest accrued up to 10 November 2009 (I payment)	74,353,391.96
Interest accrued up to 10 November 2009 (II payment)	1,019,227.02
	75,372,618.98
Repayment	450,049,810.00
Outstanding principal amount*	75,372,118.98
Interest accrued up to 15 May 2020**	77,490,798.27
Claim in total as of 15 May 2020***:	152,862,917.25

\* = (450,049,310.00 + 75,372,618.98) - 450,049,810.00

\*\* date of the Statement of Claim (to be updated)

\*\*\* = 75,372,118.98 + 77,490,798.27

850. Claimant submits that the applicable interest rates are found in promulgations by the Minister of Finances on the interest rate on late arrears dated 27 June 2008 through 4 January 2016.<sup>829</sup>

851. Further, Claimant is amenable to accepting Respondent's alternative calculation of interest presented during its Opening Statement at the Hearing, showing an alternative amount of PLN 145,094,420.20.<sup>830</sup>

852. Claimant asserts that the interest accrued on the loan is not a loss in the meaning of a decrease in value or physical damage, but that it can be qualified as lost profit (*i.e.* unrealised gains Claimant would have received had Respondent not breached its obligations

<sup>828</sup> Statement of Claim, para. 219.

<sup>829</sup> Claimant's Post Hearing Brief, para. 92; **Exhibit C-84**, Promulgations of the Minister of Finances on the rate of interest on late arrears, the reduced rate of interest on late arrears and the increased rate of interest on late arrears, dated 27 June 2008 through 4 January 2016.

<sup>830</sup> Claimant's Post Hearing Brief, paras. 93-94.

under the ECT).<sup>831</sup> According to Claimant, the interest under the Loan Agreement is Claimant's remuneration for the use of money lent to JSE.<sup>832</sup>

## **II. Respondent's Position**

853. Respondent submits that Claimant's calculation of the alleged loss is fundamentally flawed.<sup>833</sup> According to Respondent, Claimant treats the Respondent's alleged breach as the source of profits.<sup>834</sup>

854. In light of Claimant defining its loss with reference to the unpaid portion of the Loan Agreement concluded between Mercuria and JSE and not as the unpaid portion of the Penalty, Respondent submits that the calculation of quantum in these proceedings largely depends on two questions: (i) the interpretation of Article 4 of the Loan Agreement regarding the interest rate; and (ii) the method of allocation of debt repaid by JSE to Mercuria.<sup>835</sup> It is Respondent's position that Claimant erred in both questions under the following considerations.

855. *First*, Respondent submits that Claimant misrepresents the provisions of the Loan Agreement concerning the interest rate applicable (*i.e.* Articles 4.2 and 4.4) in order to artificially inflate the amount of JSE's debt for the purpose of this arbitration.<sup>836</sup>

856. Respondent notes that according to Article 4.2 of the Loan Agreement:

*"If the Borrower receives the refund of the Penalty imposed by the Material Reserve Agency together with the interest accrued in accordance with the Polish Law, the Interest due for the entire loan period on the Capital Sum shall be accrued at the same rate as the interest received by the Borrower from the Material Reserve Agency on the Penalty amount".*<sup>837</sup>

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<sup>831</sup> Claimant's Post Hearing Brief, para. 96.

<sup>832</sup> Statement of Claim, para. 220.

<sup>833</sup> Statement of Defence, para. 415.

<sup>834</sup> Statement of Defence, para. 416.

<sup>835</sup> Respondent's Post Hearing Brief, para. 129.

<sup>836</sup> Statement of Defence, para. 417; Rejoinder para. 223(1).

<sup>837</sup> **Exhibit CL-19**, Loan Agreement concluded on 23 June 2008 and the amendment of 6 October 2009.

857. Respondent alleges that the interest rate provided for in Article 4.2 (*i.e.* in accordance with the Tax Ordinance) would be applicable only if the borrower (*i.e.* JSE) received the refund of the Penalty with the interest.<sup>838</sup> According to Respondent, "*it is undisputed that the alleged receivable [interest] has not been returned to this day*".<sup>839</sup>
858. Respondent thus contends that given that JSE did not receive the full refund of the Penalty from Poland, Article 4.4 of the Loan Agreement shall be applied (as opposed to Article 4.2), which provides for a much lower interest (*i.e.* WIBOR 3 months + 1,25%).<sup>840</sup>
859. Accordingly, it is Respondent's position that WIBOR +1.5% is the only interest rate relevant to this arbitration if the Tribunal decides that Poland is liable under the ECT, while the Tax Ordinance is irrelevant to calculating interest on the unpaid part of the Loan Agreement.<sup>841</sup>
860. It is Respondent's position that the accumulated interest on the unpaid amount under the Loan Agreement calculated from the Statement of Claim, *i.e.* 15 May 2020, using the average WIBOR index pursuant to Article 4.4 of the Loan Agreement would amount to PLN 31,562,528.29.<sup>842</sup>
861. Respondent contends that if the interest rate of the Tax Ordinance were applicable, Claimant would be awarded interest in this arbitration significantly exceeding the interest applicable to the Loan Agreement, which would result in gross overcompensation.<sup>843</sup>
862. In any event, Respondent submits that no interest is due because the Penalty was returned on time following the SAC 1<sup>st</sup> Judgment.<sup>844</sup>
863. *Second*, Respondent submits that the amount of JSE's debt towards Mercuria under the Loan Agreement was calculated incorrectly and thus artificially inflated by Claimant, by (i) applying the wrong interest rate, resulting from an incorrect interpretation of the Loan

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<sup>838</sup> Statement of Defence, para. 418.

<sup>839</sup> Statement of Defence, para. 420.

<sup>840</sup> Statement of Defence, para. 419.

<sup>841</sup> Respondent's Post Hearing Brief, para. 136.

<sup>842</sup> Rejoinder para. 234.

<sup>843</sup> Statement of Defence, para. 423.

<sup>844</sup> Statement of Defence, para. 424; Respondent's Post Hearing Brief, para. 132; **Exhibit RER-1**, First Expert Report of Dr Izabela Andrzejewska-Czernek, paras 137-141, and page 10, point III.

Agreement (as indicated above); and (ii) through improper appropriation of the repaid portion of the Loan Agreement towards interest (whereas it should be appropriated towards the principal sum).<sup>845</sup>

864. Respondent alleges that JSE, whilst paying its debt towards Mercuria under the Loan Agreement made no express indication on how the money repaid should be allocated.<sup>846</sup> According to Respondent, JSE's inaction resulted in allocating the money received by Mercuria towards the interest (as opposed to the principal) under the so-called Clayton Rule, which is disputed by Respondent, so as to leave PLN 75,372,118.98 of the outstanding principal amount.<sup>847</sup> Under this method, the interest is still accruing on this outstanding debt and, as of 15 May 2020, JSE owes Mercuria a total of PLN 152,862,917.25.<sup>848</sup>
865. In this respect, Respondent contends that JSE's management inaction, resulting in a debt allocation which left over PLN 75 million of the capital sum unpaid, is something Respondent cannot be held responsible for under any circumstances.<sup>849</sup>
866. Furthermore, Respondent asserts that the interest on the remaining part of the unpaid Penalty was calculated incorrectly by JSE.<sup>850</sup> According to Respondent, until March 2017, the interest on the amount of PLN 64 million was calculated correctly by Claimant.<sup>851</sup> However, in Respondent's view, in October 2017, Claimant added around PLN 10 million of additional interest to the calculation.<sup>852</sup> In other words, Respondent asserts that an amount of around PLN 10 million has been counted twice by Claimant.<sup>853</sup>

### III. Tribunal's Analysis

867. In light of its finding in Section H. above that Respondent has breached Article 10(1) and Article 10(12) of the ECT in the present case, the Tribunal will analyse the nature and

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<sup>845</sup> Rejoinder para. 223.

<sup>846</sup> Rejoinder, para. 237.

<sup>847</sup> Rejoinder paras. 237, 247

<sup>848</sup> Rejoinder para. 247.

<sup>849</sup> Rejoinder para. 248.

<sup>850</sup> Rejoinder, paras. 246-248.

<sup>851</sup> Rejoinder, paras. 246-248.

<sup>852</sup> Rejoinder, para. 251.

<sup>853</sup> Rejoinder para. 253; Respondent's Post Hearing Brief, para. 133; **Exhibit R-093**, Audit letter of 3 October 2017 page 5.

amount of loss suffered by Claimant as a result of these breaches (1.), before determining the relief owed (2.).

## 1. Nature and Amount of Claimant's Loss

868. It is Respondent's position that (i) Claimant has not suffered any loss, and (ii) Claimant's calculations of the outstanding amount under the Loan Agreement, as well as the interest applicable thereto, are incorrect.

869. With regard to (i), the Tribunal takes the view that Claimant has indeed suffered a loss because it has been deprived of the remuneration it would have otherwise received under the Loan Agreement it concluded with JSE on 23 June 2008 to provide the funds to pay the Penalty.<sup>854</sup>

870. With regard to (ii), the Tribunal notes that Claimant has presented its damages as the outstanding amount under the Loan Agreement plus interest at the rate applied to tax arrears in accordance with the Polish Tax Ordinance, calculated as follows:

- i. PLN 152,862,917.25 for the outstanding amount under the Loan Agreement plus interest at the rate applied to tax arrears in accordance with the Polish Tax Ordinance calculated up until the Statement of Claim submitted on 15 May 2020, plus
- ii. interest accrued on the outstanding amount under the Loan Agreement, *i.e.* PLN 75,372,118.98, at the rate applied to tax arrears in accordance with the Polish Tax Ordinance from 16 May 2020 until the day on which the amount stipulated in a. is paid to the Claimant.<sup>855</sup>

871. According to Respondent, this calculation is based on an improper allocation of the repaid amount under the Loan Agreement (a)) and an incorrect application of the Clause 4 of the Loan Agreement (b)).

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<sup>854</sup> Exhibit CL-19, Loan Agreement entered into by Claimant and JSE on 23 June 2008.

<sup>855</sup> Statement of Claim, para. 229.

**a) Claimant's Allocation of the Amount Repaid**

872. By way of background, it is undisputed that on 10 November 2009 and following the repayment of the Penalty by the administrative authorities, JSE repaid PLN 450,049,810 (*i.e.* the Capital Sum under the Loan Agreement plus an additional PLN 500) to Claimant in accordance with the Loan Agreement.<sup>856</sup>
873. The Parties are in dispute, however, as to whether Claimant's allocation of the amount repaid by JSE under the Loan Agreement is correct. Claimant submits that the common law Clayton rule, as codified in Articles 59-61 of the Cypriot Contract Law, was applied to the repayment of the loan so that PLN 75,372,618.98 of the principal remained outstanding.<sup>857</sup>
874. Respondent, on the other hand, objects to this allocation on the basis of the interpretation of the Clayton rule under Cypriot law and inaction of JSE's management under Polish law.<sup>858</sup> In particular, Respondent contends that it cannot be held responsible for JSE's management inaction that resulted in a debt allocation leaving over PLN 75 million of unpaid principal under the Loan Agreement, when the unpaid capital of the Penalty would be approximately PLN 64 million (plus approximately PLN 11 000 000 in interest) if the repayment had been allocated in accordance with Article 78a of the Tax Ordinance, which governs the repayment from the MRA to JSE.<sup>859</sup>
875. The Tribunal is not convinced by Respondent's argument that Claimant's allocation of the repaid amount under the Loan Agreement was improper. Rather, the Tribunal finds that Claimant's method of allocation was, in principle, in line with both the terms of the Loan Agreement and the principles of Cypriot law as applicable to the Loan Agreement pursuant to its Clause 7.1.

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<sup>856</sup> **Exhibit C-84**, Promulgations of the Minister of Finances on the rate of interest on late arrears, the reduced rate of interest on late arrears and the increased rate of interest on late arrears, dated 27 June 2008 through 4 January 2016.

<sup>857</sup> Statement of Claim, para. 218.

<sup>858</sup> Statement of Defence, paras. 235-241.

<sup>859</sup> Rejoinder, paras. 245-248; Hearing Transcript Day 1, 101:2 – 102:3.

**b) Clause 4 of the Loan Agreement**

876. The Parties are also in dispute as to which rate of interest should be used to calculate Claimant's damages, in particular whether Clause 4.2 or Clause 4.4 of the Loan Agreement should apply.

877. Clause 4 of the Loan Agreement reads as follows:

*"4. Interest*

*4.1 As the Lender has agreed to support the Borrower in the course of the Litigation process, the method of the Interest rate calculation will depend on the outcome of the Litigation.*

*4.2 If the Borrower receives the refund of the Penalty imposed by the Material Reserve Agency together with the interest accrued in accordance with the Polish Law, the Interest due for the entire loan period on the Capital Sum shall be accrued at the same rate as the interest received by the Borrower from the Material Reserve Agency on the Penalty amount. Interest on the Capital Sum for the period preceding the refund shall be accrued on the day of receiving the refund.*

*4.3 In the case described in paragraph 4.2 above, the Interest accrued at the rate stipulated therein on the Capital Sum shall be payable by the Borrower to the Lender within 5 working days from the day the interest on the Penalty is received on the Borrower's bank account.*

*4.4 If as a result of the Litigation the Borrower does not receive the refund of the Penalty or any interest due in line with the Polish Law on the Penalty amount, the Interest applicable to the Capital Sum under this Agreement payable to the Lender shall calculated [sic] at the rate of LIBOR 3 months for USD + 1.25 %. In this case, Interest for the period preceding the day of receiving the final court or administrative decision ending the Litigation shall*



*accrue on the day of receiving such final decision.*

*4.5 If required by the Polish Law, the Borrower shall collect the withholding tax due on the payments made to the Lender and as a result, net amounts of payment shall be paid by the Borrower to the Lender. The Parties will make their best endeavours to have the taxes recovered and refunded to the Lender."*<sup>860</sup>

878. With reference to Clause 4.1 of the Loan Agreement, it is clear that the parties to the Loan Agreement intended for the applicable interest rate to "*depend on the outcome of the Litigation*".

879. The term Litigation as referred to Clause 4 of the Loan Agreement is defined in its Clause 1 as follows:

*"[...] legal proceedings undertaken by the Borrower before the appropriate authorities in Poland aimed at cancelling the Penalty imposed by the Material Reserve Agency as well as claiming back the Penalty amount together with the interest calculated on the penalty amount in line with the Polish Law. This covers all proceedings and means of appeal at all instances that are available to the Borrower under the Polish laws."*<sup>861</sup>

880. In the present proceedings, it is undisputed that the Penalty imposed on JSE by the MRA was revoked by way of the PAC's Judgement of 23 December 2008 (upheld by the SAC in its Judgment of 20 October 2009) and that, on 9 November 2009, the MRA returned a sum equal to the amount of the Penalty to JSE (*see* Sections E.IV. and E.V. above).

881. In its Application to the MRA for the recognition of overpayment of a financial penalty dated 10 November 2010, JSE claimed under Article 75 §1 in conjunction with Article 2 §2 of the Tax Ordinance that the overpayment of the Penalty paid by JSE in the amount of PLN 64,636,447.36 be recognised, including interest in an amount equal to the amount

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<sup>860</sup> **Exhibit CL-19**, Loan Agreement concluded on 23 June 2008 and the amendment of 6 October 2009, Clause 4.

<sup>861</sup> **Exhibit CL-19**, Loan Agreement concluded on 23 June 2008 and the amendment of 6 October 2009, Clause 1.

of interest charged with regard to tax arrears:

- on the amount of PLN 64,352,048.42, from 1 July 2008 until the date of refund of the overpayment;
- on the amount of PLN 255,113.48, from 2 July 2008 until the date of refund of the overpayment; and
- on the amount of PLN 29,285.46, from 12 July 2008 until the date of refund of the overpayment<sup>862</sup>.

882. The Tribunal is of the view that Clause 4 of the Loan Agreement shows that the parties to this Agreement were guided by the principle that the JSE had to pay the interest on the loan amount to Claimant at the rate of the Tax Ordinance only if it ultimately received the refund of the interest by the Respondent on such rate.

883. It is undisputed that JSE has, at the date of this Final Award, not received any further repayment from the MRA as a result of its Application.

884. The Tribunal further notes that the outcome of the Litigation for JSE is still unknown after more than ten years of proceedings and is not to be expected anytime soon considering that JSE's Application of 10 November 2010 was returned to the MRA for re-examination following the SAC's 3<sup>rd</sup> Judgement rendered on 15 March 2022. The President of the MRA has since extended the deadline for settling JSE's case three times, with the current deadline set for 31 January 2023 pursuant to the most recent notice issued on 30 November 2022.<sup>863</sup>

885. Consequently, the conditions required for the application of either Clause 4.2 or Clause 4.4 of the Loan Agreement, respectively, have not materialised as of the date of this Final Award.

886. On the other hand, the Tribunal has found above that it is far from being certain whether a final result of the Litigation will ever occur given the endless loop of court and

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<sup>862</sup> **Exhibit C-39**, Motion for declaration and repayment of the overpayment of the penalty, dated 10 November 2010.

<sup>863</sup> **Exhibit C-120**, Ruling No. BPIzo.520.117.2022/914, dated 25 July 2022; **Exhibit C-122**, Ruling No. BPI – 8P/22 (BPIzo.520.117.2022/1350), dated 30 November 2022.

administrative proceedings regarding JSE's Application. It is for this precise reason that the Tribunal has concluded that the Respondent was in breach of the ECT and that it must compensate Claimant for its loss, *i.e.* to pay to Claimant the interest due under the Loan Agreement. In other words, Claimant will not receive the interest as a result of the Litigation, but because of the Respondent's ECT breaches.

887. Under these circumstances, the Tribunal is of the view that, for the purposes of being compensated for the ECT breaches by Respondent, Claimant must be treated as if it had received the interest under Clause 4.2 of the Loan Agreement.
888. Consequently, the Tribunal considers that the interest rate for the calculation of Claimant's damages should be determined with reference to the rate of interest on the refund of the Penalty applicable if "*received by the Borrower from the Material Reserve Agency on the Penalty amount*" as specified in Clause 4.2 of the Loan Agreement. It is undisputed that this would be the interest rate applicable to tax arrears under the Tax Ordinance and as derived from Announcements of the Minister of Finance.<sup>864</sup> The Tribunal further notes that Claimant has submitted these Announcements of the Minister of Finance for 27 June 2008 through 4 January 2016, which were not disputed by Respondent.<sup>865</sup>

**c) Respondent's Alternative Calculation**

889. Respondent has argued that the ceiling of its responsibility should be the amount of the public law receivable payable to JSE and offered an alternative calculation of interest owed on the Penalty under the Tax Ordinance amounting to PLN 145 094 420.20.<sup>866</sup> The Tribunal agrees with this approach, which is congruent with the finding of the Tribunal above that the interest rate applied to calculate Claimant's damages should be determined according to the claims contained in JSE's Application rather than the terms of the Loan Agreement.
890. In its Post-Hearing Brief, Claimant submitted that, although it saw no legal grounds for

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<sup>864</sup> Respondent's Post-Hearing Brief, para. 132.

<sup>865</sup> **Exhibit C-84**, Promulgations of the Minister of Finances on the rate of interest on late arrears, the reduced rate of interest on late arrears and the increased rate of interest on late arrears, dated 27 June 2008 through 4 January 2016.

<sup>866</sup> Respondent's Post-Hearing Brief, paras. 137-138; Respondent Opening Presentation, slide 77; Hearing Transcript, Day 1, 101:14-18.

having the alternative calculation accepted and that it considered this amount unverifiable, it was amenable to accepting this alternative amount, thereby reducing the principal amount of its claim.<sup>867</sup>

891. Respondent's alternative calculation is based on its contention that the allocation of the amount repaid under the Loan Agreement in accordance with Article 78a of the Tax Ordinance would have left an amount of PLN 64,636,447.36 unpaid.<sup>868</sup> The Tribunal notes that this is the same amount referenced as the overpayment in JSE's Application of 10 November 2010 and that it is common ground between the Parties that the payment of the amount paid to JSE by the MRA was governed by Article 78a of the Tax Ordinance.

892. As stated above, Claimant has accepted Respondent's alternative calculation based on this figure. In any event, however, the Tribunal considers it appropriate to limit the base amount for the calculation of Claimant's damages to reflect the public law receivable and the allocation of the repaid amount in accordance with the Tax Ordinance, *i.e.* to PLN 64,636,447.36, as presented by Respondent in its alternative calculation.

## **2. Relief Owed**

893. On the basis of the foregoing, the Tribunal deems it appropriate to accept Respondent's alternative calculation, and the base figure underlying this calculation, and rules that Claimant is entitled to compensation for Respondent's breach of Article 10(1) and Article 10(12) of the ECT in the amount of:

- i. PLN 145,094,420.20 for damages, which includes interest at the rate applied to tax arrears in accordance with the Polish Tax Ordinance up until the date of the Statement of Claim, plus
- ii. interest accrued on the amount of PLN 64,636,447.36 at the rate applied to tax arrears in accordance with the Polish Tax Ordinance from 16 May 2020 until the day on which the amount in i. above is paid to the Claimant.

894. As discussed above in Section G.III.5. above, although the risk of double recovery in this

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<sup>867</sup> Claimant's Post-Hearing Brief, para. 94.

<sup>868</sup> Rejoinder, para. 246.

case cannot be excluded, the Tribunal is satisfied that this risk is insignificant and can in any event be mitigated by way of this Final Award, as reflected in the Operative Part in Section K. below.

895. In this regard, Claimant has suggested that the Tribunal should address the risk of double recovery into its decision in a way similar to *Manchester v. Poland*, by designing its ruling – except for the decision on costs – as follows:

*"For the reasons set out herein, the Tribunal has decided:*

*(a) order the Respondent to pay the Claimant the aggregate amount of PLN 152,862,917.25;*

*(b) order the Respondent to pay the Claimant interest accrued on the amount of 75,372,118.98, at the rate applied to tax arrears in accordance with the Polish Tax Ordinance, as from time to time announced by the Polish Minister of Finances, from 16 May 2020 until the day on which the amount stipulated in (a) is paid to the Claimant;*

*(c) order the Claimant to make JSE refrain from pursuing its claim for the repayment of the outstanding part of the penalty with interest as described in the letter dated 10 November 2010, provided that the amounts stipulated in (a) and (b) are paid to the Claimant within six months from the date of this award;*

*(d) order the Claimant to make JSE withdraw its claim for the repayment of the outstanding part of the penalty with interest as described in the letter dated 10 November 2010 within three days from the day on which the amounts stipulated in (a) and (b) are paid to the Claimant."*<sup>869</sup>

896. The Tribunal is of the view that this suggestion will mitigate any risk of double recovery in the case at hand and will thus incorporate, with slight modification, the mechanism put

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<sup>869</sup> Claimant's Post-Hearing Brief, paras. 87-88.

forward by Claimant in literas (c) and (d) above into its decision.

897. As a final remark in this regard, the Tribunal expects that JSE and Claimant would in any event not attempt to obtain double recovery from Respondent.

## **J. COSTS**

### **I. Claimant's Position**

898. In its Statement of Costs dated 1 October 2021, Claimant originally submitted that it has incurred costs in connection with this arbitration in the amount of EUR 469,343.69, which consist of (i) arbitration costs pursuant to Article 49(1) of the 2017 SCC Rules (*i.e.* the fees of the Tribunal, the SCC's administrative fee and the expenses of the Tribunal); and (ii) legal fees, expert witness costs and other expenses.<sup>870</sup>
899. As to its legal fees, Claimant submits that Claimant's counsel spent 773.17 hours (based on hourly rates of EUR 180/h) on preparatory work, drafting Claimant's submissions, reviewing Respondent's submissions, and preparing for and taking part in the Hearing.<sup>871</sup>
900. As to its expert witness cost, Claimant submits that it retained one legal expert, Professor Wierzbowski, who issued two invoices for the legal opinion and for the participation in the Hearing in the amounts of EUR 6,287.76 and EUR 3,160.39, respectively.<sup>872</sup>
901. According to Claimant, due to the circumstances caused by the COVID-19 pandemic, it incurred additional costs related to the organisation of the Hearing (*i.e.* EUR 11,828.43) as part of the arbitration costs indicated above.<sup>873</sup>
902. Further, Claimant contends that its costs have been denominated in EUR, though some of them had been incurred in PLN and revaluated in accordance with the appropriate exchange rates as applicable on the relevant dates of payment.<sup>874</sup>
903. As requested by the Tribunal, Claimant submitted its Statement of Additional Costs on 9 December 2022, covering the additional costs incurred after the submission of the Statement of Costs on 1 October 2021, as follows:

- Additional legal fees in the amount of EUR 12,346.20, and

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<sup>870</sup> Claimant's Statement of Costs, dated 1 October 2021, para. 5.

<sup>871</sup> Claimant's Statement of Costs dated 1 October 2021, para. 8.

<sup>872</sup> Claimant's Statement of Costs dated 1 October 2021, para. 11.

<sup>873</sup> Claimant's Statement of Costs dated 1 October 2021, para. 6.

<sup>874</sup> Claimant's Statement of Costs dated 1 October 2021, para. 3.

- Additional other expenses in the amount of EUR 934.54 for additional printing and translations.<sup>875</sup>

904. Further, Claimant submitted in its Comments to New Evidence dated 22 December 2022, covering the additional costs incurred after the submission of the Statement of Additional Costs on 9 December 2022, as follows:

- Additional legal fees in the amount of EUR 4,390.20, and
- Additional other expenses in the amount of EUR 213.90 for additional printing and translations.<sup>876</sup>

905. Claimant has provided the following breakdown of the total costs incurred in connection with these proceedings as of 22 December 2022:<sup>877</sup>

ARBITRATION COSTS	
Advance payments	EUR 274,900.39
Cost of the Hearing	EUR 11,828.43
CLAIMANT'S LEGAL COSTS	
Drzewiecki, Tomaszek i Wspólnicy sp. j. / Andersen Tax & Legal Matyka i Wspólnicy sp. k.	EUR 155,907.00
COSTS OF EXPERTS	
Professor Marek Wierzbowski	EUR 9,448.15
OTHER COSTS	
Printing, translation and postal fees	EUR 35,144.56
<b>TOTAL</b>	<b>EUR 487,228.53</b>

906. On 5 December 2022, the SCC confirmed that Claimant had made an additional advance payment to the SCC for the amount of EUR 14,750. Consequently, Claimant's total share

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<sup>875</sup> Claimant's Statement of Additional Costs dated 9 December 2022, paras. 6-9.

<sup>876</sup> Claimant's Comments to New Evidence dated 22 December 2022, paras. 38-40.

<sup>877</sup> Claimant's Comments to New Evidence dated 22 December 2022, para. 41.



of the SCC cost of the arbitration amounts to EUR 289,650.39.

907. Claimant has requested the Tribunal to order Respondent to reimburse Claimant for all the arbitration costs, legal fees and other expenses incurred by Claimant in this arbitration,<sup>878</sup> plus interest accrued at the standard rate of 5% per annum, until the day on which such amounts are paid to Claimant, if they are not paid within seven days from the date of the notification of the Award.<sup>879</sup>
908. Claimant contends that Respondent's alleged cost of legal representation by the General Counsel to the Republic of Poland (the "**GCRP**"), *i.e.* calculated according to an hourly rate of PLN 300/h to the time the GCRP's lawyers spent on the case, was not caused by this arbitration because it would have been incurred regardless of the arbitration.<sup>880</sup> According to Claimant, the GCRP's lawyers are being paid monthly salaries which do not depend on the time they spend on a particular case and they are not remunerated on the basis of hourly rates.<sup>881</sup>

## **II. Respondent's Position**

909. On 1 October 2021, Respondent submitted its revised Statement of Costs in accordance with Procedural Order No. 10, indicating that the costs and expenses incurred by Respondent in this arbitration amount to (i) PLN 355,945.31; (ii) EUR 274,750.00; and (iii) PLN 802,288.19,<sup>882</sup> and requested the Tribunal to order Claimant to bear all cost of the arbitration and other costs incurred by Respondent, including interest from the date of the Award to the date of payment.<sup>883</sup>
910. Respondent originally provided the following breakdown of its costs, divided in cost incurred by the Ministry of Climate and Environment in the amount of EUR 274,750.00 and PLN 355,945.31 and by the General Counsel to the Republic of Poland in the amount

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<sup>878</sup> Claimant's Statement of Costs dated 1 October 2021, para. 2; Claimant's Statement of Additional Costs dated 9 December 2022, paras. 2-3.

<sup>879</sup> Statement of Claim, para. 229; Reply para. 151(d).

<sup>880</sup> Claimant's Statement of Costs dated 1 October 2021, paras. 16, 20.

<sup>881</sup> Claimant's Statement of Costs dated 1 October 2021, para. 17.

<sup>882</sup> Respondent's Statement of Costs dated 1 October 2021, para. 9.

<sup>883</sup> Respondent's Statement of Costs dated 1 October 2021, paras. 2-3.

of PLN 802,288.19.<sup>884</sup>

911. In its Updated Statement of Costs dated 9 December 2022, requested by the Tribunal to cover the additional costs incurred in connection with these proceedings since the Statement of Costs dated 1 October 2021, Respondent updated its breakdown of costs to EUR 304,000.00 and PLN 355,945.41 in expenditures for the Ministry of Climate and Environment and PLN 806,288.19 in costs incurred by the General Counsel to the Republic of Poland.<sup>885</sup>

912. In its Re-Updated Statement of Costs dated 22 December 2022, requested by the Tribunal to cover the additional costs incurred in connection with these proceedings since the Statement of Costs dated 9 December 2022, Respondent updated its breakdown of costs as follows:<sup>886</sup>

(1) Expenditures of the Ministry of Climate and Environment: EUR 289,500.00 and PLN 355,945.31, including in particular:<sup>887</sup>

- The Advances on Costs: **EUR 289,500.00**,
- The cost of experts' fees: **PLN 259,933.00 (Polish experts' fees: PLN 176,100.00 – experts' reports, PLN 18,892.00 – attendance at the Hearing; S. Pavlou's fees: EUR 14,500.00)**,
- The cost of the translation of documents: **PLN 3,731.82**,
- The cost of Hearing arrangements in June and July 2021: **PLN 92,280.49 (PLN 16,605.00 – interpretation, court reporter – PLN 75,675.49)**.

(2) Cost incurred by the General Counsel to the Republic of Poland: PLN 808,288.19,

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<sup>884</sup> Respondent's Statement of Costs dated 1 October 2021, paras. 2-3.

<sup>885</sup> Respondent's Updated Statement of Costs dated 9 December 2022, paras. 6-7.

<sup>886</sup> Respondent's Re-Updated Statement on Costs dated 22 December 2022, paras. 45-46.

<sup>887</sup> Respondent's Re-Updated Statement on Costs dated 22 December 2022, para. 45.

including in particular:<sup>888</sup>

- The cost of catering for the PGRP's legal team, witnesses, and experts during the Hearing in June and July 2021: **PLN 2,462.00,**
- The cost of printing the Respondent's written submissions: **PLN 4,676.31,**
- The cost of posting the Respondent's written submissions: **PLN 1,049.88,**
- The cost of the PGRP's legal team's fees (lawyers' and translator's work), presented in more detail in the table below: **PLN 800,100.00.**

913. Respondent further provided a table with a breakdown of the General Counsel to the Republic of Poland's legal team fees (*i.e.* PLN 800,100.00), as follows:<sup>889</sup>

COST OF LEGAL REPRESENTATION PROVIDED BY THE GENERAL COUNSEL TO THE REPUBLIC OF POLAND			
No.	Type of service	Number of hours	Cost
1.	Work on the Statement of Defence	986 hrs	PLN 295,800
2.	Work on the Production of Documents	105 hrs	PLN 31,500
3.	Work on the Statement of Rejoinder	738 hrs	PLN 221,400
4.	Pre-Hearing preparations	428 hrs	PLN 128,400
5.	Participation in the Hearing	192 hrs	PLN 57,600
6.	Work on the Post-Hearing Brief and Statement of Costs	188 hrs	PLN 56,400
7.	Work between 1 October 2021 and 22 December 2022	30 hrs	PLN 9,000
<b>TOTAL</b>		<b>2,667 hrs</b>	<b>PLN 800,100</b>

914. According to its Updated Statement of Costs dated 9 December 2022, Respondent's total

<sup>888</sup> Respondent's Re-Updated Statement on Costs dated 22 December 2022, para. 46.

<sup>889</sup> Respondent's Re-Updated Statement on Costs dated 22 December 2022, para. 46.

cost incurred in this arbitration are as follows:<sup>890</sup>

Costs of the Ministry of Climate and Environment	Costs of the General Counsel to the Republic of Poland
PLN 355,945.31	PLN 808,288.19
EUR 289,500.00	

915. Respondent submits that the payments made in currencies other than PLN (*i.e.* EUR and GBP) were translated into PLN, using the rates of exchange on the dates the payments were actually made.<sup>891</sup>

916. Respondent requests the Tribunal to order that the first part of the costs described in point (1) above, *i.e.* PLN 355,945.31 and EUR 289,500.00 be paid by Claimant in favour of Respondent represented by the Ministry of Climate and Environment; and the second part of the costs described in point (2) above, *i.e.* PLN 808,288.19, be paid by Claimant in favour of Respondent represented by the General Counsel to the Republic of Poland.<sup>892</sup>

### **III. Costs of the Arbitration Determined by the SCC**

917. Pursuant to its letter of 30 November 2022, the SCC has determined the Costs of the Arbitration as follows:

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<sup>890</sup> Respondent's Re-Updated Statement on Costs dated 22 December 2022, para. 47.

<sup>891</sup> Respondent's Statement of Costs dated 1 October 2021, para. 4.

<sup>892</sup> Respondent's Re-Updated Statement on Costs dated 22 December 2022, para. 48.

Klaus Michael Sachs		
Fee	EUR 189 459	plus any VAT*
Expenses	EUR 80	plus any VAT*
Juliet Blanch		
Fee	EUR 113 675	plus any VAT*
Expenses	GBP 40	plus any VAT*
Laurence Boisson de Chazournes		
Fee	EUR 113 675	plus any VAT*
Expenses	CHF 57	plus any VAT*
Stockholm Chamber of Commerce		
Administrative fee	EUR 53 515	plus any VAT*

918. The Tribunal notes that Value Added Tax ("VAT") is applicable at 19% to the costs and expenses of Prof. Sachs, as well as at 25% to the administrative fee of the SCC.

#### **IV. Tribunal's Analysis**

919. Article 50 of the SCC Rules provides as follows:

*"Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, at the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances."*

920. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including legal fees and other costs, between the Parties as it deems appropriate.

921. In accordance with Article 50 of the SCC Rules, the Tribunal will consider the outcome of the case as the primary factor to decide costs, with the conduct of the Parties as a relevant circumstance under which the Tribunal could adjust its decision on costs.

922. The Tribunal will thus apply the principle that costs follow the event to the two main categories of costs, namely (i) the Costs of the Arbitration determined by the SCC, and

(ii) the legal fees and expenses incurred by the Parties.

923. Following this approach, the Tribunal notes the following:

- i. The SCC Board rejected Respondent's request to dismiss the case for manifest lack of jurisdiction under Article 12(i) of the SCC Rules;
- ii. Claimant has prevailed in all the jurisdictional objections raised by Respondent;
- iii. Claimant has prevailed on the merits of the dispute; and
- iv. The Tribunal has almost fully awarded the quantum of damages sought by Claimant.

924. In the Tribunal's view, the legal fees and other costs incurred by Claimant are reasonable, particularly in light of the legal and factual complexity of the present dispute.

925. Considering the foregoing and exercising its discretion, the Tribunal concludes that Respondent shall bear the Costs of the Arbitration in full, as well as Claimant's legal fees and expenses in full.

926. Respondent thus has to reimburse to Claimant its share of the total advance on the Costs of the Arbitration, totalling EUR 289,650.39.

927. Pursuant to Section 41 of the Swedish Arbitration Act, a party may apply to amend the award regarding the decision on the fees of the arbitrators. Such application should be filed with the Stockholm District Court within two months from the date when the party received this Final Award.

928. Further, Respondent shall reimburse to Claimant the legal fees and other expenses incurred by Claimant in this arbitration, totalling EUR 212,328.14.

929. Finally, the Tribunal grants Claimant's request for Respondent to pay interest on those amounts at the rate of 5% per annum, until the day on which such amounts are paid to Claimant, if they are not paid within 21 days from the date of the notification of the Award.

## **K. OPERATIVE PART**

930. By way of this **FINAL AWARD** and for the reasons referred to above, the Tribunal:

- I. REJECTS Respondent's objections to the jurisdiction of this Tribunal and the admissibility of the claims in this arbitration;**
- II. DECLARES that Respondent has breached Article 10(1) and Article 10(12) of the ECT with respect to Claimant's Investment;**
- III. ORDERS Respondent to pay Claimant the aggregate amount of PLN 145,094,420.20 as a result of the breaches determined in II. above;**
- IV. ORDERS Respondent to pay Claimant simple interest accrued on the amount of PLN 64,636,447.36 at the rate applied to tax arrears in accordance with the Polish Tax Ordinance, as announced by the Polish Minister of Finances, from 16 May 2020 until the day of full and final payment to Claimant of this amount and the principal amounts owed pursuant to III. above;**
- V. ORDERS Claimant to instruct its Polish subsidiary, J&S Energy S.A., to refrain from pursuing its claim for the repayment of the outstanding part of the Penalty with interest as contained in its Application to the Material Reserves Agency in Poland for the recognition of the overpayment of a financial penalty dated 10 November 2010 and submitted as Exhibit C-39 in this arbitration provided that the amounts stipulated in III. and IV. above are paid to Claimant within six months from the date of this Final Award;**
- VI. ORDERS Claimant to instruct its Polish subsidiary, J&S Energy S.A., to withdraw its claim for the repayment of the outstanding part of the Penalty with interest as contained in its Application to the Material Reserves Agency in Poland for the recognition of the overpayment of a financial penalty dated 10 November 2010 and submitted as Exhibit C-39 in this arbitration within one week from the day on which the amounts stipulated in III. and IV. above are paid to Claimant;**

**VII. DECIDES that the Parties are jointly and severally liable for the Costs of the Arbitration, which have been set as follows:**

**The Fee of Prof. Dr. Sachs amounts to EUR 189,459 and compensation for EUR 80 expenses, in total EUR 189,539, plus VAT of EUR 36,012.41;**

**The Fee of Ms. Blanch amounts to EUR 113,675 and compensation for GBP 40 expenses;**

**The Fee of Prof. Dr. Boisson de Chazournes amounts to EUR 113,675 and compensation for CHF 57 expenses;**

**The Administrative Fee of the SCC is EUR 53,515 plus VAT of EUR 13,378.75.**

**As between the Parties, Respondent is liable to pay the entire Costs of the Arbitration. Therefore, the Tribunal ORDERS Respondent to reimburse Claimant for the share of the Costs of the Arbitration advanced by Claimant amounting to EUR 289,650.39;**

**VIII. ORDERS Respondent to reimburse Claimant for the legal expenses and other costs incurred in this arbitration by Claimant amounting to EUR 212,328.14;**

**IX. ORDERS Respondent to pay Claimant simple interest on the amounts stipulated in VII. and VIII. above at the rate of 5% per annum until the day on which such amounts are paid to the Claimant, if they are not paid within 21 days from the date of the notification of this Final Award;**

**X. NOTES that a party may apply to amend the award regarding the decision on the fees of the arbitrators. Such application should be filed with the Stockholm District Court within two months from the date when the party received this Final Award: and**

**XI. DISMISSES all other claims and requests raised by the Parties.**

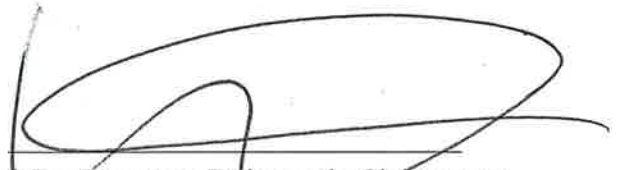


THE TRIBUNAL



Ms. Juliet Blanch, Co-Arbitrator  
Co-Arbitrator

Date: 29 December 2022



Prof. Dr. Laurence Boisson de Chazournes  
Co-Arbitrator

Date: 29 December 2022



Prof. Dr. Klaus Sachs  
Chairperson

Date: 29 December 2022

Place of Arbitration: Stockholm, Sweden