INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)

In the arbitration proceeding between

DAVID MINNOTTE AND ROBERT LEWIS

Claimants

and

REPUBLIC OF POLAND

Respondent

ICSID Case No. ARB(AF)/10/1

AWARD

Members of the Tribunal
Professor Vaughan Lowe, QC, President
Professor Maurice Mendelson, QC, Arbitrator
Professor Eduardo Silva Romero, Arbitrator

Secretary of the Tribunal
Ms Frauke Nitschke

Date of dispatch to the Parties: 16 May 2014

REPRESENTATION OF THE PARTIES

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I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") under the Additional Facility Rules on the basis of the Treaty between the United States of America and the Republic of Poland concerning Business and Economic Relations, signed 21 March 1990 (the "BIT", "U.S.-Poland BIT" or "Treaty"), which entered into force on 6 August 1994 (the text of the BIT is attached to this Award as Annex A). The dispute relates to the construction and intended operation of blood plasma fractionation facilities in Poland.

2. The Claimants are Mr David Minnotte and Mr Robert Lewis (hereinafter the "Claimants"), who are both U.S. nationals.

3. The Respondent is the Republic of Poland (hereinafter "Poland" or the "Respondent").

4. The Claimants and the Respondent are hereinafter collectively referred to as the "parties." The parties' respective representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On 16 July 2010, ICSID received a request for arbitration from Mr David Minnotte, Mr Robert Lewis, and Plasma Fractionation Laboratory, LLP ("PFL") against the Republic of Poland (the "Request"),[1] invoking the ICSID dispute settlement provision for Additional Facility arbitration contained in Article IX of the BIT. Subsequently, by letter of 4 August 2010, the parties notified the Centre that they had agreed to suspend the registration of the Request. On 2 September 2010, the Claimants informed ICSID that they did not wish to further suspend the registration process of their Request.

6. By letters of 7 and 13 September 2010, the requesting parties supplemented their 16 July Request, informing the Centre *inter alia* that they withdrew the Request for arbitration with regard to PFL.

[1] At the time, the Request was filed by PFL and Mr David Minnotte, with Mr Minnotte acting as attorney-in-fact for Mr Robert Lewis. It was later confirmed that Mr Lewis himself wished to be a Claimant in this arbitration. See Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, pp. 3-4.

7. On 14 September 2010, the Secretary-General of ICSID approved access to the ICSID Additional Facility and registered the Request, as amended and supplemented, in accordance with Articles 4 and 5 of the ICSID Arbitration (Additional Facility) Rules. On the same day, the Secretary-General notified the parties of the registration, and invited them to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Article 5(c) and Chapter III of the ICSID Arbitration (Additional Facility) Rules.

8. By letter of 14 January 2011, the Claimants requested that the Tribunal be constituted in accordance with Article 9 of the ICSID Arbitration (Additional Facility) Rules. Pursuant to that Article, the Tribunal is to consist of three arbitrators, one arbitrator appointed by each party and the third, and presiding arbitrator, appointed by agreement of the parties.

9. By the same letter, the Claimants appointed Professor Maurice Mendelson QC, a British national, as arbitrator, and Professor Mendelson subsequently accepted his appointment. Following appointment by the Respondent, Professor Eduardo Silva-Romero, a dual national of Colombia and France, accepted his appointment as arbitrator on 14 February 2011. Further to an agreement reached by the parties, Professor Vaughan Lowe QC, a British national, was appointed as President of the Tribunal, and Professor Lowe accepted this appointment on 25 February 2011.

10. On the same day, *i.e.*, on 25 February 2011, the Acting Secretary-General, in accordance with Article 13(1) of the ICSID Arbitration (Additional Facility) Rules, notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms Frauke Nitschke, Legal Counsel at ICSID, was appointed to serve as the Secretary of the Tribunal.

11. The Tribunal held a first session with the parties on 14 April 2011 in London. The parties confirmed at the session that the Tribunal had been properly constituted, and agreed *inter alia* that the applicable rules would be the 2006 Arbitration (Additional Facility) Rules in effect from 10 April 2006, and that the procedural language would be English. It was further decided at the session that the legal seat of proceedings would be England and that English law was the governing law of this proceeding. Absent an agreement by the parties, the Tribunal further determined a schedule for the parties' written pleadings, including

production of documents. With regard to confidentiality, it was further agreed that the content of the proceedings was to be kept confidential, but may be disclosed to the extent that the parties so agree. The Tribunal was further asked to rule on the issue of unilateral disclosure of information by a party of any content of the proceedings.

12. On 26 September 2011, the Claimants filed a request for provisional measures seeking an interim order from the Tribunal directing (i) that the Respondent suspend criminal proceedings instituted against Mr David Minnotte and Mr Robert Lewis until after the Final Award in this proceeding has been rendered; (ii) that the Respondent take immediate steps to ensure that no arrest warrants are issued against Mr David Minnotte and Mr Robert Lewis that could interfere with the conduct of this proceeding; and (iii) that the Respondent confirm in writing the ability of Mr Zygmunt Nizioł, a former business partner of the Claimants, to attend the oral procedure in this case without fear of arrest or violation of the terms of his bail..

13. On 14 October 2011, the Respondent filed observations on the Claimants' request for provisional measures. Each party filed a further written submission on this request on 4 and 18 November 2011, respectively. A hearing on provisional measures was held by video-conference on 23 January 2012. Besides the Members of the Tribunal, who jointly participated in the hearing from London, and the Secretary of the Tribunal, the hearing was attended by Claimants' counsel Messrs David Baron and Joseph Matthews (participating from ICSID's office in Washington, D.C.), and by Respondent's counsel Dr Sabine Konrad (participating from Frankfurt), and Mr Maciej Jamka, Dr Wojciech Sadowski, and Ms Katarzyna Szostak-Tebbens (jointly participating from Warsaw).

14. On 23 February 2012, the Tribunal issued a decision on provisional measures and Procedural Order No. 1 concerning the organization of the proceeding and specifically the hearing of evidence. The Tribunal rejected requests for an Interim Order suspending criminal proceedings and arrest warrants in respect of the Claimants and Mr Nizioł regarding alleged offences which the Claimants consider to arise out of and form part of their dispute with the Republic of Poland. The Tribunal decided, however, that it would, *inter alia*, organize its proceedings in such a way that all parties, including Mr Minnotte

and Mr Lewis, have the opportunity to participate effectively in all sessions held in these proceedings.

15. In accordance with the Summary Minutes and further to an extension granted by the Tribunal, the Claimants filed their memorial on the merits on 7 November 2011.

16. On 7 May 2012, the Respondent filed its counter-memorial on the merits, a request for bifurcation and objections to jurisdiction and admissibility.

17. Following observations by the Claimants on the Respondent's request for bifurcation of 7 May 2012, the Tribunal issued its decision on this matter on 5 June 2012, deciding to join the Respondent's objections to jurisdiction and admissibility to the merits of the dispute.

18. By letters of 15 June and 18 July 2012, and following an invitation by the Tribunal, the parties agreed on the procedural calendar for the parties' further written pleadings, and subsequently reached an agreement on dates for the oral procedure. However, the parties were unable to agree on the venue for the hearing on jurisdiction and the merits. In their correspondence, the Claimants indicated that given the criminal proceedings instituted in Poland against Messrs Minnotte and Lewis, they feared *inter alia* possible arrest, at the instance of a Polish prosecutor, in the event that the hearing were to be held inside the area of the European Union.

19. Following several exchanges between the parties and the Tribunal on this matter during the months of June and October 2012, the Tribunal decided on 23 November 2012 that the hearing was to take place in Istanbul, Turkey during the week of 15 April 2013.

20. On 11 September 2012, the Claimants filed a request for production of documents, which the Claimants subsequently amended on 25 September 2012. Following written observations by the Respondent, the Tribunal decided on the Claimants' requests in its Procedural Order No. 2 of 2 November 2012.

21. On 30 November and 18 December 2012, each party filed a written submission concerning certain remaining document production matters. Following a telephone conference held

with the parties on 10 January 2013, the Tribunal issued Procedural Order No. 3 dated 14 January 2013 concerning production of documents.

22. On 10 April 2013, the Tribunal held a pre-hearing organizational meeting with the parties by telephone conference to discuss certain logistical questions pertaining to the hearing on jurisdiction and the merits.

23. The hearing on jurisdiction and the merits was held in Istanbul from 15 April to 17 April 2013. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

Attending on behalf of the Claimants:

Mr David Minnotte;
Mr Robert Lewis;
Mr Joseph M. Matthews, Colson Hicks Eidson, P.A.;
Mr David Baron, Greenberg Traurig LLP;
Mr Pawel Tatarczak, Greenberg Traurig LLP;
Mr Antoni Libiszowski, Greenberg Traurig LLP; and
Mr Zygmunt Nizioł, PFL.

Attending on behalf of the Respondent:

Ms Katarzyna Szostak-Tebbens, State Treasury Solicitors' Office;
Mr Maciej Jamka, K&L Gates Jamka Sp.K.;
Dr Wojciech Sadowski, K&L Gates Jamka Sp.K.; and
Ms Anna Leszczyńska, K&L Gates Jamka Sp.K.

In the course of the hearing, Mr Robert Lewis, Mr David Minnotte, and Mr Zygmut Nizioł provided oral witness testimony on behalf of the Claimants.

24. Following the hearing, the parties filed a joint proposed list of points for determination by the Tribunal on 28 May 2013 (the "List", which is attached to this Award as Annex B). The parties further filed an agreed chronology of events and their submissions on costs on 10 June 2013.

25. The Tribunal declared the proceedings closed on 22 April 2014. The Tribunal deliberated in person and by correspondence.

III. SUMMARY OF THE MAIN FACTS

26. This section summarizes the factual background of this arbitration in so far as it is necessary to understand the matters raised in this proceeding.

27. The summary is intended to provide a general overview of the issues in dispute between the parties, and is based on the agreed chronology of events filed by the parties in June 2013. It further takes into account the narratives proposed by each party for this section. The summary does not purport to be an exhaustive description of all facts considered relevant by the Tribunal for its decision: these will be addressed as necessary in the context of the Tribunal's analysis of the issues in dispute, taking into account all of the written pleadings in this case and the evidence given by witnesses in the course of oral testimony during the hearing held in April 2013.

A. Blood Plasma Fractionation – General Background

28. Blood plasma is a liquid component of blood. Blood plasma contains a variety of proteins, including albumin, immunoglobulin, and other proteins known as Factor VIII and Factor IX complexes.[2] Plasma fractionation involves the separation and clearing of these proteins for pharmaceutical purposes and for the production of blood derivative preparations.[3]

29. Blood-derivative medicinal products obtained from the fractionation of plasma, including (i) albumin, (ii) immunoglobulin, (iii) Factor VIII, and (iv) Factor IX are essential for treatment of many diseases, including haemophilia, deficiencies of immunological systems, multiple sclerosis, as well as many forms of cancer. Supply of hospitals and other state-run healthcare establishments with these products is a mandatory element of a health policy of modern states. Governments also provide for reserves of such products to be stored and available in case of necessity.[4]

30. Manufacturing and marketing of blood plasma derivative products has been regulated both in Poland and in the European Economic Community (the "European Union"). Council

[2] Claimants' Memorial, ¶ 4.

[3] Claimants' Memorial, ¶ 3.

[4] Respondent's Counter-Memorial, ¶ 16.

Directive 89/381/EEC of 14 June 1989 extended the requirements applicable to marketing of medicinal products to products derived from human blood. Furthermore, the abovementioned Directive mandated the Member States to adopt supplementary, specific measures necessary to protect public health by avoiding viral contamination.[5]

31. Manufacturing and use of blood plasma derivative products is exposed to a number of unique risks. These include risks relating to (i) the supply of raw material (in most countries, including Poland, blood donations are only permitted if made voluntarily and without any remuneration being paid to the donor), (ii) possible viral contamination of the entire pool of plasma, and (iii) adverse reactions of patients to blood-plasma derivative products.[6]

32. Self-sufficiency in plasma derivative products has been recommended by the World Health Organization ("WHO"), the European Union and the Council of Europe.[7]

33. Self-sufficiency in blood-plasma derivative products means that the haemotherapy needs of a given country are satisfied using blood (and its derivatives) obtained from the population of that particular country. Such self-sufficiency was, at the time this dispute arose, considered to be beneficial for countries in order to (i) better control the risk of disease transmission, (ii) utilize blood-derivative products sensibly, and (iii) establish domestic reserves of blood and blood-derivatives independent of global price fluctuations.[8]

B. Blood Plasma Fractionation – *Status quo ante* in Poland

34. It is undisputed that at the time the present dispute arose, there was no industrial facility in Poland which was capable of satisfying the country's demand for blood-plasma derivative products. During the relevant period, the Republic of Poland attempted to satisfy the needs for blood-plasma derivative products by entering into agreements with fractionation providers located outside of its territory. Between 1993 and 2005, Poland used the

[5] Respondent's Counter-Memorial, ¶ 6.

[6] Respondent's Counter-Memorial, ¶¶ 4, 9, 10.

[7] Article 3(4) of the EEC Directive of 14 June 1989, Article II of Recommendation No. R/88/4 of the European Council, and Recommendation No. R/90/9 of the Council of Europe of 29 March 1990. See Claimants' Memorial, ¶ 7.

[8] Claimants' Memorial, ¶ 8.

fractionation services of the Central Laboratory of Plasma Fractionation ("ZLB") of the Swiss Red Cross in Bern, Switzerland.[9] ZLB's services were provided on the basis of an agreement signed on 26 March 1993, which was for an initial term of 3 years and was renewed in each subsequent year.[10]

35. The responsibility for assuring the supply of blood plasma and products in Poland was vested in the Institute of Haematology, which performed this responsibility by collecting blood plasma donated by Polish citizens in Poland, then shipping it to Switzerland, where ZLB fractionated the plasma into blood derivative products, which then were intended for resale to Poland.[11] According to the Claimants, Poland did not purchase all blood-derivative products derived from the blood plasma it supplied to ZLB,[12] and therefore did not obtain any benefit from its production and sale. The Claimants estimate that Poland may have left with ZLB immunoglobulin products derived from Polish plasma valued at app. US$108,000,000 to US$200,000,000 per year.[13]

36. An early attempt to construct a blood plasma fractionation plant in Poland was contemplated but abandoned in the early 1990s.[14] In 1994, the idea of constructing such a plant in Poland was revisited. According to the Respondent, the Polish government considered it more cost effective to build and operate a private plasma fractionation facility in Poland, which was also viewed as a measure to stabilize the availability of blood plasma products for the Polish health system.[15]

C. Poland's Blood Fractionation Program and the Selection of Nedepol

37. On 4 August 1994 a committee (the "First Committee") was set up by the Minister of Health in order to develop a national program aimed at establishing a modern base for

[9] Claimants' Memorial, ¶ 9, Respondent's Counter-Memorial, ¶ 17.

[10] Respondent's Counter-Memorial, ¶ 17.

[11] Claimants' Memorial, ¶ 9; Respondent's Counter-Memorial, ¶ 1.3; Pinkas Report, p. 128.

[12] Claimants' Memorial, ¶ 9.

[13] Claimants' Memorial, ¶ 11; see also Claimants' Proposed Statement of Facts/Chronology, para, 8, citing Nizioł Witness Statement, ¶ 25 and Exhibit C-31.

[14] Claimants' Memorial, ¶ 9.

[15] Respondent's Counter-Memorial, ¶ 18.

blood fractionation.[16] The First Committee comprised representatives from the Ministry of Health, the Institute of Haematology, the Polish Red Cross and the Postgraduate Medical Education Centre.[17]

38. The First Committee also carried out a tender to select an entity which was to build and operate a plasma fractionation plant in Poland. The First Committee evaluated bids made by the following companies: i) Medicplast; ii) Miles Inc.; iii) TERPOL S.A; iv) Octapharma/Cevit and v) NEDEPOL Sp. z o.o ("Nedepol"). Nedepol was a company incorporated in Poland and owned by Mr Zygmunt Nizioł.[18]

39. The results of the tender are reflected in the Committee's report of 12 April 1995 (the "First Committee Report").[19] This Report noted that Behringwerke AG, Miles Inc. and Octapharma had adequate technology and financial resources to build and operate a plasma fractionation plant in Poland in a self-reliant manner.[20]

40. With regard to Nedepol, the First Committee Report concluded:

> NEDEPOL, although lacking its own technologies and experience, claims to be capable of constructing a processing plant based on its own capital, a credit line from Kredyt-Bank and technologies of KABI, BAXTER and NOVO NORDISK. NEDEPOL claims to be going [based on an oral declaration] to construct a plasma processing plant in Omsk.[21]

41. The First Committee Report recommended that an additional round of interviews with the participants of the first tender was needed, and that this task was to be entrusted to an *ad hoc* intra-ministerial committee be established to for that purpose.[22]

42. In 1995, the Inter-Ministerial Committee was established (the "Second Committee"), which was entrusted with the additional round of interviews.[23] In December 1995, the

[16] Respondent's Counter-Memorial, ¶ 19.

[17] *Idem*.

[18] Respondent's Counter-Memorial, ¶ 20; Exhibit R-12, p. 9; see also *infra*, footnote 73.

[19] Respondent's Counter-Memorial, ¶ 21.

[20] Exhibit R-12, pp. 17-19.

[21] Exhibit R-12, p.17.

[22] Exhibit R-12, p. 21.

Second Committee issued its final report (the "Second Committee Report"), which contained the following statements:

> The analysis of tenders was conducted with consideration of the following criteria:
>
> A – the construction should be entrusted to a counterparty being in possession of modern technology, without prejudice to viral inactivation methods in processed plasma, as well as experience in this field,
>
> B – the construction should not take long and the modular production line should allow the enhancement of plasma processing proportionately to the amount of material obtained,
>
> C – due to the risk, the State Treasury funds should neither be involved in the construction nor should Government loan guarantees be granted. The funds should come from foreign or Polish private investors,
>
> D – the selected counterparty should ensure a sufficient amount of factor VIII whose yield per litre of FFP [*i.,e. Fresh Frozen Plasma*] is contingent upon technological procedures applied at the lowest possible prices,
>
> E – the agreement should guarantee that the counterparty will comply with the policy of blood donation and blood transfusion in Poland.

43. The Second Committee Report then reviewed the proposals by three companies, which had confirmed their interest in the second round of the procurement process. These companies were Miles Inc., Nedepol and Terpol.[24] The key parameters of each of the bids submitted were summarized by the Second Committee as follows:[25]

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[23] Members of this Committee were the Assistant Director of the Government Cabinet Agency's Public Administration Department, the Director of the Community Medicine Program at the Postgraduate Medical Education Centre, the Assistant Director of the Economic Department at the Ministry for International Economic Cooperation, an employee of the Economic Sector Department of the Ministry of Industry and Commerce, the Director of the Department of Medical Technology and Investment at the Ministry of Health and Public Welfare, and an employee of the Department of Medical Technology and Investment at the Ministry of Health and Public Welfare. Respondent's Counter-Memorial, ¶ 25; Exhibit R-13.

[24] Exhibit R-13, p. 5.

[25] Exhibit R-13, p. 8.

No.	Criteria – evaluation of conditions	NEDEPOL	MILES	TERPOL
1	Investment financed with extra-Governmental funds	Yes	No	Yes
2	Modern technology and experience	Yes	Yes	No
3	Double viral inactivation	Yes	Yes	Yes
4	Construction period (in months)	12-15	18-24	24
5	Annual output (in thousand liters per year)	50-150	400	50-200
6	Compliance with policy on blood donation and blood transfusion in Poland	Yes	No[1]	No[2]

[1] guarantee as regards access to sufficient amounts of plasma and exclusive rights to the final product, at least for a certain period of time.
[2] priority in selling preparations

44. With regard to Nedepol, the Second Committee's Report contained the following information:

> NEDEPOL Sp. z o.o in Warsaw was represented by its co-owner and Chairman Zygmunt Nizioł, MSc. The company has been operating for 6 years. It deals in technology lines for infusion liquids manufacturing, according to Fresenius (Spencer Company, the Netherlands). NEDEPOL intended to build a turn-key plasma processing plant in Omsk in line with the modern technologies of BAXTER (USA), KABI (SWEDEN) and NOVO NORDISK (Denmark). These technologies would be applied in Poland. The investment in Poland would encompass a target processing module of 150 000 litres of FFP together with licences and transport.
>
> The investment would be financed by shareholders of NEDEPOL and ZAM HOLDING Companies from Poland. Kredyt Bank S.A. confirmed its readiness for loan financing. The investment would start within 3 months following its confirmation and it would last for 12-15 months. Starting production after 15 months, with output at a level of 50% and its regular increase within the subsequent 4-6 months, all aimed at achieving an optimal processing result in the amount of 150 000 L of FFP per year. The investment implementation is in conformity with ISO standards, and the technology line will have a requisite certificate.
>
> The Company suggests cooperation with the Institute of Hematology and Blood Transfusion and the Polish Red Cross.

> Locations in Warsaw, its vicinity, Gdańsk or Mielec – special economic zone.[26]

45. In the course of the bidding process, the Second Committee prepared a questionnaire to which Mr Nizioł submitted the following answers on behalf of Nedepol:

> The investment will be carried out by a company established for such purpose under a business name of Laboratorium Frakcjonowania Osocza Sp. z o.o. (LFO) with the following shareholders:
>
> ZAN Holding BV (international partner; ¼ of shares)
>
> and the following Polish companies:
>
> NEDEPOL Sp. z o.o,
>
> IMAR Sp. z o.o. […]
>
> ZAN Holding B.V. is an investment and financing company registered in the Netherlands. The company participated in financing and construction of a similar facility in Omsk. […]
>
> IMAR Sp. z o.o. is a Polish company, which initiated the construction of Omsk facility. It is the owner of real property and co-owner and constructor of the plant producing glass fiber reinforced tanks and pipes, i.e. Nordcap Plastik Sp. z o.o. […]
>
> At the same time we wish to underline that we will use licenses of the following companies in the project:
>
> Factor VIII: NOVO NOROOISK
>
> Factor IX: CRTS LILLE
>
> Viral inactivation: NYBC […]
>
> Construction period of the project will be 12 – 15 months from the beginning of financing. The production will commence after the lapse of 15 months with the output of 50% which will be systematically increase within the next 4 to 6 months in order to achieve maximum capacity of 100%, i.e. 150,000 liters of FFP per year. […]

[26] *Idem*.

> We focus on this issue because during the recent interview on January 24, 1995 in the Ministry of Health and Social Welfare one of the question (32) was as follows: Is the company aware of the fact that it cannot have exclusivity for collection of FFP in Poland? This kind of thinking simply scares us.[27]

46. The Second Committee recommended Nedepol as the preferred entity to build and operate a plasma fractionation facility in Poland. The Second Committee Report was subsequently approved by the Ministry of Health.[28] Nedepol was notified accordingly by the Ministry by letter of 28 December 1995.[29]

D. Establishment of LFO and the 1996 Bank Loan Application

47. As proposed by Mr Nizioł during the bidding process,[30] Laboratorium Frakcjonowania Osocza Sp. z o.o. ("LFO") was subsequently created and incorporated in December 1995 as a limited liability company under Polish law. Its initial share capital was PLN100,000 (approximately US$30,000). As evidenced by the 1996 Investors' Agreement, the initial shareholder in LFO was Nedepol.[31]

48. On 10 April 1996, LFO submitted an application to Kredyt Bank, a financial institution located in Poland, seeking a loan in the amount of US$35,974,000 to finance its operations. In this application, LFO asserted that a Swedish company PharmaFrac AB was its main contractor and supplier,[32] and that the "technical documentation" for the construction and operation of a fractionation plant in Poland (the "LFO Project") was "ready". LFO further stated that construction of the plant was to be completed by 31 December 1997, and that production was to commence on 2 January 1998, with full production capacity to be achieved by 30 June 1998.[33]

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[27] Exhibit C-51, p. 8.

[28] Exhibit R-14.

[29] Exhibit R-15.

[30] See above, paragraph 45.

[31] See *infra*, section F; Exhibit C-6.

[32] Exhibit R-28, p. 5.

[33] Exhibit R-28, p. 3.

49. In response to LFO's application,[34] Kredyt Bank decided to approach other commercial banks to establish a consortium.[35] These financial institutions insisted that LFO apply to the State Treasury for a surety as a precondition to the loan being granted to LFO.

E. Involvement of Messrs Minnotte and Lewis in LFO and Their Visits to Poland

50. In 1996, Zygmunt Nizioł met Mr David Minnotte and Mr Robert Lewis in Pittsburgh, Pennsylvania.[36] It is not disputed that Messrs Lewis and Minnotte travelled repeatedly to Poland in 1996, and met with several representatives of the Polish Government during their visits, including the then Minister of Health, the late Mr Ryszard Żochowski, the then Minister of Treasury and Industry, Mr Wieslaw Kaczmarek[37] and the then President of the Republic of Poland, Mr Aleksander Kwaśniewski.[38] According to the Claimants, the Minister of Health, the Minister of Treasury and Industry, and the President of Poland all made representations to Messrs Minnotte and Lewis suggesting *inter alia* that (i) LFO's operations would receive strong support from the Government, (ii) the Government would ensure the delivery of blood plasma products to LFO, (iii) LFO would be gaining a monopoly with respect to the supply of blood plasma products, and (iv) the Government would guarantee up to 60% of the required bank financing to build such blood fractionation facility.[39] The Respondent however contends that the Claimants' allegations in this regard are neither supported by evidence nor confirmed by any subsequent measure taken by the Polish authorities.[40]

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[34] See above, paragraph 48.

[35] Respondent's Counter-Memorial, ¶ 40. The participating banks were: Kredyt Bank, Pomorski Bank Kredytowy, Bank Śląski, Bank Przemysłowo-Handlowy and Bank Zachodni.

[36] Claimants' Memorial, ¶16.

[37] Minnotte Witness Statement, ¶¶ 10, 16, 17, 20 and 21.

[38] Claimants' Memorial, ¶ 17.

[39] Minnotte Witness Statement, ¶¶ 17 and 30; Hearing on Jurisdiction and Merits, Transcript, 17 April 2013, pp. 106-107.

[40] Respondent's Counter-Memorial, ¶ 316.

F. The 1996 Investors' Agreement

51. On 16 September 1996, Zygmunt Nizioł, Włodzimierz Wapiński, Bjorn Hedberg, LFO, Nedepol, Robert Lewis and David Minnotte signed the 1996 Investors' Agreement.[41] This agreement contained *inter alia* the mutual rights and obligations of its signatories with respect to the management and operations of LFO, and determined the participation of each party in LFO. According to this agreement, LFO's shareholding structure was as follows:

Zygmunt Nizioł:	49%
David Minnotte:	16.5%
Robert Lewis:	16.5%
Bjorn Hedberg:	1%
Włodzimierz Wapiński:	8%
Nedepol:	9%

52. The Investors' Agreement further provided for financial contributions by the shareholders to LFO in the aggregate amount of US$12,000,000[42] consisting of US$2,500,000 each from Messrs Minnotte and Lewis, and US$7,000,000 from "the Nizioł Group".[43] The Investors' Agreement also called for the financing of the LFO Project by way of bank loan agreements in an amount not lower than US$35,350,000.[44]

53. The Investors' Agreement included, as an Appendix C, a business plan for the development and operation of a plasma protein fractionation plant. This business plan notes in its Section 1(1): "*Within this project it has been assumed that the production would cover 25-30% of domestic requirements for blood plasma products*".[45] Appended to the business plan were a number of financial statements. It is disputed between the parties whether these statements provided for the supply of fresh frozen plasma to LFO before the completion of the plant.

[41] Request for Arbitration, Annex 5-A.

[42] Exhibit C-6, Article 3.4.(a).

[43] *Idem*. See also Article 3.4(b). The Nizioł Group loans were to be made by Nizioł, Walinski, Nedepol and Hedberg.

[44] Request for Arbitration, Annex 5-A, Article 1.1.(g).

[45] Request for Arbitration, Annex 5-A, Appendix C.

54. Following the Investors' Agreement, LFO's shareholders adopted a resolution on 24 September 1996,[46] which authorized Mr Nizioł to offset a certain amount of his capital contributions due under the Investors' Agreement against a claim for remuneration for services provided by Mr Nizioł to a Dutch company, Spencer Holland BV.[47]

55. Based on the Investors' Agreement, Mr Lewis and Mr Minnotte each acquired 16.5% shares in LFO, and were appointed members of the Management Board of LFO.[48] According to the Claimants, they subsequently issued the following promissory notes evidencing loans to LFO:[49]

4 September 1996	US$62,500 from Mr Minnotte
4 September 1996	US$62,500 from Mr Lewis
25 September 1996	US$75,000 from Mr Minnotte
25 September 1996	US$75,000 from Mr Lewis
21 October 1996	US$1,362,500 from Mr Minnotte
21 October 1996	US$1,362,500 from Mr Lewis

56. The Claimants further submit that they advanced US$500,000 each on 16 December 1996.[50] According to the Claimants, these funds were not evidenced by promissory notes, but were loans to LFO evidenced by wire transfer made pursuant to the Investors' Agreement.[51] However, the Claimants' payments of 21 October 1996 and 16 December 1996 were not made directly to LFO's bank account in Poland, but into an account located in Guernsey and held by ZAN Trust.[52] ZAN Trust was a British company owned by Mr Nizioł. The Respondent contends that these two payments had no legal justification and did not make any commercial sense.[53] The Respondent further argues that these payments may only be understood as the Claimants' intention to assist Mr Nizioł's alleged fraud

[46] Exhibit R-154.

[47] *Idem*. Respondent's Rejoinder, ¶ 148. The Respondent asserts that this resolution was intended to assist Mr. Nizioł to evade his obligation to contribute capital funds to LFO and lacked any business rationale.

[48] Request for Arbitration, Annex 5-A**,** Article 4.1**.**

[49] Request for Arbitration, p. 6, Annex 5B and 5D (Annex 5D was subsequently re-submitted as Exhibit C-38).

[50] Request for Arbitration, pp. 6 *et seq*.

[51] Request for Arbitration, pp. 6 *et seq*., see also Exhibit C-38.

[52] Respondent's Counter-Memorial, ¶ 124.

[53] Respondent's proposed chronology of events.

concerning the amount of his actual contributions to LFO. The Claimants disagree with the Respondent's assertion and contend that the payments were made through the Guernsey entity following a tax advice they had previously received.[54]

57. Messrs Minnotte and Lewis provided a further US$650,000 each on 23 February 1998 as a loan evidenced by a letter of credit initially drawn in favour of Kredyt Bank.[55]

G. Disputed Invoices and Shareholder Contributions by Mr Nizioł

58. The shareholders of LFO took a number of further measures between September 1996 and April 1997 to comply with the US$12,000,000 contribution requirement established by the Investors' Agreement.[56] The parties differ on the significance and/or purpose of the various steps taken, and also on the amounts ultimately contributed to LFO by its shareholders. The most significant differences relate to the payment of three invoices.

(1) Payment of Invoice No. 140396 dated 4 December 1996 issued by CSL and NYBC

59. On 4 December 1996, LFO was allegedly charged with an invoice issued jointly by CSL Limited A.C.N, Bioplasma Division ("CSL"),[57] a corporation incorporated in Australia, and the New York Blood Centre ("NYBC"),[58] in the amount of US$2,766,750 for "prepayment of royalties" and "fixed up front fees", and made "with reference to a recent agreement".[59] The invoice[60] was paid by LFO in full in two instalments,[61] and payment was made into a bank account located in Switzerland.[62]

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[54] Hearing on Jurisdiction and the Merits, Transcript, 16 April 2013, p. 119.

[55] Kredyt Bank ultimately relied on this letter of credit to pay the sums due under the Bank Loan Agreement, Hearing on Jurisdiction and the Merits, Transcript, 16 April 2013, p. 115. See *infra.*

[56] Respondent's Counter-Memorial, ¶¶ 121-153.

[57] In the parties' respective pleadings, they differ as to the official name of this company. The Claimant identifies it as CSL Bioplasma Ltd., while the Respondent indicates the name to be CSL Limited A.C.N. See Claimants' Memorial, p. iii; Respondent's Counter-Memorial, ¶ p.4.

[58] Exhibit R-43.

[59] Respondent's Counter-Memorial, ¶ 128; Exhibit R-43.

[60] The Claimants sought to introduce a new version of this invoice after the hearing. In their "Proposed Statement of Facts/Chronology" dated 10 June 2013, the Respondent opposed its introduction at that stage in the proceedings. The Tribunal does not consider that the new version affects its reasoning in any way; and it is accordingly unnecessary to rule upon its admissibility.

60. The Respondent alleges that this invoice was forged and was intended to: (i) defraud LFO's creditors by purporting to be a purchase of licence rights to technology, and (ii) create a legal basis to transfer the invoiced amounts abroad. In support of these allegations, the Respondent contends that the two payments were made to a Swiss bank account, which was held, not by CSL, but by Mr Włodzimierz Wapiński, who was himself a shareholder in LFO and a business partner of Mr Nizioł.[63] The Respondent asserts that subsequently, US$100,000 were transferred from the Swiss bank account to an account held by Mr Wapiński in Poland. The remainder of the funds was then first transferred to an intermediary bank, before being deposited in two tranches into LFO's bank account in Poland. These two payments were made on 16 January 1997 in the amounts of US$1,355,000 and US$1,355,005.03 respectively, and were identified as capital contributions from Messrs Minnotte and Lewis to LFO.[64] The Respondent further submits that the forgery of the invoice was confirmed by representatives of CSL and NYBC.

61. The Claimants dispute that this invoice was forged.[65] Relying on testimony by Mr Nizioł, the Claimants assert that the invoice was issued by CSL, and that payments were made in instalments due to a shortage in cash flow at LFO at the time.[66] The Claimants further state that payment was made in a confidential manner upon CSL's request.[67] The Claimants also submit in this regard that after these payments had been made, Mr Nizioł entered into a licence agreement with CSL on 31 January 1997,[68] and sold to CSL a transferable option to

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[61] The precise dates of the payment of these invoices was subject of much discussion during the hearing, see Hearing on Jurisdiction and the Merits, Transcript, 16 April 2013, pp. 40-44, varying between 9, 10 or 12 December 1996 for the first payment and 19 or 20 December 1996 for the second payment.

[62] Respondent's Counter-Memorial, ¶ 129; see also Exhibit R-53, Confirmation of LFO 1st payment to NYBC CSL, and Exhibit R-54, Confirmation of LFO 2nd payment to NYBC CSL.

[63] Respondent's Counter-Memorial, ¶ 130; see also bank account agreement between Julius Baer Bank and Włodzimierz Wapiński, Exhibit R-55; see also excerpt from the Juliusz Baer Bank account of Włodzimierz Wapiński, Exhibit R-56.

[64] Respondent's Counter-Memorial, ¶ 132; see also fax from Z. Nizioł to Bachmann Trust, Exhibit R-57; and 1997.01.16 letter from Bachmann Trust to Barclays Bank, Exhibit R-52.

[65] Claimants' Reply Memorial, ¶ 23.

[66] *Idem*.

[67] Claimants' Reply Memorial, ¶ 22.

[68] Claimants' Reply Memorial, ¶ 24.

purchase 10% of LFO's shares for US$2,100,000. In light of this agreement Mr Nizioł hence returned the US$2,100,000 to LFO.[69]

(2) Payment of Invoice No. 00035/97 dated 17 February 1997 issued by Spencer Holland B.V.

62. On 17 February 1997, LFO was charged with Invoice No. 00035/97, allegedly issued by Spencer Holland B.V. for the amount of US$2,520,000. This invoice related to a 45% pre-payment under a contract for supply of laboratory equipment.[70] On 5 March 1997, LFO paid this invoice in full into the bank account of Spencer Holland B.V. at the ING Bank in Warsaw.[71]

63. The Respondent argues that this invoice too was forged, and that the forgery had been confirmed by representatives of Spencer Holland B.V., who stated that they never delivered any equipment to LFO, nor had they received any payment from LFO.[72] In this regard, the Respondent asserts that Mr Nizioł was authorized by Spencer Holland B.V. to manage the company's bank account in Warsaw.[73] According to the Respondent, the amount of US$2,000,000 was transferred on 11 March 1997 from Spencer Holland B.V.'s account to one of Mr Nizioł's personal bank accounts located in the Netherlands.[74] Two days later, on 13 March 1997, Mr Nizioł then initiated a wire transfer in the amount of US$2,000,000 from his Netherlands account to LFO's account in Poland. In the Respondent's view, Mr Nizioł abused his power to manage Spencer Holland B.V.'s bank account, and further presented the payment to LFO as his own financial contribution.[75]

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[69] Claimants' Reply Memorial, ¶ 25; see also Nizioł Reply Witness Statement, ¶ K.

[70] Exhibit R-60.

[71] Respondent's Counter-Memorial, ¶ 138; Exhibit R-62.

[72] Respondent's Counter-Memorial, ¶ 153.

[73] Respondent's Counter-Memorial, ¶ 139. Exhibit R-63 Exhibit R-64. The Respondent further summarizes the relationship between Mr Nizioł and Spencer Holland as follows: "Mr. Nizioł was a sales and technical representative of Spencer Holland in Poland from 1985. Then he worked for that company in the Netherlands from 1990 to 1993, where he met Mr. Eduard Krapels, the Director of Spencer Holland. Then, Mr. Nizioł founded Nedepol, which was initially owned by Mr. Krapels and Mr. Nizioł's wife. Nedepol was the distributor of Spencer Holland's equipment in Poland." Respondent's Counter-Memorial, ¶ 138.

[74] Respondent's Counter-Memorial, ¶ 140.

[75] *Idem*. 1997.03.12 ABN Amro bank account excerpts (re Spencer), Exhibit R- 65.

(3) Payment of Invoice No. 140821, issued by E. Krapels Holding and CSL, dated 13 May 1997

64. On 5 May 1997, LFO was charged with Invoice No. 140821, issued by E. Krapels Holding for the amount of US$1,065,000.[76] The invoice indicated that it was issued in relation to a pre-payment for supply of certain gels and filters to be delivered to LFO.

65. The Respondent alleges that after this invoice had been paid in full to Krapels Holding on 17 May 1997, Mr Nizioł instructed Krapels Holding on 20 May 1997 to (i) return US$1,005,000 to a personal bank account held by Mr Nizioł, and (ii) transfer US$60,000 to CSL in Australia.[77] The Respondent further alleges that Mr Nizioł transferred on 22 May 1997 US$1,000,000 from his private account to LFO, presenting this sum as his own contribution to LFO.[78]

(4) Other Disputed Transactions

66. The Respondent further contends that over the period giving rise to this dispute, LFO diverted or misspent substantial financial resources, including funds paid for fictitious suppliers of technology, equipment, and services, or under sham property lease agreements.[79] The Claimants dispute these allegations.

H. The State Treasury Surety and the 1996 Bank Loan Agreement

67. As indicated above, the consortium of banks which contemplated the conclusion of a Bank Loan Agreement with LFO requested that LFO obtain a State Treasury surety for the loan in question.[80] LFO applied for such surety to the State Treasury on 27 January 1997.[81]

68. On 4 March 1997, LFO entered into a Bank Loan Agreement with a consortium consisting of five private banks.[82] Under this agreement, LFO received a loan for an amount

[76] Exhibit R-66.
[77] Respondent's Counter-Memorial, ¶ 141.
[78] Respondent's Counter-Memorial, ¶ 142.
[79] Respondent's Counter-Memorial, ¶¶ 154-184.
[80] See above, paragraph 49.
[81] Exhibit R-22.

equivalent to US$34,651,000.[83] The release of the funds to LFO was however conditioned upon the granting of a surety by the State Treasury of Poland.

69. On 27 May 1997, the Polish Council of Ministers adopted Resolution No. 39/97 approving the granting of a surety to LFO, and authorized the Minister of Finance to sign the relevant agreements with LFO.[84] The Resolution approved a surety in the amount of up to 60% of the sum due under the Bank Loan Agreement, and also covered up to 60% of the interest. The State Treasury's liability was capped at US$25,900,824.

70. The Respondent submits that the Government's decision to approve these guarantees was based on the information provided by LFO in the course of the application process. According to the Respondent, LFO had not informed the Ministry about a recent change in technological partners from Pharmacia, Novo Nordisc, NYBC and Lille Blood Centre, to CSL. The Respondent hence argues that the information provided by LFO during the application process was incorrect and misleading.[85]

71. On 1 July 1997, two surety agreements were signed. One agreement was concluded between LFO and the Minister of Finance acting on behalf of State Treasury (the "LFO Surety Agreement"),[86] and the second surety agreement was concluded between the Minister of Finance and the consortium of financial institutions which had agreed to provide a loan to LFO (the "Consortium Surety Agreement").[87]

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[82] Exhibit C-12.

[83] The Bank Loan Agreement was subsequently amended 10 times by way of further Annexes, concluded during the years 1997 to 2001. One of the collaterals provided for in the original Bank Loan Agreement was the registered pledge on the shares in LFO held by the LFO shareholders. All LFO shareholders signed registered pledge agreements, intended to cover the entire share capital in LFO. The registered pledge agreements also contained a clause that enabled the banks, which were party to the Bank Loan Agreement, to take over the shares in LFO in the event that one of the pledgers defaulted.

[84] Respondent's Counter-Memorial, ¶ 42; see also Exhibit R-23, 1997.05.27 Resolution No. 39/97 of the Council of Ministers.

[85] Respondent's Counter-Memorial, ¶ 51.

[86] Exhibit R-24.

[87] Exhibit R-25.

I. The Licence Agreements with CSL and the 1997 Elections in Poland

72. On 21 November 1996, LFO entered into an agreement with CSL to obtain licence rights to technology for blood fractionation processes.[88] A further licence agreement between CSL and LFO was subsequently entered into on 31 January 1997.[89] LFO and CSL also concluded a Memorandum of Understanding on 1 November 1997,[90] which contained specific provisions on toll fractionation procedures.[91] A further licence agreement was signed on 1 May 1998.[92] The parties differ with respect to the effect of these agreements on the position of LFO. The Claimants contend that by virtue of these agreements, LFO had acquired enforceable rights to the technology required for the operation of its plasma fractionation plant.[93] The Respondent submits that the alleged transfer of technology from CSL to LFO had not been proven, particularly given that in all agreements concluded with CSL, LFO's access to technology was dependent on several preconditions which, according to the Respondent, had never been met.[94]

73. On 17 September 1997, the Minister of Health Ryszard Żochowski died. On 21 September 1997 parliamentary elections were held in Poland, which resulted in a change of government: the coalition of the Democratic Left Alliance and the Polish People's Party was replaced by the Solidarity Electoral Action. The Cabinet of Prime Minister Jerzy Buzek was established in October 1997.

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[88] Exhibit C-41.

[89] Exhibit R-29.

[90] Exhibit C-11 (undated draft), and Exhibit R-42.

[91] Exhibit R-42. Toll fractionation is the process of recovering blood products from plasma from a particular country, and returning those products to that country.

[92] Exhibit C-43 and Exhibit R-30. The Claimants however contend this document was issued on 29 April 1998.

[93] Claimants' Memorial, ¶ 18.

[94] Respondent's Counter-Memorial, ¶¶ 107-118. According to the Respondent, this understanding is supported by evidence in that once CSL terminated its negotiations with LFO in June 2000, LFO was left without any enforceable licence rights.

J. The 1997 Fractionation Agreement

74. On 1 October 1997, LFO and the Minister of Health concluded an agreement for the fractionation of blood plasma by LFO (the "1997 Fractionation Agreement").[95] The relevant provisions of the 1997 Fractionation Agreement are set forth below:

> Article 2 – Documents
>
> The agreement includes this document and all of the Annexes mentioned below
>
> Annex 1 Copy of extract from the commercial register
>
> Annex 2 Records of the departmental commissions and interdepartmental commissions in the PFL matter
>
> Annex 3 Conditions for the delivery and monitoring of the plasma
>
> Annex Resolution No 39/97 of the Council of Ministers dated May 27 1997
>
> Article 3 - Obligations of PFL
>
> 3.1 PFL undertakes to build and equip the plant within period of 24 months from the date of signature of this agreement and will begin production of the products within period of 6 months from the date of completion of the construction.
>
> 3.2 PFL undertakes:
>
> a. To accept plasma from organizational units of the public blood service at its own cost and to assume any risk connected with its care and transport and any liability for delay in the acceptance of the plasma and any damage that may result therefrom in which connection the conditions of acceptance - quantity quality prices time limits for the acceptance of the plasma and for the delivery of the products - shall be agreed upon directly between the suppliers of the plasma and the receivers of the product once during each calendar year in accordance with Article 6.
>
> b. To provide the finished products at its own expense with the resources of the plant;

[95] Exhibit C-13.

c. To offer the products at prices lower than global prices.

Article 4 - Obligations of the MHaSW

4.1 The Ministry of Health and Social Welfare shall ensure that the organizational actions are taken for the supplying of plasma to PFL by organizational units of the public blood service giving due regard to the requirement specified by PFL for minimum quantity of plasma that is to say 150000 liters per year.

During subsequent years the Ministry of Health and Social Welfare shall endeavor to increase the deliveries of plasma to PFL with view to achieving Poland's ability to meet its own needs for plasma-derivative preparations

The prices of the plasma must not exceed global prices.

Article 5 – Duration of the Agreement

5.1 The agreement shall enter into force on the date of its signature and shall be valid for period of 15 years

Article 6 - Price time limits delivery and conditions of payment for the plasma and the products

6.1 The price of the plasma and the products shall be specified for given financial year before June 30 of the preceding financial year

6.2 Each party to the agreement shall before June 30 of the preceding financial year make its orders addressed to the other for the delivery of plasma and products for the following financial year in written form with due regard for:

a. The quantity of the plasma supplied

b. The quantity form and type of the products converted from the plasma supplied

c. The place and time for the acceptance of the plasma and the delivery of the products

6.3 The settlement and payment for the delivery of the plasma and the products in given financial year shall take place before the last day of the financial year

> Article 9 - Arbitration
>
> 9.2 All disputes between the parties not amenable to amicable settlement which have arisen in connection with or on the basis of this agreement shall be settled by the Arbitral Tribunal at the National Economic Chamber Izba Gospodarcza in Warsaw in accordance with the rules of procedure of that Tribunal and on the basis of the provisions of Polish law
>
> Article 10 - Miscellaneous provisions
>
> 10.1 The Annexes referred to in this agreement constitute an integral part thereof.

75. The parties are in disagreement as to the content of the Ministry of Health and LFO's rights and obligations pursuant to the 1997 Fractionation Agreement.

76. The Claimants assert that the 1997 Fractionation Agreement created the right for LFO to receive supplies of fresh frozen plasma, upon LFO's demand, even before the fractionation plant was completed.[96] In this regard, the Claimants rely *inter alia* on the Supreme Chamber of Control Audit Report of 2007, which described the 1997 Fractional Agreement in the following manner:

> On October 1, 1997, the Minister of Health and Public Welfare signed an understanding with PFL, which included such items as the obligations of PFL and the Ministry of Health and Public Welfare with regard to the construction of the plasma fractionation plant and the provision of plasma by public healthcare facilities (The Covenant). […]
>
> In the Covenant, the Minister of Health and Public Welfare stated that Poland needed a plasma fractionation plant and agreed to take organizational actions in order to supply PFL with 150,000 liters of plasma per year, via public blood service facilities. Plasma prices could not exceed world prices. […]
>
> The Covenant of 10/1/97 between the Minister of Health and Public Welfare and PFL was actually an agreement establishing the terms and conditions of business between those parties in the area of plasma processing, made for the term of 15 years (a blanket agreement). […]

[96] Claimants' Reply Memorial, ¶¶ 37 *et seq*, and 93 *et seq*.

> Said Covenant actually constituted giving PFL exclusivity to process a significant portion of the plasma obtained in Poland, for a term of 15 years, and thus constituted preferential treatment of that company on the Polish market.[97]

77. The Respondent contends that under Article 3.2. of the 1997 Fractionation Agreement, the obligation of the Ministry of Health to supply fresh frozen plasma was conditional upon the completion of the plant by LFO.[98] The Respondent submits that the lack of a provision in the 1997 Fractionation Agreement on (i) the quantity of plasma to be supplied, (ii) the prices any fresh frozen plasma to be supplied, and (iii) the prices for plasma-derivative products, renders it impossible to accept the interpretation proposed by the Claimants that the 1997 Fractionation Agreement envisioned LFO to start production immediately.[99]

K. The Construction of the Fractionation Plant

78. On 23 October 1996, LFO had obtained a permit to conduct commercial activities in the Special Economic Zone "*Euro-Park*" in Mielec, and on 18 December 1997, LFO acquired from the State Treasury the right of perpetual usufruct to 2ha of land located in the Special Economic Zone in Mielec.[100] The Claimants contend that the Ministry of Health approved the construction of a fractionation facility on this land, and construction of the LFO plant began in 1998.

79. According to the Claimants, construction of the factory building was completed in 2000.[101] The Respondent asserts that due to disputes between LFO and several construction companies, construction of the plant was delayed from the beginning, and works on the facility came to a halt in 1999.[102] In the Respondent's view, construction of the plant was never completed.[103]

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[97] Exhibit C-33, p. 28, sec. 3.2.6.

[98] Respondent's Rejoinder, ¶ 66.

[99] Respondent's Rejoinder, ¶ 68.

[100] Exhibit R-27. The State Treasury had leased the land to LFO on 1 March 1997.

[101] Claimants' Memorial, ¶ 28; Exhibit C-20.

[102] Respondent's Rejoinder, ¶¶ 99-100; see also Exhibit R-164.

[103] Respondent's Counter-Memorial, ¶ 85.

L. The Claimants' Request for Supply of Frozen Plasma

80. During the period 1998 and 2000, LFO sent a series of letters to the Ministry of Health, including letters dated 20 April 1998,[104] 12 August 1998,[105] 24 August 1998,[106] 9 September 1998,[107] 12 February 1999,[108] 29 June 1999,[109] 26 August 1999[110] and 17 September 1999.[111] Referencing the 1997 Fractionation Agreement, LFO requested the Ministry in these letters to supply fresh frozen plasma to LFO and indicated that such plasma would be processed at CSL's facilities in Australia.

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[104] Exhibit C-15. "In accordance with the Agreement with the Ministry of Health and Social Welfare, in mid-year 1998 we are planning to process approximately 50,000 liters of plasma at CSL on the same technological line and using the same technological process. This will considerably speed up the registration of preparations and the preparations will permit to make up the deficit in their supply."

[105] Exhibit C-56. "In accordance with the agreement of October 1st, 1997 concluded between the Ministry of Health and Social Welfare and Laboratorum Frakcjonowania Osocza we plan to process in CSL approximately 60,000 liters of human blood plasma in the period from October 1998 to May 1999. ... I further wish to inform you that from June to the end of December 1999 we plan to process in CSL another 90,000 liters of human-blood plasma on the same terms as presented above."

[106] Exhibit C-16(A). This letter summarizes a meeting held between LFO, CSL, The Ministry of Health and a representative of Parliament.

[107] Exhibit C-16(B). In this letter, LFO indicates that it is ready to process Polish plasma in the amount of 60,000 liters in 1998 and 150,000 liters in 1999. LFO requests from the government "support in completing the very complex registration procedures (in order to obtain the appropriate documents), just as the support given at registration of plasma derivatives manufactured from Polish plasma by ZLB of Swiss Red Cross."

[108] Exhibit C-16(C). **"**On 16 September 1998 during a meeting at the Ministry of Health and Social Welfare, in accordance with the letter ref. l.dz. 201/9/98 of 9 September 1998 we declared that LFO in cooperation with CSL guaranteed the readiness to process 150 000 liters of plasma in the year 1999. We once again offered to deliver a corresponding quantity of Factor VIII concentrate for Immunoglobulin manufactured, in total it would be 39 million IU. We proposed the first batch of plasma be sent for processing already in November 1998. We are sorry to say that we have had no reply to any of our letters or proposals. The only reply was the message on resignation of Dr M. Kornatowski, Secretary of State, from his post."

[109] Exhibit C-57. In this letter, dated 29 June 1999, LFO requested that the Ministry of Health order Regional Blood Donation Centers to supply Polish plasma to LFO, reasoning that such instructions would be "...a necessary document ...to continue the registration process of plasma-derived products obtained from Polish human blood plasma." *Idem.*

[110] Exhibit C-16(D). "I wish to inform you that till the present moment I have not received any reply to several questions asked in our letters. ... In accordance with Article 3.1. of the Agreement of 1 October 1997 between the Minister of Health and Social Welfare and LFO Sp. z o.o., in the 2nd quarter of 2000 we should have commenced manufacture of plasma derivatives. (...) Under the Agreement the Parties were obligated to place, by 30 June this year, written reciprocal orders of plasma and products for the subsequent accounting year. A matter of particular importance is your consent to the acquisition by LFO of 25 000 l of fresh frozen plasma in order to be processed at CSL Limited of Australia, our licensor. Until the commencement of production in Mielec, acting under an agreement with CSL Limited (letter of intent dated 30 July 1999 enclosed herewith) we entrust the production of plasma derivatives to CSL Limited, a company with documented many years' experience in manufacture of the above products. During that period we also intend to send plasma to CSL Limited for fractionation and manufacture of plasma derivatives."

[111] Exhibit C-16(E).

81. The parties differ as to the origin and character of these letters. The Claimants contend that the letters were sent pursuant to LFO's right under the 1997 Fractionation Agreement to receive fresh frozen plasma, and that these letters remained unanswered.[112] The Respondent maintains that the issue of intermediate deliveries of fresh plasma to LFO was discussed, but ultimately rejected in the course of the negotiations leading to the 1997 Fractionation Agreement, and that there was no obligation by the government to supply the plasma prior to LFO completing the plant in Poland.[113] According to the Respondent, these letters were perceived as an attempt by LFO to change the terms of the 1997 Fractionation Agreement.

M. 1998 Tax Inspection & the Ministry's Subsequent Exchanges with Kredyt Bank

82. From 19 August 1998 to 17 December 1998 LFO was the subject of an inspection by Polish tax authorities.[114] The protocol concluding the inspection contained objections and reservations regarding (i) the amount of the financial contributions made by LFO's shareholders, and (ii) the way in which funds were spent by LFO. This protocol was delivered to LFO, and LFO subsequently filed comments in response to these findings.[115]

83. Following the tax inspection, the Ministry of Finance sent a further letter to Kredyt Bank on 29 December 1998, stating:

> The Guarantee Department wishes to express our concern at the deterioration of economic and financial situation of "Laboratorium Frakcjonowania Osocza" sp. z o.o. At the same time, considerable delays in the project construction may shortly lead to the Company's loss of credit capacity. […]
>
> Till the present moment, the Shareholders have failed to make the supplementary payment in full amount, i.e. USD 12 million, to the reserve capital declared. […]
>
> According to the Ministry of Finance information, considerable expenses not related with the project activities have been accounted as the project costs. […]

[112] Claimants' Memorial, ¶¶ 21 *et seq*.

[113] Respondent's Rejoinder, ¶ 66; see also Exhibit R-158.

[114] Respondent's Counter-Memorial, ¶ 117; see also Exhibit R-41.

[115] Exhibit R-177.

> Under § 5 of the Guarantee Agreement of 1 July 1997 concluded between the Minister of Finance and Kredyt Bank PBI S.A., we request any and all explanations be provided and necessary documents presented to the fiscal control inspectors carrying their audit of reliability of the Bank supervision over utilization of the State-Treasury guaranteed credit given to "Laboratorium Frakcjonowania Osocza" sp. z o.o. and the credit security established by the Bank. Further refusal of cooperation with the fiscal control bodies will be deemed the breach of the terms of the Guarantee Agreement of 1 July 1997. […]
>
> In view of the ensuing risk to the repayment of the investment credit by "Laboratorium Frakcjonowania Osocza" sp. z o.o., *the Ministry of Finance, Guarantee Department requests the payment of the means from the State-Treasury guaranteed credit be suspended until the borrower has fulfilled all the obligations under the credit repayment security agreements and the Bank has provided the Ministry of Finance with comprehensive information*. (emphasis added).[116]

84. The parties dispute the character of the Ministry's 29 December 1998 letter. While the Claimants contend that this letter was an exercise of *puissance publique,*[117] the Respondent asserts that the letter was sent by the Ministry acting in a commercial capacity *qua* party to the Surety Agreements.[118]

85. It is not disputed, however, that Kredyt Bank refused to accept the requests of the Ministry of Finance. The response of Kredyt Bank of 5 February 1999[119] included the following statements:

> considerable majority of its charges or claims bear testimony of your complete ignorance of the subject and of the documentation concerned by the State Treasury, or possibly show that your information has been acquired from an incomplete source which could not have been the Fiscal Audit Office […]
>
> […]

[116] Claimants refer to this letter as dated 24 December, Claimants' Memorial, ¶ 23(A); see also Exhibit C-17. (ref. DG/S-5/19/491/98, 2 pages) (Exhibit C-17(A)).

[117] Claimants' Memorial, ¶¶ 51 and 80.

[118] Respondent's Counter-Memorial, ¶ 329.

[119] Exhibit C-17.

> To sum up, we do not share your opinion on credit repayment by the borrower himself being at risk, since project execution does not show any symptoms to suggest that.

86. The Claimants assert that in 1999, Kredyt Bank ceased to provide financing to LFO, and decided to do so based on the Ministry's 29 December 1998 letter.[120] The Respondent however submits that throughout 1999, Kredyt Bank continued to provide funds to LFO.[121]

87. On 4 August 2000, the Ministry of Finance sent a further letter to Kredyt Bank, expressing additional concerns regarding LFO. In its letter, the Ministry stated "Well-grounded suspicions that LFO utilizes the funds from the State Treasury-guaranteed credit to finance the expenses not directly related with the project activities pose a threat to the execution of the whole project and may have adverse consequences for Kredyt Bank S.A."[122]

88. Kredyt Bank responded by letter of 28 August 2000, indicating that it disagreed with the Ministry's assessment of the LFO Project, stating "[t]he audit results available to our Bank at present, in our opinion do not confirm the fears and suspicions suggested in your letter."[123]

N. CSL's Withdrawal and the 2000 Fractionation Agreement

89. In 1999, at the initiative of LFO, the Ministry of Health and LFO began to renegotiate the terms of the 1997 Fractionation Agreement. CSL was to become a strategic investor in LFO and acquire 35% of its shares. The involvement of CSL in such a manner also required renegotiations of the Bank Loan Agreement, which was amended by Annex No. 6 dated 23 May 2000.[124]

90. In early June 2000, CSL however acquired ZLB and withdrew from the LFO Project. The parties differ as to the reasons why CSL withdrew from co-operation with LFO. The Claimants argue that CSL withdrew because (i) CSL had become aware of the

[120] Claimants' Memorial, ¶ 24.

[121] Respondent's Rejoinder, ¶ 114; see also Exhibits R-168 to R-164.

[122] Exhibit C-17(C).

[123] Exhibit C-17(D).

[124] Exhibit R-39.

government's delays in delivering blood plasma to LFO; (ii) the Institute of Haematology had interfered in the performance by the Ministry of Health under the 1997 Fractionation Agreement;[125] (iii) CSL had made a rational business decision to abandon more than AUS$4,000,000 of unpaid consulting fees from LFO in favour of assuming a contract with ZLB;[126] and (iv) the Institute of Haematology "sweetened" the contract between the Government of Poland and ZLB for the benefit of ZLB after it was acquired by CSL.[127] In turn, the Respondent asserts that the evidence supports the conclusion that CSL withdrew from the co-operation with LFO, because: (i) CSL realized that LFO had no financial resources to complete the project with its own resources,[128] (ii) LFO had been unable to convince the Polish Government in the negotiations leading to the 2000 Fractionation Agreement to increase prices for blood derivative products,[129] and (iii) CSL discovered the forgery of the invoice No. 140396 mentioned above.[130]

91. It is not disputed between the parties that LFO knew about the withdrawal of CSL during the negotiations leading to the 2000 Fractionation Agreement.[131]

92. On 14 June 2000, the 2000 Fractionation Agreement was signed between LFO and the Ministry of Health. This agreement included *inter alia* the following provisions:

(i) "[LFO] holds unlimited licenses in terms of their life span to fractionate Plasma and produce Derivatives issued by CSL A.C.N Limited with its registered office at 189 Camp Road Broadmeadows Australia under Licensing Agreements of January 31 1997 and May 1998 and that the rights under the licenses acquired thereunder have not been limited for the benefit of any third party" (Art. 3.1.b);

(ii) "[LFO] offers to produce the Derivatives and provide Plasma Fractionating abroad starting from January 1, 2001, and from July 1, 2001 the said operations shall be gradually transferred to the Plant" (Art. 3.1.d);

[125] Claimants' Reply Memorial, ¶¶ 11 and 15.

[126] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, p. 57 and cf. p. 69; Exhibit R-159.

[127] Pinkas Report, p. 133.

[128] Respondent's Rejoinder, ¶ 107.

[129] Respondent's Counter-Memorial, ¶ 114; Respondent's Rejoinder, ¶ 107.

[130] Respondent's Counter-Memorial, ¶ 115; Respondent's Rejoinder, ¶ 107; see also Exhibit R-43; Exhibit R-44; Exhibit R-45; Exhibit R-159; Exhibit R-160.

[131] Claimants' Memorial, ¶ 27; Respondent's Counter-Memorial, ¶¶ 191 *et seq*; Exhibit C-21.

The agreement further specified the selling prices for plasma-derived products until 31 December 2004 (Art. 6.3), and contained an obligation by LFO to complete its production facilities within 36 months, i.e., by 14 June 2003. The agreement further contemplated that fractionation production was to reach full capacity within 12 months from the completion of the construction process (Art. 3.1.e).[132]

93. It is undisputed that the entry into force of the 2000 Fractionation Agreement depended on two conditions which were to be fulfilled by 31 December 2000:[133]

(i) the 2000 Fractionation Agreement was to be cleared by the Ministry of Health and the President of the Public Procurement Office; and

(iii) LFO was obliged to present to the Ministry of Health documents to evidence sufficient financial, organizational and technological support of LFO by an external investor.[134]

94. The 2000 Fractionation Agreement was subsequently cleared by the Ministry of Health and the Public Procurement office, hence the first condition was met.[135] The second condition, requiring LFO to provide certain documentation, was not complied with.[136]

95. With regard to the second condition, LFO undertook a number of steps to comply with this provision. Following CSL's withdrawal from the project, LFO first requested, and obtained, authorization from the Ministry of Health to change the technological provider.[137] LFO subsequently entered into an agreement on 6 November 2000 with Octapharma AB, an Austrian company, pursuant to which Octapharma AB was to provide fractionation technology to LFO.[138] It is however disputed between the parties whether this agreement entered into force.[139]

[132] Exhibit C-21.

[133] Respondent's Counter-Memorial, ¶ 188; Claimant's Reply Memorial, ¶ 132.

[134] Exhibit C-21, Article 5(3).

[135] Respondent's Counter-Memorial, ¶ 189, referencing Nizioł Witness Statement, ¶ 36.

[136] Respondent's Counter-Memorial, ¶ 190.

[137] Respondent's Counter-Memorial, ¶ 312; Claimants' Reply Memorial, ¶ 131.

[138] Claimants' Memorial, ¶ 27; Exhibit C-23; Claimants' Reply Memorial, ¶ 134.

[139] Claimants' Reply Memorial, ¶ 32.

96. On 29 December 2000, LFO and the Ministry of Health agreed to further extend the deadline for LFO's delivery of the documents evidencing LFO's sufficient financial and organizational support until 28 February 2001.[140]

97. By letter of 7 February 2001, the Ministry of Health reminded LFO to produce the documentation required under the 2000 Fractionation Agreement.[141] In response, on 20 February 2001, LFO informed the Ministry of Health that it had signed a "Term Sheet" with Credit Suisse First Boston (Europe) ("Credit Suisse"), which reportedly expressed its willingness to invest US$20,000,000 in LFO.[142] Following consultations with Kredyt Bank, the Ministry of Health decided to agree to further prolong the time-limit for LFO to produce the required documentation until 30 April 2001.[143]

98. On 27 April 2001, LFO requested a further 2-month extension to file the relevant documentation, indicating that Credit Suisse had not finalized its decision to invest in LFO.[144] It is undisputed that the Ministry did not respond to LFO's request.

99. Upon expiration of the 30 April 2001 deadline, LFO had not provided the relevant documents to the Ministry of Health. According to the Respondent, the 2000 Fractionation Agreement therefore automatically lost all legal effects upon the expiration of this deadline, and the agreement was to be deemed as to never have been concluded, in accordance with its Article 5.3.[145] The Respondent further argues that the parties' contractual relationships were therefore continuously governed by the 1997 Fractionation Agreement. The Claimants were also of the view that the 1997 Fractionation Agreement continued to be the determining legal instrument.[146]

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[140] Respondent's Counter-Memorial, ¶ 194; Annex No. 1 to the 2000 Fractionation Agreement, Exhibit R-104.

[141] Respondent's Counter-Memorial, ¶ 195.

[142] *Idem*.

[143] Annex No. 2 to the 2000 Fractionation Agreement was signed on 28 February 2001; see Exhibit R-106, and Exhibit R-107.

[144] Respondent's Counter-Memorial, ¶ 196; see also Exhibit R-108.

[145] Respondent's Counter-Memorial, ¶ 197.

[146] Claimants' Reply Memorial, ¶ 137: "The Government declared that 2000 Fractionation Agreement did not enter into force due to lack of technology and financial support of the project (…) In response, LFO informed

100. On 7 May 2001, the consortium of financial institutions party to the Bank Loan Agreement requested LFO to repay all then outstanding sums, which amounted to app. US$7,000,000, within 7 days, indicating that they would otherwise terminate the Bank Loan Agreement.[147] LFO did not repay the outstanding amounts within that time-frame.

101. On 14 May 2001, LFO filed an application with the Polish court to commence a "composition procedure," which is a type of insolvency proceedings.[148] In its application, LFO summarized its inability to pay the current liabilities as follows:

> The reasons for the Debtors cessation in payment of the debts are circumstances independent of the Debtor, particularly the following:
>
> 1. the withdrawal of the strategic investor (CSL LTD in Australia) from entering the Company, which was supposed to be associated with a subsidy to the Company in a minimum amount of 10 million USD and assurance of credit resources;
>
> 2. the withdrawal of the financial investor (Credit Swiss First Boston LTD) entering the Company, which was supposed to be associated with a subsidy to the Company in the amount of USD 20 million (the SCFB board informed us of the decision to freeze all investments in relation to the loss of 500 million dollars on the international financial market);
>
> 3. the need to change the production technology at the design and construction stages, caused by the need to adapt the technology to the Union standards, entailing a growth in the necessary investment expenditures and the lengthening of the investment cycle."[149]

102. On 16 May 2001, a meeting took place between Mr Nizioł, one representative of the consortium of the financial institutions who were party to the Bank Loan Agreement, several representatives of the Ministry of Finance, and representatives of the Ministry of Health. In the course of this meeting, the representatives of both, the Ministry of Health and the representative of the consortium of financial institutions indicated their preference

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the Government that the provisions of 1997 Fractionation Agreement are binding and requested that the Government perform its obligations arising therefrom."; see also Exhibit C-100.

[147] Respondent's Counter-Memorial, ¶ 198; see also Exhibit R-109.

[148] Respondent's Counter-Memorial, ¶ 199; see also Exhibit R-40.

[149] Exhibit R-40.

for LFO to continue with its project, and also stated their willingness to continue supporting LFO on the condition that LFO find a suitable strategic investor. In the course of this meeting, Mr Nizioł asserted that he would present such an investor by 25 May 2001.[150] However, Mr Nizioł did not present an investor to the Ministry within the time-frame.

O. Termination of the Bank Loan Agreement

103. On 31 May 2001, the consortium of financial institutions terminated the Bank Loan Agreement.[151] The notice of termination stated that the decision was based on LFO's non-compliance with the credit repayment schedule. On the loan termination date, the overdue principal amounted to US$5,568,279.27, and the interest amounted to US$1,470,792.49. The total amount to be repaid by LFO as of 31 May 2001 (including principal that was not yet overdue) was US$22,746,309.12.[152] The Polish courts later confirmed by way of a final judgment that the Bank Loan Agreement had been properly terminated.[153]

P. LFO's Attempts to Engage Investors and Technology Providers

104. LFO continued its attempts to engage an outside investor, and on 2 July 2001, LFO signed an investor's agreement with Ciech S.A., a Polish state-owned chemical sector company, which contemplated a US$12,000,000 investment by Ciech in LFO.[154] It is not disputed between the parties that this agreement never entered into force, and that Ciech did not ultimately invest in LFO.[155]

[150] Respondent's Counter-Memorial, ¶ 201; see also Exhibit R-110.

[151] Claimants' Memorial, ¶ 29; see also Exhibit C-25.

[152] Respondent's Counter-Memorial, ¶ 202.

[153] Exhibit R-111.

[154] Claimants' Memorial, ¶ 27; see also Exhibit C-26(1).

[155] In their pleadings, the Claimants refer to this agreement as Ciech's written "offer" to invest in LFO, Claimants' Memorial, ¶ 95, and Claimants' Reply Memorial, ¶ 172; Respondent's Counter-Memorial, ¶ 203 argues that the agreement never entered into force as it was conditional on the 2000 Fractionation Agreement and the Bank Loan Agreement – both of which were not in force in July 2001.

105. By letter of 20 September 2001, Octapharma, a company which had previously been approached by LFO as a potential investor,[156] informed the Ministry of Health that it did not plan to invest in LFO.[157] The Claimants contend that while Octapharma indicated in this letter that it did not intend to invest in LFO, the letter did not stipulate that Octapharma was unwilling to provide fractionation technology to LFO.[158]

106. The Claimants assert that any possible co-operation between LFO and Octapharma was frustrated due to pressure from the Polish government, and specifically following an intervention by the Ministry of Health.[159] In this regard, the Claimants submit that a person by the name of Mr Andrzej Kaminski, who was allegedly employed by the Ministry of Health, misrepresented to Octapharma in early 2002 that he was an employee of LFO, in order to (i) receive copies of correspondence exchanged between Octapharma and LFO, and to (ii) convince Octapharma to terminate its co-operation with LFO.[160] The Respondent rejects these allegations and asserts that these are not credible and not supported by evidence.[161] In this regard, the Respondent refers to an email sent by Mr Kim Bjoemstrup, Executive Corporate Vice President of Octapharma, to the Ministry of Health on 18 March 2002, which indicates that while Octapharma had signed two licensing agreements with LFO, neither of these agreements had entered into force and that no payments had ever been received by Octapharma from LFO.[162]

Q. Termination of the 1997 Fractionation Agreement

107. By letter of 22 May 2002, the Ministry of Health informed LFO that it would terminate the 1997 Fractionation Agreement in the event that LFO did not finalize the construction of the fractionation plant and/or start production within a period of 3 months from the date of the

[156] Respondent's Counter-Memorial, ¶ 214, see also Exhibit R-117.

[157] Respondent's Counter-Memorial, ¶ 217; see also Exhibit R-117. Claimants contend that Octapharma's letter did not mean that Octapharma was not willing to provide technology to LFO; Claimants' Reply Memorial, ¶ 32.

[158] Claimants' Reply Memorial, ¶ 32.

[159] Claimants' Memorial, ¶¶ 72B and 94; Claimants' Reply Memorial, ¶¶ 32 *et seq*.

[160] Claimants' Reply Memorial, ¶ 33.

[161] Respondent's Counter-Memorial, ¶¶ 337 *et seq*.

[162] Claimants' Reply Memorial, ¶ 138; see also Exhibit R-119.

Ministry's letter.[163] The parties disagree whether the construction of the fractionation plant had ever been completed.[164]

108. On 22 August 2002, the Ministry of Health sent a notice to LFO terminating the 1997 Fractionation Agreement.[165] The termination of this agreement was subsequently confirmed to LFO by the Ministry's letter of 8 October 2002.[166]

R. The November 2002 Shareholders Resolution

109. On 26 November 2002, the shareholders of LFO adopted resolutions,[167] which:

(i) decreased the share capital in LFO from PLN100,000 to PLN20,000, by way of redemption of 80% of existing shares (in proportion to the shareholding). The shareholding of the Claimants was thus diminished by 80%, i.e. it decreased from 33% shares to 6.6% shares in the share capital of LFO;

(ii) simultaneously increased the share capital of LFO from PLN20,000 to PLN400,000;

(iii) increased the nominal value of individual shares from PLN100 to PLN500, each;

(iv) issued 600 new shares, constituting 75% of the new share capital, which were offered to Mr Krzysztof Łysakowski, who was an employee of LFO; and

(v) 600 shares were given to Mr Łysakowski in consideration of a fuel tank valued at PLN300,000 (approximately US$87,000).[168]

110. The Respondent contends that these resolutions were not in accordance with Polish law and adversely affected the Government and the financial institutions that were party to the Bank Loan Agreement. The Respondent argues in essence that (i) given the redemption of 80% of LFO shares, the registered pledge that constituted a collateral under the Bank Loan Agreement was automatically extinguished;[169] (ii) the financial institutions no longer had a

[163] Respondent's Counter-Memorial, ¶ 217; see also Exhibit R-121.

[164] See above, paragraph 79.

[165] Respondent's Counter-Memorial, ¶ 128.

[166] *Idem*; see also Exhibit R-122.

[167] Claimants' Memorial, ¶ 73D; Respondent's Counter-Memorial, ¶ 219 *et seq.;* Exhibit R-123.

[168] Respondent's Counter-Memorial, ¶ 219; Exhibit R-125.

[169] Respondent's Counter-Memorial, ¶ 221.

legal title to request a lien in their favour since Mr Łysakowski, being the new majority shareholder in LFO, was not a party to the Bank Loan Agreement;[170] (iii) the resolutions were in violation of the Bank Loan Agreement[171]; and (iv) no real value was contributed to LFO by these resolutions given that only the nominal value of LFO share capital was increased.[172] The Claimants maintain that these resolutions were considered legal and were adopted on the basis of advice from Polish counsel to LFO.[173]

S. Payments by the State Treasury under the Consortium Surety Agreement

111. The bankruptcy of LFO was declared on 26 June 2006 by the bankruptcy court in Tarnobrzeg.[174] Subsequently, the financial institutions that were party to the Bank Loan Agreement unsuccessfully attempted to enforce their claims under the Bank Loan Agreement against LFO. These institutions subsequently requested payment from the State Treasury pursuant to the Bank Loan Agreement and the Consortium Surety Agreement.[175] In 2006, Poland paid the surety for LFO to the financial institutions. The sums paid by Poland are as follows:[176]

(i) PLN8,207,371.26 were paid to Kredyt Bank S.A. w Warszawie;

(ii) PLN12,281,819.91 were paid to Bank Polska Kasa Opieki S.A.;

(iii) PLN12,281,824.85 were paid to ING Bank Śląski S.A.;

(iv) PLN12,272,095.78 were paid to Bank BPH S.A.;

(v) PLN15,838,927.25 were paid to Bank Zachodni WBK S.A.

The total amount paid by the State Treasury appears to have been PLN60,882,039.05.[177]

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[170] Respondent's Counter-Memorial, ¶ 222.

[171] Respondent's Counter-Memorial, ¶ 223.

[172] Respondent's Counter-Memorial, ¶ 224.

[173] Claimants' Reply Memorial, ¶¶ 46, 144(iv).

[174] Respondent's Counter-Memorial, ¶ 231; Exhibit R-134.

[175] Respondent's Counter-Memorial, ¶ 233; Exhibit R-135.

[176] Respondent's Counter-Memorial, ¶ 233.

[177] The Respondent in its Counter-Memorial at ¶ 233 arrives at a total sum of PLN60,887,635.42, which however does not correspond to the total amount of the individual sums listed in (i)-(v) above.

112. Special audit proceedings were also commenced by the Supreme Audit Chamber of the Republic of Poland. The aim of these proceedings was to inspect the regularity and legality of the acts and omissions of the Polish administration with respect to the LFO project.[178] The Chamber issued a Report in early 2007.[179]

113. LFO was deleted from the commercial register in Poland in January 2012.[180]

IV. LEGAL ANALYSIS

114. As stated above, the BIT on which the Claimants rely is annexed to this Award as Annex A. At the request of the Tribunal the parties jointly prepared a list of points upon which they wished to the Tribunal decide (the "List"). The List is attached to this Award as Annex B. The Tribunal will follow that List as a framework for the analysis in the Award, after some preliminary observations relating to questions of jurisdiction and admissibility.

A. Jurisdiction and Admissibility

115. The Claimants assert that the Tribunal has jurisdiction under Article IX of the U.S.-Poland BIT and the Arbitration (Additional Facility) Rules. Article IX of the U.S.-Poland BIT reads as follows:

> **ARTICLE IX.**
> **Settlement of Disputes Between a Party and an Investor of the Other Party**
>
> 1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party (including any agency or instrumentality of such Party) and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment. A decision of a Party which denies entry of an investment shall not constitute an investment dispute within the meaning of this Article.

[178] Respondent's Counter-Memorial, ¶ 234.

[179] Request for Arbitration, p. 8; Request for Arbitration, Annex 7; Exhibit C-33.

[180] Respondent's Counter-Memorial, ¶ 231.

2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third party procedures. Each Party shall encourage its nationals and companies to resort to local courts, especially for the resolution of disputes relating to administrative actions. Subject to paragraph 3 of this Article, if the dispute cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures. Any dispute-settlement procedures, including those relating to expropriation, specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provisions of domestic laws and applicable international agreements regarding enforcement of arbitral awards.

3. (a) At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by concilia~tion or binding arbitration to the International Centre for the Settlement of Investment Disputes ("Centre") or to the Additional Facility of the Centre or pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") or pursuant to the arbitration rules of any arbitral institution mutually agree between the parties to the dispute. Once the national or company concerned has so consented, either party to the dispute may institute such proceeding provided:

(i) The dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute-settlement procedures; and

(ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute. If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

(b) Each Party hereby consents to the submission of an investment dispute for settlement by conciliation or binding arbitration:

(i) To the Centre, in the event that the Republic of Poland becomes a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States done at Washington, March 18, 1965 ("Convention") and the Regulations and Rules of the Centre, and to the Additional Facility of the Centre, and

(ii) to an arbitral tribunal established under the UNCITRAL Rules, as those Rules may be modified by mutual agreement of the parties to the dispute, the appointing authority referenced therein to be Secretary General of the Centre.

(c) Conciliation or arbitration of disputes under (b) (i) shall be done applying the provisions of the Convention and the Regulations and Rules of the Centre, or of the Additional Facility as the case may be.

(d) The place of any arbitration conducted under this Article shall be a country which is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

(e) Each Party undertakes to carry out without delay the provisions of any award resulting from an arbitration held in accordance with this Article. Further, each Party shall provide for the enforcement in its territory of such arbitral awards.

4.[181] In any proceeding involving an investment dispute, a Party shall not assert, as defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages. However, to the extent that a Party succeeds to the rights or claims of the national or company concerned by reason of subrogation or assignment, the national or company concerned shall not continue to pursue such rights and claims in its own name unless authorized to do so on behalf of the subrogee or assignee.

5. In the event of an arbitration, for the purposes of this Article any company legally constituted under the applicable laws and regulations of either Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or

[181] Paragraph 4 is incorrectly labelled paragraph 3 in the copy of the BIT published on the UNCTAD website, and in the copy of the BIT attached to the Claimants' Request.

company of such other Party, in accordance with Article 25(2)(b) of the Convention.

(1) The 'investment'

116. An 'investment' is defined in Article I(1)(b) of the BIT as "every kind of investment, in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other party." It is also specified in Article I(1)(b) that "a company or shares of stock" and "a claim to money" are included within the definition.

117. The Claimants, whose U.S. nationality is not disputed, assert that their investment took the form of (i) equity shares in the Polish company LFO and (ii) loans to LFO, and that both shares and loans count as 'investments' within the meaning of the BIT. The Respondent asserts that the Claimants' shares did not represent an injection of cash, because amounts initially invested were withdrawn from the company and then returned to the company ostensibly as additional investments, in a manner that might be described as 'churning'.[182] The Respondent's allegations in this regard were directed primarily at the activities of Mr Nizioł.

118. For the purposes of establishing its jurisdiction it is necessary that the Tribunal be satisfied that the Claimants made an investment in Poland. Monies paid by the Claimants to Mr Nizioł or to another third party which were intended to be invested in Poland, in LFO, but which were not in fact so invested, are not investments by the Claimants in Poland.

119. It is clear, however, that the Respondent does accept that the Claimants made a substantial investment in LFO. In its Counter-Memorial it wrote:

> the contemporary documents originating from LFO demonstrate that the Claimants contributed to LFO only USD 1,980,000 each (totalling 3,960,000 USD) [Fn. 1998.10.20 Letter to Kredyt Bank, Exhibit R-141]**.** The Claimants have not proven that they committed any more funds to the LFO Project, except for the loan

[182] Respondent's Counter-Memorial, ¶¶ 121-144, 183-184.

> agreement for USD 180.000, produced by the Claimants as Exhibit C-22.[183]

120. While the Respondent raises serious questions concerning the reality and validity of several transactions concerning monies transferred in connection with the establishment of LFO, those questions do not affect the fact that it is common ground that the Claimants did make a substantial investment in LFO.

121. For the purposes of establishing the jurisdiction of the Tribunal and the admissibility of the claims, it is sufficient that there was a real investment. The precise amount of that investment, or its value (which is a different thing), is not critical at this stage of the analysis, without prejudice to its significance when the merits are considered.

(2) The 'investment dispute'

122. Article IX(1) of the U.S.-Poland BIT defines an investment dispute so as to include "an alleged breach of any right conferred or created by this Treaty with respect to an investment." The claims in this case fall squarely within that definition.

123. Notice of the claim was given by the Claimants by letter dated 24 March 2008.[184] In that letter it was alleged that the Respondent had failed to treat the Claimants' investment fairly and equitably and without discrimination; and specific reference was made to Articles II(6) [fair and equitable treatment], II(8)(c) and(d) [non-discrimination], III(2)(c) and (d) [non-discrimination] and III(3). Article III(3) is the broadest of those provisions and reads as follows:

> Nationals and companies of each Party in the conduct of commercial activities shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the conduct of commercial

[183] Respondent's Counter-Memorial, ¶ 372. Respondent did not finally accept that the US$180,000 sum was a genuine loan: see Respondent's Counter-Memorial ¶ 381.

[184] Request for Arbitration, Annex 3; Exhibit C-35.

> activities. Each Party shall observe any obligation it may have entered into with regard to the conduct of commercial activities.

Those claims were developed in the Claimants' written pleadings.

124. The Claimants' letter dated 24 March 2008, requested consultation and negotiation with the Respondent in accordance with Article IX(2) of the BIT.[185]

125. Article IX(2) of the BIT requires that the parties should seek initially to settle an investment dispute by consultation and negotiation. Article IX(3) provides that the national or company – *i.e.*, the investor – may choose after six months from the date on which the dispute arose to submit the dispute to ICSID arbitration, provided that the dispute has not been submitted to any applicable previously agreed dispute-settlement procedures or to the courts or tribunals of the State Party to the dispute.

126. The Request for Arbitration was registered by ICSID on 14 September 2010 pursuant to Article 4 of the Arbitration (Additional Facility) Rules, there having been no settlement of the dispute after its notification to the Respondent in the Claimants' letter dated 24 March 2008.[186] By letter of September 7, 2010, the Claimants confirmed that they had not submitted the claims in this case to any other tribunal or court. The formal requirements set out in Article IX(2) of the BIT are accordingly met.

127. The Respondent argues, however, that the Tribunal nonetheless lacks jurisdiction because (i) the investment was tainted by fraud, and (ii) applying the *Oil Platforms* test,[187] even if the Claimants' factual allegations are accepted as true they would not disclose any violation of the BIT. We address these points in turn.

[185] Request for Arbitration, Annex 3; Exhibit C-35.

[186] Request for Arbitration, Annex 3.

[187] See Judgment of the International Court of Justice in the *Oil Platforms case (Islamic Republic of Iran v United States of America)* (Preliminary Objection) [1996] ICJ Rep 803, ¶¶ 16-17 and *passim*, and also the Separate Opinion of Judge Higgins, ¶ 32 and *passim*.

(3) Question 1. Whether the Tribunal has jurisdiction over the dispute in the light of the Respondent's asserted defence based on allegations of fraud and deceit related to the LFO Project.

128. The Respondent argues that the investment was from the outset tainted by fraud, deceit and bad faith, contrary not only to domestic Polish legislation but also to international public order, and that the Claimants were consequently deprived of a right to protection under the BIT and the Tribunal was accordingly deprived of jurisdiction.[188] While arguing that it would be more efficient and reasonable to deal with this as a preliminary matter, the Respondent submitted in the alternative that if the Tribunal decided to address this point on the merits, it should at that stage dismiss the claims in their entirety for the same reasons.

Question 1: The Tribunal's analysis and decision

129. The allegations of fraud, deceit and bad faith in this case are serious,[189] but they are inextricably bound up with the merits of the case. It would not have been practical or efficient to deal with them as a preliminary matter at the hearing, and the Tribunal did not do so.

130. The practicalities of organizing and making best use of the hearing do not, however, predetermine the content or juridical character of decisions set out in the Award. Having heard and considered all of the evidence, the Tribunal could in principle have decided that the correct legal analysis required it, in this Award, to treat those allegations as a matter going to the question of its jurisdiction rather than to the merits of the claims. Again, however, the Tribunal has decided that the allegations do not have that character.

131. The BIT in this case does not define an 'investment' in terms that explicitly require the investment to be made in accordance with the host State's law.[190] Nonetheless, it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State's

[188] Respondent's Counter-Memorial, ¶¶ 284-291; Respondent's Rejoinder, ¶¶ 136-160.

[189] Respondent's Counter-Memorial, ¶¶ 119-184, 360-381.

[190] U.S.-Poland BIT Article 1(1)(b). In contrast, there is a reference to permission and treatment "in accordance with [the host State's] relevant laws and regulations" in Article II(1) of the BIT.

law.[191] In previous cases, as the *Abaclat* Tribunal noted,[192] some tribunals have treated arguments based on fraud, etc, as going to jurisdiction or admissibility,[193] while others have treated them as arguments going to the merits.[194]

132. There may be circumstances where fraud is so manifest, and so closely connected to facts (such as the making of an investment) which form the basis of a tribunal's jurisdiction as to warrant a dismissal of claims *in limine* for want of jurisdiction. This situation is, however, likely to be exceptional; and it is not the situation in the present case.

133. The Tribunal, having heard the evidence and the points adduced by both parties in relation to the allegations of fraud, deceit and bad faith, has decided that the circumstances in which that investment were made are far from displaying such manifest fraud or other defects as to warrant the conclusion that the Claimants must be denied the benefit of the dispute settlement procedure under the BIT, and so denied any further consideration of the merits of their claims.

134. In this case it is not alleged that there was any manifest violation of Polish law, or that the Claimants, Mr Minnotte and Mr Lewis, themselves had actual knowledge of the facts that are alleged to prove that there was fraudulent conduct in the initial making and conduct of the investment. The serious allegations made by the Respondent are primarily directed at Mr Nizioł.

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[191] See, e.g., *Inceysa Vallisoletana, S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, 2 August 2006 ("Inceysa"), ¶¶ 230-244, where the Tribunal appears to treat fraud as a matter going to jurisdiction (because States cannot be supposed to have intended to give investments made fraudulently the benefit of BIT protection), and to admissibility (because no claimant can benefit from his own fraud), on grounds that are independent of the wording of the BIT. The *Inceysa* Tribunal also regarded claims in respect of fraudulent investments as barred by international public policy and by the principle of unjust enrichment.

[192] *Abaclat and others (Case formerly known as Giovanna a Beccara and others) v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011 ("Abaclat"), ¶ 648.

[193] *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009 ("Phoenix Action").

[194] *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013 ("Rompetrol"), *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3), Decision on Respondent's Objections to Jurisdiction, 21 October 2005 ("Aguas del Tunari"), *Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh* (ICSID Case No. ARB/06/10), Award, 17 May 2010 ("Chevron"), *Saba Fakes v. Republic of Turkey (*ICSID Case No. ARB/07/20), Award, 14 July 2010 ("Saba Fakes").

135. The Respondent did not put forward evidence of deliberate fraud on the part of the Claimants in the initial making and conduct of the investment, although it did take the position that by virtue of their role in LFO they could and should have been aware of the nature of the allegedly fraudulent transactions.[195] In other words, the Respondent's case is in this respect based essentially upon the alleged negligence of the Claimants.

136. The Tribunal also notes that the Respondent had many dealings with and related to LFO prior to the initiation of this arbitration, without manifesting any concern that the investment had been improperly made.

137. The question is thus whether this Tribunal's jurisdiction is vitiated by reason of the alleged negligent failure of the Claimants to investigate the factual circumstances surrounding the making of their investment. The Tribunal considers that it is not.

138. While the Claimants' conduct can certainly bear upon the question whether they can benefit from the BIT protections as a matter of the merits of this case, the Tribunal does not consider that the actual terms of the BIT in this case deny them access to a tribunal to have the merits of their claims heard.

139. Nor does the Tribunal consider that any principle of international law, such as the principle *ex turpi causa non oritur actio* (assuming, *arguendo*, that principle to have the status of a rule of international law), would bar its jurisdiction in the case of the Claimants whose connection with an alleged fraud consists in a negligent failure to make inquiries which might (or might not) have unearthed evidence of fraud.

140. The Tribunal accordingly decides that the allegations of fraud, deceit and bad faith in relation to the investment made by the Respondent in this case do not warrant the dismissal of the claims on the basis that the claims do not fall within the jurisdiction of the Tribunal. Nor does the Tribunal consider that the grounds raised by the Respondent would warrant a decision that the claims are inadmissible. The Tribunal will consider the allegations of impropriety in the context of the merits of this case.

[195] See, *e.g.*, Respondent's Counter-Memorial, ¶¶ 240-242.

(4) Question 2. Whether the Tribunal has jurisdiction over the dispute under the *Oil Platforms* test.

141. The Respondent argues that even if the Claimants' factual allegations are assumed to be true, the claims do not in any event disclose any violation of the U.S.-Poland BIT: i.e., the claims fail to meet the *Oil Platforms* test.[196]

Question 2: The Tribunal's analysis and decision

142. The Tribunal notes that the Respondent itself sets out certain propositions advanced by the Claimants but asserts that they are easily answered or are without merit.[197]

143. The *Oil Platforms* test, applied by tribunals in cases such as *Impregilo v. Pakistan,*[198] requires the tribunal to ask, not whether the claims *do* disclose violations of the treaty, but rather whether the claims are *capable* of amounting to violations of the treaty on the basis of the facts alleged by the claimant, so that the tribunal has jurisdiction to entertain those claims.

144. On that basis, the Tribunal has no doubt that, whatever the force of the points that the Respondent might make in reply, the claims in the present case are capable of disclosing violations of the BIT. That is evident from the submissions in the Claimants' Memorial, in which the Claimants allege, for example, that the Respondent acted "arbitrarily and without justification" in refusing to provide LFO with plasma.[199]

145. The Tribunal accordingly is not deprived by the *Oil Platforms* test of its jurisdiction to determine whether or not the Claimants have made out their case.

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[196] Respondent's Counter-Memorial, ¶¶ 266-283 and Respondent's Rejoinder, ¶¶ 168-170.

[197] Respondent's Counter-Memorial, ¶¶ 270-272.

[198] *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, 22 April 2005, ¶¶ 237-254.

[199] Claimants' Memorial, ¶¶ 51-88.

(5) Other matters relating to jurisdiction and admissibility

146. Two other matters relating to questions of jurisdiction and admissibility were raised during the proceedings. Although they were resolved, it is desirable for the sake of good order that they be recorded in this Award.

147. First, during the initial stages of this arbitration, the Respondent raised a question as to whether or not Mr Robert Lewis was himself to be regarded as a party to the proceedings.[200] He had previously granted a power of attorney to Mr Minnotte authorizing him to act as Mr Lewis' agent for the pursuit of this claim, and had not withdrawn that power of attorney; but both Mr Minnotte and Mr Lewis were present at the hearing.[201]

148. At the hearing, in the presence of Mr Lewis and Mr Minnotte, it was made unequivocally clear that Mr Lewis is himself a Claimant in these proceedings, with all the rights and obligations of a Party.[202] The Respondent withdrew its jurisdictional objection relating to Mr Lewis.[203]

149. Second, the Respondent objected to certain specific claims made by the Claimants concerning the conduct of criminal proceedings in Poland.[204] The Claimants subsequently withdrew those claims, without prejudice to the possibility of raising them in a separate proceeding.[205] The Tribunal therefore determined that those claims lay outside the scope of the present proceedings, although the Claimants were at liberty to make an application to amend the claims in this case so as to include them. No such application was made.[206]

150. The Tribunal is further of the view that the other jurisdictional requirements set forth in the ICSID Additional Facility Rules are also fulfilled in this case, namely:

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[200] See Respondent's Counter-Memorial, ¶¶ 246, 249-265; Respondent's Rejoinder, ¶¶ 133-135.

[201] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, p. 2; see above, footnote 1.

[202] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, pp. 2-4.

[203] Hearing on Jurisdiction and the Merits, Transcript, 17 April 2013, p. 96.

[204] Respondent's Counter-Memorial, ¶¶ 292–305.

[205] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, pp. 14-15.

[206] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, pp. 35-36; Hearing on Jurisdiction and the Merits, Transcript, 17 April 2013, p. 96.

a) There is a legal dispute between a national of an ICSID Contracting State and a State party which is not an ICSID Contracting State, which arises directly out of an investment in accordance with Article 2(a) of the Additional Facility Rules. Messrs Minnotte and Lewis are nationals of the U.S., which is an ICSID Contracting State, while the Republic of Poland is not an ICSID Contracting State. As discussed above, the Tribunal is of the view that Messrs Minnotte and Lewis have made an investment for the purposes of the BIT and hence for the purposes of Articles 4(2) and 2(a) of the Additional Facility Rules. Further, the parties disagree about whether the Republic of Poland complied with its obligations under the BIT vis-à-vis LFO. Therefore, a legal dispute exists between the parties which arises directly out of an investment.

b) The parties have consented in writing to ICSID Additional Facility arbitration.[207] The Respondent's advance consent is contained in Article IX of the BIT, the pre-requisites of which are fulfilled, and the Claimants' consent is contained in the Request for Arbitration. Further, approval of access to the Additional Facility was granted by the ICSID Secretary-General on September 14, 2010.

(6) Conclusion on jurisdiction and admissibility

151. The Tribunal accordingly decides that it has jurisdiction to consider the Claimants' claims within the scope of the present proceedings, and that those claims are admissible.

B. Merits

152. The Joint List of Points set out a series of questions, there numbered 3 – 8, which covers the Claimant's case. The Tribunal will answer each in turn.

[207] In accordance with Article 4(2) of the Additional Facility Rules, the parties also consented to ICSID jurisdiction under Article 25 of the ICSID Convention (in lieu of the Additional Facility) in the event that the Republic of Poland would have become a Contracting State at the time when proceedings were instituted.

(1) Question 3. Whether the Claimants' claims should be dismissed on the merits because of the Respondent's defence based on allegations of fraud and deceit related to the LFO Project?

153. It was noted above[208] that the Respondent had argued that the Claimants were not entitled to the protection of the BIT because the investment was made in circumstances tainted by fraud and deceit.[209]

154. The Claimants did not accept that there had been any impropriety associated with the making of the investment. Further, they suggest that if there were any impropriety it was not their responsibility. Indeed, the Claimants submitted that the Respondent's failure to inform the Claimants in timely fashion of the factual basis for any such impropriety would amount to a further failure by the Respondent to treat the Claimants and their investment fairly and equitably.[210]

Question 3: The Tribunal's analysis and decision

155. There are several aspects of this case that prick the curiosity of the observer. The details and purposes of the money transfers associated with the making of the investment are one; the circumstances of the Polish authorities' apparent abandonment in Switzerland of millions of dollars' worth of immunoglobulin derived from Polish blood collections is another. For better or worse, this Tribunal has a limited responsibility and limited powers. It is not an investigative body; and it has not pursued these questions any further than is necessary for the fulfilment of its responsibilities.

156. As far as this Tribunal is concerned, the critical question at this stage in its analysis is not whether any fraud or deception occurred, but rather whether, within the framework of these proceedings, it is proved that there was fraud and / or deception of such a kind as to disentitle the Claimants to the protection of the BIT for their investment.

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[208] See paragraphs 128-140, above.

[209] See Respondent's Counter-Memorial, ¶¶ 284-291, and Respondent's Rejoinder, ¶¶ 136-160, 171; Hearing on Jurisdiction and the Merits, Transcript, 17 April 2013, pp. 97-106.

[210] See *e.g.*, Claimants' Reply Memorial, ¶¶ 143, 144.

157. The Tribunal has noted in the context of its discussion of questions of jurisdiction and admissibility that the definition of an investment in Article I.1(b) of the BIT does not contain an express requirement that the investment be made "in accordance with the laws [of the host State]". It has also noted that the Respondent does not directly accuse the Claimants themselves of deliberate fraud or deceit in the making or initial conduct of the investment, but only of negligence.[211] The Tribunal concluded in that context that the Respondent's allegations of fraud and deceit were not of such a nature as to exclude the jurisdiction of the Tribunal or to render the claims inadmissible.

158. Moving the analysis forward to the next step, the Tribunal now considers whether, having decided that the Claimants' claims are within its jurisdiction and admissible, they should be dismissed on the merits because of the Respondent's defence based on allegations of fraud and deceit related to the LFO Project.

159. This question might be approached in two ways. It might be asked whether the investment itself is tainted by fraud, so as to deprive it of the benefit of protection under the BIT. Alternatively, it might be asked whether the investors are tainted by fraud, so as to disentitle them from the benefit of protection under the BIT for their investment.

160. The Tribunal must apply the specific terms of the U.S.-Poland BIT. While one of the provisions invoked by the Claimants – Article II(6) – refers to a duty to accord fair and equitable treatment, etc, to "investments", the other provisions invoked – Articles II(8)(c) and (d), III(2)(c) and (d), and III(3) – refer to the treatment to be accorded to "nationals and companies of each Party".

161. Thus, for instance, it is "nationals and companies of each Party" that are protected against treatment that is not "fair and equitable", by Article III(3). The Tribunal does not consider that a claimant can be altogether denied the protection of the BIT in respect of treatment that is alleged to be unfair or inequitable by reason of the conduct of some person other than the claimant. Such a bar would be incompatible with the very idea of fair and equitable treatment of the claimant.

[211] See above, paragraphs 134-135.

162. Though one provision of the U.S.-Poland BIT – Article II(6) – is phrased in terms that protect "investments" rather than "investors", that does not materially affect the Claimants' position, because substantially the same rights as are secured by Article II(6) for investments are also secured for investors by Article III(3).

163. The Tribunal does not consider that there is any warrant in international law for denying altogether the protection of a bilateral investment treaty such as the one applicable in the present case, in every case where the claimant has been negligent in respect of the detection of wrongdoing that is alleged to have accompanied the making of the investment. It is, however, entirely possible that the conduct of a third party, or a claimant's negligence, may justify specific conduct of a respondent that could in other circumstances amount to a violation of the BIT. There may be circumstances in which the deliberate closing of eyes to evidence of serious misconduct or crime, or an unreasonable failure to perceive such evidence, would indeed vitiate a claim; but the Tribunal does not consider that the proven facts provide sufficient evidence to justify the conclusion that such circumstances existed in the present case.

164. The Tribunal accordingly decides that the particular allegations made by the Respondent of fraud and deceit, not being allegations made against the Claimants themselves, and the allegations of negligence made against the Claimants, are not of such a nature as entirely to deprive the Claimants of the benefit of the protections of the U.S.-Poland BIT for their investment in this case. It will consider in the following paragraphs whether the facts underlying those allegations justify some or all of the conduct of the Respondent towards the Claimants' investment.

(2) Question 4. Whether the Respondent directly or indirectly expropriated the Claimants' investment (direct expropriation) or the value thereof (indirect expropriation) in violation of the U.S.-Poland BIT by:

4.1. Alleged pressure on Kredyt Bank to cease funding LFO's line of credit, based on the Claimants' allegation that this led to acceleration of the loan repayment and Kredyt Bank's motion to institute LFO's bankruptcy proceedings?

4.2. Alleged failure to supply blood plasma under the 1997 Fractionation Agreement?

4.3 Alleged action by Respondent, through the Institute of Haematology inducing CSL to back out of the LFO Project?

165. The Tribunal does not find that the Respondent expropriated the Claimants' investment, because it finds that the facts proven in this case do not support such a claim.

a. Question 4.1.: Kredyt Bank.

166. The Claimants allege that the Respondent improperly brought pressure upon Kredyt Bank to cease funding LFO's line of credit, in order to force the failure of the LFO project.

167. The Respondent maintains that the communications with Kredyt Bank were motivated solely by the desire to protect its position as guarantor, in accordance with normal commercial practice, and to fulfil its responsibilities as the custodian of public finances.

168. The documentary evidence submitted as Exhibit C-17 certainly shows that the Ministry of Finance Guarantee Department expressed "concern at the deterioration of economic and financial situation of 'Laboratorium Frakcjonowania Osocza' sp. S o.o." and at delays that "may shortly lead to the Company's loss of credit capacity, and at "inadequate security of the investment credit".[212] That concern was, however, expressly placed in the context of "the Guarantee Agreement of 1 July 1997 concluded between the Minister of Finance and Kredyt Bank PBI S.A." and the "reliability of the Bank supervision over utilization of the State-Treasury guaranteed credit given to [LFO]".[213] In other words, the Ministry was

[212] Letter dated 24 December 1998, Exhibit C-17-A. For the guarantee arrangement, see paragraph [44] above.

[213] Letter dated 24 December 1998, Exhibit C-17-A.

seeking to protect its position, and fulfil its responsibilities, as a public authority that had provided a credit guarantee for LFO.[214]

169. Kredyt Bank replied to the Ministry's letter of 24 December 1998 with a brusque but reasonably detailed letter dated 5 February 1999.[215] That letter indicated that its author had a low opinion of the Ministry's ability to understand the workings of the Guarantee Agreement, though that opinion was not substantiated by any facts. The letter was written in memorably robust terms, which give no indication that Kredyt Bank either understood itself to be under pressure to cut off LFO's credit or, had it felt itself under such pressure, that it would have done so.

170. On 4 August 2000 the Ministry of Finance wrote again to Kredyt Bank, drawing attention to certain irregularities in the operations of LFO discovered in the course of an official audit, including the issuance of allegedly forged and fictitious invoices.[216] Kredyt Bank's reply, dated 28 August 2000, responded in some detail to the Ministry's letter and indicated that Kredyt Bank had, in the course of its monitoring of LFO, found no evidence of such irregularities.[217]

171. There is no evidence that indicates that the Respondent's dealings with Kredyt Bank were motivated by anything other than a legitimate concern to protect its position as a guarantor and fulfil its responsibilities as an accountable user of public funds. The Tribunal accepts the Respondent's explanation of its conduct in relation to the Kredyt Bank issue. The Tribunal has relied here upon contemporaneous evidence, but it notes also the account (which is relevant to all of the findings on the merits) given in 2002 by the Minister of Health to the Secretary of the Committee of the Council of Ministers.[218] The Tribunal accordingly finds that there is no evidence that the Respondent brought improper pressure upon Kredyt Bank to cease funding LFO's line of credit.

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[214] The role of Respondent as guarantor is described in the report of the Supreme Chamber of Control, Audit Nos. I/05/014, I/05/017, I/06/023, File No. 7/2007/I05014/I05017/I06023/LRZ (February 2007), Exhibit C-33.

[215] Exhibit C-17-B.

[216] Exhibit C-17-C.

[217] Exhibit C-17-D.

[218] Letter dated 7 February 2002, Exhibit R-115.

b. Question 4.2.: *Supply* of Plasma.

172. The Tribunal has approached the question of the supply of plasma pursuant to the 1997 Fractionation Agreement bearing in mind that the LFO project involved several phases or aspects, including (a) the testing of LFO's processes and products, (b) the registering of LFO's processes and products as drugs for use in Poland, and (c) obtaining authorizations from the Respondent to register and use its processes and sell its products to the Respondent in Poland. These phases are distinguished as a matter of fact: the 1997 Fractionation Agreement does not itself distinguish between the supply of plasma for different phases or purposes.

173. It is common ground that blood plasma was not in fact supplied under the 1997 Fractionation Agreement for the purpose of testing the fractionating process through trials to be conducted abroad before the factory in Poland was completed. The question in the context of this claim is whether the Respondent was under any duty to supply the plasma in such circumstances and improperly refused to do so.

174. The Claimants assert that the Respondent was under a duty to supply plasma for testing purposes on demand,[219] which it did not fulfil,[220] and that the failure to deliver the samples for testing caused delays which led to the failure of the project. The Respondent denies that there was any such duty, and denies that the non-delivery caused the failure of the project.

175. As far as the existence of the duty is concerned, the 1997 Fractionation Agreement[221] contains no provision that addresses the question of the supply of plasma for testing abroad, and the Tribunal finds no basis for implying such a term into the contract. Article 3.4 of the 1997 Fractionation Agreement provides that LFO (there described as 'PFL') "shall carry out the registration of the products in accordance with the regulations in force", but says nothing about the supply of plasma for that purpose or about the schedule according to which registration would be secured.

[219] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, pp. 66-67.

[220] Claimants' Memorial, ¶ 64.

[221] Exhibit C-13.

176. The Tribunal is not persuaded by the Claimants' argument that an obligation to supply plasma for testing purposes was created by Article 4.1 of the 1997 Fractionation Agreement.[222] That provision required the Ministry to "ensure that the organizational actions are taken for the supplying of plasma to PFL by organizational units of the public blood service" in the minimum amount of 150,000 litres per year. The obligation in Article 4.1 lasted throughout the 15-year life of the Fractionation Agreement set by Article 5.1, and is plainly a general provision guaranteeing minimum supplies for fractionation, in what was described as "a framework agreement setting forth the cooperation between the ministry and the company".[223] It is silent on the specific question of the supply of plasma for testing purposes.

177. In the view of the Tribunal, the express terms of Article 4.1 cannot be construed as requiring the Respondent to deliver plasma for the purposes of pre-production testing, either on demand or by any given date. The Tribunal notes that a contractual term that would have imposed such a duty was included in a draft of the 1997 Fractionation Agreement but was not included in the agreed final text of the 1997 Fractionation Agreement.[224]

178. The Respondent had monopoly control over the supply of Polish plasma[225] (but not over all plasma; and non-Polish plasma could be and was used for the initial stage of the testing).[226] It is certainly arguable that the Respondent was obliged to supply Polish plasma at some stage for testing purposes. That conclusion is at least arguably necessary in order to give the 1997 Fractionation Agreement practical effect: at some stage LFO had to obtain Polish plasma for testing from somewhere. But the Claimants' case requires more than that.

179. The Claimants assert that the Respondent wrongfully failed to deliver the plasma when it was demanded; but the Tribunal considers that the Claimants have not shown that there

[222] Claimants' Reply Memorial, ¶¶ 93 -105.

[223] See Hearing on Jurisdiction and the Merits, Transcript, 16 April 2013, p. 91.

[224] Article 4.1.c of the draft, Exhibit R-158; cf., Hearing on Jurisdiction and the Merits, Transcript, 17 April 2013, p. 83.

[225] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, p. 107; Hearing on Jurisdiction and the Merits, Transcript, 17 April 2013, pp. 8, 33-34.

[226] Hearing on Jurisdiction and the Merits, Transcript, 16 April 2013, p. 93.

was any legal obligation to supply the plasma on demand and have not shown that the failure to deliver it in 1998 or 1999 was wrongful. Furthermore, the Respondent pointed to the possibility of different scenarios for testing and registration of plasma products, which could have avoided the need for the pre-production delivery of plasma for testing prior to the completion of the construction of the plant.[227]

180. The Tribunal reaches this conclusion without the need to explore the question whether, if there had been such an obligation, any failure by the Respondent to deliver supplies of plasma might have been justified in the light of LFO's own conduct.[228]

181. The Tribunal has also considered whether there was an obligation that arose otherwise than by contract: for example, through the creation by the Respondent of legitimate expectations on which the Claimants were entitled to rely. Though Mr Nizioł suggested in his testimony that it had reasonably been assumed or understood that plasma supplies would be provided by the Respondent on request for testing abroad, the Tribunal does not regard this as proven or supported by the evidence before it. No evidence of the Respondent making any specific commitment to supply plasma on demand or at any specific time for testing can be found.

182. There is also a factual point to be made. As far as the alleged breach of a duty to supply the plasma for testing is concerned, while there is evidence that LFO communicated to the Respondent its readiness to receive plasma samples and its plans to process them, there appears to be no documentary evidence of any clear request that the Respondent deliver those samples before 1999.[229]

183. Article 3.2 and Article 6.2 of the 1997 Fractionation Agreement required that requests for the supply of plasma be made once during each (calendar) year, before June 30th of the preceding (financial) year. There is no clear request prior to 30 June 1998. The letter dated 20 April 1998[230] is not a request for plasma: it is a statement – a report – of the activities of

[227] Hearing on Jurisdiction and the Merits, Transcript, 17 April 2013, pp. 82-86.

[228] See, *e.g.*, Claimants' Reply Memorial, ¶¶ 74, 136-137.

[229] See Hearing on Jurisdiction and the Merits, Transcript, 16 April 2013, pp. 9-97; Exhibits C-15, C-16.

[230] Exhibit C-15.

LFO. Mr Nizioł testified that he had requested plasma;[231] but it is not until the year preceding 30 June 1999 in the documentary record that actual requests (even then couched in somewhat oblique language) are made for the delivery of the plasma to LFO for testing.[232]

184. In these circumstances, and in particular in light of the absence of proof of any specific legal obligation to deliver plasma for testing abroad before the completion of the plant in Poland (let alone, to deliver it by any particular date), the Tribunal is unable to find that the Respondent acted improperly in not delivering plasma samples for testing in Australia. It accordingly rejects the claim that the non-delivery of plasma for testing was conduct that could support a finding that the Claimants' property had been expropriated.

185. In these circumstances, the Tribunal finds that it is not proven that the Respondent was acting in breach of any legal duty in not delivering plasma to LFO for testing abroad, and that nothing in the circumstances of the non-delivery provides a basis upon which a claim that the Respondent had expropriated the Claimants' property, in violation of the BIT, could be built.

c. Question 4.3.: CSL's Withdrawal from the project.

186. The evidence in this case is insufficient to yield a complete explanation of the circumstances in which, and the reasons for which, CSL withdrew from the project and, in particular, eventually failed to supply LFO with the necessary licences. The Claimants say that CSL was induced or pressured by the Respondent to withdraw from the arrangement with LFO.[233] The Respondent denies that allegation, for which it says there is no evidence.[234]

187. The Claimants have not pointed to any actual evidence that CSL was induced or pressured by the Respondent to withdraw from the arrangement with LFO. They rest their case on

[231] Hearing on Jurisdiction and the Merits, Transcript, 17 April 2013, pp. 95-96.

[232] See Exhibit C-16 C-F.

[233] Claimants' Reply Memorial, ¶¶ 11, 15.

[234] Respondent's Rejoinder Memorial, ¶¶ 102-111,

inferences drawn from the fact that CSL's withdrawal was followed by its subsequent entry into an advantageous arrangement with ZLB and the Institute of Haematology.[235]

188. The Tribunal has concluded that there is no evidence in the record that warrants the conclusion that CSL was induced or pressured by the Respondent to withdraw from the arrangement with LFO. It notes that Mr Nizioł's Reply Witness Statement puts forward the view that "CSL was just using LFO to gain access to the Polish plasma market, which access it then exploited when it secretly acquired ZLB." [236] That suggests what counsel for the Claimants described as the "very cold, very hard business decision" by CSL to pull out of its arrangement with LFO.[237] Similarly, the suggestion that CSL pulled out because the Respondent was "blowing hot and cold at the same time toward the LFO project"[238] points to a withdrawal prompted by CSL's commercial judgement rather than engineered by or in collusion with the Respondent.

189. The Tribunal accordingly finds that the allegation that the Respondent induced or pressured CSL to withdraw from its arrangement with LFO is not proven as a matter of fact.

190. The Tribunal having found against the Claimants on the facts in relation to this part (i.e., the part addressed in question 4.3) of the claim, there is no basis upon which the claim that the Respondent's conduct constituted expropriation can be built. It is not necessary to decide the question whether the facts as alleged by the Claimants would have amounted to an expropriation contrary to the U.S.-Poland BIT if they had been proved.

[235] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, pp. 69-70; and see paragraph 90 above.
[236] At p. 9.
[237] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, p. 41.
[238] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, p. 57, and cf., p. 69.

(3) Question 5. Whether the Respondent violated its obligations to the Claimants under the fair and equitable treatment standard of the U.S.-Poland BIT, because of:

5.1. Alleged failures to meet legitimate expectations of the Claimants related to their investment;

5.2. Alleged pressure on Kredyt Bank to cease funding LFO's line of credit;

5.3. Alleged failure to supply blood plasma under the 1997 Fractionation Agreement;

5.4 Alleged interference with CSL; and/or

5.5 Alleged interference with the Octapharma contract.

191. The Tribunal's determinations in relation to Questions 1, 2 and 3, above, are applicable also in this context.

a. Question 5*.1.: Legitimate Expectations.*

192. The Claimants rely upon representations by Government officials that the Claimants say showed that the Polish Government was "fully supportive of LFO and its principal, Zygmunt Nizioł."[239] The Respondent says that "legitimate expectations must be created in a specific and unambiguous manner", and that this has not been shown by the Claimants.[240]

193. The Tribunal must decide on the basis of the evidence before it. While there may, arguably, be a general expectation that States will observe basic standards such as reasonable consistency and transparency, more specific expectations must be specifically created and proved. In the present case, the Claimants allege that there was a legitimate expectation that the Respondent would provide blood plasma under the 1997 Fractionation Agreement.[241] As was noted above,[242] however, the Claimants need to show, not merely that there was a legitimate expectation that blood plasma would be provided, but more precisely that there was a legitimate expectation that it would be provided on demand or at

[239] Claimants' Memorial, ¶ 61; cf., Hearing on Jurisdiction and the Merits, Transcript, 17 April 2013, p. 48.
[240] Hearing on Jurisdiction and the Merits, Transcript, 17 April 2013, p. 116.
[241] Claimants' Reply Memorial, ¶ 159.
[242] Above, paragraph 181.

a specific time for the purposes of testing abroad prior to the completion of the fractionation facility in Poland.

194. The Claimants and LFO may have hoped or expected that this would be the case; but there is no documentary, or specific evidential, support for that expectation. This is not merely a question of the form in which the evidence is presented. In the present case, the specific removal from the draft Fractionation Agreement of the explicit obligation concerning the supply of plasma for testing purposes[243] created a situation in which LFO, that is, an international business operator, deemed to be a competent professional - should have taken some step to obtain reassurance that the supply would be made as LFO wished. In the view of the Tribunal, the Claimants' inability to point to any such reassurance weighs heavily against the claim that LFO had a legitimate expectation upon which they could rely concerning the circumstances in which they could require the supply of plasma for testing purposes, prior to completion of the plant.

195. The Tribunal has also considered whether the alleged treatment of Kredyt Bank or CSL by the Respondent interfered with any legitimate expectations of the Claimants or LFO. For the reasons stated in response to Question 4, the Tribunal has decided that there is no evidence that the Respondent conducted itself improperly in its dealings with Kredyt Bank or CSL, and accordingly finds that there is no basis for a claim that those dealings defeated any legitimate expectations of the Claimants.

196. The Tribunal concludes that the Claimants have not shown that they had any legitimate expectations that were defeated by the conduct of the Respondent.

b. Other claims in relation to 5.2.: Kredyt Bank; 5.3.: Supply of Plasma; 5.4.: CSL.

197. The question whether the treatment by the Respondent of Kredyt Bank, or of the supply of plasma for testing purposes, or its alleged dealings with CSL, violated the duty of fair and equitable treatment is distinct from (and broader than) the question whether that treatment defeated any of the Claimants' legitimate expectations. In each of those three contexts the

[243] See above, paragraph 177.

Tribunal has already found that the Respondent did not act in a manner that violated any specific obligations by which it was bound to the Claimants and LFO.

198. The Claimants refer to the approach to the interpretation of the duty of fair and equitable treatment adopted by tribunals in cases such as *Waste Management*, *Myers*, *Lauder*, *Saluka* and *TecMed.*[244] While the precise formulations of the fair and equitable treatment standard in these, and other, awards differ, they all have in common the notion that the State must be shown to have acted delinquently in some way or other if it is to be held to have violated that standard. It is not enough that a claimant should find itself in an unfortunate position as a result of all of its dealings with a respondent.

199. In the present case, the Tribunal can find no evidence that the Respondent acted unlawfully, or that it exercised its rights for an improper purpose or in an improper manner. The Tribunal notes that there were long delays in responding to letters from LFO.[245] While those delays may have been inappropriate, they are not of a nature to amount to a violation of its obligations under the BIT. The Tribunal concludes that the Claimants have not made out their claim that the Respondent acted in a manner that was unfair or inequitable.

c. Question 5.5.: Octapharma.

200. The same conclusion is true of the Respondent's dealings with Octapharma. The Claimants alleged that Octapharma was induced by the Institute of Haematology to cancel its contracts with LFO.[246] The Tribunal has considered the evidence carefully, but can find no evidence of conduct towards Octapharma, attributable to the Respondent, that would breach the fair and equitable treatment standard or any other BIT provision. In particular,

[244] *Waste Management, Inc. v. Mexico* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, ¶ 98 ("Waste Management"); *S.D. Myers v. Canada*, Partial Award, 13 November 2000, ¶¶ 134 *et seq.*. ("Myers"); *Lauder (US) v. Czech Republic*, Final Award, 3 September 2001 ("Lauder"); *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, ¶¶ 298 & 309 ("Saluka"); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award, 29 May 2003, ¶ 154 ("Tecmed"); see also Claimants' Memorial, ¶¶ 45-46, 56, 58, 71; Claimants' Reply Memorial, ¶ 155.

[245] See paragraphs 80-81, above.

[246] Claimants' Reply Memorial, ¶¶ 32-33; Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, pp. 71-72.

the Tribunal is unable to find evidence that Octapharma was induced by the Institute of Haematology to cancel its contracts with LFO.

201. The Tribunal accordingly concludes that the Claimants have not shown any breach of the fair and equitable treatment standard of the U.S.-Poland BIT.

202. The Tribunal has also considered whether the facts might evidence a violation of any other U.S.-Poland BIT provision invoked by the Claimants,[247] such as the provision on arbitrary and discriminatory measures in Article III(3), and has concluded that they do not.

(4) Question 6.Whether the Respondent violated the 'umbrella clause' provision in the U.S.-Poland BIT because of the alleged failure to supply blood plasma to LFO under the 1997 Fractionation Agreement?

203. The last sentence of paragraph 6 of Article II of the BIT provides that "Each [State] Party shall observe any obligation it may have entered into with regard to investments." It is an example of a so-called "umbrella clause". The Tribunal has decided that the Claimants have not shown that there was any legal obligation to supply the plasma on demand and have not shown that the failure to deliver it in 1998 or 1999 was wrongful.[248] It follows that there can be no violation of the umbrella clause even if (which the Tribunal does not decide) the umbrella clause were in principle applicable in this context.

(5) Question 7. Whether the Respondent's allegations concerning the Claimants' negligence with respect to the LFO project are well-founded and what relevance the alleged negligence may have on the outcome of the case?

204. In light of the Tribunal's determination that no breach of the Claimants' rights under the BIT has been established, there is no need to provide an answer to Question 7 in order to decide this case. Nonetheless, the Tribunal thinks it right to state clearly that it has found no evidence of any deliberate wrongdoing by the Claimants.

205. The full facts underlying this claim may never be known, but it is evident that the Claimants relied to a remarkable degree upon their trust in their Polish associates, and in

[247] See above, paragraph 123.

[248] See above, paragraph 179.

particular Mr Nizioł. They were unable to speak Polish, and apparently relied upon the accounts given by others of the many papers and conversations concerning LFO that were, naturally, in Polish. It is difficult to see how they could, by so doing, exercise any effective oversight of the company of the kind for which their positions on the management board of LFO made them responsible. It is unclear precisely what they understood to be the reasons for, and effects of, transactions such as the 2002 resolutions, which dramatically altered the position of the company's creditors;[249] but whatever the truth may be it cannot affect the outcome of this case or the Tribunal's decisions on the list of questions put to it; and the Tribunal pursues the matter no further.

206. It is tempting to conclude, with hindsight, that the Claimants trusted too much, and perhaps overestimated the extent to which their previous commercial successes demonstrated a level of business acumen sufficient to overcome the obstacles of operating in a foreign country, in a foreign language, and within a foreign legal and administrative system.

(6) Question 8. What is the evidentiary effect of Decision No. 117/PG/2002 of October 2, 2002 of the Ministry of Economy that the "main reason for the delay in completion of the investment project was the failure of the Ministry of Health to perform the 1 October 1997 agreement on cooperation with regard to the supply of plasma and collection of finished products health service establishments?"[250]

207. The Claimants submit that Decision No. 117/PG/2002 of October 2, 2002 of the Ministry of Economy (the "Decision")[251] says that the reason the LFO project had not been completed up until that time was not the fault of the principals of LFO, and that this decision is binding on the Respondent.[252]

[249] See Respondent's Counter-Memorial, ¶¶ 219-227.

[250] This is an evidential question which logically precedes the Tribunal's finding on the law. But it figures in this position in the Parties' joint list of issues which might require determination; and it is convenient to deal with it here.

[251] Exhibit C-73

[252] Hearing on Jurisdiction and the Merits, Transcript, 15 April 2013, p. 73; Claimants' Reply Memorial, ¶¶ 140-141.

208. That Decision related to the permit under which LFO was allowed to operate in the Special Economic Zone 'Euro-Park' Mielec,[253] with the various tax advantages which that entailed.[254] The permit had expired because the conditions set out in Clause II of the permit, which included the commencement of economic activity at the facility by 31 December 2001, had not been met by LFO. The Decision extended the 2001 deadline until 30 June 2003.

209. The extension was based on the finding by the Minister of Economy that "the circumstances which led to the entrepreneur's failure to meet the terms of the Permit were beyond his control."[255] LFO had "pointed out that the main reason for the delay in the completion of the investment project was the failure of the Ministry of Health to perform the 1 October 1997 agreement on cooperation with regard to the supply of plasma and collection of finished products by health service establishments." The Decision does not, however, make any explicit determination of the proper interpretation of the contractual obligations under the 1997 Fractionation Agreement: it rests on the finding that the delay was beyond the control of LFO.

210. Moreover, the Decision records that "By its letter of September 18, 2002, the entrepreneur added that Court proceedings aimed at reaching a settlement with the Minister of Health are currently underway."[256] That indicates the existence of a subsisting legal dispute concerning the 1997 Fractionation Agreement.

211. The Tribunal does not consider the Decision of the Minister of Economy on the extension of the deadlines under the Special Economic Zone permit to be a decision (much less, a reasoned decision by a competent judicial authority), whether explicit or implicit, on the interpretation of the terms of the 1997 Fractionation Agreement. Neither can it be said to give rise to an estoppel, for there is no evidence that the Claimants or LFO relied on the statement in question, whether to their detriment or at all. The Tribunal has considered the

[253] Permit No. 44, Exhibit R-19.

[254] Respondent's Counter-Memorial, ¶ 3(v).

[255] Exhibit C-73.

[256] Exhibit C-73. LFO's legal advisor had also taken the position, in a letter dated 26 June 2002, that "interpretation of these provisions [of the agreement between the parties] is subject to a dispute": Exhibit C-71.

Decision as a part of the factual matrix in this case, but has given it no dispositive or authoritative weight on the question of the interpretation of Respondent's duties arising from the 1997 Fractionation Agreement. The Tribunal's reasoning on the 1997 Agreement is set out above.

(7) Question 9. On the condition that the Tribunal holds that the Respondent violated its obligations towards the Claimants under the Treaty, what amount of damages the Claimants are entitled to, if any?

212. The Tribunal has held that the Respondent did not violate its obligations towards the Claimants under the Treaty. Question 9 does not arise.

(8) Question 10. How should the costs of the proceedings be allocated between the parties?

213. Article 58 of the Arbitration (Additional Facility) Rules provides in that "[u]nless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne."

214. The Tribunal does not question that the claims in this case were initiated and presented in good faith. It does, however, note that (i) the Tribunal has found that the Claimants did not establish any breach of the BIT by the Respondent, (ii) it was evident from the outset that a good deal of weight was placed on inferences drawn from circumstantial evidence, and (iii) the Respondent was put to the burden of producing a good deal of documentary evidence, and refuting the Claimants' arguments, in relation to allegations of wrongdoing for which the Claimants had little or no evidence.

215. The cost of the arbitration, which includes, *inter alia*, the arbitrators' fees, the expenses of the Tribunal, the Secretariat's fees and expenses and the charges for the use of the facilities of the Centre, amount to US$573,380.12.[257]

[257] This amount consists of the arbitration costs at the time of the Award (i.e., US$573,247.07), and estimated charges of US$133.05 for the costs to be incurred in connection with the dispatch of the Award (*e.g.*, costs related to courier services, binding, and photocopying). The ICSID Secretariat will provide the parties with a

216. Pursuant to Article 58(1) of the Arbitration (Additional Facility) Rules, the Tribunal has decided to apply the principle that costs should follow the event and that the Claimants should bear (i) all the ICSID arbitration costs and expenses, (ii) reasonable costs and expenses incurred by the Respondent in the preparation of its legal case, and (iii) their own costs and expenses. The Tribunal has decided further that the costs and expenses stated in the Respondent's letter dated 10 June 2013 and the documents that accompanied it are reasonable. As a consequence, the Claimants is ordered to pay (i) the Respondent's share of the arbitration costs, i.e. one half of the total arbitration costs, amounting to US$286,690.06, and (ii) US$931,051.23 for the Respondent's legal fees and expenses. Hence, the Claimants are ordered to pay to the Respondent a total amount of US$1,217,741.29.

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detailed Financial Statement as soon all invoices are received and the account is final. The balance remaining in the case account will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

V. OPERATIVE PART

FOR THE REASONS STATED ABOVE

217. The Tribunal decides:

(1) That the Tribunal has jurisdiction to consider the Claimants' claims within the scope of the present proceedings, and that these claims are admissible;

(2) That the Respondent did not violate its obligations under the 1990 Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations, as alleged by the Claimants;

(3) As a consequence, that all the Claimants' claims are dismissed;

(4) That the Claimants should bear all the ICSID arbitration costs and expenses, reasonable costs and expenses incurred by the Respondent in the preparation of its legal case, and their own costs and expenses; and

(5) As a consequence, that the Claimants shall pay US$1,217,741.29 to the Respondent.

Professor Maurice Mendelson, QC
Arbitrator

Date: 13 May 2014

Professor Eduardo Silva Romero
Arbitrator

Date: 12 May 2014

Professor Vaughan Lowe, QC
President

Date: 13 MAY 2014

ANNEX A

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF POLAND CONCERNING BUSINESS AND ECONOMIC RELATIONS

Signed March 21, 1990; Entered into Force August 6, 1994

PREAMBLE

The United States of America and the Republic of Poland; (hereinafter referred to as "the Parties");

Desiring to develop further the friendship between the American and Polish peoples;

Recognizing that the further development of business and economic ties can contribute to a general strengthening of their relations;

Desiring to promote greater economic cooperation between them with respect to investment by nationals and companies of one Party in the territory of the other Party;

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;

Desiring to develop long-term business and economic cooperation based upon the principles of sovereign equality and mutual benefits;

Recognizing that the development of business and economic ties can contribute to the well-being of workers in both countries and promote respect for fundamental worker rights;

Convinced that private enterprise operating within a free and open market offers the best opportunities for raising living standards and the quality of life for the inhabitants of the Parties; and

Recognizing the desire of the Republic of Poland to reduce the role of state enterprises and privatize its economy;

Agree as follows:

ARTICLE I
Definitions

1. For the purposes of this Treaty,

(a) "company of a Party" means any kind of corporation, company, association, state enterprise, or other organization, legally constituted under the laws and regulations of

a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned;

(b) "investment" means every kind of investment, in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other party, and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock, or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, rights relating to: literary and artistic works, including sound recordings, patent rights, industrial designs, semiconductor mask works, trade secrets, and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

(c) "national of a Party" means, a natural person who is a national of a Party under its applicable law;

(d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance other fees; or returns in kind;

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

(f) "nondiscriminatory" treatment means treatment that is at least as favorable as the better of national treatment or most-favored nation treatment;

(g) "national treatment" means treatment that is at least as favorable as the most favorable treatment accorded by a Party to companies or nationals of that Party in like circumstances;

(h) "most-favored nation treatment" means treatment that is at least as favorable as that accorded by a Party to companies and nationals of third parties in like circumstances;

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

(j) "control" means having a substantial interest in or the ability to exercise substantial influence over the management and operation of an investment, provided that such an influence will not be deemed to exist solely as a result of a contractual relationship for the provision of goods or services or the extension of commercial credits in connection with such contracts.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested undertaken in accordance with the laws of the Party concerned, provided that the application of such laws does not impair any rights conferred by this Treaty, shall not affect their character as investment.

ARTICLE II
Treatment of Investment

1. Each Party shall permit, in accordance with its relevant laws and regulations, and treat investment and associated activities on a nondiscriminatory basis, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exceptions by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. Except as stated otherwise in the Annex, the treatment accorded pursuant to any exceptions shall not be less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country, except with respect to ownership of real property. Rights to engage in mining on the public domain shall be dependent on reciprocity.

2. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party and their families shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

3. Companies of a Party which are investments shall be permitted to engage professional, technical, and managerial personnel of their choice, regardless of nationality.

4. Neither Party shall impose, as a condition of establishment, expansion or maintenance of investments, any performance requirements which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements or measures.

5. The treatment accorded by the United States of America to investments and associated activities under the provisions of this Article shall in any State, Territory or possession of the United States of America be the treatment accorded therein to companies legally constituted under the laws and regulations of any other State, Territory or possession of the United States of America.

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

7. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments under this Treaty and authorizations relating thereto, with the exception of denials thereof, and investment agreements.

8. Subject to the right to make or maintain exceptions falling within one of the sectors or matters listed in the Annex, each Party shall accord nondiscriminatory treatment to nationals and companies of the other Party in the conduct of their investment and associated activities with respect to:

(a) the granting of franchises or rights under licenses;

(b) the issuance of registrations, licenses, permits and other approvals necessary for the conduct of commercial activity, which shall in any event be issued expeditiously;

(c) access to financial institutions and credit markets;

(d) access to their funds held in financial institutions;

(e) the importation and installation of equipment necessary for the normal conduct of business affairs, including, but not limited to office equipment and automobiles, and the export of any equipment and automobiles so imported;

(f) the dissemination of commercial information;

(g) the conduct of market studies;

(h) the appointment of commercial representatives, including agents, consultants and distributors and their participation in trade fairs and promotion events;

(i) the marketing of goods and services, including through internal distribution and marketing systems and by direct contract with individuals and companies;

(j) access to public utilities, public services and commercial rental space at nondiscriminatory prices, if the prices are set or controlled by the government;

(k) access to raw materials, inputs and services of all types at nondiscriminatory prices, if the prices are set or controlled by the government.

9. Subject to the right to make or maintain exceptions falling within one of the sectors or matters listed in the Annex, for purposes of facilitating investment and associated activities, each Party shall accord nondiscriminatory treatment to nationals and companies of the other Party with respect to the sale, offering for sale and acquisition of equity shares and other securities. With respect to acquisition of interests in any governmentally-owned enterprise or organization undergoing privatization, the Republic Poland shall provide most-favored nation treatment to nation and companies of the United States.

ARTICLE III
Business Facilitation and Business Rights

1. Each Party will encourage the participation of its national and companies in trade promotion events such as fairs, exhibition, missions and seminars held in the territory of the other Party. Similarly, each Party will encourage nationals and companies of the other Party to participate in trade promotion events in its territory. Subject to the laws in force within their territories, the Parties agree to allow the import and re-export on a duty-free basis of all articles for use in trade promotion events, provided that such articles are not sold or otherwise transferred.

2. Subject to the right to make or maintain exceptions falling within one of the sectors or matters listed in the Annex, for purposes of facilitating trade between the Republic of Poland and the United States in goods and services, each Party shall accord non-discriminatory treatment to nationals and companies of the other Party in the conduct of their commercial activities with respect to:

(a) the granting of franchises or rights under licenses;

(b) the issuance of registrations, licenses, permits and other approvals necessary for the conduct of commercial activity which shall in any event be issued expeditiously;

(c) access to financial institutions and credit markets;

(d) access to their funds held in financial institutions;

(e) the importation and installation of equipment necessary for the normal conduct of business affairs, including, but not limited to office equipment and automobiles, and the export of any equipment and automobiles so imported;

(f) the dissemination of commercial information;

(g) the conduct of market studies;

(h) the appointment of commercial representatives, including agents, consultants and distributors and their participation ir trade fairs and promotion events;

(i) the marketing of goods and services, including through internal distribution and marketing systems and by direct con tact with individuals and companies;

(j) access to public utilities, public services and commercia rental space at nondiscriminatory prices, if the prices are sei or controlled by the government;

(k) access to raw materials, inputs and services of all types ai nondiscriminatory prices, if the prices are set or controlled by the government.

3. Nationals and companies of each Party in the conduct of commercial activities shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the conduct of commercial activities. Each Party shall observe any obligation it may have entered into with regard to the conduct of commercial activities.

4. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exceptions with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exceptions by either Party shall not apply to commercial activities conducted in that sector or matter at the time the exception becomes effective. Except as stated otherwise in the Annex, the treatment accorded pursuant to any exceptions shall not be less favorable than that accorded in like situations to commercial activities of nationals or companies of any third country.

5. Each Party shall provide effective means of asserting claims and enforcing rights with respect to agreements in connection with the conduct of commercial activity.

6. The Parties endorse the use of arbitration, under internationally recognized rules, for the settlement of commercial disputes between nationals and companies of the Republic of Poland and nationals and companies of the United States. Neither Party shall require that the place of any arbitration be in the United States or the Republic of Poland.

7. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party and their families shall be permitted to enter and to remain in the territory of the other Party for the purpose of carrying on trade between the territory of the two Parties and engaging in commercial activities.

8. The treatment accorded by the United States of America to nationals and companies of the Republic of Poland under the provisions of this Article shall in any State, Territory or possession of the United States of America be the treatment accorded therein nationals and companies legally constituted under the laws and regulations of any other State, Territory or possession of the United States of America.

ARTICLE IV
Protection of Intellectual Property

The Parties shall provide adequate and effective protection and enforcement of intellectual property rights. To establish such protection, each Party agrees, *inter alia*, to:

-extend copyright protection to computer program as literary works;

-provide product as well as process patent protection for pharmaceuticals and chemicals for a term at least equivalent to that provided to other patentable subject matter;

-provide adequate and effective protection for integrated circuit layout design (mask works);

-provide adequate and effective protection against unfair competition.

ARTICLE V
Transfers

1. Each Party shall permit all transfers related to an investment of commercial activity to be made freely and without delay into and out of its territory. Such transfers include:

(a) returns;

(b) compensation pursuant to Article VII

(c) payments arising out of an investment dispute or commercial dispute;
(d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement;

(e) proceeds from the sale or liquidation of all or any part of an investment; and

(f) additional contributions to capital for the maintenance or development of an investment. 2. Except as provided in Article VII paragraph 1, transfers shall be made in a freely usable currency at the prevailing market rate of exchange for commercial transactions on the date of transfer with respect to spot transactions in the currency to be transferred.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

ARTICLE VI
Taxation

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of, and commercial activity conducted by, nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Articles IX and X, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article VII;

(b) transfers, pursuant to Article V; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article IX(I) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

ARTICLE VII
Compensation for Expropriation

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose, in a nondiscriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II (6). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became publicly known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin, from the date of expropriation; be fully realizable; be freely transferable; and calculated on the basis of the prevailing market rate of exchange for commercial transactions on the date of expropriation.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefor, conforms to the provisions of this Treaty and to principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded nondiscriminatory treatment by such other Party as regards any measures it adopts in relation to such losses.

ARTICLE VIII
Exchange of Information and Transparency

1. Each Party acknowledges the desirability of facilitating the collection and exchange of all non-confidential, non-proprietary information relating to investments and commercial activities within its territory.

2. Each Party shall make publicly available all non-confidential, non-proprietary information which may be useful in connection with investment and commercial activities. In addition, each Party shall promptly make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions having general application that pertain to or affect commercial activities or investments.

3. The Parties shall disseminate to their respective business communities such information made available under paragraph 2 which will assist their nationals and companies in pursuing the most expeditious and equitable settlement of any dispute affecting them which may arise under this Treaty. Such information may be related to timeliness of decisions and vindication of rights under the Treaty.

ARTICLE IX

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

1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party (including any agency or instrumentality of such Party) and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment. A decision of a Party which denies entry if an investment shall not constitute an investment dispute within the meaning of this Article.

2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third party procedures. Each Party shall encourage its nationals and companies to resort to local courts, especially for the resolution of disputes relating to administrative actions. Subject to paragraph 3 of this Article, if the dispute cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures. Any dispute-settlement procedures, including those relating to expropriation, specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provisions of domestic laws and applicable international agreements regarding enforcement if arbitral awards.

3. (a) At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration to the International Centre for the Settlement of Investment Disputes ("Centre") or to the Additional Facility of the Centre or pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") or pursuant to the arbitration rules of any arbitral institution mutually agree between the parties to the dispute. Once the national or company concerned has so consented, either party to the dispute may institute such proceeding provided:

(i) The dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute-settlement procedures; and

(ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute.

If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

(b) Each Party hereby consents to the submission of an investment dispute for settlement by conciliation or binding arbitration:

(i) To the Centre, in the event that the Republic of Poland becomes a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States done at Washington, March 18, 1965 ("Convention") and the Regulations and Rules of the Centre, and to the Additional Facility of the Centre, and

(ii) to an arbitral tribunal established under the UNCITRAL Rules, as those Rules may be modified by mutual agreement of the parties to the dispute, the appointing authority referenced therein to be Secretary General of the Centre.

(c) Conciliation or arbitration of disputes under (b) (i) shall be done applying the provisions of the Convention and the Regulations and Rules of the Centre, or of the Additional Facility as the case may be.

(d) The place of any arbitration conducted under this Article shall be a country which is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

(e) Each Party undertakes to carry out without delay the provisions of any award resulting from an arbitration held in accordance with this Article. Further, each Party shall provide for the enforcement in its territory of such arbitral awards.

3. In any proceeding involving an investment dispute, a Party shall not assert, as defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages. However, to the extent that a Party succeeds to the rights or claims of the national or company concerned by reason of subrogation or assignment, the national or company concerned shall not continue to pursue such rights and claims in its own name unless authorized to do so on behalf of the subrogee or assignee.

5. In the event of an arbitration, for the purposes of this Article any company legally constituted under the applicable laws and regulations of either Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party, in accordance with Article 25(2)(b) of the Convention.

ARTICLE X

Consultation and Settlement of Disputes Between the Parties

1. The Parties agree to consult promptly, on the request of either Party, to resolve any disputes in connection with this Treaty, or to discuss any matter relating to the interpretation or application of this Treaty.

2. Any dispute between the Parties concerning the interpretation or application of this Treaty which is not resolved within six months through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with this Treaty and the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

3. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Centre.

4. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

5. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a high proportion of the costs be paid by one of the Parties. Each Party shall bear the expense of its representation in the proceedings before the arbitral tribunal.

ARTICLE XI
Disputes Not Covered by Articles IX and X

The provisions of Articles IX and X shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

ARTICLE XII
Reservation of Rights

1. This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicators decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment or commercial agreement or an investment authorization, that entitle commercial activities, investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

2. The nondiscrimination and most-favored nation provisions of this Treaty shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:

(a) that Party's binding obligations that derive from full membership in a free trade area or customs union or existing binding obligations under the Council of Mutual Economic Assistance; or

(b) that Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade entered into subsequent to this Treaty.

3. This Treaty shall, not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

4. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments or the conduct of commercial activities, but such formalities shall not impair the substance of any of the rights set forth in this treaty.

5. This Treaty shall not preclude either Party from establishing qualifications for the practice of professions.

ARTICLE XIII
Application to Political Subdivisions

This Treaty shall apply to the political subdivisions of the Parties.

ARTICLE XIV
Entry Into Force and Termination

1. This Treaty shall be ratified and shall enter into force on the thirtieth day following the date of the exchange of instruments of ratification which shall take place in Warsaw. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 3 of this Article.

2. This Treaty shall apply to investments and associated activities and to commercial activities existing at the time of entry into force as well as to investments made or acquired and commercial activities undertaken while this Treaty is in force.

3. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

4. With respect to investments made or acquired and commercial activities undertaken prior to the date of notice of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

5. The Annex, Protocol and related letters exchanged this day on assistance to investors, tourism and travel-related services, intellectual property, and entry of United States investments shall form an integral part of the Treaty.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at Washington on the twenty-first day of March, 1990 in the English and Polish languages, both texts being equally authentic.

For the United States of America:

George Bush.

For the Republic of Poland:

Tadeusz Mazowiecki.

ANNEX

1. Consistent with Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions in the sectors or matters it has indicated below:

air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real estate; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources;

2. Consistent with Article II, paragraphs 1 and 9, the United States shall accord treatment in accordance with its laws and regulations with respect to primary dealership in U.S. government securities; maritime related services; and the sale, offering for sale and acquisition of equity shares and other securities and all services and activities related thereto.

3. Consistent with Article III, paragraph 2, the United States reserves the right to make or maintain limited exceptions in the sectors or matters noted in paragraph 1 of this Annex.

4. Consistent with Article 11, paragraph 1, the Republic of Poland reserves the right to make or maintain limited exceptions in the sectors or matters it has indicated below:

air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership and use of real estate; ownership and operation of broadcast or common carrier radio and television stations; the provision of postal,

telephone, telegraph and other telecommunications services; exploitation of natural resources; commercial agency and broker activities performed for third parties; railway transportation; dealership in securities; the sale, offering for sale and acquisition of equity shares and other securities; maritime related services; publishing and printing activities; lotteries and games of chance; public utilities; spirits and alcoholic beverages; operation of ports and airports.

The Republic of Poland reaffirms its intention to eliminate the state monopoly status of a number of sectors and matters listed above. As the process of privatization and demonopolization progresses, the Republic of Poland intends to remove some of these sectors or matters from the list of exceptions in this Annex. The Republic of Poland will notify the Government of the United States the measures being taken in fulfillment of the Republic of Poland takes note of the particular interest in the sectors of telecommunications, publishing and printing, banking and other financial services (including insurance).

5. Consistent with Article II, paragraph 8(c), the Republic of Poland shall accord the treatment provided therein with respect to access to financial institutions and credit markets only to (i) nationals of the United States legally resident in the territory of the Republic of Poland; and (ii) companies incorporated in the republic of Poland which are owned or controlled directly or indirectly by nationals or companies of the United States. The Parties understand that these Limitations shall be eliminated upon the introduction of the full convertibility of the zloty.

6. Consistent with Article III, paragraphs 2(c) and 3, the Republic of Poland shall accord the treatment provided therein with respect to access to financial institutions, credit markets and foreign exchange only to (i) nationals of the United States legally resident in the territory of the Republic of Poland; and (ii) companies incorporated in the Republic of Poland which are owned or controlled directly or indirectly by nationals or companies of the United States. The Parties understand that these limitations shall be eliminated immediately upon the introduction of the full convertibility of the zloty.

7. During the period of transformation of Polish economic law but in no case beyond December 31, 1992, the Republic of Poland may add to the list of sectors or matters indicated in this Annex if needed in order to comply with changes in Polish law, provided that any such modifications shall be kept to a minimum and shall not significantly impair investment or commercial opportunities for nationals and companies of the United States under this Treaty. Any modifications under this paragraph shall not apply to investments and associated activities existing at the time such modifications become effective.

PROTOCOL

1. The Republic of Poland agrees that nationals and companies of the United States shall be free to select commercial agents of their choice and to agree upon commission rates with such agents.

2. The Parties understand that with respect to transfers referred to in Article V, paragraph 1 of the Treaty, the term "without delay" means that transfers should be made in accordance with normal banking and commercial practices. The Parties

further understand that normal banking and commercial practices in the Republic of Poland are generally governed by the National Bank of Poland. Under current provisions issued by the Bank, companies which are investments can obtain foreign exchange within three working days if such foreign exchange is obtained from a bank lised to conduct foreign exchange transactions, and eight working days in all other instances in connection with payments for imported goods and related services.

3. The Republic of Poland affirms its policy of ensuring that bank deposits held within the territory of Poland receive a positive real rate of interest.

4. Notwithstanding the provisions of Article V, paragraph with regard to the Republic of Poland the transfer of profits derived from an investment exceeding the amount transferrable under Article 19, paragraph 1, of the Law of December 23, 1988 on Economic Activity with the Participation of Foreign Parties shall be made according to the following schedule:

As of 1st January 1992: 20 percent of the remaining profits gained in 1990-1991 and not previously transferred.

As of Ist January 1993: 35 percent of the remaining profits gained in 1990-1992 and not previously transferred.

As of Ist January 1993: 50 percent of the remaining profits gained in 1990-1993 and not previously transferred.

As of Ist January 1995: 80 percent of the remaining profits gained in 1990-1993 and not previously transferred.

As of Ist January 1996: 100 percent of the remaining profits gained in 1990-1995 and not previously transferred, and 100 percent of profits gained thereafter.

If the Republic of Poland introduces full convertibility of its currency before Ist January 1996, transfers of profits shall be made without restrictions from the date of introduction of full convertibility.

5. The Republic of Poland shall ensure that the opportunity exists to invest profits which cannot be transferred in accordance with paragraph 3 of this Protocol in a bank account that yields a positive real rate of interest.

DEPARTMENT OF COMMERCE,
Washington, DC, March 21, 1990.

Mr. DARIUSZ LEDWOROWSKI,
Undersecretary of State,
Ministry of Foreign Economic Relations,
Warsaw, Poland

DEAR MR. MINISTER: I have the honor to confirm the following understanding in relation to United States companies and Polish companies which was reached between the delegations of the United States and the Republic of Poland in the course of negotiations of the Treaty Concerning Business and Economic Relations signed this day:

The Government of the Republic of Poland agrees to designate within the Agency for Foreign Investments a Deputy President to assist U.S. nationals and companies in deriving the full benefits of the Treaty in connection with their investment and associated activities.

The Deputy President will serve as the government coordinator and problem solver for investors experiencing difficulties with registration, licensing, nondiscriminatory access to utilities regulatory and other matters.

The office will provide the following types of services:

information on current national and local business/investment regulations, including licensing and registration procedures, taxation, labor regulation, accounting standards and access to credit;

a notification procedure on proposed regulatory or legal changes affecting investors and circulation of notices on regulatory changes and their entry into force;

coordination with Polish government agencies at the national and local level to facilitate investment and resolve disputes;

identification and dissemination of information on investment projects and their sources of finance;

assistance to investors experiencing difficulties in repatriating profits and obtaining foreign exchange.

I have the honor to propose that this understanding be treated as an integral part of the Treaty Concerning Business a Economic Relations.

I would be grateful if you would confirm that this understanding is shared by your Government.

Sincerely,

Robert A. Mosbacher
Secretary of Commerce.

[DEPARTMENT OF STATE, DIVISION OF LANGUAGE SERVICES-TRANSLATION LS No. 132108 A JS/AO Polish]

MINISTRY OF ECONOMIC COOPERATION WITH FOREIGN COUNTRIES,
Under Secretary of State.

Hon. ROBERT A. MOSBACHER,

Secretary of Commerce, US. Department of Commerce, Washington,

DEAR MR. SECRETARY: I have the honor to confirm the following understanding reached between the delegations of the Republic of Poland and the United States in the course of the negotiations of the Treaty Concerning Business and Economic Relations signed this day:

[The English translation of this letter agrees in all substantive respects with the text of Secretary Mosbacher's letter on assistance to investors.]

I have the honor to propose that this understanding be treated as an integral part of the Treaty Concerning Business and Economic Relations.
I would be grateful if you would confirm that this understanding is shared by your Government.

Respectfully,

(S) D. LEDWOROWSKI.

WASHINGTON, March *21, 1990.*

DEPARTMENT OF COMMERCE,
Washington DC, March 21, 1990.

Mr. DARIUSZ LEDWOROWSKI,
Under Secretary of State,
Ministry of Foreign Economic Relations,
Warsaw, Poland.

DEAR MR. MINISTER: I have the honor to confirm the following understanding in relation to United States companies and Polish companies providing tourism and travel-related services, which was reached between the delegations of the United States and the Republic of Poland in the course of negotiations of the Treaty Concerning Business and Economic Relations signed this day.

1. The Parties recognize the need to encourage and promote the growth of tourism and travel-related investment and trade between the United States of America and the Republic of Poland,

2. The Parties recognize the benefits to both economics of increased tourism and travel-related investment in and trade between their two territories.

3. Each Party shall ensure, within the scope of its legal authority, that any company owned, controlled or administered by that Party, or any joint venture therewith, which effectively controls a significant portion of supply of any travel or tourism services shall provide that service to the nationals and companies of the other Party on a fair and equitable basis.

In furtherance of the provisions of this letter, we take note of the Agreement between the Government of the United States of America and the Government of the Polish People's Republic on the Development and Facilitation of Tourism, signed on September 20, 1989.

Nothing in this understanding shall be construed to mean that tourism and travel-related services shall not receive the benefits from the Treaty Concerning Business and Economic Relations as fully as other industries and sectors.

I have the honor to propose that this understanding be treated as an integral party of the Treaty Concerning Business and Economic Relations.

I would be grateful if you would confirm that this understanding is shared by your Government.

Sincerely,

ROBERT A. MOSBACHER,
Secretary of Commerce.

[DEPARTMENT OF STATE, DIVISION OF LANGUAGE SERVICES-TRANSLATION LS No. 132108 A JS/AO Polish]

MINISTRY OF ECONOMIC COOPERATION WITH FOREIGN COUNTRIES,
Under Secretary of State.

Hon. ROBERT A. MOSBACHER,
Secretary of Commerce,
U.S. Department of Commerce,
Washington, D.C.

DEAR MR. SECRETARY: I have the honor to confirm the following understanding reached between the delegations of the Republic of Poland the United States in the course of the negotiations of the Treaty Concerning Business and Economic Relations signed this day.
[The English translation of this letter agrees in all substantive respects with the text of Secretary Mosbacher's letter on tourism.]
I have the honor to propose that this understanding be treated as an integral part of the Treaty Concerning Business and Economic Relations.
I would be grateful if you would confirm that this understanding is shared by your Government.

Respectfully,

(S) D. LEDWOROWSKI.

WASHINGTON, *March 21,* 1990

ANNEX B

JOINT PROPOSED LIST OF POINTS FOR THE TRIBUNAL'S DECISION IN THE CASE OF

David Minnotte and Robert Lewis v. Republic of Poland

(ICSID Case No. ARB(AF)/10/1)[258]

A. Jurisdiction and admissibility

1. Whether the Tribunal has jurisdiction over the dispute in the light of the Respondent's asserted defense based on allegations of fraud and deceit related to the LFO Project?

[Counter-Memorial, paras. 284-291 and Rejoinder, paras. 136 to 160]

2. Whether the Tribunal has jurisdiction over the dispute under the *Oil Platforms* test?

[Counter-Memorial, paras. 266-283 and Rejoinder, paras. 168-170]

Additional comments to Part A (Jurisdiction and admissibility)

a. Jurisdictional objection against Mr. Lewis has been withdrawn by the Respondent:

[Transcript, Day 3, p.96, lines 9 to 11]

b. Admissibility objection of the Respondent against the Claimants' claim concerning the conduct of criminal proceedings in Poland became moot after the Claimants withdrew the claims without prejudice to raising them in a separate proceeding and the Tribunal took the decision to leave them outside the scope of the proceedings:

[Transcript, Day 1, p. 35 line 20 to p. 36, line 13, and the Respondent's position in Transcript, Day 3, p.96, lines 12 to 21]

B. Merits

On the condition that the Tribunal is satisfied with its jurisdiction to hear the dispute:

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[258] See paragraph 24 of the Award, above.

3. Whether the Claimants' claims should be dismissed on the merits because of the Respondent's defense based on allegations of fraud and deceit related to the LFO Project?

[Counter-Memorial, paras. 284-291 and Rejoinder, paras. 136 to 160 and 171]

4. Whether the Respondent directly or indirectly expropriated the Claimants' investment (direct expropriation) or the value thereof (indirect expropriation) in violation of the U.S. Poland-BIT by:

4.1. Alleged pressure on Kredyt Bank to cease funding LFO's line of credit, based on the Claimants' allegation that this led to acceleration of the loan repayment and Kredyt Bank's motion to institute LFO's bankruptcy proceedings?

4.2. Alleged failure to supply blood plasma under the 1997 Fractionation Agreement?

4.3 Alleged action by Respondent, through the Institute of Haematology inducing CSL to back out of the LFO Project?

5. Whether the Respondent violated its obligations to the Claimants under the fair and equitable treatment standard of the U.S.-Poland BIT, because of:

5.1. Alleged failures to meet legitimate expectations of the Claimants related to their investment?

5.2. Alleged pressure on Kredyt Bank to cease funding LFO's line of credit?

5.3. Alleged failure to supply blood plasma under the 1997 Fractionation Agreement?

5.4 Alleged interference with CSL?

5.5 Alleged interference with the Octapharma contract?

6. Whether the Respondent violated the umbrella clause provision in the U.S.-Poland BIT because of the alleged failure to supply blood plasma to LFO under the 1997 Fractionation Agreement?

7. Whether the Respondent's allegations concerning the Claimants' negligence with respect to the LFO project are well-founded and what relevance the alleged negligence may have on the outcome of the case?

[Counter-Memorial, para. 242 and Rejoinder, paras. 161-167 and 171]

8. What is the evidentiary effect of Decision No. 117/PG/2002 of October 2, 2002 of the Ministry of Economy that the "main reason for the delay in completion of the investment project was the failure of the Ministry of Health to perform the October 1, 1997 agreement on cooperation with regard to the supply of plasma and collection of finished products health service establishments?" **Exhibit C-73** Claimants assert that this decision is binding on Respondent. It is Respondent's position that the evidentiary effect of the Decision should be considered in light of the arbitration clause provided in Article 9.2 of the 1997 Fractionation Agreement [Exhibit C-13] and other evidence.

Additional comments to part B (Merits)

I. The Claimants' claims for violation of the fair and equitable treatment and full security and protection, related to the conduct of the criminal proceedings in Poland have been withdrawn by the Claimants without prejudice to being raised in a separate proceeding.

[Transcript, Day 1, p. 35 line 20 to p. 36, line 13, and the Respondent's position in Transcript, Day 3, p.96, lines 12 to 21]

II. The parties also agree that the following issues could require determination by the Tribunal, for purposes of the analysis whether the alleged violations of the Treaty, referred to in points 4-6 above, occurred:

Whether either of the following acts alleged by Claimants were an exercise of *puissance publique* by Respondent:

i. Alleged pressure on Kredyt Bank to cease funding LFO's line of credit (based on Claimants' allegation that there were acts of *puissance publique* through repeat tax audits that Claimants allege were referred to in the Ministry of Finance letters to Kredyt Bank contained in Exhibit C-17).

ii. Alleged failure to supply blood plasma to the LFO Project.

III. The Claimants propose that within the analysis of the issue in para. 5.3 above, the Tribunal should consider as sub-issues to the alleged failure to supply blood plasma under the 1997 Fractionation Agreement, the following matters:

(a) testing of LFO's processes and products,

(b) Registering of LFO's processes and products as drugs for use in Poland, and

(c) obtaining of authorizations from the Respondent to register and use its processes and sell its products to the Respondent in Poland.

[Claimant's Initial Memorial at para. 21, 52(ii); Claimant's Counter-Memorial at paras. 99 – 102 & nn.69-70; Nizioł Witness Statement at para. 30; Nizioł Supplemental Witness Statement at 8-14; Transcript Day 1, page 67, line 23-page 68, line 4; Transcript Day 2, page 90, line 2-page 92, line 4; Transcript Cay 2, page 159, lines 9-19; Respondent's Position at Transcript Day 3, page 87, lines 1-24.]

The Respondent's position is that the distinction and corresponding arguments were for the first time developed by the Claimants during the Merits Hearing and therefore they are late. It is also the Respondent's position that under the 1997 Fractionation Agreement there were no separate and differentiated conditions for delivery of blood plasma for each of the purposes indicated by the Claimants. Therefore, according to the Respondent, it would first be artificial to split the issue in para. 5.3 into these three sub-issues. Moreover, the determination need not at all be necessary, as the claim may fail on the lack of the *puissance publique* element.

C. Remedies

On the condition that the Tribunal holds that the Respondent violated its obligations towards the Claimants under the Treaty:

9. What amount of damages the Claimants are entitled to, if any?

D. Costs

10. How should the costs of the proceedings be allocated between the parties?