

PCA Case No. 2013-01

**IN THE MATTER OF AN ARBITRATION  
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT  
BETWEEN THE KINGDOM OF THE NETHERLANDS AND  
THE REPUBLIC OF POLAND ON ENCOURAGEMENT AND RECIPROCAL  
PROTECTION OF INVESTMENTS SIGNED ON 7 SEPTEMBER 1992,  
ENTERING INTO FORCE ON 1 FEBRUARY 1994**

**- and -**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW AS REVISED IN 2010**

**BETWEEN:**

**ENKEV BEHEER B.V.  
(of the Netherlands)**

*The Claimant*

**- and -**

**THE REPUBLIC OF POLAND**

*The Respondent*

---

**FIRST PARTIAL AWARD**

---

*The Tribunal:*

**Mr. V.V. Veeder (President);  
Professor Albert Jan van den Berg; and  
Dr. Klaus M. Sachs**

**TABLE OF CONTENTS**

I.	INTRODUCTION .....	7
A.	The Parties .....	7
B.	The Parties' Dispute .....	7
II.	THE PROCEDURAL HISTORY .....	8
A.	The Commencement of the Arbitration .....	8
B.	The Claimant's Request for Interim Measures .....	8
C.	The Claimant's Document Production Request .....	10
D.	The Parties' Written Pleadings .....	11
E.	The Expert Site Visit to Enkev Polska's Premises .....	13
F.	The Hearing on Jurisdiction and Liability .....	14
G.	The Parties' Post-Hearing Exhibits .....	15
H.	Post-Hearing Developments 2013-2014 .....	16
III.	PRINCIPAL FACTUAL BACKGROUND .....	20
A.	Materially Undisputed Facts .....	20
B.	Disputed Facts and Inferences .....	28
IV.	THE FINAL RELIEF REQUESTED BY THE PARTIES .....	31
V.	JURISDICTION .....	32
A.	Introduction .....	32
B.	Article 8(2) of the Treaty .....	33
	The Respondent's Position .....	33
	The Claimant's Position .....	34
C.	Article 8(1) of the Treaty .....	35
	The Respondent's Position .....	35
	The Claimant's Position .....	37
D.	Whether the Claimant Is an "Investor" Within the Meaning of Article 1(b) of the Treaty .....	38
	The Claimant's Position .....	38
	The Respondent's Position .....	39
E.	Whether the Claimant Made an "Investment" Within the Meaning of Article 1(a) of the Treaty .....	39
	The Respondent's Position .....	40
	The Claimant's Position .....	42
VI.	THE CLAIMS UNDER THE TREATY .....	44
A.	Article 5 of the Treaty .....	44
	1. Deprivation of the Investment under Article 5 of the Treaty .....	44
	The Claimant's Position .....	44

	The Respondent's Position .....	45
2.	<b>Public Interest under Article 5(a) of the Treaty</b> .....	47
	The Claimant's Position .....	47
	The Respondent's Position .....	49
3.	<b>Due Process of Law under Article 5(a) of the Treaty</b> .....	52
	The Claimant's Position .....	52
	The Respondent's Position .....	53
4.	<b>Undertakings under Article 5(b) of the Treaty</b> .....	55
	The Claimant's Position .....	55
	The Respondent's Position .....	56
5.	<b>Just Compensation under Article 5(c)</b> .....	56
	The Claimant's Position .....	56
	The Respondent's Position .....	59
B.	<b>Article 3(1) of the Treaty – Fair and Equitable Treatment (“FET”)</b> .....	61
	The Claimant's Position .....	61
	The Respondent's Position .....	61
1.	<b>Unreasonable Uncertainties</b> .....	62
	The Claimant's Position .....	62
	The Respondent's Position .....	65
2.	<b>Stable and Predictable Investment Framework</b> .....	68
	The Claimant's Position .....	68
	The Respondent's Position .....	69
3.	<b>Due Process</b> .....	72
	The Claimant's Position .....	72
	The Respondent's Position .....	72
4.	<b>Bad Faith</b> .....	74
	The Claimant's Position .....	74
	The Respondent's Position .....	75
C.	<b>Article 3(2) of the Treaty – Full Security and Protection (“FSP”)</b> .....	76
	The Claimant's Position .....	76
	The Respondent's Position.....	77
D.	<b>Article 3(5) of the Treaty – Umbrella Clause</b> .....	78
1.	<b>Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.</b> .....	78
	The Claimant's Position .....	78
	The Respondent's Position.....	79

VII. THE CLAIMANT'S RENEWED REQUEST FOR INTERIM MEASURES.....	82
The Claimant's Position.....	82
The Respondent's Position.....	83
VIII. THE TRIBUNAL'S ANALYSIS AND DECISIONS.....	86
IX. OPERATIVE PART.....	114

**TABLE OF ABBREVIATIONS**

<b>Term</b>	<b>Description</b>
<b>1993 Spatial Plan</b>	Local zoning plan for Łódź, Poland, dated 22 June 1993
<b>2002 Study</b>	Study of Conditions and Directions of Development for Łódź (2002) adopted by the Council of the Municipality
<b>2007 Resolution</b>	Resolution of the City Council of Łódź on the development of a new centre of Łódź
<b>2010 Decision on Environmental Conditions</b>	Decision on Environmental Conditions rendered by the Regional Director for Environmental Protection on 27 September 2010
<b>2010 Study</b>	Study of Conditions and Directions of Development for Łódź (2010)
<b>2013 Expropriation Request</b>	Request to the City of Łódź Department of Town Planning and Architecture made by the Mayor of Łódź commencing expropriation proceedings under the Road Legislation filed on 28 January 2013
<b>GCCP</b>	German Code of Civil Procedure
<b>ILC Draft Articles</b>	2001 International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts
<b>Łódź Premises</b>	Production facilities owned by Enkev Polska in Łódź, Poland
<b>Notification</b>	Notice given to Enkev Polska on 7 January 2014 concerning a motion to commence the decision-making procedure for an immediately enforceable expropriation decision for part of Enkev Polska's Łódź Premises (Exhibit C-150)
<b>PaIiIZ</b>	Polish Information and Foreign Investment Agency (Ministry of Foreign Affairs)
<b>PCA</b>	Permanent Court of Arbitration
<b>PCCC</b>	Polish Commercial Companies Code
<b>Road Legislation</b>	Act of 10 April 2003 on the Detailed Principles of Preparing and Implementing Public Road Projects
<b>Treaty</b>	Treaty between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments, signed on 7 September 1992, entering into force on 1 February 1994
<b>UNCITRAL Arbitration Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010

<b>WZ-decision</b>	Municipality decision on building conditions
<b>ZRID decision</b>	Immediately enforceable expropriation decision rendered by a road administration authority upon application from a relevant public entity

## **I. INTRODUCTION**

### **A. The Parties**

1. The Claimant, Enkev Beheer B.V., is a private limited liability company with its corporate seat in the Netherlands. The Claimant is represented in this arbitration by Mr. R. Schellaars and Mr. M. Raas, Simmons & Simmons LLP, Claude Debussylaan 247, 1082 MC Amsterdam, the Netherlands.
2. The Respondent is the Republic of Poland, represented by Dr. D.A.M.H.W. Strik, Linklaters LLP, Zuidplein 180, 1077 XV Amsterdam, the Netherlands, and Dr. C.W. Wisniewski, Linklaters LLP, Warsaw Towers, Sienna 39, 00-121 Warsaw, Poland.

### **B. The Parties' Dispute**

3. In brief, the dispute arises out of the Claimant's alleged investment as an investor in its Polish subsidiary, Enkev Polska S.A., a joint stock company with its corporate seat in Łódź, Poland ("Enkev Polska"). Enkev Polska owns certain industrial facilities in the centre of Łódź (the "Łódź Premises") and holds a perpetual usufruct right to the property under Polish law for the use of the land as real property for 99 years.<sup>1</sup>
4. The Claimant contends that, in 2012, 2013 and currently in 2014 to date, the Respondent made and continues to make a series of threats to expropriate the Claimant's investment, and that this act of expropriation is underway, in such a way as to violate the Respondent's international responsibilities.<sup>2</sup> The Claimant attributes to the Respondent the conduct of its Ministry of Economy, that of the local city government in Łódź (the "City of Łódź"), and that of the Polish Information and Foreign Investment Agency ("PalIZ").
5. The Respondent objects to the Tribunal's jurisdiction; it disputes the admissibility of the Claimant's claims; and it denies any wrongdoing to the Claimant.

---

<sup>1</sup> Claimant's Request for Arbitration, dated 6 August 2012 ("Claimant's Request for Arbitration"), ¶ 3.1; Claimant's Post-Hearing Brief, dated 5 July 2013 ("Claimant's Post-Hearing Brief"), ¶ 1.27; Respondent's Counter-Memorial, dated 15 May 2013 ("Respondent's Counter-Memorial"), ¶ 31.

<sup>2</sup> Claimant's Addendum to its Request for Arbitration, dated 29 November 2012 ("Claimant's Addendum to its Request for Arbitration"), ¶¶ 2.14–2.15; Claimant's Statement of Claim, dated 2 April 2013 ("Claimant's Statement of Claim"), ¶¶ 2.5(F), 2.8(D), 2.9; Claimant's Statement of Reply, dated 24 May 2013 ("Claimant's Statement of Reply"), ¶¶ 1.4(C), 3.28; Hearing Transcript (13 June 2013), 3:20–25 to 4:1–3, 4:19–24, 33:13–18.

## **II. THE PROCEDURAL HISTORY**

### **A. The Commencement of the Arbitration**

6. On 6 August 2012, the Claimant served a Request for Arbitration on the Respondent pursuant to Article 8 of the Treaty between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments, signed on 7 September 1992, entering into force on 1 February 1994 (the "Treaty"), and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010 (the "UNCITRAL Arbitration Rules").
7. On 6 November 2012, the Claimant appointed Professor Albert Jan van den Berg as a Co-Arbitrator and the Respondent appointed Dr. Klaus M. Sachs as a Co-Arbitrator. The two Co-Arbitrators appointed Mr. V.V. Veeder as Presiding Arbitrator on 30 November 2012.
8. On 29 November 2012, the Claimant submitted an "Addendum" to its Request for Arbitration with updated alleged factual information regarding events taking place after the filing of the Request for Arbitration. The Respondent informed the Claimant that: "it does not accept that this exposé will be part of the Request for Arbitration."<sup>3</sup>
9. On 15 January 2013, the Respondent submitted a Response to the Claimant's Request for Arbitration asking that the Tribunal dismiss the Claimant's claims for lack of jurisdiction. In the alternative, the Respondent requested that the Tribunal bifurcate the proceedings in a merits phase and a quantum of damages phase.
10. On 13 February 2013, the Tribunal and the Parties' legal representatives signed the Agreed Terms of Appointment.

### **B. The Claimant's Request for Interim Measures**

11. On 21 January 2013, the Claimant submitted a Request for Interim Measures in which it sought to (i) preserve the *status quo* and "thus avert undue expropriation of its Łódź Premises and damages that it will suffer as a result thereof;" (ii) oblige the Respondent to provide the Claimant with "information on the exact (time) planning, drawings and remedial works to be undertaken [...] for the proposed works in Łódź" under Article 26(2)(a)-(b) and 26(3) of the UNCITRAL Arbitration Rules; and (iii) "[appoint] an expert to conduct a survey and make an

---

<sup>3</sup> Parties' joint letter to the Tribunal, dated 23 November 2012, ¶ 8; Respondent's Response to the Request for Arbitration, dated 14 January 2013 ("Respondent's Response to the Request for Arbitration"), at 3, note 1.



assessment of the Łódź Premises to preserve evidence regarding the state and characteristics of the Łódź Premises and operating mechanics and conditions” under Articles 26(2)(d) and 29 of the UNCITRAL Arbitration Rules.<sup>4</sup>

12. On 23 January 2013, a first procedural hearing was held by telephone. During this hearing, the Respondent suggested that it submit its written response to the Request for Interim Measures by 4 February 2013. The Tribunal informed the Parties that before that date either Party could apply to the Tribunal if there were material developments requiring the Tribunal’s urgent attention. The Parties also agreed that the Permanent Court of Arbitration (“PCA”) act as Registry.

13. On 25 January 2013, the Respondent noted the following written statement made by the Vice-President of the City of Łódź (Mr. Stępień) on the same date:

On behalf of the City of Łódź I hereby declare that until 04.02.2013 no administrative decision will be issued, which could constitute a legal basis for expropriation of ENKEV Polska S.A. from the right of perpetual usufruct the Company has over the real estate located in Łódź at Targowa Street 2. 5

14. In the same communication, the Respondent further elaborated on the timing and procedures applicable to an expected expropriation of the Łódź Premises under Polish law. The Respondent emphasised the expropriation’s “clearly non-impending character,”<sup>6</sup> in support of the Respondent’s request to extend until 4 February 2013 the deadline for its Response to the Request for Interim Measures.

15. By letter dated 31 January 2013, the Claimant requested that the Tribunal take emergency action in response to the statement by the Vice-President of the City of Łódź. The Claimant requested that the Tribunal: (i) order the Respondent to take all measures necessary to prevent the Polish authorities from issuing any expropriatory measures until the Tribunal’s decision on interim measures; or (ii) order the Respondent to make best efforts to prevent the competent Polish authorities from issuing any expropriatory measures until the Tribunal’s decision on interim measures; or (iii) take any other appropriate measures to prevent immediate and grave harm to the Claimant until the Tribunal’s decision on interim measures.

---

<sup>4</sup> Claimant’s Request for Interim Measures, dated 21 January 2013 (“Claimant’s Request for Interim Measures”), ¶ 8.3, *see also* ¶ 7.3.

<sup>5</sup> Unofficial English translation provided by the Respondent.

<sup>6</sup> E-mail message from the Respondent dated 25 January 2013.

16. On 4 February 2013, the Respondent submitted its Response to the Claimant's Request for Interim Measures, seeking the dismissal of the Request. In the event that the Tribunal ordered interim measures, the Respondent requested that the Tribunal order the Claimant to provide appropriate security under Article 26(6) of the UNCITRAL Arbitration Rules.
17. On 13 February 2013, a Hearing on the Claimant's Request for Interim Measures ("Hearing on Interim Measures") was held in Berlin, Germany.
18. On 8 March 2013, the Tribunal issued an Order on Interim Measures and Other Procedural Matters stating, in operative part:
  93. **Interim Measures:** Having considered the Parties' several oral and written submissions made to date, the Tribunal dismisses the Claimant's Request for Interim Measures under Article 26(3) of the UNCITRAL Arbitration Rules. It is not therefore necessary for the Tribunal to decide the Respondent's request for security under Article 26(6) of the UNCITRAL Arbitration Rules given the Tribunal's decision to dismiss the Claimant's Request.
  94. **Tribunal Expert:** The Tribunal decides, in principle, to appoint an expert to the Tribunal under Article 29 of the UNCITRAL Arbitration Rules, with terms of reference reflecting the scope of work agreed by the Parties. The Tribunal will select and appoint such an expert in further consultation with the Parties, as soon as possible.
19. On 8 March 2013, the Claimant requested that the Tribunal clarify and/or supplement the Order on Interim Measures. On 11 March 2013, the Tribunal observed that it did not consider that any addition or interpretation was required since it had dismissed the Claimant's Request for Interim Measures in its entirety.
20. On 22 May 2013, the Respondent informed the Tribunal that a meeting between the President of Enkev Polska ( ), the leader of the Polish social-democratic party (*Sojusz Lewicy Demokratycznej*) and trade unions had been held at the Łódź Premises. The Respondent contended that this meeting was widely reported by the Polish media, contrary to the Tribunal's direction at the Hearing on Interim Measures not to aggravate the dispute through undue publicity.

**C. The Claimant's Document Production Request**

21. On 18 March 2013, pursuant to Article 27(3) of the UNCITRAL Arbitration Rules, the Claimant sought an order for production of four categories of documents available to the Respondent regarding (i) the public purpose for the expropriation of the Łódź Premises and (ii) the due process that the Respondent was obliged to afford to the Claimant under Articles 5(a) and 5(b) of the Treaty (the "Document Production Request").

22. On 25 March 2013, the Respondent commented on the Claimant's Document Production Request, asking the Tribunal to reject the Request or, in the alternative, to amend the current timetable by two to three months.
23. On 2 April 2013, the Claimant replied to the Respondent's objections to its Document Production Request, arguing that the Request is "tied directly to the Respondent's assertions in these proceedings."
24. On 22 April 2013, the Presiding Arbitrator, on behalf of the Tribunal, issued Procedural Order No. 3 on Document Production which provided:
  5. The Tribunal declines, for the time being, to make orders for the production of documentation by the Respondent comprised within the Claimant's Request for Document Production. Nonetheless, the Tribunal hereby keeps that Request on the file and anticipates that the Request could be decided by the Tribunal promptly, if and to the extent necessary, one way or the other following the Respondent's submission of its Counter-Memorial (with associated documentation and other evidence) due no later than 15 May 2013, but before the Claimant's next responsive pleading, namely its Reply Memorial due no later than 24 May 2013.
  6. To that end, given the short time between these two written pleadings, the Tribunal considers it necessary to establish at this stage, in advance, a further procedure for deciding any disputed document production requested by the Claimant as at 15 May 2013; namely:
    - i. if and to the extent that the Respondent should wish at the time of its Counter-Memorial to decline voluntarily to produce any documentation comprised within the Claimant's Request for Document Production, the Respondent shall state the reasons for its objection to produce such documentation in the form of a Redfern/Park Schedule to be submitted to the Claimant, along with the Counter-Memorial; and
    - ii. the Claimant shall thereafter have a brief opportunity to respond to the Respondent's reasons (as soon as practicable but not more than five days) in the form of additional entries to that Redfern/Park Schedule to be then submitted by the Parties to the Tribunal for its decision.
25. On 19 May 2013, the Claimant submitted a Redfern/Park Schedule completed by the Parties with regard to the Claimant's Document Production Request.
26. On 31 May 2013, the Presiding Arbitrator, on behalf of the Tribunal, issued Procedural Order No. 5 on Document Production dismissing the Claimant's Request for Document Production, dated 18 March 2013.

**D. The Parties' Written Pleadings**

27. On 2 April 2013, the Claimant submitted its Statement of Claim in which it agreed with the Respondent's proposal in its Response to the Request for Arbitration to bifurcate the proceedings.

28. On 19 April 2013, the Presiding Arbitrator, on behalf of the Tribunal, issued Procedural Order No. 2 on Bifurcation in which the Tribunal decided to bifurcate the jurisdiction and liability phase from the damages phase of the proceedings.
29. On 7 May 2013, the Claimant submitted a Request for Clarification arguing that a map in one of the Respondent's exhibits (Exhibit R-7) showing the 2002 Study of Conditions and Directions of Development for Łódź incorrectly depicted the current location of the Łódź Premises as well as the planned trajectory of the Nowotargowa Street. The Claimant requested the Respondent's explanation on the exhibit and its origin.
30. On 15 May 2013, the Respondent submitted its Counter-Memorial.
31. On 17 May 2013, the Claimant notified the Tribunal that it intended to file an additional witness statement on Polish administrative law and proceedings under the Road Legislation by 24 May 2013. The Claimant argued that this additional submission was required to respond to certain allegations and "various novel lines of argument" contained in the Respondent's Counter-Memorial which were material to the Claimant's case.
32. On 20 May 2013, the Respondent replied to the Claimant's Request for Clarification of 7 May 2013. The Respondent criticised the Request as belatedly issued and, hence, outside the procedural timeframes foreseen by the Tribunal. According to the Respondent, Procedural Order No. 2 required the Statement of Claim to have been a "full written statement of the Claimant's case." Accordingly, the Claimant was required to raise the matter in its Statement of Claim. Regarding the substance of the Claimant's Request, the Respondent asserted that the map contained in Exhibit R-7 served only demonstrative purposes regarding the plans that existed over time for the construction of the Nowotargowa Street. To support this contention, the Respondent submitted e-mail correspondence dated 9 February 2013 sent by the City of Łódź, which contained maps of the City's historical development plans from 1949–2010, each depicting the planned road in relation to the Łódź Premises.
33. On 21 May 2013, the Respondent requested that the Tribunal dismiss the Claimant's request to submit an additional witness statement for four reasons, namely that (i) all opinions should have been attached to Claimant's Statement of Claim; (ii) the Respondent's argument was not novel and would not merit new submissions; (iii) it would jeopardise the fairness of the proceedings; and (iv) it would not contribute to increasing procedural efficiency while causing unnecessary additional costs.
34. On 23 May 2013, the Claimant filed its additional witness statement with annexes.

35. On 24 May 2013, the Claimant submitted its Statement of Reply. It applied conditionally to add Enkev Polska as co-claimant pursuant to Article 22 of the UNCITRAL Arbitration Rules and § 1046(2) of the German Code of Civil Procedure (“GCCP”). The Claimant further renewed its Request for Interim Measures, based on Articles 22 and/or 26 of the UNCITRAL Arbitration Rules and § 1041 GCCP, contending that it faced expedited expropriation proceedings in Poland which would likely materialise in June 2013 (the “Renewed Request for Interim Measures”). Reiterating its “urgent interest in some form of stability,” the Claimant requested that the Tribunal grant it provisional relief to preserve the *status quo* at the Łódź Premises pending either the issuance of a partial final award on jurisdiction and liability, or subsidiarily, pending the issuance of a partial final award with declaratory relief on the interpretation and application of Article 5(c) of the Treaty.

36. On 7 June 2013, the Respondent submitted its Rejoinder.

#### **E. The Expert Site Visit to Enkev Polska’s Premises**

37. On 27 March 2013, at the Tribunal’s request, the PCA provided the Parties with a list of four independent expert candidates, recommended by the Royal Institute of Chartered Surveyors, to serve as an expert pursuant to paragraph 94 of the Order on Interim Measures and Article 29 of the UNCITRAL Arbitration Rules.

38. On 29 April 2013, the Presiding Arbitrator, on behalf of the Tribunal, issued Procedural Order No. 4 on the Appointment of an Expert. Having taken into consideration the comments made by both Parties, the Tribunal nominated [redacted] : Expert in accordance with Article 29 of the UNCITRAL Arbitration Rules.

39. On 8 May 2013, the Expert, the Parties and the PCA held a conference call during which the Parties agreed with the Expert that the inspection of the Łódź Premises would be conducted on 29 May 2013 by the Expert and his assistant. The Parties further agreed on the expected agenda of the site visit, the documents to be provided to the Expert and the time frame for the Expert’s report. The Parties were unable to agree, however, on the scope of the Expert’s mandate or on the need for the Expert to be present at the Hearing on Jurisdiction and Liability.

40. On 21 May 2013, the Chairman, on behalf of the Tribunal, noted that:

[t]he expert’s function is essentially to make a permanent record of what he and the Parties consider relevant to the Parties’ dispute; and, during the site inspection, he should be free to interpret his mandate in the most useful and efficacious manner possible, exercising his own professional discretion. This should not be an occasion for debating or even attempting to resolve that dispute – hence disputes regarding the merits should have no place during this site inspection, as to which the Parties’ respective positions before the Tribunal are fully reserved.

41. On 29 May 2013, the Expert's signed Terms of Reference were circulated to the Parties.
42. On the same day, the Expert conducted the site visit at the Łódź Premises.
43. On 14 June 2013, the Expert submitted his draft Expert Report inviting the Parties to provide comments thereon.
44. On 26 June 2013, the Claimant submitted its comments to the draft Expert Report inviting the Expert to provide additional information on certain items referred to in the Expert Report.
45. On 15 July 2013, the Expert submitted his revised Expert Report. The Tribunal added the Expert Report to the evidential file in this arbitration.

**F. The Hearing on Jurisdiction and Liability**

46. From 13 to 14 June 2013, the Hearing on Jurisdiction and Liability was held at the Peace Palace in The Hague, the Netherlands. Appearing were:

The Tribunal

Mr. V.V. Veeder (Presiding)  
Professor Albert Jan van den Berg  
Dr. Klaus M. Sachs

For the Claimant

Mr. Rogier Schellaars  
Mr. Mathieu Raas  
Ms. Heleen Biesheuvel  
Ms. Laura Aymerich  
Mr. Adam Kozlowski

For the Respondent

Dr. Daniella Strik  
Dr. Cezary Wiśniewski  
Ms. Olga Górska  
Ms. Kate Lalor  
Ms. Alicja Zielinska  
Ms. Elzbieta Buczkowska  
Ms. Joanna Jackowska-Majeranowska

For the PCA

Ms. Kathleen Claussen  
Ms. Ina Gätzschmann

47. During this hearing, the Tribunal admitted into evidence two new exhibits put forward by the Claimant on 10 June 2013: Exhibits C-141 and C-142. Exhibit C-141 was an audio file

accompanied by a corresponding transcript of a statement made by the current Mayor of Łódź (Ms. Zdanowska) on 7 May 2012 on the alleged goals pursued by the previous administration of Łódź in regard to the road construction. Exhibit C-142 was a letter from the representative of Enkev Polska ( ) to the then First Vice-President of Łódź (Mr. Tomaszewski) of 29 May 2009. The Tribunal allowed the admission of these exhibits into the evidential file subject to an application by the Respondent to submit rebuttal evidence.

48. Also during the hearing, the Parties agreed to hold a video-conference on 25 June 2013 to examine one of the Respondent's witnesses (Mr. Cieślak), who was not available for examination during the hearing on 13-14 June 2013.
49. On 18 June 2013, the Respondent applied "to have Ms. Hanna Zdanowska put forward as a witness in relation to Exhibit C-141 submitted by Claimant," confirming her availability for cross-examination during the video-conference scheduled for 25 June 2013. On the same day, the Claimant communicated to the Tribunal that it would "be able to accommodate the examination of another witness on Tuesday 25 June 2013."
50. On 24 June 2013, the Tribunal issued Procedural Order No. 6 on the Additional Rebuttal Factual Witness called by the Respondent, instructing the Respondent to submit to the Claimant and the Tribunal in advance a short signed written witness statement by Ms. Zdanowska.
51. On 25 June 2013, a video-conference was held during which Mr. Cieślak and Ms. Zdanowska were examined and cross-examined by the Parties.
52. On 5 July 2013, the Parties filed their Post-Hearing Briefs.

#### **G. The Parties' Post-Hearing Exhibits**

53. On 28 June 2013, the Respondent submitted as Exhibits R-80 to R-83 copies of slide presentations it used at the hearing on 13-14 June 2013 and two maps of a local Spatial Plan that dated back to 1993 (the "1993 Spatial Plan"). The Claimant likewise submitted its hearing presentation as Exhibit C-147 on 1 July 2013, along with excerpts of a valuation report dated 14 January 2013 as Exhibit C-148.
54. On 2 July 2013, the Respondent objected to the admission of Exhibit C-148, stating that it lacked any procedural foundation and was made after the deadline set by the Tribunal. The Respondent commented that "for the sake [of] equal parties' rights" it wished to submit two exhibits—a motion dated 9 March 2012 brought by Enkev Polska in the proceedings for the adoption of a new local zoning plan for the City of Łódź and excerpts of a 2010 Study (Exhibits

R-84 and R-85),<sup>7</sup> should the Tribunal admit Exhibit C-148. On the same day, the Claimant agreed to the admission of Exhibits R-84 and R-85.

55. On 3 July 2013, the Claimant submitted a document that it described as the legend pertaining to the map of the 1993 Spatial Plan (with English translation), requesting the Tribunal to admit the document as Exhibit C-149.
56. On 5 July 2013, the Respondent requested that the Tribunal not admit Exhibit C-149 for three reasons. First, the document did not contain a legend but rather a textual excerpt from the 1993 Resolution on the Adoption of the Local Zoning Plan which was, according to the Respondent, not “an integral and necessary part of the 1993 [Spatial Plan].” Second, the request made by the Tribunal during the Hearing on Jurisdiction and Liability was limited to the production of certain maps only. Third, the Respondent argued that the 1993 Spatial Plan, including its textual and graphic parts, were publicly available and should have been produced by the Claimant at an earlier stage of the proceedings since the Respondent filed the 1993 Spatial Plan as Exhibit R-7 prior to the Hearing on Interim Measures on 13 February 2013.
57. On the same day, the Claimant commented on the Respondent’s objection to admit Exhibit C-149 into the evidential record. It argued that the Respondent’s objection was “incomprehensible from a substantive and formal point of view” because the alleged inadequacy of the maps contained in Exhibit R-7 was the primary reason why the Tribunal requested the Respondent to submit another copy of the 1993 Spatial Plan. The Respondent should have produced the document prior to the Hearing on Jurisdiction and Liability. Moreover, the map of the 1993 Spatial Plan would be incomplete without a legend to it. The Claimant argued that, contrary to the Respondent’s contention, it had not submitted other texts than the chart and definitions pertaining to the 1993 Spatial Plan.

#### **H. Post-Hearing Developments 2013-2014**

58. *July 2013:* On 19 July 2013, the Respondent informed the Tribunal and the Claimant that the City of Łódź had filed its application for funding from the EU Infrastructure and Environment Operational Programme on 28 June 2013.
59. *August 2013:* By e-mail dated 2 August 2013, the Claimant raised concerns about the late date of receipt of the City’s EU application, as well as the absence of any English translation and the exclusion of the annexed documents—in particular, a schedule for the City’s modernisation

---

<sup>7</sup> The study is described in greater detail at ¶ 96 below.



project—that it claimed were material to the Claimant’s case. According to the application described by the Claimant,<sup>8</sup> the City of Łódź set 31 December 2013 as the final deadline for the acquisition of the Łódź Premises and set aside PLN 50,000,000 for this purpose—which was insufficient (in the Claimant’s submission) to cover the expected costs, approximately PLN 65,000,000, for the relocation of its facilities.

60. By an e-mail reply dated 9 August 2013, the Respondent argued that the submission of the application was intended for information only. In response to the Claimant’s concerns about the timing, language, and completeness of the submission, the Respondent stated that it transmitted the application as soon as it was received by Counsel; that the omitted enclosures comprised hundreds of documents, the production of which would be neither useful nor justified; and, that the Tribunal should not accept the Claimant’s informal, unofficial translated excerpt. Further, the Respondent noted that an exact date for the physical acquisition of the Łódź Premises in particular would be determined by the expropriation decision yet to be issued. According to the Respondent’s reading of the application, the City of Łódź set aside PLN 50,000,000 for the acquisition of all outstanding plots of land, not just for the premises of Enkev Polska.
61. By e-mail dated 27 August 2013, the Claimant alleged that the City of Łódź had dismissed the Mayor’s application for an expropriation decision on 26 July 2013 pursuant to a request to withdraw the application by the Mayor on the previous day.
62. *September 2013:* By response e-mail dated 6 September 2013, the Respondent contended that the information submitted by the Claimant on 27 August 2013 had “no material, if any at all, impact on the subject matter of the pending arbitral proceedings.” It explained, through an enclosed map, that the change in the construction plans prompting the withdrawal of the application would have no bearing on the plans for the Łódź Premises.
63. On 7 September 2013, the Claimant requested information on the origin of the demonstrative map attached to the Respondent’s 6 September e-mail.
64. On 10 September 2013, the Respondent resubmitted the map attachment and indicated that it had enquired as to the origin and the intended use of the map with the City of Łódź. The Respondent also enclosed a copy of a letter dated 5 September 2013 in which a representative of the City, Mr. Nita, elaborated on the Claimant’s questions concerning the recent change in the City’s construction plans for the city centre and the road junction system.

---

<sup>8</sup> The Claimant provided an excerpted English translation, which it submitted as Exhibit C-150.

65. On 11 September 2013, the Claimant replied to the Respondent's e-mail stating that it would "take mitigation steps" and hold the Respondent "fully to account for further costs for mitigation of damages and alternative locations." The Claimant argued that the Respondent's failure to report on the Mayor's withdrawal of the application constituted a breach of the Order on Interim Measures, in which the Tribunal asked the Parties to report pertinent changes in circumstances, and in particular, "any decision made in response to the City of Łódź's application of 28 January 2013."
66. On 12 September 2013, the Respondent asked the Tribunal to decide on the admissibility of any further correspondence between the Parties and to advise on the further course of the arbitral proceedings.
- 67.
68. Following a further exchange of communications, the Tribunal asked that the Parties refrain from further correspondence unless the correspondence contained a specific application to the Tribunal, notwithstanding that all prior orders of the Tribunal remained in force.
69. *January 2014:* By email messages and letters dated 20, 23 and 28 January 2014 (with attachments), the Claimant applied for: (i) permission to submit into the evidential record provisional exhibits C-150, C-151, C-152 and C-153; (ii) amended further interim measures; and (iii) permission to make further submissions in relation to such exhibits and measures, orally and/or in writing. The Respondent opposed the Claimant's application by letter dated 24 January 2014. The Tribunal ordered a procedural meeting to be held by telephone conference call on 7 February 2014.
70. *February 2014:* This procedural meeting took place on 7 February 2014, attended by the Parties and their legal representatives. It was recorded by transcript (copies of which were later distributed to the Parties by the Tribunal's Procedural Order No. 8).
71. By Procedural Order No. 7 of 10 February 2014, referring to the Parties' recent correspondence and oral submissions during the procedural meeting, applying the Tribunal's Procedural Order of 25 June 2013 and Article 31 of the UNCITRAL Arbitration Rules, the Tribunal decided, as a procedural order: (a) to admit into evidence the Claimant's new four provisional exhibits, to be

marked Exhibits C-150, C-151, C-152, and C-153; (b) to order the Claimant to provide a written submission explaining its case based upon these four Exhibits, as soon as possible but no later than 17 February 2014 (such submission to be “self-contained”; i.e., to replace the materials made by the Claimant in writing, as listed above); (c) to permit the Respondent to respond to such written submission by the Claimant, as soon as possible following receipt thereof, but no later than 28 February 2014 (such submission to be likewise “self-contained”); (d) to dismiss the Claimant’s application for amended interim measures; and (e) to reserve its decision on the Claimant’s application for further oral submissions (whether at an oral hearing in-person or by telephone conference call) until the Tribunal had reviewed the additional written submissions from the Parties.

72. The Claimant, by its written submission dated 17 February 2014, explained its case based upon the four new Exhibits marked C-150, C-151, C-152, and C-153; and the Respondent, by its written submission dated 28 February 2014 (with nine new exhibits marked Exhibits R-87 to R-95), explained its opposition to the Claimant’s submission, including any argument that there existed any exceptional circumstances justifying the re-opening of these proceedings pursuant to Article 31(2) of the UNCITRAL Arbitration Rules.
73. *March 2014:* By Procedural Order No. 9 of 23 March 2014, having reviewed these written submissions from the Parties and applying the Tribunal’s order of 25 June 2013 and Article 31 of the UNCITRAL Arbitration Rules, the Tribunal decided to admit into the evidentiary record the Respondent’s nine new exhibits (albeit that none is material to decisions made in this Award) and not to grant the Claimant’s application for further oral submissions.
74. By letter to the Parties dated 22 April 2014, the Tribunal confirmed that it formally closed these arbitration proceedings as regards issues decided in this Award pursuant to Article 31(1) of the UNCITRAL Arbitration Rules, further to Paragraph 4 of Procedural Order No. 9 dated 23 March 2014.

### III. PRINCIPAL FACTUAL BACKGROUND

75. The following factual summary is drawn by the Tribunal largely from the Parties' pleadings, as considered relevant to the Tribunal's decisions later in this Award. Many of these facts are common ground between the Parties; but many inferences from such facts, as well as certain important facts alleged by one Party, remain much in dispute between the Parties.

#### A. Materially Undisputed Facts

76. Enkev Polska has operated in Łódź since the 1960s.<sup>9</sup> In 2001, the Claimant acquired approximately 79 percent of shares in Enkev Polska, making it the controlling shareholder of the Polish company. The Łódź Premises were of particular interest for the Claimant both for their advantageous employment conditions and for their strategic location in Eastern Europe—a growing market for its businesses.<sup>10</sup> Upon its acquisition of shares, the Claimant undertook to modernise and optimise the technical state of Enkev Polska's production lines and its operation on the Łódź Premises.

77. At the Łódź Premises, Enkev Polska produces semi-finished products on the basis of natural fibres and latex for use in furniture, packing, mattresses, horticultural and technical applications.<sup>11</sup> It supplies approximately 250 customers within and without Poland; and it produces some 691 different articles.<sup>12</sup> According to the Claimant, any interruption of operations at the Łódź Premises could lead to a substantial (or even complete) disruption of the Enkev Polska's business in Poland.<sup>13</sup>

78. The Łódź Premises are situated in the centre of Łódź, adjacent to a railroad station that connects Łódź and Warsaw, at a location that the Claimant considers to be strategically advantageous for any public or private investor.<sup>14</sup>

79. When the Claimant commenced its operations with Enkev Polska in Łódź, the Łódź Premises were included in a local Spatial Plan dating back to 1993. The purpose of the 1993 Spatial Plan

---

<sup>9</sup> Claimant's Statement of Reply, ¶ 3.5.

<sup>10</sup> Witness Statement of \_\_\_\_\_, 8.

<sup>11</sup> Claimant's Request for Interim Measures, ¶ 6.38.

<sup>12</sup> Witness Statement of \_\_\_\_\_, ¶ 5.

<sup>13</sup> Claimant's Statement of Reply, ¶¶ 3.31, 6.5.

<sup>14</sup> Claimant's Post-Hearing Brief, ¶ 2.29.

was to illustrate the City's zoning plans and projected public construction works at that time. The 1993 Spatial Plan showed the trajectory of a road known as Targowa Street along the left side of the Łódź Premises; it projected that the road's corridor might be widened (or shortened) to a certain degree; but it did not set forth its complete redirection.<sup>15</sup>

80. In anticipation of the expiration of the 1993 Spatial Plan on 31 January 2003, a new planning phase began in 2002 within the City. During this planning phase, the Council of the Municipality adopted a Study of Conditions and Directions of Development (the "2002 Study"). The 2002 Study set out the Municipality's policies regarding spatial planning. The 2002 Study was binding on the local authorities; but it was not an enforceable local act comparable to a general spatial plan.<sup>16</sup>
81. After the 1993 Spatial Plan expired on 31 January 2003, the City of Łódź did not adopt and has not adopted a new spatial plan. As a consequence, the Łódź Premises have not been subject to a general spatial plan since 2003. The national Spatial Planning and Development Act of 27 March 2003 provides that in situations where a certain plot of land is not covered by a spatial plan, the property development is governed by the municipality's "decisions on building conditions" ("WZ-decision").<sup>17</sup>
82. On 10 April 2003, the national Act on the Detailed Principles of Preparing and Implementing Public Road Projects (the "Road Legislation") entered into force. The Road Legislation makes easier expropriations for the construction of public roads than other expropriations for a different purpose.<sup>18</sup>
83. Article 17 of the Road Legislation provides (in English translation):

Article 17.

1. Where a legitimate public or economic interest exists, a provincial governor, in the case of national and provincial roads, or a district head, in the case of district and local roads, shall, at the request of the relevant road administration authority, declare a decision consenting to the implementation of a road project immediately enforceable.

2. [...].

---

<sup>15</sup> Exhibit R-7, at 1.

<sup>16</sup> Expert Report of [redacted] ¶ 5(c); Expert Report of [redacted] and [redacted], at 4.

<sup>17</sup> Expert Report of [redacted], ¶ 5(d); Expert Report of [redacted] and [redacted], at 4. Spatial plans, studies of conditions and directions of development, as well as WZ-decisions form part of general Polish law.

<sup>18</sup> Hearing Transcript (13 February 2013), 54:22-25 to 55:1 (submission of Respondent's counsel, Dr. Wiśniewski); Claimant's Statement of Claim, ¶ 5.6.

3. The decision referred to in subsection 1:

1) (repealed);

2) obligates parties to immediately hand over real properties and immediately vacate premises and other areas;

3) entitles the relevant road administration authority to take actual possession of real properties;

4) authorises the commencement of construction works [...].<sup>19</sup>

84. Under Article 17 of the Road Legislation, the competent local authority (e.g., the City of Łódź) may request that the relevant road administration authority render an expropriation decision ("ZRID decision") and declare the decision to have immediate enforceability. If granted, with such a declaration, the aggrieved party must then hand over its property immediately after the issuance of the ZRID decision.

85. In addition, Article 31(2) of the Road Legislation provides that, once the construction works mentioned in Article 17(3)(4) of the Road Legislation have begun, the aggrieved party has no remedy in the Polish administrative courts. It can file a complaint in the Polish administrative courts arguing that the ZRID decision is unlawful; but this complaint has no suspensive effect on the execution of the ZRID decision.

86. Article 31(2) of the Road Legislation reads (in English translation):

Article 31. 1. [...]

2. If a complaint against a decision consenting to the implementation of a road project that was declared immediately enforceable is admitted, then after the expiry of 14 days from the date on which the construction of the road started an administrative court may only state that the decision violates the law for reasons specified in Article 145 or Article 156 of the Code of Administrative Procedure.

3. [...].<sup>20</sup>

Thus, the Polish administrative courts can rule *ex post facto* that the expropriation decision was unlawful; but they have no power to reinstate the *status quo ante* to the benefit of the aggrieved party. An aggrieved party is only entitled to claim damages from the State for unlawful treatment.<sup>21</sup>

---

<sup>19</sup> Exhibit C-19.

<sup>20</sup> Exhibit C-19.

<sup>21</sup> Hearing Transcript (13 February 2013), 123:12–25 to 124:1–24.

87. Following the controversy surrounding the constitutionality of the Road Legislation, the Polish Constitutional Court ruled on 16 October 2012 that the Road Legislation's provisions are consistent with the Polish Constitution. The Constitutional Court acknowledged the absence of any judicial remedy that could halt ongoing construction works following an act of expropriation. The Court considered this absence to be justified "in the interest of all society members" and in the light of the fact that "equitable" compensation had to be paid by the State to the deprived party.<sup>22</sup>
88. In 2005, the Claimant acquired further shares in Enkev Polska.<sup>23</sup>
89. On 8 January 2007, the Mayor of the City of Łódź issued a WZ-decision which permitted Enkev Polska to expand its warehouse capacity on the Łódź Premises.<sup>24</sup>
90. In 2007, the City Council of Łódź issued a Resolution on the development of a new city centre as part of a broader plan to become, as it wished, the "Cultural Capital of Europe" (the "2007 Resolution"). The modernisation plans envisaged, *inter alia*, the construction of a new main railway station, the rebuilding of the City's road network and the surrounding infrastructure, as well as the construction of a large new cultural centre, the Camerimage Centre.<sup>25</sup>
91. To co-finance the modernisation project, the City of Łódź announced that it would prepare an application for a significant infrastructure subsidy from the European Union. The grant would provide EUR 63,000,000—59 percent of the total costs—for the modernisation project.<sup>26</sup> According to the Respondent, applicants are required to show that they own the plots affected by the modernisation plans to be admitted into the EU's selection process.<sup>27</sup>
92. In mid-2007, officials from the City of Łódź approached Enkev Polska to express the City's interest in acquiring its premises. The parties entered into negotiations about a potential relocation of the Łódź Premises to accommodate the construction of the Camerimage Centre.

---

<sup>22</sup> Judgment of the Constitutional Tribunal of 16 October 2012 in Case no. K4/10, ¶¶ 4.2.1 and 3.3 [Exhibit C-42, unofficial translation]; *see also* Claimant's Statement of Claim, ¶ 5.47.

<sup>23</sup> Claimant's Statement of Claim, ¶ 3.10.

<sup>24</sup> Annex 3A to Exhibit CE-1.

<sup>25</sup> Respondent's Response to the Request for Arbitration, at 9. Section (C), ¶ 1.1(1).

<sup>26</sup> Respondent's Counter-Memorial, ¶¶ 105, 110.

<sup>27</sup> Respondent's Response to the Request for Interim Measures, dated 4 February 2013 ("Respondent's Response to the Request for Interim Measures"), ¶¶ 2, 11. The City of Łódź eventually filed its application for funding from the EU Infrastructure and Environment Operational Programme on 28 June 2013. Respondent's e-mail to the Tribunal and the Claimant, dated 19 July 2013; Claimant's e-mail to the Tribunal and the Respondent, dated 2 August 2013.

93. The City of Łódź first offered to acquire the Łódź Premises on 24 December 2008 for PLN 17,781,000 (approximately EUR 4,400,000). This offer was rejected by Enkev Polska and the Claimant.<sup>28</sup>
94. In 2009, the Claimant acquired an additional tranche of shares in Enkev Polska, thereafter holding approximately 98 percent of the total shares in Enkev Polska.<sup>29</sup>
95. Between April and October 2010, the Respondent proposed an alternative site for the relocation of the Łódź Premises which Enkev Polska and the Claimant rejected.<sup>30</sup>
96. While negotiations were still ongoing in the course of 2010, the City of Łódź issued a Study of Conditions and Directions of Development (the “2010 Study”) which was binding on local authorities. The 2010 Study was informed by an Environmental Impact Assessment Procedure conducted by the Regional Director for Environmental Protection. On 11 June 2010, the Regional Director announced publicly that any potentially affected individual could review the procedural files and raise objections against the planned development.<sup>31</sup>
97. Neither the Claimant nor Enkev Polska took part in the Environmental Impact Assessment Procedure.<sup>32</sup> It seems an inexplicable omission. Nonetheless, the Tribunal accepts that it was an innocent mistake, as explained further below, with no consequences for the decisions made below in this Award.
98. On 27 September 2010, the Regional Director for Environmental Protection issued a “decision on environmental conditions” (the “2010 Decision on Environmental Conditions”). This Decision ordered, *inter alia*, that the trajectory of Targowa Street would lead through the middle of Enkev Polska’s Łódź Premises.<sup>33</sup> After the construction works were completed, Targowa Street would be re-named Nowotargowa Street. The 2010 Decision on Environmental Conditions finalised the trajectory of the proposed Nowotargowa Street with no possibility of amendment under Polish law.

---

<sup>28</sup> Claimant’s Statement of Claim, ¶ 8.5; Respondent’s slide presentation, dated 13 February 2013 (“Respondent’s slide presentation”), slide 17.

<sup>29</sup> Claimant’s Statement of Reply, ¶ 3.5.

<sup>30</sup> Claimant’s Statement of Claim, ¶¶ 8.7–8.9; Respondent’s slide presentation, slide 18.

<sup>31</sup> Respondent’s slide presentation, slide 14; Witness Statement by Mr. Cieślak, Hearing Transcript (25 June 2013) (“Witness Statement by Mr. Cieślak”), 23:21–25 to 24:1–9.

<sup>32</sup> Hearing Transcript (13 February 2013), 24:8–15.

<sup>33</sup> Respondent’s slide presentation, slide 13.



99. On 15 November 2010, after the Claimant learned of the 2010 Decision on Environmental Conditions, Enkev Polska expressed to the City of Łódź its disappointment that the latter had initiated the Environmental Impact Assessment Procedure without specifically notifying Enkev Polska. Enkev Polska also asserted that the City of Łódź had promised to inform Enkev Polska in advance of any administrative proceedings which could affect the production facilities at the Łódź Premises.<sup>34</sup> The Respondent contended in this arbitration that Enkev Polska had sufficient means to become aware, in a timely manner, of the Environmental Impact Assessment Procedure and that it was at fault in failing to become so aware. It seems there was an inadvertent and unfortunate mistake on both sides.

100. On 22 November 2010, the Head of the Bureau of Investments of the City of Łódź responded to Enkev Polska, stating that:

The announcement on the issue of the Decision No. 2212010 of 27 September 2010 of the Regional Environmental Protection Director in Łódź was posted on the notice board in the Bureau of Investments of the City of Łódź Office from 04 October to 18 October 2010. The decision came in force on 04 November of that year.

I am truly sorry that we did not inform you about the above actions and I promise to notify you of any plans to be introduced in future, however I would like to emphasise that the legal procedure of making a decision public was duly observed by the Regional Environmental Protection Director.<sup>35</sup>

101. In November 2011, Enkev Polska filed an application with the City to convert its perpetual usufruct right regarding the Łódź Premises to full ownership under Polish law.<sup>36</sup>

102. On 11 January 2012, a meeting took place between the director of Enkev Polska ( ), the co-owners and directors of the Claimant ( ); and representatives of the City of Łódź. The City discussed its plan to construct Nowofargowa Street through the Łódź Premises, making clear that the plan was final and that the trajectory of the new road could not be changed.<sup>37</sup> The City informed Enkev Polska and the Claimant that Enkev Polska was legally obliged to vacate the middle section of its Łódź

---

<sup>34</sup> Claimant's Statement of Claim, ¶ 6.18 [C-62].

<sup>35</sup> Claimant's Statement of Claim, ¶ 6.20 [C-65].

<sup>36</sup> Claimant's Statement of Claim, ¶ 2.9; Respondent's Response to the Request for Arbitration, at 10, ¶ 8; Respondent's Counter-Memorial, ¶ 247.

<sup>37</sup> Claimant's Addendum to its Request for Arbitration, ¶ 2.14.

Premises to enable the construction of a new road system as part of the envisaged modernisation of the City centre.<sup>38</sup>

103. Subsequently, the parties' representatives held several meetings to discuss a potential relocation of Enkev Polska's production facilities.
104. In May 2012, the City of Łódź offered to acquire the Łódź Premises for a purchase price of PLN 26,000,000 (approximately EUR 6,500,000). The Claimant and Enkev Polska rejected this revised offer.<sup>39</sup>
105. On 9 July 2012, the Claimant, a representative of Paliz and the Economic Counselor of the Netherlands Embassy in Poland attended a meeting to discuss relocation options. The Claimant rejected the proposals, saying that the proposed alternative sites were physically unsuitable for Enkev Polska.<sup>40</sup>
106. On 20 July 2012, a representative of the City of Łódź (Mr. Nita) reiterated to  
(for the Claimant) that the plans for the construction of the new road would neither be changed nor postponed. Mr. Nita advised the Claimant that the final deadline for acceptance by Enkev Polska would be the end of August 2012.<sup>41</sup> He clarified that, if the parties failed to enter into a joint purchase agreement, the City of Łódź would acquire the title to the Łódź Premises on the basis of the Road Legislation, i.e., by means of expropriation.<sup>42</sup>
107. No progress was made at a further meeting held in Warsaw on 27 August 2012, attended by representatives of the Claimant, the Undersecretary of State of the Polish Ministry of Economic Affairs and the Dutch Vice-Prime Minister.<sup>43</sup>
108. At an additional meeting in Warsaw on 13 September 2012, the Vice-Mayor of the City of Łódź (Mr. Cieślak) informed the Claimant that the City would not expropriate Enkev Polska's premises at the end of August 2012. He repeated the City's offer to acquire the Łódź Premises

---

<sup>38</sup> Claimant's Addendum to its Request for Arbitration, ¶ 2.14; Respondent's Response to the Request for Arbitration, at 9, Section (C), ¶ 1.1(1).

<sup>39</sup> Claimant's Statement of Claim, ¶¶ 8.10–8.11; Respondent's slide presentation, slide 19.

<sup>40</sup> Claimant's Statement of Claim, ¶ 2.5(E).

<sup>41</sup> Claimant's Statement of Claim, ¶ 2.5(F). *See also* Witness Statement by Mr. Cieślak, 14:7–25 to 15:1–18.

<sup>42</sup> Claimant's Statement of Claim, ¶ 2.5(F).

<sup>43</sup> Claimant's Statement of Claim, ¶ 2.8(B).

for PLN 26,000,000 (approximately EUR 6,500,000). In the absence of any agreement on value, the parties agreed to a re-valuation of the Łódź Premises by a joint valuator.<sup>44</sup>

109. The valuation report dated 14 January 2013 concluded that the value of the part of the Łódź Premises to be affected by the road project totalled PLN 5,816,000 (approximately EUR 1,450,000), while the value of the remaining parts amounted to PLN 18,690,000 (approximately EUR 4,500,000), making the overall value of the Łódź Premises PLN 24,506,000 (approximately EUR 5,950,000).<sup>45</sup> The parties did not agree on this report's findings.<sup>46</sup>
110. On 28 January 2013, the Mayor of Łódź filed an *ex parte* request with the City's Department of Town Planning and Architecture to expropriate Enkev Polska's premises (the "2013 Expropriation Request").<sup>47</sup> The Department found the 2013 Expropriation Request to be incomplete or improperly completed; and it sent the application back to the Mayor's Office.
111. The City of Łódź informed Enkev Polska on 6 May 2013 that, as soon as the Department of Town Planning and Architecture confirmed the completeness and accuracy of the 2013 Expropriation Request, Enkev Polska would receive a formal notification of the commencement of the expropriation proceedings with a copy of this Request and its exhibits.<sup>48</sup>
112. On 25 July 2013, the Mayor of Łódź withdrew the 2013 Expropriation Request, noting an intention to re-submit the application with modifications by the end of September 2013.<sup>49</sup>
113. On 30 September 2013, the City of Łódź adopted a motion for an immediately enforceable expropriation decision for part of Enkev Polska's Łódź Premises under the Road Legislation [C-151]. This motion was not formally notified to Enkev Polska or the Claimant, although both soon learnt of its existence. Without formal notification, it had no immediate effect under Polish law.

---

<sup>44</sup> Claimant's Statement of Claim, ¶ 2.8(G); Respondent's Response to the Request for Arbitration, at 10 *et seq.*, Section (C), ¶ 1.1(8).

<sup>45</sup> Respondent's slide presentation, slide 20.

<sup>46</sup> Claimant's Statement of Claim, ¶ 8.15.

<sup>47</sup> Claimant's Statement of Claim, ¶ 5.10; Hearing Transcript (13 June 2013), 5:9–13; Respondent's Response to the Request for Interim Measures, ¶ 35 [Exhibit R-5]; Respondent's Counter-Memorial, ¶ 146.

<sup>48</sup> Respondent's Counter-Memorial, ¶¶ 88, 146–147, 252.

<sup>49</sup> Claimant's e-mail to the Tribunal and the Respondent, dated 27 August 2013; Respondent's e-mail to the Tribunal and the Claimant, dated 6 September 2013.

114. On 30 December 2013, the City of Łódź adopted a motion to commence the decision-making procedure for an immediately enforceable expropriation decision for part of Enkev Polska's Łódź premises. This motion was notified to Enkev Polska on 7 January 2014 (the "Notification") [C-150]. With such notice, there were under Polish law certain legal and practical effects, as submitted by the Claimant. These are addressed later in this Award.
115. By letters dated 13 and 17 January 2014 to the City of Łódź, Enkev Polska responded to the Notification [Exhibit C-152]. By letter dated 22 January 2014, the City of Łódź replied to Enkev Polska [Exhibit R-87]. This correspondence was followed by a letter dated 11 February 2014 to the City of Łódź from Enkev Polska's Counsel with a list of six questions [R-88] and a letter dated 18 February 2014 from the Roads and Transport Authority in Łódź to the Consortium Torpol-Astaldi-Interdecor-PBDiM requesting information to be provided in response to Enkev Polska's questions [R-89].

#### **B. Disputed Facts and Inferences**

116. The Parties dispute several facts and factual inferences. For the sake of completeness, certain of these are summarised below, although none is materially relevant to the decisions made by the Tribunal later in this Award.
117. The Parties disagree about the precise content of the 2002 Study and, in particular, the trajectory of the Nowotargowa Street as there projected. The Claimant contends that the 2002 Study reaffirmed the trajectory as set out in the 1993 Spatial Plan, i.e., that the Nowotargowa Street cut off only an edge of the left part of the Łódź Premises.<sup>50</sup> According to the Claimant, the 2002 Study projected that only insignificant changes to the trajectory of the Targowa Street were expected to the extent that, in the worst case, its widening would have cut off an office building at the left part of the Łódź Premises. The Claimant did not consider this possibility a major concern because neither the main warehouse nor the production facilities would be affected.<sup>51</sup> As late as 2009, Enkev Polska's President ( ) understood that the Targowa Street would be rebuilt, meaning enlarging the existing Targowa Street rather than building the new Nowotargowa Street.<sup>52</sup> Consequently, the Claimant takes the position that the changes made in the 2010 Study were not predictable at the time of its investment because the

---

<sup>50</sup> Claimant's Statement of Claim, ¶ 4.29(C); Witness Statement of ( ) para. 5(c) [Exhibit CE-1].

<sup>51</sup> Hearing Transcript (13 February 2013), 93:3–16.

<sup>52</sup> Claimant's Post-Hearing Brief, ¶ 2.26.

Nowotargowa Street was not simply an extension of the Targowa Street, but rather a new street alongside the latter.<sup>53</sup>

118. The Respondent, while agreeing that the exact trajectory of the Nowotargowa Street has changed, maintains that the street was always “planned to run through” Enkev Polska’s Łódź premises.<sup>54</sup> The planning documents of the 1990s, and even those of the 1970s, reveal that the trajectory always cut through the same areas which it cuts today. Only slight eastward or westward changes were discussed. Today’s planning situation is accordingly “very similar” to that contained in the 1993 Spatial Plan.<sup>55</sup> Hence, the Respondent contends that the 1993 Spatial Plan (as confirmed by the 2002 Study) illustrated the predictable possibility that title to at least part of Enkev Polska’s premises would have to be transferred at a later stage to the City of Łódź. The Respondent concludes that the risk of being expropriated was known by Enkev Polska for almost twenty years and that it necessarily formed part of the Claimant’s risk assessment before taking its decision to invest in Enkev Polska in 2001 and, more so, subsequently.<sup>56</sup>
119. The Parties further disagree on the content and outcome of several meetings conducted between Enkev Polska and representatives of the Respondent. In connection with the meeting of 13 September 2012, the Claimant describes that the Parties agreed to a re-valuation of the Łódź Premises based on (i) the sales value, (ii) the relocation value and (iii) the standard of Article 5(c) of the Treaty.<sup>57</sup> The Respondent, on the other hand, contends that it insisted that the valuation method be determined by an independent valuator.<sup>58</sup>
120. Finally, the Claimant maintains that a letter of 17 October 2012 from the City of Łódź announced the City’s plan to expropriate Enkev Polska’s premises with immediate effect,<sup>59</sup> while the Respondent regards the letter as only a reminder to proceed with the re-valuation of the Łódź Premises.<sup>60</sup> The letter reads in relevant part:

---

<sup>53</sup> Hearing Transcript (13 June 2013), 8:19–20; Claimant’s Post-Hearing Brief, ¶ 3.59.

<sup>54</sup> Respondent’s Response to the Request for Arbitration, at 9 *et seq.* Section (C), ¶ 1.1(3). See also Witness Statement of [redacted] Hearing Transcript (14 June 2013), 107:6–25 to 108:1–11; Witness Statement by Mr. Cieślak, 24:13–15.

<sup>55</sup> Hearing Transcript (14 June 2013), 78:1–25 to 80:1–24.

<sup>56</sup> Respondent’s Response to the Request for Arbitration, at 10, Section (C), ¶¶ 1.1(4–6).

<sup>57</sup> Claimant’s Statement of Claim, ¶ 2.8(G); Claimant’s Post-Hearing Brief, ¶ 3.66.

<sup>58</sup> Respondent’s Counter-Memorial, ¶ 241; Witness Statement by Mr. Cieślak, 11:14–25 to 12:1–2.

<sup>59</sup> Claimant’s Statement of Claim, ¶¶ 2.9–2.10; Claimant’s Statement of Reply, ¶ 2.3.

<sup>60</sup> Respondent’s Response to the Request for Arbitration, at 11, Section (C), ¶ 1.1(9).

I request that you urgently, *i.e.* by 19.10.2012, make a clear declaration that Enkev withdraws from buying out the perpetual usufruct right, which will allow to commence the procedure associated with the re-valuation of the property.

Otherwise, the [expropriation procedure under the Road Legislation] will be commenced immediately and thus any negotiations on a voluntary acquisition of your property by the City will become pointless.<sup>61</sup>

*(The remainder of this page left intentionally blank.)*

---

<sup>61</sup> Exhibit C-8.

#### IV. THE FINAL RELIEF REQUESTED BY THE PARTIES

121. The Claimant requests the Tribunal to award the following relief “in the form of an order, interim award, partial final award or final award, as the Tribunal deems fit”:<sup>62</sup>

- (A) Declaratory relief consisting of a finding that Respondent has failed to comply with its obligations under the BIT, in particular Articles 3 and/or 5 thereof;
- (B) Declaratory relief consisting of finding on the interpretation and application of Article 5(c) of the BIT, by reference to the statements and exhibits adduced by the parties in these arbitral proceedings;
- (C) An award providing for damages for the consequences of the Respondent’s failure to comply with its obligations under Articles 3 and/or 5 of the BIT;
- (D) An award providing for *restitutio in integrum* and/or an award pursuant to which Enkev is restated, to the maximum extent possible, in the situation existing prior to an expropriation by the Respondent;
- (E) An award for costs of the arbitral proceedings and legal representation, to the extent permissible under the agreed upon rules of arbitration and the BIT; and,
- (F) Granting such further or amended relief as the Tribunal may deem fit.

122. The Respondent requests the Tribunal, in the form of final relief, to:

render an award declaring that it has no jurisdiction to hear the Claimant’s claim and/or that the Claimant’s claim is otherwise inadmissible; or alternatively to dismiss the Claimant’s claim in its entirety. In both cases, the Respondent requests the Tribunal - particularly taking into account that the Claimant’s claim is centred on an expropriation which has not yet even taken place - to award it costs associated with the arbitral proceedings and legal representation insofar as permissible under the Treaty.

More explicitly in relation to the question of the Claimant’s claim for costs, this must of course be denied given that - either on the basis of a lack of jurisdiction/admissibility or on the basis that the Claimant’s claims must be dismissed in their entirety - the Claimant has brought such costs upon itself. Even if the Tribunal were to award the Claimant part of its requested relief, it is the case that Article 12(9) of the Treaty mandates that each party shall bear the cost of the arbitrator it appoints and its representation, and the costs of the Chairmen as well as any other costs must be borne in equal parts by the Parties.<sup>63</sup>

---

<sup>62</sup> Claimant’s Statement of Claim, ¶ 10.2.

<sup>63</sup> Respondent’s Counter-Memorial, ¶¶ 282–283.

## V. JURISDICTION

### A. Introduction

123. The Respondent advances three objections to the Tribunal's jurisdiction based on Articles 8 and 1 of the Treaty. (For ease of reference, the Tribunal subsumes within these jurisdictional objections other like objections to the admissibility of the Claimant's claims). The Claimant rejects all these objections.

124. In describing the Parties' respective cases on Jurisdiction (as also later below on the Merits), the Tribunal only summarises those cases for the purpose of recording its decisions in this Award. It should not be assumed that any submission or reference by either Party has been overlooked by the Tribunal by reason of its omission from these summaries.

125. Article 8 of the Treaty provides, in relevant part:

(1) Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business, such as the measures mentioned in Article 5 of this Agreement [i.e. the Treaty] or transfer of funds mentioned in Article 4 of this Treaty, shall to the extent possible, be settled amicably between both parties concerned.

(2) If such dispute cannot be settled within six months from the date either party request amicable settlement, it shall upon request of the investor be submitted to an arbitral tribunal. In this case the provisions of paragraphs 3-9 of Article 12 shall be applied *mutatis mutandis*. Nevertheless the President of the Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm shall be invited to make the necessary appointments. [...]

126. Article 1 of the Treaty defines certain terms as follows:

For the purposes of this Agreement:

a) the term "investments" shall comprise every kind of asset and more particularly, though not exclusively:

- i. movable and immovable property as well as any other rights *in rem* in respect of every kind of asset;
- ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
- iii. title to money and other assets and to any performance having an economic value;
- iv. rights in the field of intellectual property, technical processes, goodwill and know-how;
- v. rights to conduct economic activity, including rights to prospect, explore, extract and win natural resources, granted under contract, administrative decisions or under the legislation of the Contracting Party in the territory of which such activity is undertaken.



b) the term “investors” shall comprise with regard to either Contracting Party:

- i. natural persons having the nationality of that Contracting Party in accordance with its law;
- ii. without prejudice to the provisions of (iii) hereafter, legal persons constituted under the law of that Contracting Party;
- iii. legal persons, wherever located, controlled, directly or indirectly, by investors of that Contracting Party. [...]

127. The Respondent maintains first that the threshold requirements of Article 8(2) are not met by the Claimant; second, it submits that the Claimant’s claims fall outside the scope of the Tribunal’s jurisdiction under Article 8(1) of the Treaty; and third, it contends that the Claimant did not adduce any or any sufficient evidence to establish that Enkev Polska enjoys the status of an “investor” under Article 1(b) of the Treaty.
128. Moreover, the Respondent submits that the Claimant’s only “investment” within the meaning of Article 1(a) of the Treaty was its shareholding in Enkev Polska and the rights derived from such shareholding—nothing more.

#### **B. Article 8(2) of the Treaty**

##### *The Respondent’s Position*

129. The Respondent concurs with the Claimant that Article 8(2) of the Treaty reflects a standing offer on the part of a Contracting Party to the Treaty (i.e., here the Respondent) to arbitrate in accordance with its terms.<sup>64</sup> By such terms, the Respondent considers this offer conditional upon the fulfillment of two binding pre-requisites, namely (i) the Claimant’s notification to the Respondent of a dispute between the Claimant and the Respondent and (ii) the Claimant’s obligation to seek amicable dispute resolution prior to its initiation of arbitration proceedings, such as this arbitration.
130. According to the Respondent, the Claimant failed to meet both threshold requirements. More specifically, the Respondent submits that the Claimant has never provided a notice of its claims, let alone “a coherent articulation of how any actions of the City of Łódź might affect [...] Enkev Beheer’s shareholding [in Enkev Polska].”<sup>65</sup> Any correspondence exchanged in early 2012 referred to by the Claimant related exclusively to investments made by Enkev Polska. In

---

<sup>64</sup> Respondent’s Counter-Memorial, ¶¶ 62, 73; Respondent’s Response to the Request for Arbitration, at 6, Section (B), ¶ 8.

<sup>65</sup> Respondent’s Counter-Memorial, ¶¶ 64–65.

the Respondent's submission, there is no evidence on the record that the Claimant notified the Respondent of the existence of a dispute between the Claimant and the Respondent.<sup>66</sup>

131. The Respondent submits further that, even if the Tribunal found an implied notice of claim, the Claimant failed to abide by the six-month waiting period provided in Article 8(2). Since the Request for Arbitration was filed on 6 August 2012, a notice of claim should have been received from the Claimant no later than 6 February 2012 and attempts by the Claimant to negotiate and settle its claims amicably should have taken place from this date. According to the Respondent, there was no such notice and there were no such negotiations.<sup>67</sup> While the Respondent admits that negotiations between the Claimant, the City of Łódź and PaliZ took place as of the date of delivery of the Request for Arbitration, it submits that these negotiations do not meet the timing requirement of Article 8(2) of the Treaty. In the Respondent's view, Article 8(2) provides that any potential parties to the dispute shall conduct negotiations, meaning the investor and the representatives of the Republic of Poland (at a governmental level), as opposed to representatives of the City of Łódź and PaliZ.<sup>68</sup>
132. The Respondent acknowledges that the Claimant participated in several meetings with representatives of the Republic of Poland between 20 August and 11 September 2012. However, since these meetings were conducted after the Request for Arbitration had been submitted by the Claimant, according to the Respondent, they cannot qualify as attempts at amicable dispute settlement as required by Article 8(2).<sup>69</sup>
133. The Claimant is not entitled, according to the Respondent, to commence these arbitration proceedings in any accelerated manner—neither by invoking the Treaty's Most Favoured Nation Clause nor by filing an application for interim measures—since the obligations of Article 8(2) form “the cornerstone of consent in the [Treaty]” and cannot therefore be circumvented by the Claimant.<sup>70</sup>

#### *The Claimant's Position*

134. The Claimant submits that it has attempted to resolve the dispute amicably with the Respondent. It points to several meetings and exchanges of correspondence with the City since

---

<sup>66</sup> Respondent's Counter-Memorial, ¶ 66.

<sup>67</sup> Respondent's Counter-Memorial, ¶ 66; Respondent's Statement of Rejoinder, dated 7 June 2013 (“Respondent's Statement of Rejoinder”), ¶ 1.

<sup>68</sup> Respondent's Counter-Memorial, ¶¶ 68–70.

<sup>69</sup> Respondent's Counter-Memorial, ¶¶ 71–72.

<sup>70</sup> Respondent's Counter-Memorial, ¶¶ 61–62.

early 2012 to show that the Claimant has made all reasonable efforts to reach a settlement.<sup>71</sup> In light of the Respondent's alleged unwillingness to settle the dispute by way of negotiations, the Claimant contends that complying with the six-month waiting period stipulated in Article 8(2) of the Treaty is not required.<sup>72</sup> Moreover, according to the Claimant, the Respondent's lack of responsiveness bars the Respondent from arguing that the Claimant did not abide by the waiting period.<sup>73</sup>

135. In the event the Tribunal finds the six-month waiting period to be required by the Treaty, the Claimant seeks to incorporate the more favourable three-month waiting periods found in Article 8(1) of the UK-Poland BIT, Article 8(2) of the Finland-Poland BIT and Article 26 of the Energy Charter Treaty, by virtue of the Most Favoured Nation Clause contained in Article 3 of the Treaty.

136. Article 3 states:

2. More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.

[...]

6. If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable prevail over this Agreement.<sup>74</sup>

### C. Article 8(1) of the Treaty

#### *The Respondent's Position*

137. The Respondent's principal argument against the Claimant's claims is that these claims are all premature since no expropriation has taken place to date; in particular, no "measure has been taken under Article 5 of the Treaty depriving the Claimant or Enkev Polska), directly or

---

<sup>71</sup> Claimant's Statement of Claim, ¶¶ 2.4–2.8. *See also* Claimant's Request for Arbitration, ¶ 5; Request for Interim Measures, ¶¶ 2.21–2.23.

<sup>72</sup> Claimant's Statement of Claim, ¶¶ 5.1–5.2.

<sup>73</sup> Claimant's Statement of Claim, ¶ 2.12.

<sup>74</sup> Claimant's Statement of Claim, ¶ 5.4.

indirectly, of any asset, property or rights.<sup>75</sup> It also submits that the Claimant is obliged to exhaust local remedies in Poland before initiating arbitration proceedings under the Treaty. It contends that the “local remedies rule” is a fundamental principle of international law. Since the Treaty is silent on this issue, the Parties should assume that the Claimant must exhaust all local remedies available under Polish law. International law requires an investor “to make reasonable efforts to allow the (judicial) State apparatus to catch any mistake of an administrative body.”<sup>76</sup> Exceptions from the local remedies rule could only be made in very limited, extraordinary situations entailing a claim for denial of justice.<sup>77</sup> This type of exceptional circumstance is, however, not present in this case because Enkev Polska has access to recourse in Polish courts once a decision on expropriation and compensation is made.<sup>78</sup> Moreover, given that no expropriation decision even now has been taken, the Claimant cannot be regarded as having exhausted its local remedies. In the Respondent’s submission, “it would be at odds with the local remedies rule for this Tribunal to make any decision relating to the direct expropriation of the Łódź Premises.”<sup>79</sup>

138. The Respondent further asserts that the Claimant’s claims fall outside the scope of Article 8(1) of the Treaty.<sup>80</sup> According to the Respondent, Article 8(1) limits the jurisdiction of the Tribunal to disputes (i) “relat[ing] to the effects of a measure with respect to ‘the essential aspects pertaining to the conduct of business’”; and (ii) “regard[ing] expropriation or the transfer of funds.”<sup>81</sup> The Respondent disputes that any of its measures have had an impact or might have an impact on essential aspects pertaining to the conduct of business.<sup>82</sup>
139. The “essential conduct of business” concerns, in the Respondent’s submission, the proper functioning and the continuation of Enkev Polska’s business, the engagement of Enkev Polska’s employees and Enkev Polska’s ability to serve customers and to meet its shareholders’ expectations. The alleged violations of Articles 3(1), 3(2), 3(5) and 5 of the Treaty thus relate to

---

<sup>75</sup> Respondent’s Response to the Request for Arbitration, at 4, Section (B), ¶ 2; Respondent’s Counter-Memorial, ¶¶ 82–83; Respondent’s Statement of Rejoinder, ¶¶ 2, 47–48; Hearing Transcript (13 June 2013), 62:8–21, 63:18–21.

<sup>76</sup> Respondent’s Statement of Rejoinder, ¶ 51.

<sup>77</sup> Respondent’s Counter-Memorial, ¶¶ 80–81.

<sup>78</sup> Respondent’s Counter-Memorial, ¶ 76.

<sup>79</sup> Respondent’s Counter-Memorial, ¶¶ 76–77.

<sup>80</sup> Respondent’s Response to the Request for Arbitration, at 4, Section (B), ¶ 2.

<sup>81</sup> Respondent’s Counter-Memorial, ¶ 54.

<sup>82</sup> Respondent’s Counter-Memorial, ¶ 56.

the conduct of Enkev Polska's business and not to the business of the Claimant.<sup>83</sup> The Respondent maintains that no actions, still less any measures, have been taken that could affect either the Claimant's shareholding or its rights to control Enkev Polska as a shareholder. Consequently, so the Respondent contends, there is no basis for the Claimant's claim under Article 8(1) of the Treaty.<sup>84</sup>

*The Claimant's Position*

140. The Claimant submits that its claim is not premature for four reasons. First, the Respondent has made explicit and repeated threats of expropriation which, at a minimum, give rise to claims under Article 3 of the Treaty (Fair and Equitable Treatment; and Full Protection and Security).<sup>85</sup> Second, in regard to Article 5 of the Treaty, the expropriation procedure has been formally commenced; and that procedure is currently ongoing.<sup>86</sup> Third, the Claimant asserts that there is no public interest in the expropriation of Enkev Polska's premises; that due process has already not been accorded to the Claimant; and that the expropriatory measures are contrary to certain "undertakings" given by the Respondent.<sup>87</sup> Fourth, according to the Claimant, the Respondent has stated that it will not offer any compensation above that which it has already offered, in an inadequate amount; and that such compensation does not meet the standard for compensation required under Article 5(c) of the Treaty.<sup>88</sup>

141. To demonstrate that the scope of Article 8(1) of the Treaty also entails claims regarding Article 3 of the Treaty (and not only claims regarding Article 5 as argued by the Respondent), the Claimant refers to the object and purpose of the Treaty and also Article 2 of the Treaty.

142. Article 2 provides:

Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of investors of the Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

143. As regards the object and purpose, the Claimant characterises the promotion of investments as a "central theme" of the Treaty reflecting the Contracting Parties' intention to "let investments in

---

<sup>83</sup> Respondent's Counter-Memorial, ¶¶ 57–59.

<sup>84</sup> Respondent's Counter-Memorial, ¶ 60; Hearing Transcript (13 June 2013), 81:20–25 to 82:1–8.

<sup>85</sup> Claimant's Statement of Claim, ¶ 2.22(A); Claimant's Statement of Reply, ¶ 3.31.

<sup>86</sup> Claimant's Statement of Claim, ¶ 2.22(B).

<sup>87</sup> Claimant's Statement of Reply, ¶ 3.32(1)–(2).

<sup>88</sup> Claimant's Statement of Claim, ¶ 2.22(C); Claimant's Statement of Reply, ¶ 3.32(3); Claimant's Post-Hearing Brief, ¶ 1.17.

the Contracting States grow and flourish.”<sup>89</sup> Accordingly, the denial to an investor of Fair and Equitable Treatment or Full Protection and Security would be contrary to the Treaty’s express object and purpose. The Claimant submits further that the Respondent’s actions also affect essential aspects relating to its conduct of business since “[t]he proper functioning and continuation of Enkev’s business is at issue as well as the future employment and engagement of its employees, ability to service its customers and meet the expectations of its other stakeholders.”<sup>90</sup>

144. The Claimant also rejects the Respondent’s argument that it was required to exhaust local remedies in Poland. According to the Claimant, since the Treaty does not contain such a rule, the Claimant is not obliged to exhaust local remedies prior to the initiation of these arbitration proceedings.<sup>91</sup> The Claimant also maintains that the local remedies rule is neither a general rule nor a fundamental principle of international law.<sup>92</sup>

#### **D. Whether the Claimant Is an “Investor” Within the Meaning of Article 1(b) of the Treaty**

145. The Parties agree that the Claimant qualifies as an “investor” within the meaning of Article 1(b)(ii) of the Treaty.<sup>93</sup> They dispute almost everything else under Article 1, particularly in regard to Enkev Polska.

##### *The Claimant’s Position*

146. If the Tribunal were to decide not to accept the Claimant’s claim on behalf of Enkev Polska, the Claimant applies to amend its claim in accordance with Article 22 of the UNCITRAL Arbitration Rules and § 1046(2) GCCP to add Enkev Polska as a co-claimant to this arbitration.<sup>94</sup> It is the Claimant’s position that the Respondent raised a new line of argument with its Counter-Memorial—that the Claimant has no standing with regard to the alleged Treaty breaches directed at Enkev Polska.<sup>95</sup> The Claimant contends that the Respondent would not be prejudiced in its procedural or substantive position by adding Enkev Polska as co-claimant.

---

<sup>89</sup> Claimant’s Statement of Claim, ¶ 2.21; Claimant’s Statement of Reply, ¶ 3.42; Hearing Transcript (13 June 2013), 15:7–24.

<sup>90</sup> Claimant’s Statement of Claim, ¶ 2.19. *See also* Request for Interim Measures, ¶ 2.20(A), stating that the impugned measures affect “essential elements of the Claimant’s conduct of business.”

<sup>91</sup> Claimant’s Statement of Reply, ¶ 3.38; Hearing Transcript (13 June 2013), 19:16–25 to 20:1.

<sup>92</sup> Claimant’s Statement of Reply, ¶¶ 3.34–3.36.

<sup>93</sup> Claimant’s Statement of Claim, ¶¶ 3.1–3.2; Respondent’s Counter-Memorial, ¶ 13.

<sup>94</sup> Claimant’s Statement of Reply, ¶ 3.18.

<sup>95</sup> Hearing Transcript (13 June 2013), 11:4–14.

because the Respondent “has made a full Statement of Defence [i.e. the Respondent’s Counter-Memorial] in response to the case raised by the Claimant.”<sup>96</sup> Moreover, the Claimant asserts that the Respondent has admitted Enkev Polska’s status as investor under Article 1(b)(iii) of the Treaty.<sup>97</sup>

#### *The Respondent’s Position*

147. The Respondent rejects the Claimant’s application to add Enkev Polska as a co-claimant, submitting that to do so would seriously prejudice the Respondent, particularly at such a late stage of these arbitration proceedings.<sup>98</sup> The Respondent notes that the Claimant made its application less than one week before the Hearing on Jurisdiction and Liability, despite having filed its Request for Arbitration nine months earlier. If the Tribunal were now to allow the addition of Enkev Polska as a co-claimant at this stage, the Respondent would not be afforded the opportunity to defend itself. That would be a violation of Article 17(1) of the UNCITRAL Arbitration Rules which requires that each Party must have a reasonable opportunity to present its case and be treated equally and fairly.<sup>99</sup> The Respondent submits that Enkev Polska is “an entirely separate claimant with an entirely separate claim”; and there are no newly discovered facts or circumstances which could now justify a decision to afford Enkev Polska standing in these proceedings.<sup>100</sup> The Respondent submits further that the Claimant failed to provide any legal basis on which the Tribunal could allow the requested “conditional joinder.”<sup>101</sup>

#### **E. Whether the Claimant Made an “Investment” Within the Meaning of Article 1(a) of the Treaty**

148. The Parties disagree on which of the Claimant’s assets qualify as an “investment” within the meaning of Article 1(a) of the Treaty, namely (i) the Claimant’s share purchase transactions to acquire shares in Enkev Polska; (ii) the allocation of the profits generated by Enkev Polska; (iii) the goodwill and know-how created by Enkev Polska; and (iv) the time and management efforts undertaken by the Claimant.<sup>102</sup>

---

<sup>96</sup> Claimant’s Statement of Reply, ¶ 3.18.

<sup>97</sup> Claimant’s Statement of Reply, ¶¶ 3.17–3.18.

<sup>98</sup> Respondent’s Statement of Rejoinder, ¶¶ 3, 41–43, 122; Hearing Transcript (13 June 2013), 84:20–25 to 85:1–9.

<sup>99</sup> Respondent’s Statement of Rejoinder, ¶¶ 41–43.

<sup>100</sup> Respondent’s Statement of Rejoinder, ¶ 43.

<sup>101</sup> Respondent’s Statement of Rejoinder, ¶¶ 45–46.

<sup>102</sup> Claimant’s Statement of Claim, ¶ 3.7.

*The Respondent's Position*

149. The Respondent agrees with the Claimant that the shares held by the Claimant in Enkev Polska constitute an "investment" within the meaning of Article 1(a)(i) of the Treaty but nonetheless criticises the Claimant for not submitting a complete record of documentary evidence as to the number and timing of its share acquisitions in Enkev Polska.<sup>103</sup>
150. The Respondent maintains that the reinvestment of Enkev Polska's profits does not constitute an "investment" by the Claimant under Article 1(a)(i) of the Treaty. Accordingly, the Claimant's decision not to distribute profits generated by Enkev Polska to its shareholders would, in the Respondent's submission, not constitute a further investment in Poland by the Claimant separate from the investment constituted by the acquisition in the shares of Enkev Polska.<sup>104</sup>
151. The Respondent submits that the Claimant's investment is therefore limited to its shareholdings in Enkev Polska and the rights derived from such shares under Polish law. Under Polish law, the Polish Commercial Companies Code ("PCCC") does not provide shareholders of a Polish joint stock company with rights related to the assets of that company.<sup>105</sup> Articles 11 and 12 of the PCCC state that a joint stock company is a juridical person distinct from its shareholders and that the property of the shareholders are to be distinguished from the property of the joint stock company.<sup>106</sup> Under Polish law, Enkev Polska's entitlement to the Łódź Premises and its buildings used in perpetual usufruct belonged exclusively to Enkev Polska and could not form part of the Claimant's assets.<sup>107</sup> The same conclusion applies to machinery, refurbishments, and fixtures since these assets pertained to or increased the value of the Łódź Premises.<sup>108</sup>
152. The Respondent submits that a perpetual usufruct right entitles its holder under Polish law to use the land owned by the Polish State Treasury or local governments for a limited time, subject to certain restrictions, and upon payment of a monetary consideration.<sup>109</sup> The usufructuary (the user), while owning the buildings and other facilities on the land, may use the

---

<sup>103</sup> Respondent's Counter-Memorial, ¶¶ 16–17. *See also* Respondent's Response to the Request for Arbitration, at 21, Section (F), ¶ 1; Hearing Transcript (13 June 2013), 81: 14–20.

<sup>104</sup> Respondent's Counter-Memorial, ¶ 19.

<sup>105</sup> Respondent's Counter-Memorial, ¶¶ 23–29.

<sup>106</sup> Respondent's Counter-Memorial, ¶ 30.

<sup>107</sup> Respondent's Counter-Memorial, ¶ 31.

<sup>108</sup> Respondent's Counter-Memorial, ¶¶ 31–32.

<sup>109</sup> Respondent's Post-Hearing Brief, ¶¶ 31–41.



land only in a manner specified in the agreement with the land-owner. This ownership of all structures is, however, closely connected to the perpetual usufruct right, meaning that, upon the expiry or termination of the perpetual usufruct right of the land, also the ownership of the buildings expires.<sup>110</sup> According to the Respondent, the usufructuary is entitled to receive payment for the buildings equal to their value as of the date of expiry of the perpetual usufruct right. The valuation method for such payment is, according to the Respondent, based on the market value or, if the market value cannot be estimated due to the nature of the property, the replacement value.<sup>111</sup> The Respondent concludes that, in practical terms, the payment in the case of expiry of a perpetual usufruct right is assessed on the same basis as compensation for the expropriation of the perpetual usufruct right.<sup>112</sup>

153. The Respondent further contends that the goodwill and business prospect of the company, as well as the know-how vested in the Polish employees was “exclusively, or largely” created by Enkev Polska; and that, hence, that is not an investment of the Claimant.<sup>113</sup>
154. According to the Respondent, the distinction between the Claimant’s assets and Enkev Polska’s assets is of pivotal importance for the case. While the Claimant was in fact an investor, it has standing only to remedy any alleged Treaty breaches relating to its own investments in Poland, limited to its shareholdings in Enkev Polska and the rights derived therefrom. Moreover, according to the Respondent, the Tribunal should not “circumvent creditors['] rights” by “awarding damages to Enkev Polska’s shareholders in relation to breaches of the Treaty duties owed by [the] Respondent *vis-à-vis* Enkev Polska.”<sup>114</sup>
155. Unlike other international agreements, so the Respondent submits, the Treaty does not contain a provision that empowers the controlling shareholder of a company to submit a claim on behalf of that company, in addition to a claim for itself.<sup>115</sup> Accordingly, under this Treaty, the Claimant can only file claims in this arbitration with respect to its own investment. Therefore, the Respondent urges the Tribunal to dismiss all claims that do not concern the Claimant’s own investment in the form of Enkev Polska’s shares.<sup>116</sup>

---

<sup>110</sup> Respondent’s Post-Hearing Brief, ¶¶ 42–43.

<sup>111</sup> Respondent’s Post-Hearing Brief, ¶¶ 44–45.

<sup>112</sup> Respondent’s Post-Hearing Brief, ¶ 46.

<sup>113</sup> Respondent’s Counter-Memorial, ¶ 34.

<sup>114</sup> Respondent’s Statement of Rejoinder, ¶ 22.

<sup>115</sup> Respondent’s Counter-Memorial, ¶ 43.

<sup>116</sup> Respondent’s Counter-Memorial, ¶¶ 39–41, 44, 48; Hearing Transcript (13 June 2013), 82:5–8.

*The Claimant's Position*

156. The Claimant submits that it made four investments: (i) the Claimant's share purchase transactions to acquire shares in Enkev Polska; (ii) the allocation of the profits generated by Enkev Polska; (iii) the goodwill and know-how created by Enkev Polska; and (iv) the time and management efforts undertaken by the Claimant.<sup>117</sup>
157. The Claimant's first investment was made by purchasing shares in Enkev Polska in 2001, 2005 and 2009. The acquisition of such shares served, in the Claimant's submission, as a vehicle through which it materialised further investments in Poland.<sup>118</sup> Its ownership of 98 percent of Enkev Polska's shares gives it control of Enkev Polska. In the Claimant's submission, the ownership of these shares confers upon the Claimant the perpetual usufruct right held by Enkev Polska for the Łódź Premises.<sup>119</sup>
158. Accordingly, the Claimant claims to be the holder of a perpetual usufruct right with respect to the land comprising the Łódź Premises since 5 December 1990, for a period of 99 years with the possibility that the term be further extended. In November 2011, according to the Claimant, it submitted an application to the City of Łódź to convert the perpetual usufruct right into full ownership, although the Claimant also asserts that there is "not much of a difference between full ownership and perpetual usufruct rights" when it comes to valuation because both rights are accessory rights under Polish law.<sup>120</sup> According to the Claimant, it is also to be considered as the full owner of the buildings situated on the Premises.<sup>121</sup> The Claimant further submits that the Road Legislation puts the holder of a perpetual usufruct right on an equal footing to a full owner, meaning that the expropriation legislation applies to perpetual usufruct holders as it would to full owners.<sup>122</sup>
159. According to the Claimant, its second investment was realised by reinvesting the profits generated by Enkev Polska between 2001 and 2013 in Enkev Polska, rather than distributing

---

<sup>117</sup> Claimant's Statement of Claim, ¶ 3.7.

<sup>118</sup> Claimant's Statement of Reply, ¶¶ 3.8, 3.10.

<sup>119</sup> Claimant's Statement of Claim, ¶ 3.17; Respondent's slide presentation, slide 4.

<sup>120</sup> Claimant's Post-Hearing Brief, ¶ 1.30.

<sup>121</sup> Claimant's Post-Hearing Brief, ¶ 1.26.

<sup>122</sup> Claimant's Post-Hearing Brief, ¶ 1.29.

them among its shareholders. These profits totalled PLN 16,392,416 and were devoted to "equipment and non-maintenance improvement."<sup>123</sup>

160. The Claimant submits further that its business relations with clients like IKEA and Johnson Controls constitute a third investment.<sup>124</sup> Based on the goodwill and business prospects established with its clients, the Claimant was able to train its Polish employees and, thus, transfer know-how to Enkev Polska.<sup>125</sup>
161. The Claimant next contends that the Respondent's strict differentiation between the Claimant's own assets and Enkev Polska's assets does not reflect international investment law. It is the Claimant's case that shareholders are entitled to bring claims regarding measures that affect the company and its assets, not just shares and shareholder rights as such.<sup>126</sup> The participation of a foreign investor in a locally incorporated company is an investment itself. Hence, the Claimant concludes that it can bring a claim involving measures depriving Enkev Polska's investment of its Treaty protections.<sup>127</sup>

*(The remainder of this page left intentionally blank.)*

---

<sup>123</sup> Claimant's Statement of Claim, ¶¶ 3.25–3.27; Claimant's Statement of Reply, ¶ 3.5(4).

<sup>124</sup> Claimant's Statement of Claim, ¶ 3.32; Claimant's Request for Interim Measures, ¶¶ 6.6–6.30.

<sup>125</sup> Claimant's Statement of Claim, ¶ 3.33.

<sup>126</sup> Claimant's Statement of Reply, ¶¶ 3.12–3.14; quoting *Schreier* [C-112] and *Alexandrov* [C-113].

<sup>127</sup> Claimant's Statement of Reply, ¶ 3.15.

## VI. THE CLAIMS UNDER THE TREATY

162. The Claimant contends that the Respondent violated the Deprivation Standard in Article 5 of the Treaty, the Fair and Equitable Treatment Standard (“FET Standard”) in Article 3(1), the Full Security and Protection Standard in Article 3(2), as well as other international obligations towards foreign investors imported by the Umbrella Clause in Article 3(5) of the Treaty.<sup>128</sup>
163. In contrast, the Respondent submits that it has taken no action that would amount to a breach of any of these Treaty provisions.<sup>129</sup>

### A. Article 5 of the Treaty

164. Article 5 of the Treaty provides:

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

- a) the measures are taken in the public interest and under due process of law;
- b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;
- c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the real value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned in any freely convertible currency accepted by the claimants.

#### 1. Deprivation of the Investment under Article 5 of the Treaty

##### *The Claimant's Position*

165. As a preliminary matter, the Claimant reiterates that it is not categorically opposed to vacating the Łódź Premises; but that it needs time and the financial means to do so as well as to find an alternative suitable location.<sup>130</sup> However, the Claimant emphasises that it is not possible to move from the Premises in the traditional sense as a result of its tailor-made buildings for the set-up of its machinery on the Premises.<sup>131</sup>

---

<sup>128</sup> Claimant's Statement of Claim, ¶ 4.3.

<sup>129</sup> Respondent's Counter-Memorial, ¶ 281; Respondent's Post-Hearing Brief, ¶ 12.

<sup>130</sup> Hearing Transcript (13 June 2013), 38:25 to 39:1–2, 40:16–25 to 41:1–6, 53:3–5; Hearing on Interim Measures, Transcript (13 February 2013), 5:21–25 to 6:1–2; Claimant's Post-Hearing Brief, ¶ 1.15.

<sup>131</sup> Claimant's Statement of Reply, ¶ 4.11; Hearing Transcript (13 June 2013), 43:8–16.

166. The Claimant contends that “[t]o some extent [a] deprivation [within the meaning of Article 5 of the Treaty] has already taken place and to another it is about to take place.”<sup>132</sup> The Claimant interprets the term “deprivation” as derived from Article 5 as including not only “an outright taking of property but also any such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.”<sup>133</sup>
167. The expected future expropriation is, according to the Claimant, impending rather than hypothetical.<sup>134</sup> It will not only occur in the “classical form” of taking assets such as land and buildings but also in the form of a deprivation “of the benefits of other assets,”<sup>135</sup> such other assets being the buildings’ fixtures, machinery assembly, intertwined production lines, customised installations as well as a trained workforce, business opportunities and the time and energy the Claimant’s technical expert ( ) and the Claimant’s commercial director ( ) spend on Enkev Polska’s operation.<sup>136</sup> The fact that the Respondent only plans to expropriate Enkev Polska would not render the Claimant’s claim under Article 5 of the Treaty moot “because it is clear that the Respondent will not meet the criteria for a lawful expropriation.”<sup>137</sup>
168. As to the timing of the envisaged expropriation, the Claimant characterises the Respondent’s assertion that it will not take place “overnight” as “overshoot[ing]” and a “gratuitous statement” since the Respondent itself had stated that Enkev Polska would be the last hold-out obstructing the construction of the Nowotargowa Street.<sup>138</sup>

#### *The Respondent’s Position*

169. The Respondent submits that it has not taken any measures which have deprived the Claimant of its shareholdings or the rights derived therefrom. The Claimant still holds its shares and controlling majority in Enkev Polska, and continues to be a “very successful and profitable

---

<sup>132</sup> Claimant’s Statement of Claim, ¶ 8.19.

<sup>133</sup> Claimant’s Statement of Claim, ¶ 7.4, quoting Article 10 of the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens.

<sup>134</sup> Claimant’s Post-Hearing Brief, ¶ 1.16.

<sup>135</sup> Claimant’s Statement of Claim, ¶ 7.6.

<sup>136</sup> Claimant’s Statement of Claim, ¶¶ 7.9–7.52.

<sup>137</sup> Claimant’s Statement of Claim, ¶¶ 7.9–7.52; Claimant’s Statement of Reply, ¶ 5.3.

<sup>138</sup> Claimant’s Statement of Reply, ¶¶ 5.6–5.7.

company.”<sup>139</sup> Therefore, to the Respondent, there has been no direct deprivation of the Claimant’s investment and, consequently, no violation of Article 5 of the Treaty.<sup>140</sup>

170. Nor, so it continues, has the Respondent caused any indirect deprivation, because Enkev Polska continues to operate the facilities located at the Łódź Premises, including all its machinery. To establish an indirect deprivation, the Claimant must demonstrate the occurrence of substantial harm, which is not shown here.<sup>141</sup> The 2013 Expropriation Request filed by the City of Łódź could not in and of itself constitute a deprivation to Enkev Polska as Enkev Polska is still able to use, enjoy and dispose of its assets.<sup>142</sup> Thus, according to the Respondent, the Claimant’s claim under Article 5 of the Treaty was based on a purely “hypothetical expropriation scenario.”<sup>143</sup>
171. The Respondent admits that it intends to expropriate the Łódź Premises but emphasises that the envisaged expropriation will not take place “overnight.” In its submission, it has taken all preparatory steps necessary under Polish law and has engaged in good faith negotiations to find an alternative location for the Łódź Premises although it was not obliged to do so. It insists that, even if the expropriation decision were to be rendered with immediate enforceability, this decision does not imply that the bulldozers will arrive the following day to demolish the facilities.<sup>144</sup> The Respondent therefore rejects the Claimant’s argument that its conduct gives rise to a breach of the Treaty.<sup>145</sup>
172. The Respondent concludes that, since no expropriation has taken place, the Tribunal need not turn to the requirements for lawful expropriations under Article 5(a)–(c) of the Treaty.<sup>146</sup> Nevertheless, should the Tribunal admit the Claimant’s claim under Article 5 of the Treaty, the Respondent submits in the alternative that the envisaged expropriation will meet all the criteria of a legal expropriation under Article 5 of the Treaty, in particular, those requiring (i) a public

---

<sup>139</sup> Respondent’s Post-Hearing Brief, ¶ 19.

<sup>140</sup> Respondent’s Counter-Memorial, ¶¶ 82–83; Respondent’s Statement of Rejoinder, ¶¶ 2, 47; Respondent’s Post-Hearing Brief, ¶ 17–19.

<sup>141</sup> Respondent’s Counter-Memorial, ¶¶ 85–88, 91; Hearing Transcript (13 June 2013), 62:9–19; Respondent’s Post-Hearing Brief, ¶ 17.

<sup>142</sup> Respondent’s Counter-Memorial, ¶ 88.

<sup>143</sup> Respondent’s Statement of Rejoinder, ¶ 48; Respondent’s Post-Hearing Brief, ¶¶ 121–124.

<sup>144</sup> Respondent’s Post-Hearing Brief, ¶¶ 127–128.

<sup>145</sup> Respondent’s Counter-Memorial, ¶ 91.

<sup>146</sup> Respondent’s Counter-Memorial, ¶ 92.

purpose, (ii) due process, (iii) non-discrimination and adherence to undertakings, and (iv) “due compensation.”<sup>147</sup>

## 2. Public Interest under Article 5(a) of the Treaty

### *The Claimant’s Position*

173. With regard to the purpose (or “interest”) of the anticipated expropriation, the Claimant contends that the Respondent has changed its position several times, invoking on the one hand the construction of a new public road and on the other hand the construction of the Camerimage Centre.<sup>148</sup> The letter of 17 October 2012 from the City of Łódź had, according to the Claimant, the purpose of sanctioning the Claimant’s November 2011 application to convert its perpetual usufruct right to full ownership, which could not constitute a valid public purpose for expropriatory measures under the Treaty.<sup>149</sup>

174. The Claimant acknowledges that road construction may be a valid public purpose for an expropriation of property. However, it submits “that the Respondent’s conduct in the present case demonstrates that this purpose is invalid” because there has not been a consistent public purpose since 1993.<sup>150</sup> In support of that contention, the Claimant relies on a statement made by the Mayor of Łódź (Ms. Zdanowska) on 7 May 2012:

To be true, former authorities may have had other guiding targets to lead this road in this line and not in any other line, because, indeed, the road could have been bent differently and your Company could be left/spared – but at the time the idea was to take over the land, nothing else.<sup>151</sup>

175. According to the Claimant’s interpretation of this statement, Ms. Zdanowska there admitted that the previous City administration had changed the trajectory of the Nowotargowa Street despite the possibility of using the existing Targowa Street.<sup>152</sup> The Claimant maintains that using the existing Targowa Street would have been an available option for the City which would not have affected adversely the Claimant’s use of the Łódź Premises. In other words, bending the Nowotargowa Street as to run through those Premises, was not necessary.<sup>153</sup>

---

<sup>147</sup> Respondent’s Counter-Memorial, ¶ 96. See also Respondent’s Statement of Rejoinder, ¶¶ 53–68.

<sup>148</sup> Claimant’s Statement of Reply, ¶ 5.12; Hearing Transcript (13 June 2013), 34:18–21, 35:4–23.

<sup>149</sup> Claimant’s Statement of Reply, ¶ 5.13.

<sup>150</sup> Claimant’s Statement of Reply, ¶ 5.16; Claimant’s Post-Hearing Brief, ¶ 3.32.

<sup>151</sup> Exhibit C-141.

<sup>152</sup> Claimant’s Post-Hearing Brief, ¶ 1.19; Hearing Transcript (13 June 2013), 8:2–20; Hearing Transcript (25 June 2013), 45:11–25.

<sup>153</sup> Claimant’s Post-Hearing Brief, ¶¶ 1.19, 3.95.

176. In the Claimant's submission, the Respondent cannot now downplay Ms. Zdanowska's statement by arguing that she had only a one-sided picture of the controversy. She gained her "ample knowledge" from sources available to her as a Member of Parliament and as Mayor of Łódź (holding the latter position since December 2010).<sup>154</sup> Equally important for the Claimant is the fact that Ms. Zdanowska did not dispute or retract her written statement during her oral testimony at the hearing.<sup>155</sup>
177. With regard to the City's planned modernisation as a valid public purpose for expropriation, the Claimant questions whether the City would actually be able to complete that modernisation, arguing that "it is not a given that this project will go ahead, and [it] has never been a given that the City of Łódź would undertake its 'big modernisation'".<sup>156</sup>
178. According to the Claimant, the construction of a road funded by the EU Infrastructure and Environment Operational Programme cannot be reasonably presented by the Respondent as a continuing public purpose from the outset because Poland has only become a member State of the EU in relatively recent times.<sup>157</sup> The Respondent has wrongly used the EU fund in an attempt to defend itself from interim measures in this arbitration and also in seeking to justify that no more time could be allowed for Enkev Polska to relocate its Premises. However, according to the Claimant, the Respondent refuses to produce any documentation on the "wholly unclear [...] funding status."<sup>158</sup> The only information given to the Claimant is that an application had been prepared by the City of Łódź.<sup>159</sup> The Claimant repeats its request that the Respondent produce the application.<sup>160</sup>
179. Finally, the Claimant disputes that the Respondent has a wide margin of discretion in determining a public purpose under Article 5 of the Treaty.<sup>161</sup>

---

<sup>154</sup> Claimant's Post-Hearing Brief, ¶¶ 3.98–3.102.

<sup>155</sup> Claimant's Post-Hearing Brief, ¶ 3.96.

<sup>156</sup> Claimant's Post-Hearing Brief, ¶ 1.15.

<sup>157</sup> Claimant's Statement of Reply, ¶ 5.16.

<sup>158</sup> Claimant's Statement of Reply, ¶ 5.16.

<sup>159</sup> Hearing Transcript (13 June 2013), 46:22–25.

<sup>160</sup> Hearing Transcript (13 June 2013), 51:12–22.

<sup>161</sup> Claimant's Statement of Reply, ¶ 5.1.



*The Respondent's Position*

180. The Respondent agrees with the Claimant that, to constitute a lawful expropriation under Article 5 of the Treaty, an expropriation measure must be taken in the public interest (or, with its synonym here, purpose). However, the Respondent maintains that host States enjoy significant discretion to decide which purposes they consider to be valid public purposes and that such a decision is subject to limited scrutiny by international arbitral tribunals under a BIT.<sup>162</sup> The Respondent also notes that “it is accepted that a [S]tate may expropriate property to facilitate private economic development projects for the purpose of urban revitalisation.”<sup>163</sup>
181. The relevant time to assess the public purpose of a measure is, according to the Respondent, the date of the expropriation. “[T]he fact that [a] government’s determination of a public purpose [changes later] does not prove that the earlier determination was not made in good faith.”<sup>164</sup> A change in public purpose over time could, therefore, not affect the legality of an expropriation as long as a valid public purpose existed at the time of the actual taking.<sup>165</sup>
182. The Respondent submits that the purpose of the expected expropriation is the construction of the Nowotargowa Street—a public investment of the City of Łódź which would “be to the benefit of all Łódź inhabitants.”<sup>166</sup> Whilst acknowledging that the City considered other purposes previously (such as the proposed new cultural centre), the Respondent contends that the construction of the new road was the primary purpose already in the 1977 Spatial Plan<sup>167</sup> or “at least since 1993.”<sup>168</sup> That Nowotargowa Street was projected to go through the Łódź Premises already in the 1940s; and its exact trajectory has only “slightly changed over time.”<sup>169</sup> Even if this purpose had changed materially over time, the City of Łódź was “fully authorised to alter or redefine its public purpose” because, according to the Respondent, the relevant time for the consideration of any public purpose is the date of the expropriatory decision. Regardless, the Respondent maintains that the trajectory of the Nowotargowa Street as depicted

---

<sup>162</sup> Respondent’s Counter-Memorial, ¶ 100; Respondent’s Statement of Rejoinder, ¶ 57, referring to the jurisprudence of the European Court of Human Rights; Hearing Transcript (13 June 2013), 69:10–14.

<sup>163</sup> Respondent’s Counter-Memorial, ¶ 98.

<sup>164</sup> Respondent’s Counter-Memorial, ¶ 99, quoting the UNCTAD Series on International Investment Treaties II Expropriation (2012) [Exhibit R-52].

<sup>165</sup> Respondent’s Statement of Rejoinder, ¶ 56.

<sup>166</sup> Respondent’s Statement of Rejoinder, ¶ 60; Respondent’s Post-Hearing Brief, ¶ 74.

<sup>167</sup> Respondent’s Post-Hearing Brief, ¶ 53.

<sup>168</sup> Respondent’s Counter-Memorial, ¶ 101; Hearing Transcript (13 June 2013), 69:23–25 to 70:1–7.

<sup>169</sup> Respondent’s Statement of Rejoinder, ¶¶ 61–62; Respondent’s Post-Hearing Brief, ¶ 52.

in the 1993 Spatial Plan not only interfered with the left part of the Łódź Premises cutting through office buildings, but that it also cut through production facilities.<sup>170</sup>

183. The Respondent makes the following submission, here best cited in full:

There was a good reason to shift the Nowotargowa Street eastward, so that it is now planned to run through the middle and not, as envisaged in the 1993 [Spatial] Plan, through the left section of the Łódź Premises. As testified by \_\_\_\_\_, the city architect of Łódź, the primary reason for the change of the road trajectory was the construction of the new Łódź Fabryczna railway station in a slightly different location than the previous station [...]. This shift, in turn, enforced moving the Nowotargowa Street trajectory to the middle section of the Łódź Premises. The road cannot now run merely as an extension of the Targowa Street because it would clearly interfere with the east bank of the new railway station.<sup>171</sup>

184. According to the Respondent, an extension or widening of Targowa Street would have an impact not only on the remodeled railway station, but it would also inevitably destroy the historical buildings alongside the street.<sup>172</sup>

185. The Respondent submits that the statement made by Ms. Zdanowska on 7 May 2012 (concerning Exhibits C-141 and C-142) was made on the basis of incomplete information provided to her by Enkev Polska.<sup>173</sup> Ms. Zdanowska testified at the Hearing on Jurisdiction and Liability that the only source of her knowledge was her contact with Enkev Polska at the time when she was a Member of Parliament (i.e., before 2010).<sup>174</sup> She was neither familiar with the planning documents, the technical documentation, nor the political options available with regard to the Targowa Street when making her statement on 7 May 2012.<sup>175</sup> Asked about the meaning of her statement, Ms. Zdanowska further explained:

I said so solely on the premise that when these decisions were taken, and that was early in 1993, when the concept of establishing the Nowotargowa Street was born, if it was considered that other entities would be affected by this decision, the road could have been directed in a different manner.<sup>176</sup>

---

<sup>170</sup> Respondent's Post-Hearing Brief, ¶¶ 58–62.

<sup>171</sup> Respondent's Post-Hearing Brief, ¶ 56.

<sup>172</sup> Respondent's Post-Hearing Brief, ¶ 57.

<sup>173</sup> Respondent's Post-Hearing Brief, ¶ 10.

<sup>174</sup> Hearing Transcript (25 June 2013), 35:17–25.

<sup>175</sup> Hearing Transcript (25 June 2013), 36:9–17.

<sup>176</sup> Hearing Transcript (25 June 2013), 36:21–25 to 37:1.

She expressed the view that once a plan for a new road was fixed in accordance with “public expectations,” the public authorities in charge should adhere to those plans for the sake of predictability and continuing legal certainty.<sup>177</sup>

186. According to the Respondent, the City’s modernisation has been planned since at least 1949.<sup>178</sup> A concrete concept for remodeling the City centre emerged in 2002 and took the form of a legal act in 2007, namely the 2007 Resolution.<sup>179</sup> It entailed an area of 90 hectares<sup>180</sup> within which the Nowotargowa Street would provide the principal access to the new railway station.<sup>181</sup>
187. For the Respondent, a further important factor for consideration is that 59 percent of the costs for the modernisation of the City of Łódź would be contributed by the EU Infrastructure and Environment Operational Programme. The Respondent contends that the City will receive the EU grant only if it completes the modernisation project of the City centre by about June/July 2015.<sup>182</sup> As the timely expropriation of the Łódź Premises is crucial for the approval of the EU grant, the City cannot allow Enkev Polska to continue to use the Łódź Premises until the end of 2015.<sup>183</sup> Any delay of the implementation of the City’s modernisation project would, according to the Respondent, not only threaten EU funding but would also exclude the City of Łódź from any EU funding for the next 36 months, precipitating serious financial consequences for the City.<sup>184</sup>
188. According to the Respondent, any extension which the EU might grant for the finalisation of the Respondent’s modernisation project would not extend beyond 31 December 2015.<sup>185</sup> To be granted such an extension, the Respondent would have to demonstrate to the EU a compelling reason for extending the June/July 2015 deadline, such as an occurrence outside its control. A

---

<sup>177</sup> Hearing Transcript (25 June 2013), 37:5–10.

<sup>178</sup> Hearing Transcript (13 June 2013), 68:23–25.

<sup>179</sup> Respondent’s Post-Hearing Brief, ¶ 49.

<sup>180</sup> Respondent’s Post-Hearing Brief, ¶ 49; Witness Statement by Ms. Zdanowska, Hearing Transcript (25 June 2013) (“Witness Statement of Ms. Zdanowska”), 37:1–4.

<sup>181</sup> Respondent’s Counter-Memorial, ¶ 102; Witness Statement of Ms. Zdanowska, 37:1–4.

<sup>182</sup> Respondent’s Counter-Memorial, ¶¶ 104–105, 108–110.

<sup>183</sup> Respondent’s Counter-Memorial, ¶ 107; Respondent’s Response to the Request for Interim Measures, ¶ 8.

<sup>184</sup> Respondent’s Counter-Memorial, ¶¶ 114–116.

<sup>185</sup> Respondent’s Counter-Memorial, ¶ 111.

private company in need of more time to leave its premises would most likely not qualify as such a reason.<sup>186</sup>

189. The Respondent states that a draft application for the EU Infrastructure and Environment Operational Programme was submitted by the City of Łódź in December 2011 and was subsequently supplemented with information requested by the EU. The finalised application was made at the end of June 2013.<sup>187</sup> The exact status of the application is immaterial to this arbitration, because the time pressure to complete the modernisation of the City centre remains the same.<sup>188</sup>

### 3. Due Process of Law under Article 5(a) of the Treaty

#### *The Claimant's Position*

190. The Claimant contends that the Road Legislation is a “draconian expropriation instrument” that violates its due process rights for three reasons.<sup>189</sup>

191. First, the Road Legislation is primarily focused on “ensur[ing] that a construction project moves forward” allowing Polish authorities substantial latitude to act on the one hand while largely neglecting the legitimate interests of the aggrieved party.<sup>190</sup> For instance, it requires the competent Polish authorities to act by certain latest dates only. However, since the authorities can act more quickly, the application of the Road Legislation creates serious uncertainties as to whether and when an expropriation decision will be executed.<sup>191</sup> The Road Legislation gives the city discretionary room for nearly each procedural step.<sup>192</sup>

192. Second, Article 17, paragraphs (1) and (3), of the Road Legislation allow for immediately enforceable decisions.<sup>193</sup> Whilst the Respondent submits that immediate enforceability would be the exception rather than the rule, the Claimant suggests that the practical reality is here the

---

<sup>186</sup> Respondent's Counter-Memorial, ¶¶ 112–113.

<sup>187</sup> Respondent's Counter-Memorial, ¶ 110; Witness Statement of [redacted], Hearing Transcript (14 June 2013), 133:18–25 to 134:1–16.

<sup>188</sup> Hearing Transcript (13 June 2013), 85:14–22.

<sup>189</sup> Claimant's Statement of Claim, ¶ 5.7.

<sup>190</sup> Claimant's Statement of Claim, ¶ 5.7(A); Claimant's Post-Hearing Brief, ¶ 2.58.

<sup>191</sup> Hearing Transcript (13 June 2013), 46:5–15, 49:14–25 to 51:1–9; Witness Statement of [redacted], ¶¶ 2–5; Claimant's Post-Hearing Brief, ¶ 2.54.

<sup>192</sup> Claimant's Statement of Reply, ¶ 5.20(C).

<sup>193</sup> Claimant's Statement of Claim, ¶ 5.7(B).

exact reverse.<sup>194</sup> In the Claimant's submission, the purpose of declaring an expropriation decision immediately enforceable is to allow for its immediate execution even if the expropriation decision is not yet final. In such a case, the decision could be revoked in higher court, but, importantly, the practical effects of the execution could not be reversed.<sup>195</sup>

193. Lastly, Article 31(2) of the Road Legislation provides for a fast track procedure to implement the expropriation decision which is declared immediately enforceable under Article 17 of the Road Legislation.<sup>196</sup> It is the Claimant's case that Article 31(2) of the Road Legislation prevents affected individuals from seeking effective recourse in administrative courts once construction work has begun.<sup>197</sup> It contends that [redacted] as an expert witness on Polish administrative law, confirmed "that it is virtually impossible to go to court and have [a] suspension [...] of the execution of an expropriation decision" granted.<sup>198</sup> It is, according to the Claimant, also impossible to receive a "provisional halting measure in Polish civil proceedings."<sup>199</sup>

#### *The Respondent's Position*

194. The Respondent rejects the Claimant's assertion that it has violated the Claimant's due process rights since the application for expropriation was only submitted in January 2013 and was then sent back to the City of Łódź. Therefore, it is the Respondent's position that "due process" "either has just been commenced or even [did not] commence."<sup>200</sup>
195. With respect to the Claimant's argument that the Road Legislation violates its due process rights, the Respondent submits that the Claimant's description of the application of the Road Legislation "lacks objectivity."<sup>201</sup> The Respondent contends that the discretion granted to Polish authorities reflects common practice in administrative procedures (in Poland as elsewhere in other European countries).<sup>202</sup>

---

<sup>194</sup> Claimant's Statement of Reply, ¶ 5.26; Claimant's Post-Hearing Brief, ¶¶ 2.58–2.60.

<sup>195</sup> Claimant's Post-Hearing Brief, ¶ 2.62.

<sup>196</sup> Claimant's Post-Hearing Brief, ¶ 2.67.

<sup>197</sup> Claimant's Statement of Claim, ¶ 5.7(C).

<sup>198</sup> Claimant's Post-Hearing Brief, ¶ 2.52.

<sup>199</sup> Claimant's Post-Hearing Brief, ¶ 2.52.

<sup>200</sup> Hearing Transcript (13 June 2013), 74:19–25 to 75:1–20.

<sup>201</sup> Respondent's Counter-Memorial, ¶ 125.

<sup>202</sup> Respondent's Counter-Memorial, ¶¶ 126–128.

196. According to the Respondent, the possibility to render an immediately enforceable expropriatory decision under Article 17 of the Road Legislation only applies in situations in which an important public, social or economic interest prevails over the interest of the aggrieved party. Although the City of Łódź made a request for an immediately enforceable expropriation decision with respect to the Łódź Premises on 28 January 2013, under Polish law the default position is rather “a scenario without immediate enforceability.”<sup>203</sup> Even if the expropriation decision were made with immediate enforceability, it would not be possible for the City’s bulldozers to enter the Łódź Premises and start their demolition the following day. As a matter of Polish law, the owner of the affected real property has 30 days to vacate that property; and, if it fails to do so, a bailiff procedure is initiated which can last “another several dozen days.” so that the practical implementation of an expropriation decision with immediate enforceability may be considerably extended, depending on the conduct of the owner of the real property.<sup>204</sup>
197. The Claimant’s position that the immediate enforceability of an expropriation decision is the rule rather than the exception under Polish law is, according to the Respondent, unsupported and “fully unmerited.”<sup>205</sup> It is also inconsistent since the Claimant has made only a hypothetical claim under Article 5 of the Treaty, i.e., the legal provisions have not yet been applied in practice to Enkev Polska (or the Claimant).<sup>206</sup> Thus, so it concludes, there is no basis for assuming that the practical reality would be immediate enforceability of any expropriation decision.
198. The Respondent submits further that the Claimant’s complaint regarding the absence of effective judicial remedies once the construction work has started is misinformed. Affected individuals could claim compensation from the Polish State if the Polish administrative courts found that the expropriation decision with immediate enforceability was unlawful. Such compensation would cover both actual damage and lost profits so that the aggrieved party ultimately would be put in the same position as if there had been no expropriation decision.<sup>207</sup> The Respondent contends that the rationale behind Article 31(2) of the Road Legislation is that, once the construction of a road has begun and (say) had lasted for two weeks or so, efficiency and cost factors would dictate that the construction work ought to be continued, rather than

---

<sup>203</sup> Respondent’s Counter-Memorial, ¶¶ 131–132.

<sup>204</sup> Hearing Transcript (25 June 2013), 4:22–25 to 6:1–9; Respondent’s Post-Hearing Brief, ¶ 141.

<sup>205</sup> Respondent’s Counter-Memorial, ¶ 133.

<sup>206</sup> Respondent’s Statement of Rejoinder, ¶ 64.

<sup>207</sup> Respondent’s Counter-Memorial, ¶ 137; Respondent’s Post-Hearing Brief, ¶¶ 137–141.

reversed.<sup>208</sup> Finally, the Respondent contends that the Claimant confuses compensation to be paid for an expropriation as compared to compensation for an expropriation decision declared illegal. The latter is “not limited to the value—be it sales or replacement—of the expropriated premises, but covers any damage or loss suffered.”<sup>209</sup>

199. As a general submission, the Respondent contends that the Claimant has a flawed understanding of procedures under Polish law as regards, first, spatial planning procedures<sup>210</sup> and second, expropriation an administrative procedures.<sup>211</sup>

#### 4. Undertakings under Article 5(b) of the Treaty

##### *The Claimant's Position*

200. The Claimant contrasts the wording of Article 3(5) and Article 5(b) of the Treaty. Article 3(5) refers to “any obligations entered into” while Article 5(b) refers to “any undertaking.” Therefore, so the Claimant concludes, Article 5(b) contains a lower threshold to trigger a host State’s international responsibility than Article 3(5). Put differently, the Claimant submits that the explicit reference to “any undertaking” in Article 5(b) establishes an additional condition for the legality of the taking of property under the Treaty.<sup>212</sup>

201. The Claimant submits further that the Respondent made assurances that qualify as undertakings within the meaning of Article 5(b) of the Treaty. In particular, it refers to an email message of 25 November 2009 sent by \_\_\_\_\_ of the Camerimage Centre the City of Łódź to \_\_\_\_\_ of the Claimant, headed “Enkev relocation negotiations,” which states, *inter alia*:

I wish to reassure you that, according to the will of the President of the City of Łódź, the negotiations regarding the relocation of your facility will be continued until [...] positive final results are achieved for both sides.<sup>213</sup>

202. The Claimant emphasises that \_\_\_\_\_ (identified in the message as the City’s legal adviser representing the City, with \_\_\_\_\_) did not deny at the Hearing on Jurisdiction and Liability that the document evidenced an offer to negotiate with Enkev. If the message had

---

<sup>208</sup> Respondent’s Counter-Memorial, ¶ 136.

<sup>209</sup> Respondent’s Statement of Rejoinder, ¶ 68.

<sup>210</sup> Respondent’s Counter-Memorial, ¶ 236.

<sup>211</sup> Respondent’s Statement of Rejoinder, ¶¶ 67–68.

<sup>212</sup> Claimant’s Statement of Claim, ¶ 7.5.

<sup>213</sup> Hearing Transcript (13 June 2013), 37:1–25 to 38:1–14, referring to Exhibit C-79.

been incorrect, Ms. Zdanowska would have corrected it or protested against her involvement at the time.<sup>214</sup>

#### *The Respondent's Position*

203. The Respondent objects to the Claimant's interpretation of "undertaking" under Article 5(b) of the Treaty. It contends that [redacted] confirmed that the Respondent did not enter into any stabilisation clause with the Respondent in regard to Polish law, neither prior nor subsequent to its first acquisition of the shares in 2001. In light of the absence of any undertaking by the Respondent and also the fact that Poland was a developing country undergoing a significant period of political and economic transition, the Respondent submits that the Claimant could not reasonably expect that Poland's law on expropriation would never change.<sup>215</sup>
204. Further, the message of 25 November 2009 sent on behalf of the City of Łódź to [redacted] cannot be reasonably interpreted as a binding obligation upon the Respondent to continue negotiations endlessly towards the result satisfactory for the Claimant.<sup>216</sup>

### **S. Just Compensation under Article 5(c)**

#### *The Claimant's Position*

205. The Claimant makes four observations on the legal materials dealing with the question of compensation for expropriation. First, according to the Claimant, Polish law allows for compensation based on the replacement value of an investment in cases where no market value can be established.<sup>217</sup> The Claimant urges the Tribunal to apply this valuation method which envisages compensation that would allow Enkev Polska to move to an equivalent location. In the Claimant's words, the relocation value is "the amount necessary to replace the investment prior to the injurious acts."<sup>218</sup>
206. Second, since the Treaty term "just compensation" is linked to the terms "real value" and "effective," the Tribunal should not apply the fair market value mechanically. In the present case, so the Claimant submits, the relocation value would be the appropriate standard since it captures not only the real value of the investment but also buildings, fixtures and machinery on

---

<sup>214</sup> Claimant's Post-Hearing Brief, ¶¶ 3.84–3.91.

<sup>215</sup> Respondent's Post-Hearing Brief, ¶¶ 76–78.

<sup>216</sup> Hearing Transcript (13 June 2013), 75:21–25 to 76:1–9.

<sup>217</sup> Claimant's Statement of Claim, ¶ 8.23.

<sup>218</sup> Claimant's Statement of Claim, ¶ 8.27.



the Premises.<sup>219</sup> “Fair market value,” representing the sales value of an investment at a particular date, would not by itself constitute just compensation should Enkev Polska have to relocate (as it must).<sup>220</sup> Should the Tribunal decide to apply a fair market value standard, the Claimant requests the Tribunal to take into account the “potential of change in use of the property,” its strategic value and the cost of the buildings themselves.<sup>221</sup>

207. According to the Claimant, a valuation method based on the market value would be insufficient to meet the Treaty’s requirement in the present case since the Łódź Premises have special features such as their strategic location in the City centre; buildings which meet the Claimant’s needs and enable it to produce goods in an efficient and reliable manner; and the uniqueness of Enkev Polska’s business in the region.<sup>222</sup> “Enkev’s excellent fit in the present location and the unlikely fit for any other company” are “unique advantages [which] make market prices [unsuitable]. [...] In the absence of an actual market[,] factors such [as the] costs of ‘obtaining a functional substitute’” ought to be taken into account.<sup>223</sup> The Claimant maintains that only a valuation based on replacement value would appropriately capture these unique circumstances. Thus, the calculation of just compensation in the present case must comprise (i) the land holding; (ii) the buildings on the land; (iii) the machinery and equipment; (iv) the actual relocation costs; and (v) compensation for the costs of business interruption and further commercial damages.<sup>224</sup>
208. Third, the Claimant contends that deprivation in the present case can be characterised as unlawful. Therefore, the Claimant invokes Article 36(2) of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Draft Articles”) with regard to the calculation of compensation for unlawful expropriation,<sup>225</sup> which reads:

2. The compensation [for an internationally wrongful act] shall cover any financially assessable damage including loss of profits insofar as it is established.

---

<sup>219</sup> Claimant’s Statement of Claim, ¶¶ 8.20(A), 8.24–8.28.

<sup>220</sup> Claimant’s Statement of Claim, ¶ 8.20.

<sup>221</sup> Claimant’s Statement of Claim, ¶ 8.20(B).

<sup>222</sup> Claimant’s Statement of Claim, ¶ 8.14; Hearing Transcript (13 June 2013), 42:9–25 to 44:1.

<sup>223</sup> Claimant’s Statement of Claim, ¶ 8.31(B).

<sup>224</sup> Claimant’s hearing slides (“Opening Statement Enkev: Hearing 13 and 14 June 2013”), slide 29; Hearing Transcript (13 June 2013), 42:9–25 to 44:1–19.

<sup>225</sup> Claimant’s Statement of Claim, ¶¶ 8.29–8.30.

If the Tribunal were to distinguish actual loss from lost profits, the Claimant relies on the Commentary to Article 36 of the ILC Draft Articles to make clear that, in the case of the expropriation of a factory, the actual loss includes the land, buildings and equipment of that factory. The ILC Commentary further confirms, in the Claimant's submission, that the assessment becomes more complicated where the investment is of a unique or unusual nature. Especially in cases where business entities are concerned, their goodwill and profitability should be included in the calculation.<sup>226</sup>

209. Finally, the Claimant relies on certain arbitral awards to contend that the Most Favoured Nation Clause contained in Article 3(6) of the Treaty imports the more favourable compensation standards contained in other BITs concluded by the Respondent.<sup>227</sup>

210. Article 3(6) provides:

6. If the provision of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Treaty contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Treaty, such regulation shall to the extent that it is more favourable prevail over this Treaty.

211. The Claimant refer to a number of BITs between the Respondent and other States, such as the United Arab Emirates, Chile, Australia, Argentina, Portugal and India. The Claimant emphasises that compensation, as required by these treaties, is to be sufficient to allow Enkev Polska to carry on with production and also conforms with principles of international law: "[C]ompensation shall be computed on the basis of equitable principles taking into account inter alia the capital invested [...] replacement value, goodwill and other relevant factors."<sup>228</sup> In the Claimant's submission, the most equitable compensation would be the value of replacing its investment, "especially given the knowledge of unjust application of the local laws and the negotiations in 2009."<sup>229</sup>

212. Although the Claimant acknowledges that the Respondent has made several offers of relocation and compensation, the Claimant considered all unacceptable. The Claimant rejected the first offer (of 24 December 2008) because it represented only the cost of liquidating the production

---

<sup>226</sup> Claimant's Statement of Claim, ¶ 8.31.

<sup>227</sup> Claimant's Statement of Claim, ¶ 8.34.

<sup>228</sup> Claimant's Statement of Claim, ¶ 8.34(A) [C-91].

<sup>229</sup> Claimant's Statement of Claim, ¶ 8.34(E) [C-97].

facilities, but did not include costs associated with the transfer to a new location.<sup>230</sup> The second offer (made between April and October 2010) envisaged relocation, but, according to the Claimant, did not succeed “due to changing political circumstances in Łódź.”<sup>231</sup> The Claimant rejected the third offer (of May 2012) because the Claimant disagreed with several propositions laid down in the valuation report.<sup>232</sup> In response, the Claimant submitted an estimate to the Respondent of the compensation necessary to relocate production facilities to Konstanyov (Łódź), as a reply to the Respondent’s second offer. The Claimant calculated that the reconstruction of the current plant in Konstanyov would total PLN 63,645,000;<sup>233</sup> and that such a relocation would take approximately two years.<sup>234</sup>

213. In conclusion, the Claimant submits that the compensation offered by the Respondent for the impending expropriation of the Premises does not meet the requirements of Article 5(c) of the Treaty.<sup>235</sup>
214. The Claimant further requests the Tribunal to render a declaratory award on the interpretation and application of Article 5(c) of the Treaty, due to a perceived lack of clarity concerning the meaning of the term “just compensation” representing the “real value of the investment affected” contained in Article 5(c) of the Treaty.<sup>236</sup> It is the Claimant’s position that Article 11 of the Treaty does not preclude an investor from requesting a tribunal to issue a declaratory award—even if a proposal for consultations between the Contracting Parties to the Treaty has been made—because the interpretation of this Treaty is not the exclusive task of the Contracting Parties.<sup>237</sup>

#### *The Respondent’s Position*

215. The Respondent submits that there is no need to discuss questions of compensation for three reasons. First, the Claimant’s investment (i.e., its shareholdings in Enkev Polska) is not threatened by any expropriation. Second, since Enkev Polska has not yet been subjected to any

---

<sup>230</sup> Claimant’s Statement of Claim, ¶ 8.5.

<sup>231</sup> Claimant’s Statement of Claim, ¶ 8.9.

<sup>232</sup> Claimant’s Statement of Claim, ¶¶ 8.10–8.13.

<sup>233</sup> Claimant’s Statement of Claim, ¶ 8.6.

<sup>234</sup> See, e.g., Claimant’s Pleading notes, dated 13 February 2013, ¶ 7.4(A).

<sup>235</sup> Claimant’s Statement of Claim, ¶ 8.3.

<sup>236</sup> Claimant’s Statement of Claim, ¶ 10.2(B); Claimant’s Statement of Reply, ¶ 3.46.

<sup>237</sup> Claimant’s Statement of Reply, ¶¶ 3.44–3.45, 3.48–3.49, relying on *Sempra Energy Int’l v. Argentina* [C-130], ¶ 147, as well as an article published by *Dunand & Koszyńska* [C-131], at 1.

expropriation decision, there can be no “measure [...] accompanied by the provision of payment of just compensation” as required under Article 5(c) of the Treaty. According to the Respondent, the Tribunal could not make any decisions “based on Enkev Beheer’s apprehension of what a Polish decision maker may do or not.”<sup>238</sup> The Claimant cannot prove, in the abstract, that the envisaged expropriation will fail to meet the requirements of the Treaty.<sup>239</sup> Third, any compensation offer by the City of Łódź was made to reach an amicable settlement with Enkev Polska and not to meet the Treaty’s requirements.<sup>240</sup>

216. The Respondent also reiterates that it is beyond dispute between the Parties that the City offered “many different alternatives for a possible relocation.”<sup>241</sup> Nevertheless, the City of Łódź remains legally entitled to apply the Road Legislation if no agreement could be reached. Consequently, the Respondent emphasises that “this fact should not be distorted [by the Claimant] into a ‘push to get Enkev Polska into accepting a settlement and sell the entire Łódź Premises substantially below the real value’.”<sup>242</sup>
217. The Respondent also rejects the Claimant’s request for the declaratory interpretation and application of Article 5(c) of the Treaty, and in particular the interpretation of “just compensation” as representing the “real value of the investment affected.” It submits that such a request is an *in abstracto* request for interpretation which is reserved to the Contracting Parties to the Treaty according to Article 11.<sup>243</sup> Whilst the Tribunal’s task is the interpretation and application of the Treaty in the present dispute between the Claimant and the Respondent, it is the Contracting Parties’ task to give an authoritative interpretation of the Treaty.<sup>244</sup> The Respondent concurs with the Claimant that declaratory relief is generally legitimate in international arbitration; however, the possibility of obtaining a declaratory award as a pre-emptive remedy is not generally accepted because it might interfere with a host State’s sovereignty.<sup>245</sup> The Respondent stresses that “[c]learly, an order to measure compensation for

---

<sup>238</sup> Respondent’s Counter-Memorial, ¶ 158. See also Respondent’s Statement of Rejoinder, ¶ 55.

<sup>239</sup> Respondent’s Statement of Rejoinder, ¶ 55.

<sup>240</sup> Respondent’s Counter-Memorial, ¶¶ 154–155.

<sup>241</sup> Respondent’s Post-Hearing Brief, ¶ 103.

<sup>242</sup> Respondent’s Statement of Rejoinder, ¶ 73.

<sup>243</sup> Respondent’s Counter-Memorial, ¶ 94; Hearing Transcript (13 June 2013), 65:6–16.

<sup>244</sup> Respondent’s Statement of Rejoinder, ¶¶ 113–118; Respondent’s Post-Hearing Brief, ¶¶ 131, 133.

<sup>245</sup> Respondent’s Statement of Rejoinder, ¶¶ 109–112.

expropriation of the Łódź Premises in a pre-defined manner before any expropriation has taken place would limit the sovereignty of the Republic of Poland.”<sup>246</sup>

218. In the event that the Tribunal were to decide to consider the Claimant’s request for interpretation of “just compensation,” the Respondent advocates for a fair market value valuation.<sup>247</sup>

**B. Article 3(1) of the Treaty – Fair and Equitable Treatment (“FET”)**

219. Article 3(1) of the Treaty reads:

Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

*The Claimant’s Position*

220. It is the Claimant’s submission that the term “treatment” should be interpreted broadly: “Treatment is an expansive term, defined as ‘conduct, behaviour, action or behaviour toward a person’.” Essentially, so it contends, “any action or omission attributable to a host State can become the subject of an FET claim.”<sup>248</sup>
221. The Claimant submits that it was and is still treated unfairly and inequitably by the Respondent in violation of Article 3(1) as the Respondent has: (i) exposed the Claimant to “unreasonable uncertainties” as to the operation of the Łódź Premises; (ii) not provided the Claimant with stable and predictable investment framework; (iii) subjected the Claimant to undue process under Polish domestic procedure; and (iv) failed to act in good faith in these arbitration proceedings.

*The Respondent’s Position*

222. The Respondent interprets the FET Standard as giving investors protection against serious instances of arbitrary, discriminatory or abusive conduct by host States which must be considered “egregious” or “shocking” from an international perspective.<sup>249</sup> The threshold to make a State liable under this standard is high. “Inefficiency, imperfection on a government’s

---

<sup>246</sup> Respondent’s Statement of Rejoinder, ¶ 112.

<sup>247</sup> Respondent’s Response to the Request for Arbitration, at 16 *et seq.*, Section (C), ¶¶ 1.3.4–1.3.6.

<sup>248</sup> Claimant’s Statement of Claim, ¶ 4.6, relying on the UNCTAD Series on Issues in International Treaties II: “Fair and Equitable Treatment” (2012).

<sup>249</sup> Respondent’s Counter-Memorial, ¶¶ 191–192.

conduct and even its own domestic law does not necessarily amount to a breach of [that standard].<sup>250</sup> The Respondent observes that the expectations of an investor must be legitimate and reasonable, taking into consideration “(i) any specific representations or commitments made by the State to the investor [...], (ii) the presumption that the investor is aware of the general regulatory framework in the host [S]tate; and balancing the investor’s legitimate expectations against the legitimate regulatory activities of the State.”<sup>251</sup>

223. It is the Respondent’s case that the Claimant has failed to demonstrate that the Respondent’s conduct amounted to any breach of the FET Standard. The Respondent maintains that its actions and inactions toward Enkev Polska (rather than those directed toward the Claimant itself) are of no relevance to the Claimant’s claims. Since the Claimant has not established that its shareholding in Enkev Polska has been affected, the Respondent submits there was no breach of Article 3(1) of the Treaty.<sup>252</sup> In the alternative, the Respondent contends that both the Claimant and Enkev Polska were treated fairly.<sup>253</sup>

#### **1. Unreasonable Uncertainties**

##### *The Claimant’s Position*

224. The Claimant contends that the Respondent created unreasonable uncertainty by invoking more than one purpose to justify the Premises’ expected expropriation. As a consequence of this uncertainty, the Claimant maintains that it has not been able to conduct its business in a normal fashion and to invest in new business opportunities.<sup>254</sup> Ms. Zdanowska acknowledged, according to the Claimant, that Enkev Polska was left in a state of uncertainty and that the root of the conflict between Enkev and the City of Łódź was, in her opinion, that “the company could not develop. The situation blocked its possibility to grow.”<sup>255</sup>
225. Moreover, the Claimant maintains that the repeated threats to expropriate the Łódź Premises were “made, kept alive for extended periods of time and then not followed up” causing unreasonable uncertainty regarding the status of the investment in breach of Article 3(1) of the Treaty.<sup>256</sup> The Claimant characterises the “frequently changing attitudes and policies” as

---

<sup>250</sup> Respondent’s Counter-Memorial, ¶ 192.

<sup>251</sup> Respondent’s Counter-Memorial, ¶¶ 198–202, 218–219.

<sup>252</sup> Respondent’s Counter-Memorial, ¶¶ 194–195; Respondent’s Statement of Rejoinder, ¶ 69.

<sup>253</sup> Respondent’s Counter-Memorial, ¶ 196.

<sup>254</sup> Claimant’s Statement of Claim, ¶¶ 4.13–4.15.

<sup>255</sup> Claimant’s Post-Hearing Brief, ¶ 3.97.

<sup>256</sup> Claimant’s Statement of Claim, ¶ 4.16.

“unacceptable behaviour in light of [...] the legitimate expectations of an investor in a sophisticated European country” which would undermine the predictability of the legal investment framework.<sup>257</sup>

226. The Claimant puts special emphasis on the “expropriation threat” in the City’s letter of 17 October 2012 to Enkev Polska,<sup>258</sup> which, in the Claimant’s submission, envisaged an expropriation with immediate effect (on 19 October 2012), allowing Enkev Polska a mere two-day notice to vacate the Łódź Premises. The Claimant contends that, at that time, the City was about to decide on Enkev Polska’s application, made in November 2011, to convert its perpetual usufruct right regarding the Łódź Premises to full ownership. This application “apparently provided the direct impetus for kicking Enkev into a corner.”<sup>259</sup> The Claimant immediately informed the Respondent’s Government in Warsaw by e-mail messages of 19 and 24 October 2012. The Claimant contends that the failure “to respond adequately to *actions known* to be harassing/threatening Enkev also constitutes, in and by itself, a failure to provide for fair and equitable treatment of Enkev’s investment and to provide Enkev with full security and protection of its investment.”<sup>260</sup>
227. The Claimant contends that the Respondent attempts to “disguise” the expropriation threats that put it under duress as good faith negotiations.<sup>261</sup> During a meeting on 9 July 2012, for instance, the City representative (Mr. Nita) stated: “in clear word[s] that an expropriation decision with an order of immediate enforceability would [...] take place immediately.”<sup>262</sup> Enkev Polska (assisted by the Dutch Vice-Prime Minister and the Dutch Embassy) articulated clearly to the City that it perceived the communications as threats.<sup>263</sup> These threats and changing deadlines created unreasonable uncertainty for the Claimant.<sup>264</sup> Moreover, this characterisation stands, in the Claimant’s submission, in contrast to the statement made by Mr. Cieślak who testified that

---

<sup>257</sup> Claimant’s Statement of Reply, ¶¶ 4.12–4.14.

<sup>258</sup> Claimant’s Statement of Reply, ¶¶ 4.19–4.25; Hearing Transcript (13 June 2013), 3:17–25 to 4:1–9.

<sup>259</sup> Claimant’s Statement of Reply, ¶ 4.20.

<sup>260</sup> Claimant’s Statement of Reply, ¶ 4.25 (emphasis in the original).

<sup>261</sup> Claimant’s Statement of Claim, ¶ 4.44.

<sup>262</sup> Claimant’s Post-Hearing Brief, ¶ 3.55.

<sup>263</sup> Claimant’s Post-Hearing Brief, ¶ 1.23.

<sup>264</sup> Claimant’s Post-Hearing Brief, ¶ 3.46.

the postponement was “a result of the situation on the building site and the progress of the work there.”<sup>265</sup>

228. In addition, the Claimant submits that the lack of information regarding the planned road construction and remedial works, as well as the lack of transparency of decision-making processes, inhibited its oversight over the present and future operations of Enkev Polska at the Łódź Premises.<sup>266</sup> It contends that, while the Respondent withheld information repeatedly sought by the Claimant, it nonetheless reported on the timing of construction work and the details of this arbitration to the Polish media.<sup>267</sup>
229. The Claimant submits that the lack of information not only hampered the planning required for the operation of the Łódź Premises, but also impeded the Claimant’s position in these arbitration proceedings. The Claimant refers, for example, to the Respondent’s failure to produce documents and to respond to clarifications sought by the Claimant.<sup>268</sup> In the Claimant’s submission, this behaviour demonstrates the Respondent’s “evasive actions” and “diffuse information sharing.”<sup>269</sup>
230. It is the Claimant’s position that the Respondent’s unresponsiveness during the negotiation phase preceding this arbitration prevented the Claimant from mitigating damages.<sup>270</sup> The Claimant contacted the City of Łódź and PałiZ on 9 July 2012 with a request to provide information regarding the mitigation of damages by 15 July 2012, emphasising that a failure to reply would be considered as a release from the Claimant’s obligation to mitigate its loss. As a result of the lack of response, the Claimant contends that it could not be reasonably expected to mitigate damages. Leaving the Łódź Premises was not an option, in the Claimant’s submission, since the Claimant would need “at least minimal compensation, time and a location to go to.”<sup>271</sup>

---

<sup>265</sup> Claimant’s Post-Hearing Brief, ¶ 3.46.

<sup>266</sup> Claimant’s Statement of Claim, ¶¶ 4.20, 4.22; Claimant’s Document Production Request, dated 18 March 2013, at 2.

<sup>267</sup> Claimant’s Statement of Reply, ¶¶ 4.4–4.7.

<sup>268</sup> Claimant’s Statement of Claim, ¶ 4.25. Claimant’s Reply to the Respondent’s Objections to the Document Production Request, dated 2 April 2013, ¶¶ 3–9.

<sup>269</sup> Claimant’s Statement of Reply, ¶ 4.3.

<sup>270</sup> Claimant’s Statement of Claim, ¶ 4.19.

<sup>271</sup> Claimant’s Statement of Claim, ¶ 4.19.



*The Respondent's Position*

231. The Respondent contends that the purpose of the City's envisaged expropriation has always been the construction of a new public road and that this idea emerged "much earlier than the adaptation of the [1993 Spatial Plan]." While admitting that the City had earlier plans to use the remaining parts of the Łódź Premises for the construction of the Camerimage Centre (that were eventually abandoned), the Respondent contends that the plan to construct a new road remained consistent. The fact that the public purpose for a plan regarding adjacent plots changed has no bearing on the present case since the City of Łódź abandoned this plan and still seeks to expropriate a part of the Łódź Premises necessary for the construction of the Nowotargowa Street.<sup>272</sup>
232. The Respondent disputes that the discussions between Enkev Polska and the City of Łódź constituted "threats" of expropriation.<sup>273</sup> According to the Respondent, these discussions amounted only to "announcements by civil servants of the City of Łódź that in case no out-of-court [i.e., amicable] settlement would be reached with respect to the Łódź Premises, the City of Łódź would proceed with the statutory expropriation procedure."<sup>274</sup> The Respondent maintains these are "statements of fact."<sup>275</sup>
233. The Respondent emphasises that the deadlines for expropriation must be strictly distinguished from deadlines for the acceptance of the purchase offers for the Łódź Premises.<sup>276</sup> The deadline set during the meeting on 20 July 2012, for instance, was a deadline for accepting the purchase offer after which an expropriation procedure could have been initiated by the City. The reason for postponing these deadlines was the City's continuing desire to reach a negotiated solution acceptable to all Parties.<sup>277</sup> According to Mr. Nita, the postponement was "a favour [...] to allow the company to continue its operations;"<sup>278</sup> to "organise itself and [to] prepare for the move."<sup>279</sup> It is also worth noticing, so the Respondent suggests, that each extension of time was

---

<sup>272</sup> Respondent's Counter-Memorial, ¶ 226.

<sup>273</sup> Hearing Transcript (13 June 2013), 80:20–25 to 81:1–8.

<sup>274</sup> Respondent's Statement of Rejoinder, ¶¶ 70, 75; Hearing Transcript (13 June 2013), 60:21–24.

<sup>275</sup> Respondent's Statement of Rejoinder, ¶ 70.

<sup>276</sup> Witness Statement by Mr. Nita. Hearing Transcript (14 June 2013) ("Witness Statement by Mr. Nita"), 54:19–25 to 55:1–21; Witness Statement by Mr. Cieślak, 22:17–25 to 23:1–6; Respondent's Post-Hearing Brief, ¶ 110.

<sup>277</sup> Respondent's Statement of Rejoinder, ¶¶ 71–72; Witness Statement by Mr. Nita, 55:22–25 to 56:1–11. See also Witness Statement by Mr. Cieślak, 15:11–24.

<sup>278</sup> Witness Statement by Mr. Nita, 51:13–18.

<sup>279</sup> Hearing Transcript (14 June 2013), 61:20–25 to 62:1–8.

made at the request by Enkev Polska itself.<sup>280</sup> The Claimant cannot now abuse the City's goodwill wrongly to construct a breach of the Treaty's Fair and Equitable Standard.<sup>281</sup>

234. The Respondent further disputes that the extensions of deadlines for the acceptance of the purchase offers resulted in uncertainties for the Claimant, since the City made arrangements for additional re-valuations of the Premises.<sup>282</sup>

235. It is the Respondent's position that the City's goodwill towards Enkev Polska to negotiate is now being unfairly distorted by the Claimant in its attempt to show that the decision not to expropriate immediately amounted to a breach of Articles 3(1) and 3(2) of the Treaty. The Respondent submits that, first, the City was not obliged under Polish law to engage in any negotiations with Enkev Polska before an expropriation decision.<sup>283</sup> Second, the intention behind these negotiations was to find a substitute location for Enkev Polska, thus, keeping it in Łódź and maintaining the employment of some 200 local employees.<sup>284</sup> Third, the negotiations were, in the Respondent's submission, always conducted in a transparent manner. In particular, the City of Łódź's position that the trajectory of the Nowotargowa Street could not in practice be altered (after the 2010 Decision on Environmental Conditions) remained unchanged throughout the negotiations with Enkev Polska. Even then, the representatives of the City of Łódź articulated their impression that the Dutch shareholders of Enkev Polska were not sufficiently informed of the processes regarding the City's spatial planning by their Polish counterparts.<sup>285</sup>

236. The Respondent disputes that the City's letter of 17 October 2012 can be characterised as a threat of expropriation. It notes that "[p]robably the reference to the immediate commencement of the expropriation procedure [...] was not the most fortunate one, but definitively it was not the City's intention to threaten Enkev Polska."<sup>286</sup> According to the Respondent, the letter of 17 October 2012 must be read in context of the meeting of 13 September 2012 where the Parties jointly agreed to a re-valuation of the Łódź Premises.<sup>287</sup> Enkev Polska's application to

---

<sup>280</sup> Respondent's Post-Hearing Brief, ¶ 112.

<sup>281</sup> Respondent's Counter-Memorial, ¶ 237.

<sup>282</sup> Respondent's Post-Hearing Brief, ¶ 114.

<sup>283</sup> Respondent's Counter-Memorial, ¶ 228; Respondent's Post-Hearing Brief, ¶ 1.

<sup>284</sup> Respondent's Counter-Memorial, ¶¶ 230, 235.

<sup>285</sup> Respondent's Counter-Memorial, ¶ 236.

<sup>286</sup> Respondent's Counter-Memorial, ¶ 247.

<sup>287</sup> Respondent's Post-Hearing Brief, ¶ 117.

convert its perpetual usufruct right to full ownership caused uncertainty as to the legal status of the Łódź Premises. This “unregulated legal status” would have had substantial impact on the value of the Premises, thus, hindering its envisaged re-evaluation.<sup>288</sup> To avoid further delay in the re-valuation (and by the same token delay in the implementation of the City’s modernisation project), the letter was meant to encourage Enkev Polska<sup>289</sup> and to serve as a reminder to proceed with the joint re-valuation of the Łódź Premises.<sup>290</sup>

237. The Respondent submits that the City applied for expropriation only on 28 January 2013 because the negotiations for the voluntary purchase of the Enkev Polska’s premises remained fruitless, after nearly a decade.<sup>291</sup> However, the Respondent submits that “[m]ere announcements that the City of Łódź wishes to expropriate the Łódź Premises do not constitute a breach of the FET standard.”<sup>292</sup>

238. The Respondent also rejects the contention that it ignored the Claimant’s requests for information. The Claimant had access to “extensive information” on the City’s planning through publicly available documents. The City also provided Enkev Polska with documents, including but not limited to: (i) a general schedule to construction works in the Łódź inner city; (ii) information on funding of the modernisation project; (iii) a draft application for the EU funds; (iv) architectural and planning documentation; and (v) valuation reports.<sup>293</sup>

239. The Claimant’s reference to certain media reports given to the Polish media by the City of Łódź had no effect on this arbitration, for two reasons. First, they entailed no subjective comments as to the substance of the claim and did not go beyond objective, basic information on these arbitration proceedings. Second, all the reports were made before the Tribunal requested the Parties not unnecessarily to aggravate the dispute during the Hearing on Interim Measures on 13 February 2013.<sup>294</sup>

---

<sup>288</sup> Respondent’s Counter-Memorial, ¶ 247; Hearing Transcript (14 June 2013), 74:1–25 to 75:1–4.

<sup>289</sup> Hearing Transcript (25 June 2013), 19:7–25 to 20:1–16.

<sup>290</sup> Respondent’s Response to the Request for Arbitration, at 11, Section (C), ¶ 1.1(9).

<sup>291</sup> Respondent’s Counter-Memorial, ¶ 71.

<sup>292</sup> Respondent’s Counter-Memorial, ¶ 75.

<sup>293</sup> Respondent’s Counter-Memorial, ¶¶ 248–250. *See also* Hearing Transcript (14 June 2013), 36:15–25 to 37:1–14.

<sup>294</sup> Respondent’s Statement of Rejoinder, ¶ 90.

## 2. Stable and Predictable Investment Framework

### *The Claimant's Position*

240. The Claimant submits that, after its investment had first been made in 2001, the Respondent introduced radical changes to the Polish legal landscape by enacting the Road Legislation in 2003. The Claimant submits that the subsequent application of the Road Legislation to Enkev Polska “further deteriorate[d] the legal regime.”<sup>295</sup>
241. According to the Claimant, the City of Łódź created “legitimate expectations of stability of its investment” by giving specific representations and assurances which should be honoured.<sup>296</sup>
242. It is the Claimant’s case that the Respondent’s arguments regarding the limitations on an investor’s legitimate expectations are misplaced. In particular, the Claimant disputes: (i) that the legal instruments for public purpose expropriations were already available under Polish law at the time of its first investment in 2001; (ii) that the Claimant had to expect the introduction of the Road Legislation since Poland was a country in transition at that time; and (iii) that investors generally cannot expect the legal system of the host State to remain unchanged.<sup>297</sup> The Claimant submits that the speed of expropriation proceedings and the “severe limitation of rights of the affected parties” were first introduced by the Road Legislation.<sup>298</sup> The Claimant concludes that:

it is too long a shot for Poland to effectively argue that Enkev should have known all along that the piece of legislation (i) was only introduced after Enkev’s first investments, (ii) was intended to be in place for a few years, (iii) radically changed in 2006 and 2008 (as Respondent acknowledged), (iv) was highly controversial in several respects over the years and to date, (v) was recently challenged by the national Ombudsman before the Constitutional Court, and (vi) led to a Constitutional Court judgment in which that court confirmed that legal means aiming at saving ownership actually should remain illusory, should have been accounted for by Enkev in making and continuing its investments.<sup>299</sup>

243. According to the Claimant, the 2002 Study confirmed the trajectory of the Targowa Street as described in the 1993 Spatial Plan, cutting slightly the left part of the Łódź Premises where office buildings were located. The corridor of the Targowa Street as projected in the 2002

---

<sup>295</sup> Claimant’s Statement of Claim, ¶¶ 4.31–4.32.

<sup>296</sup> Claimant’s Statement of Claim, ¶ 4.34.

<sup>297</sup> Claimant’s Statement of Reply, ¶ 5.33.

<sup>298</sup> Claimant’s Statement of Reply, ¶ 5.34, referring to the Witness Statement of [redacted], ¶¶ 1–3, 9–10.

<sup>299</sup> Claimant’s Statement of Reply, ¶ 5.35.

Study was only extended and did not, according to the Claimant, cut through the middle of the Łódź Premises.<sup>300</sup>

244. In the Claimant's submission, it is clear that the street trajectory has shifted from the projected path in 2002 by comparing the most recent depiction to the plans in place as late as 2007.<sup>301</sup> On 8 January 2007, the Mayor of Łódź issued a WZ-decision that permitted Enkev Polska to expand its warehouse capacity on the Łódź Premises.<sup>302</sup> At that time, the warehouse was already located where the trajectory of the Nowotargowa Street is currently planned. The Claimant submits that the WZ-decision could not have been granted "if it had been incompatible with an applicable study or a zoning plan that would have directed a road on that bit of land."<sup>303</sup> According to the Claimant, the City decided in 2007 to remodel the existing railway station, precipitating the shift in the trajectory. The new station would require considerably more space compared to the existing one and, since the City intended to protect the buildings to the west of the existing station, the corridor of the Targowa Street had to be moved eastward.<sup>304</sup>

245. The Claimant concludes that, on the basis of the planning documents and legislative framework in force in 2001, it could not have reasonably expected that the City of Łódź would expropriate the Łódź Premises.<sup>305</sup>

#### *The Respondent's Position*

246. The Respondent concurs that the FET Standard comprises a host State's obligation to provide a stable and predictable investment environment, but notes that: "investors should legitimately expect regulations to change over time as an aspect of the normal operation of [the] legal and policy process of the economy they operate in;"<sup>306</sup> and, particularly, "in the absence of any representations given by the respondent State, the investor could not reasonably [expect] that such regulatory changes would not occur."<sup>307</sup> According to the Respondent, the FET Standard

---

<sup>300</sup> Claimant's Post-Hearing Brief, ¶¶ 3.33–3.36.

<sup>301</sup> Claimant's Post-Hearing Brief, ¶¶ 3.38, 3.92(D).

<sup>302</sup> Claimant's Post-Hearing Brief, ¶¶ 3.38.

<sup>303</sup> Claimant's Post-Hearing Brief, ¶ 2.10.

<sup>304</sup> Claimant's Post-Hearing Brief, ¶ 3.37.

<sup>305</sup> Claimant's Post-Hearing Brief, ¶ 1.20.

<sup>306</sup> Respondent's Counter-Memorial, ¶ 20 i.

<sup>307</sup> Respondent's Counter-Memorial, ¶ 204.

does not, therefore, prevent a host State from introducing legislative changes adverse to an investor.

247. The Respondent contests the Claimant's assertion that the Respondent did not provide a stable and predictable investment framework, for three reasons. First, the Respondent did not give any representations or assurances regarding the legal preconditions for expropriations, neither in 2001 (the time of the Claimant's initial acquisition of shares), nor in 2005 nor in 2009 (the time of the two subsequent acquisitions).<sup>308</sup> Second, no such assurance could be derived from Polish laws in force at that time. Third, Polish law permitted the envisaged expropriation "well before Enkev Beheer made its investment in Łódź."<sup>309</sup>

248. Further, the Respondent contends that the Claimant should have been aware that Poland was in transition in 2001, "only twelve years after the collapse of the communism and three years before joining the European Union,"<sup>310</sup> and that it could not have expected the same legal and business standards as in Western European countries. During 2001 and 2009, it was known that Poland was "in heavy need for infrastructure development, including, in the first place, roads, railways and public transport."<sup>311</sup> According to the Respondent, it was also commonly known that the Act on Real Estate Management then in place (which regulated expropriations for public purposes) did not allow for the efficient implementation of infrastructure projects, so that a prudent investor should have expected legislative changes.<sup>312</sup> The Respondent contends that the legal situation at the time of Claimant's first investment (in 2001) was such that it must have anticipated that the Łódź Premises might be affected at a later time by legislative changes.<sup>313</sup>

249. The Respondent submits that, contrary to the Claimant's contention, the 1993 Spatial Plan already projected a road cutting through the Łódź Premises.<sup>314</sup> According to the Respondent, admitted that the Claimant was well aware of the City's plans to run a road through the Premises and to modernise the City centre before the time of its first investment in

---

<sup>308</sup> Respondent's Counter-Memorial, ¶¶ 203–204.

<sup>309</sup> Respondent's Counter-Memorial, ¶ 204.

<sup>310</sup> Respondent's Counter-Memorial, ¶ 206.

<sup>311</sup> Respondent's Counter-Memorial, ¶ 207.

<sup>312</sup> Respondent's Counter-Memorial, ¶¶ 207–208.

<sup>313</sup> Hearing Transcript (13 June 2013), 77:16–23; Respondent's Post-Hearing Brief, ¶ 21.

<sup>314</sup> Respondent's Response to the Request for Arbitration, at 9 *et seq.*, Section (C), ¶ 1.1(3); Hearing Transcript (14 June 2013), 78:1–25 to 80:1–24.

2001.<sup>315</sup> It must therefore be presumed that the Claimant included the risk of being affected by subsequent legislative changes into its legitimate expectations.<sup>316</sup>

250. The Respondent contends that the WZ-decision, which allowed Enkev Polska to extend its warehouse space, had already been issued on 16 September 2005 (not 2007) and contained “unambiguous information that there [was] a junction road planned to run over the Łódź Premises. Further, it made clear that, although the final trajectory had not yet been decided by the City, there were two versions being considered, each of which was to cut through the plan for extended production.”<sup>317</sup> Therefore, the Respondent concludes that the Claimant must have known of the City’s plans in 2005.
251. The Respondent agrees with the Claimant that the entry into force of the Road Legislation in 2003 marked a “radical change,” because expropriation proceedings with the public purpose of facilitating road constructions became easier than general expropriation proceedings under Polish law.<sup>318</sup> However, the Respondent submits that the entry into force of the Road Legislation is materially irrelevant for the assessment of a Treaty breach for three reasons.
252. First, although the Road Legislation did not yet exist at the moment of the Claimant’s investment in 2001, its underlying goal in fact did exist, namely the revitalisation of the City centre. In the Respondent’s submission, this goal represents the public purpose, while the Road Legislation represents the only instrument to implement that public purpose.<sup>319</sup> The Respondent emphasises that already in 2001 there were other legal instruments in force which could have led to the Premises’ expropriation and, thus, limited any legitimate expectations of the Claimant.<sup>320</sup> Second, the Claimant effectively accepted the Road Legislation by acquiring further shares in Enkev Polska in 2005 and 2009 despite being aware of the legislative developments and the risks of potential expropriations.<sup>321</sup> Third, the Treaty was not meant to limit the Contracting States’ sovereign powers to implement public goals and that implementing the Road Legislation fell within the Respondent’s such powers.<sup>322</sup>

---

<sup>315</sup> Respondent’s Counter-Memorial, ¶¶ 211–212; Respondent’s Post-Hearing Brief, ¶¶ 27–30.

<sup>316</sup> Respondent’s Counter-Memorial, ¶¶ 211–212; Respondent’s Post-Hearing Brief, ¶ 30.

<sup>317</sup> Respondent’s Post-Hearing Brief, ¶ 108.

<sup>318</sup> Hearing Transcript (13 February 2013), 54:22.

<sup>319</sup> Hearing Transcript (13 June 2013), 77:23–25 to 78:1–6.

<sup>320</sup> Hearing Transcript (13 June 2013), 78:7–25.

<sup>321</sup> Respondent’s Counter-Memorial, ¶¶ 213–217.

<sup>322</sup> Respondent’s Counter-Memorial, ¶¶ 220, 224.

253. Thus, the Respondent contends that the Claimant cannot shift responsibility for the risks it took or underestimated at the time of its investments in 2001, 2005 and 2009. The Claimant's "lack of due care for its business affairs may not simply be remedied by extending the host [S]tate's duties beyond the [BIT] standards."<sup>323</sup>

### 3. Due Process

#### *The Claimant's Position*

254. The Claimant submits that the Environmental Impact Assessment Procedure violated its due process rights under the Treaty. Though the Claimant did not participate in the Procedure in 2010 (because, the Claimant maintains, it did not know about the Procedure at the time), the Claimant submits that, if it had participated, its contribution would not have had any fundamental impact on the planning of the Nowotargowa Street. It quotes the Director of the Road and Transportation Authority of Łódź (Mr. Nita) stating that "[the Claimant's participation] may have moved the road by a couple of meters only, but [the] road would be constructed anyway."<sup>324</sup>

255. The Claimant further submits that providing the Environmental Impact Assessment Procedure as the only opportunity for it to lobby the City for a change in the development plan constitutes a denial of justice,<sup>325</sup> since the Procedure would typically assess technical, social or natural impacts on the environment. Economic interests fall, according to the Claimant, outside the scope of the Environmental Impact Assessment Procedure.<sup>326</sup>

256. Its rights were further violated, the Claimant submits, by the Road Legislation's limited recourse to administrative courts.<sup>327</sup>

#### *The Respondent's Position*

257. The Respondent contends that the Claimant acted "reckless[ly]" when making its first investment in 2001 as it failed to properly investigate the status of the Łódź Premises and the related planning documents. It would have discovered that: (i) the title to the Łódź Premises

---

<sup>323</sup> Respondent's Counter-Memorial, ¶ 224; Respondent's Post-Hearing Brief, ¶ 11.

<sup>324</sup> Claimant's Statement of Claim, ¶ 4.39(D); Hearing Transcript (13 June 2013), 31:10–25 to 32:1–25; Hearing Transcript (13 February 2013), 14:3–10; Claimant's Post-Hearing Brief, ¶¶ 3.17–3.18, 3.21–3.23, 3.82.

<sup>325</sup> Claimant's Statement of Claim, ¶ 4.41.

<sup>326</sup> Claimant's Post-Hearing Brief, ¶¶ 2.55–2.56, 3.16.

<sup>327</sup> Claimant's Statement of Claim, ¶ 4.41.



was limited in time; (ii) there was a road planned to be built over the Premises; and (iii) a modernisation of the City centre would occur, involving the construction of such a road.<sup>328</sup>

258. According to the Respondent, there were numerous public announcements and extensive public consultations concerning the content of the 2010 Study as well as that of the 2010 Decision on Environmental Conditions.<sup>329</sup> Enkev Polska's admitted failure to participate in these consultations is not, in the Respondent's submission, excused by arguing that it did not receive a special notification from the City of Łódź. Under the applicable law, the commencement of the Environmental Impact Assessment Procedure is made public by general public announcements.<sup>330</sup> The Respondent contends that the commencement of the Environmental Impact Assessment Procedure was announced on the blackboard and the website of the City of Łódź with a clear reference to the construction of the railway station and passenger traffic service.<sup>331</sup> The fact that Enkev Polska's neighbours took part in these proceedings shows, in the Respondent's submission, that the announcement was properly communicated to the general public.<sup>332</sup>

259. The Respondent maintains also that the Claimant makes several incorrect and unsupported statements about the possible effects of its participation in the 2010 Environmental Impact Assessment Procedure. It disagrees that the Claimant's participation in this Procedure could not have resulted in a change of the trajectory of the planned road.<sup>333</sup> Contrary to the Claimant's contention, the Respondent submits that the Environmental Impact Assessment Procedure was not limited to technical, social or natural impacts "but extend[ed] also to links with the existing transportation system and its interaction with the environment around it."<sup>334</sup>

260. The Respondent further asserts that, in light of periodic meetings with the City's representatives, "Enkev Polska had full knowledge of the Łódź plans regarding its premises [so that] the Claimant may not simply [...] try to push the burden of its own omissions onto the Respondent."<sup>335</sup> If it did not have such knowledge at that time, the Respondent reiterates that it

---

<sup>328</sup> Respondent's Post-Hearing Brief; ¶¶ 23–24.

<sup>329</sup> Respondent's Post-Hearing Brief; ¶¶ 81–84.

<sup>330</sup> Witness Statement by \_\_\_\_\_, Hearing Transcript (13 June 2013), 206:4–9.

<sup>331</sup> Respondent's Post-Hearing Brief; ¶¶ 85–86.

<sup>332</sup> Respondent's Post-Hearing Brief; ¶ 87.

<sup>333</sup> Respondent's Counter-Memorial, ¶ 239; Respondent's Post-Hearing Brief; ¶ 87.

<sup>334</sup> Respondent's Post-Hearing Brief; ¶ 88.

<sup>335</sup> Respondent's Counter-Memorial, ¶ 258.

ought to have gained such knowledge on its own by investigating and seeking legal advice, rather than expecting to be informed personally by the City.<sup>336</sup>

261. The Respondent notes that the City of Łódź is in the process of devising a new spatial plan. The Respondent emphasises that the announcements concerning the commencement of the planning of a new spatial plan were made in the same way as the announcements to participate in the proceedings leading to the 2010 Study and the 2010 Decision on Environmental Conditions.<sup>337</sup> Enkev Polska made an application in these proceedings in March 2012, despite not having been individually invited to participate by the City. More important, the Respondent comments, is that Enkev Polska did not, in its application, raise any concerns with regard to the trajectory of the Nowotargowa Street.<sup>338</sup>

#### **4. Bad Faith**

##### *The Claimant's Position*

262. The Claimant accuses the Respondent of acting in bad faith in these arbitration proceedings with respect to allegedly erroneous statements regarding the application for EU funding by the City.<sup>339</sup> The Respondent had, according to the Claimant, undertaken to provide the City's application once the City of Łódź had formally submitted it to the EU.<sup>340</sup>

263. Further, the Claimant complains about not having received certain translations and maps from the Respondent.<sup>341</sup> The Claimant criticises the Respondent's map relating to the 2002 Study, found in Exhibits R-7 (page 2) and R-71 (page 6), for being distorted.<sup>342</sup> The Claimant does not accept the Respondent's explanation that the map served only demonstrative purposes. According to the Claimant, "[its] purpose must have been to wrongly establish that there had always been a road planned over, in particular, the middle of the Łódź Premises—which matches the current trajectory of the Nowotargowa [Street] but not the trajectory valid on the

---

<sup>336</sup> Respondent's Post-Hearing Brief, ¶ 21.

<sup>337</sup> Respondent's Post-Hearing Brief, ¶ 89.

<sup>338</sup> Respondent's Post-Hearing Brief, ¶ 90.

<sup>339</sup> Claimant's Statement of Claim, ¶ 4.26; Hearing Transcript (13 June 2013), 8:1–12, 46:16–25, referring to Exhibit C-141.

<sup>340</sup> Claimant's Post-Hearing Brief, ¶ 3.2.

<sup>341</sup> Hearing Transcript (13 June 2013), 10:10–24. It notes that the map referenced in Exhibit R-5 was updated by the Respondent despite having previously stated that this map did not exist.

<sup>342</sup> Hearing Transcript (13 June 2013), 23:1–25 to 29:1–15; Claimant's hearing slides ("Opening Statement Enkev: Hearing 13 and 14 June 2013"), slide 17; Claimant's Post-Hearing Brief, ¶¶ 3.29–3.30.

basis of [...] the 1993 [Spatial] Plan and the 2002 Study.”<sup>343</sup> According to the Claimant, the Respondent tried to demonstrate that “Enkev must have known, since 1993 or at least 2002 [...] that a road was planned through the very middle of the Łódź Premises.”<sup>344</sup>

264. The Claimant alleges further that the Respondent was able to produce good-quality maps when suitable for its own purposes, such as the more detailed map of the 1993 Spatial Plan.<sup>345</sup> The fact that not only the map of the 2002 Study but also the map of the 1993 Spatial Plan in Exhibit R-7 are, in the Claimant’s submission, incorrect leads the Claimant to conclude that (i) the Respondent’s submissions based on the planning documents “are not reliable”<sup>346</sup>; and (ii) the Respondent acted in bad faith in these proceedings.<sup>347</sup>
265. Finally, the Claimant submits that the Respondent failed adequately to react to various attempts by the Claimant to settle the dispute amicably since May 2012.<sup>348</sup>

#### *The Respondent's Position*

266. The Respondent maintains that it had no intention to misrepresent the facts of the case through the use of Exhibit R-7 and R-71.<sup>349</sup> While apologising for any confusion caused by its presentation, the Respondent stresses that the maps on which the Claimant commented still show that the plans for the modernisation of the City centre were in place for decades and that Enkev Polska’s Premises had been in the area affected by the new road plans throughout this time.<sup>350</sup>
267. The Respondent contends that the Claimant approached its negotiations with the City in bad faith. It submits that “Enkev Polska wanted a commercial buy[-]out and [that] the central issue [...] was always money.”<sup>351</sup> From the outset of the negotiations, the Claimant sought the grant of modern facilities, despite the fact that the buildings on the Łódź Premises are “old and worn

---

<sup>343</sup> Claimant’s Post-Hearing Brief, ¶ 1.35.

<sup>344</sup> Claimant’s Post-Hearing Brief, ¶¶ 2.37–2.41 (emphasis omitted).

<sup>345</sup> Claimant’s Post-Hearing Brief, ¶ 1.36.

<sup>346</sup> Claimant’s Post-Hearing Brief, ¶¶ 1.33, 1.37.

<sup>347</sup> Hearing Transcript (13 June 2013), 21:20–23.

<sup>348</sup> Claimant’s Statement of Claim, ¶ 2.16 (emphasis omitted).

<sup>349</sup> Respondent’s Post-Hearing Brief, ¶ 75.

<sup>350</sup> Hearing Transcript (13 June 2013), 87:22–25 to 88:1–14.

<sup>351</sup> Respondent’s Post-Hearing Brief, ¶ 4.

down.”<sup>352</sup> In the Respondent’s submission, Enkev Polska expected the City of Łódź to pay even more than the replacement value.

**C. Article 3(2) of the Treaty – Full Security and Protection (“FSP”)**

268. Article 3(2) provides:

More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.

*The Claimant’s Position*

269. The Claimant contends that Article 3(2) of the Treaty obliges the Respondent to act in a transparent manner toward the investor.<sup>353</sup> It submits that the Respondent failed to accord its investment full security and protection by not:

- (i) intervening when the Claimant was threatened with the discontinuation of its operations on the Łódź Premises;
- (ii) intervening when the Claimant was pushed to sell the Łódź Premises “substantially below real value;”
- (iii) notifying the Claimant of the commencement of the Environmental Impact Assessment Procedure despite having previously guaranteed to do so and despite being able to do so; or
- (iv) providing a stable legal framework for its investment.<sup>354</sup>

270. The Claimant submits that the Road Legislation violates its right to full security and protection under Article 3(2) of the Treaty. It submits that “[t]he Respondent (in its governmental capacity) is ultimately responsible for enacting this legislative arrangement and should seek to prevent application thereof in violation of the Respondent’s treaty obligations.”<sup>355</sup> The Claimant submits that the Respondent used its expanded power as provided in the Road Legislation deliberately to put pressure on the Claimant.<sup>356</sup>

271. The Claimant next refers to “the gentlemen’s agreement reached on 13 September 2012 to conduct a re-valuation of the Łódź Premises” and follow-up contacts in which it made clear that

---

<sup>352</sup> Respondent’s Post-Hearing Brief, ¶ 4.

<sup>353</sup> Claimant’s Statement of Claim, ¶ 5.12.

<sup>354</sup> Claimant’s Statement of Claim, ¶¶ 4.45–4.46.

<sup>355</sup> Claimant’s Statement of Claim, ¶ 5.2.

<sup>356</sup> Claimant’s Statement of Claim, ¶ 5.8.

the re-valuation was to be based on the replacement value and the standard set in Article 5(c) of the Treaty.<sup>357</sup> According to the Claimant, it was agreed that the Parties would jointly appoint and instruct the valuer. However, since the Respondent proposed a list of potential candidates and instructed the valuer unilaterally to base the valuation on the sales value only, the Claimant refused to accept the valuer's appointment.<sup>358</sup>

272. With regard to transparency, the Claimant accuses the City of Łódź of deliberately failing to provide adequate information, despite the Claimant's repeated information requests in Polish administrative proceedings and also in these arbitration proceedings.<sup>359</sup> The Claimant criticises in particular that the Respondent did not proffer any reliable overview of the expropriation proceedings instituted under the Road Legislation. It accuses the Respondent of withholding information and of making opaque, "ever-changing and sometimes incorrect statements" which will ultimately damage the Claimant's business.<sup>360</sup>

273. Nevertheless, the Claimant underlines that the City of Łódź remains in a position to act to "reduce the number of breaches of its obligations under Articles 3 and 5 of the BIT."<sup>361</sup> Most importantly, according to the Claimant, the City could prevent the immediate enforceability of the expropriation decision and allow the maximum periods provided in the Road Legislation. Further, the City could and should provide the Claimant with all information regarding the current status of the expropriation proceedings.<sup>362</sup>

#### *The Respondent's Position*

274. In the Respondent's submission, there is no basis to claim that disagreement on a valuation of the Łódź Premises constitutes a violation of Article 3 of the Treaty. According to the Respondent, the documents on which the Claimant relies in this respect do not support its contention.<sup>363</sup> These "notes" are in fact the Claimant's own notes and do not constitute official minutes of the meetings. Even so, their content does not lend credence to the Claimant's allegations: the documents do not serve as evidence that the Parties agreed to use three

---

<sup>357</sup> Claimant's Statement of Reply, ¶ 4.15.

<sup>358</sup> Claimant's Statement of Reply, ¶ 4.18.

<sup>359</sup> Claimant's Statement of Claim, ¶¶ 5.12–5.13.

<sup>360</sup> Claimant's Statement of Claim, ¶ 5.8, 5.12–5.17. *See also* Claimant's Post-Hearing Brief, ¶ 3.14.

<sup>361</sup> Claimant's Statement of Claim, ¶ 5.57(A).

<sup>362</sup> Claimant's Statement of Claim, ¶ 5.11.

<sup>363</sup> Respondent's Statement of Rejoinder, ¶ 77.

valuation standards; but rather, there was no such gentlemen's agreement as described by the Claimant.<sup>364</sup>

275. While it is true that the Claimant did not receive a copy of the full expropriation request filed by the City, the lack of such a copy has not prejudiced Enkev Polska in any way, so the Respondent maintains, as those proceedings have not begun (as at June 2013). In particular, Enkev Polska would be the entity to make a formal request in administrative proceedings for such a document, as it would be the party in those proceedings. Even if the proceedings had begun, Enkev Polska has not made any such request.
276. The Respondent submits that the Claimant's complaint concerning lack of information is not borne out by the facts, as the City of Łódź has been in regular contact with the Claimant.<sup>365</sup> The Respondent refers to its explanations as to why it is not in a position to provide certain information, but submits that any "failure" is, in any event, an inchoate act: "the Republic of Poland has not yet had an opportunity to put to use its systematic safeguards against breaches of international obligations."<sup>366</sup> Thus, an omission to provide information to the Claimant would not constitute a breach under Article 3 of the Treaty.

#### **D. Article 3(5) of the Treaty – Umbrella Clause**

277. Article 3(5) provides:

- 1. Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.**

##### *The Claimant's Position*

278. The Claimant interprets Article 3(5) of the Treaty as a supplement to the FET Standard. By applying the general rules of interpretation derived from Article 31 of the Vienna Convention on the Law of Treaties, the Claimant concludes that Article 3(5) of the Treaty "has a meaning in itself" and that "the clause was intended to impose substantial international obligations, separate and distinct from the other Treaty standards."<sup>367</sup> It is the Claimant's position that the

---

<sup>364</sup> Respondent's Statement of Rejoinder, ¶¶ 76–80.

<sup>365</sup> Respondent's Rejoinder, ¶¶ 81–86. *See also* Hearing Transcript (14 June 2013), 36:15–25 to 37:1–14.

<sup>366</sup> Respondent's Rejoinder, ¶ 89.

<sup>367</sup> Claimant's Statement of Claim, ¶¶ 6.3–6.11.

Tribunal should therefore take into account the Treaty, general international law and all other agreements existing between the Contracting Parties.<sup>368</sup>

279. The Claimant identifies at least two specific obligations binding on the Respondent under Article 3(5). According to the Claimant, a first assurance was given in 2010 when the City of Łódź promised to inform the Claimant of “any administrative steps to be taken” (such as, for instance, the Environmental Impact Decision).<sup>369</sup> In a letter to the Claimant dated 22 November 2010, the Head of the Bureau of Investment of the City of Łódź apologised for not having notified the Claimant of this 2010 Decision on Environmental Conditions and promised to do so with regard to “any plans to be introduced in the future.”<sup>370</sup>
280. A second assurance was made, in the Claimant’s submission, by letter of 7 June 2011, in response to an inquiry from the Claimant, by the City of Łódź stating “that there is no knowledge on the potential pending administrative proceedings ENKEV POLSKA SA would be a party to.”<sup>371</sup> The Respondent’s argument that a distinction should be drawn between a statement of having knowledge of an ongoing proceeding and a statement that there was no such proceeding ongoing, is, in the Claimant’s submission, problematic for the Respondent because the City of Łódź did not make any disclaimer for distinguishing between actual knowledge and the factual existence of any ongoing proceedings in this letter. In any event, the Claimant’s inquiry was specifically directed to receive information on present or future proceedings “with participation of the City or any other subjects.” Last, the Claimant notes that the City of Łódź complied with the obligation when it informed Enkev Polska about the enlargement of two other roads.<sup>372</sup>

#### *The Respondent’s Position*

281. Analysing the language of Article 3(5) of the Treaty, the Respondent contends that the provision covers only contractual obligations between an investor and the host State with respect to the investment. Unilateral statements or assurances do not qualify as obligations within this interpretation.<sup>373</sup>

---

<sup>368</sup> Claimant’s Statement of Claim, ¶¶ 6.3–6.5.

<sup>369</sup> Claimant’s Statement of Claim, ¶ 6.18; Hearing Transcript (13 June 2013), 30:1–6.

<sup>370</sup> Claimant’s Statement of Claim, ¶¶ 6.20–6.23; Claimant’s Post-Hearing Brief, ¶ 1.23.

<sup>371</sup> Claimant’s Statement of Claim, ¶¶ 6.24–6.25.

<sup>372</sup> Claimant’s Statement of Claim, ¶ 6.27.

<sup>373</sup> Respondent’s Counter-Memorial, ¶¶ 260–261.

282. According to the Respondent, the scope of the Umbrella Clause should be defined narrowly as it would otherwise have “a too far reaching impact on the sovereignty of the host [S]tate, which could not be presumed in the absence of a clear expression of the parties’ will to this effect.”<sup>374</sup> That scope should be further limited since, according to the Respondent, investment tribunals generally require significant interference with the rights of the investor to constitute a violation of an umbrella clause obligation.<sup>375</sup>
283. In any event, the Respondent submits that there can be no violation of the Umbrella Clause for two reasons. First, the Respondent denies having entered into any obligations toward the Claimant. Any statements alleged by the Claimant were made towards Enkev Polska and not the Claimant.<sup>376</sup> In any event, the Respondent submits that these statements cannot qualify as “obligations” within the meaning of Article 3(5) of the Treaty. Those communications do not even give rise to obligations by the City of Łódź under Polish law.<sup>377</sup>
284. In more general terms, the Respondent reiterates that it “has never given any assurances or representations to the Claimant that it would receive a better treatment than to which it was entitled under the Polish Road Legislation.”<sup>378</sup> It asserts:
- [...] an investor may not simply assume that it is in general entitled to treatment more preferential than that accorded to other individuals or entities and granted by the law in force. Any commitment to grant such preferential treatment, besides from going beyond the competences of the City, would clearly lead to discrimination in favour of Enkev and as such could not be held as legal.<sup>379</sup>
- All the statements alleged by the Claimant were, according to the Respondent, either made “subject to the applicable procedures,” meaning that they could not go beyond Polish law,<sup>380</sup>— or, made by persons not authorised to act on behalf of the City.<sup>381</sup>
285. The Respondent emphasises that it noted its lack of knowledge of any pending administrative proceedings against Enkev Polska, but did not indicate definitively that there were no such proceedings. Contrary to the Claimant’s assertion, the Respondent maintains that its

---

<sup>374</sup> Respondent’s Counter-Memorial, ¶ 270.

<sup>375</sup> Respondent’s Counter-Memorial, ¶ 272.

<sup>376</sup> Respondent’s Counter-Memorial, ¶¶ 261–265.

<sup>377</sup> Respondent’s Counter-Memorial, ¶ 266.

<sup>378</sup> Respondent’s Counter-Memorial, ¶ 205.

<sup>379</sup> Respondent’s Response to the Request for Arbitration, at 15, Section (C), ¶ 14.

<sup>380</sup> Hearing Transcript (13 June 2013), 79:19–25 to 80:1–12; Respondent’s Post-Hearing Brief, ¶ 92.

<sup>381</sup> Respondent’s Post-Hearing Brief, ¶¶ 95–99.



communication on this topic did not give rise to any additional obligations nor create “grounds to develop any kind of expectation in this respect.”<sup>382</sup>

286. The Respondent adds that these communications were exchanged after the issuance of the 2010 Decision on Environmental Conditions, so they could not have created any obligations regarding the Environmental Impact Assessment Procedure.<sup>383</sup>

287. Even if the Tribunal should find that the Respondent entered into any obligations within the meaning of the Umbrella Clause, in the Respondent’s submission, the Claimant failed to demonstrate any actual interference with its rights.<sup>384</sup>

*(The remainder of this page left intentionally blank.)*

---

<sup>382</sup> Respondent’s Response to the Request for Arbitration, Section (C), ¶¶ 16–17.

<sup>383</sup> Respondent’s Counter-Memorial, ¶ 274.

<sup>384</sup> Respondent’s Counter-Memorial, ¶ 277.

## VII. THE CLAIMANT'S RENEWED REQUEST FOR INTERIM MEASURES

### *The Claimant's Position*

288. In the Claimant's Renewed Request for Interim Measures, the Claimant asserts its "urgent interest for some form of stability pending the resolution by the Arbitral Tribunal."<sup>385</sup> In the alternative, the Claimant requests an order aimed at preserving the *status quo* pending the issuance of a partial award on the interpretation and application of Article 5(c) of the Treaty.<sup>386</sup>
289. The Claimant submits that it faces a great deal of uncertainty regarding the timing and the concrete effects of the construction works on the Łódź Premises, particularly in light of the Mayor's indication that she would re-submit a request for expropriation by the end of September 2013 (as she eventually did). In the Claimant's submission, numerous questions on vital matters, such as the possibility of access to the buildings, their use, fire safety, security of energy supplies and the overall effect of the road construction in the middle section of the Łódź Premises remain unanswered. The Claimant contends that uncertainty makes its business in Łódź commercially and practically untenable<sup>387</sup> and it destabilises Enkev Polska's operation as a going concern.<sup>388</sup>
290. The Claimant further contends that if Enkev Polska was to hand over the Łódź Premises immediately, it would face grave consequences such as the loss of employees and crucial business prospects, as well as irreparable harm to its reputation.<sup>389</sup> According to the Claimant, the damage resulting from a takeover of its Premises increases with the less time Enkev Polska is allowed to move to another location.<sup>390</sup> Hence, according to the Claimant, a decision on interim measures would be necessary to "offer the Tribunal and the Parties more leeway to operate with nuance rather than bulldozers."<sup>391</sup>
291. Next, the Claimant contends that the arguments on which the Respondent relied to dissuade the Tribunal from issuing interim measures in the first instance, in particular, the Respondent's alleged concerns about the adverse effects of delaying the takeover of the Łódź Premises and

---

<sup>385</sup> Claimant's Statement of Reply, ¶¶ 7.8, 6.7; Hearing Transcript (13 June 2013), 45:15–17, 51:23–25, 52:10–13.

<sup>386</sup> Claimant's Statement of Reply, ¶ 7.8; Hearing Transcript (13 June 2013), 52:13–14.

<sup>387</sup> Claimant's letter to the Tribunal and the Respondent, dated 27 August 2013.

<sup>388</sup> Claimant's letter to the Tribunal and the Respondent, dated 11 September 2013, ¶¶ 1–2.

<sup>389</sup> Claimant's Post-Hearing Brief, ¶¶ 1.9–1.10.

<sup>390</sup> Claimant's Statement of Reply, ¶ 6.5.

<sup>391</sup> Claimant's Statement of Reply, ¶ 6.9.

the risk of the EU funding application being rejected, “have all proved to be baseless.”<sup>392</sup> The City’s late application for EU funding suggests that the acquisition of title to the Łódź Premises was not a necessary precondition for the application to be successful, or even for it to be submitted at all.<sup>393</sup>

292. Likewise, the Claimant submits that the Respondent has failed to show that the City would be unable to meet the deadline of 31 December 2015 for completing the City centre modernisation project if it could not obtain title to the Łódź Premises immediately. Rather, Polish media reports suggest that compliance with the 2015 deadline was difficult for reasons unrelated to the Łódź Premises.<sup>394</sup>

#### *The Respondent’s Position*

293. It is the Respondent’s position that the Claimant’s Renewed Request for Interim Measures should be rejected by the Tribunal since no action which the Respondent might take with regard to the Łódź Premises in the future could constitute a “danger of current or imminent harm to Enkev Beheer—or more correctly its relevant investment: its shareholding [in Enkev Polska].”<sup>395</sup> Even if this were the case, any such damage could be adequately remedied by awarding pecuniary damages and would not outweigh the damage incurred by the Respondent if the “EU funding be jeopardised.”<sup>396</sup>
294. The Respondent further disputes that the factual pattern of the case changed since the Tribunal issued its Order on Interim Measures on 8 March 2013. The Claimant’s Renewed Request would not reveal new circumstances but rather “a series of misstatements.”<sup>397</sup> For one, the fact that the Mayor of Łódź withdrew the 2013 Expropriation Request on 25 July 2013 does not mean, according to the Respondent, that the Claimant’s situation was altered. The change in the City’s plans for the construction of the City centre does not impact the City’s plans regarding the trajectory of the Nowotargowa Street, which will still serve as a main access road to the

---

<sup>392</sup> Claimant’s e-mail to the Tribunal and the Respondent, dated 2 August 2013, at 2, “Concluding Remarks”; Claimant’s Post-Hearing Brief, ¶¶ 1.3, 3.10.

<sup>393</sup> Claimant’s Post-Hearing Brief, ¶¶ 3.5–3.7; Claimant’s e-mail to the Tribunal and the Respondent, dated 2 August 2013.

<sup>394</sup> Claimant’s Post-Hearing Brief, ¶ 3.8.

<sup>395</sup> Respondents Statement of Rejoinder, ¶ 97.

<sup>396</sup> Respondents Statement of Rejoinder, ¶ 97.

<sup>397</sup> Respondents Statement of Rejoinder, ¶ 103; Hearing Transcript (13 June 2013), 85:12–14; Respondent’s Post-Hearing Brief, ¶ 144.

Fabryczna railway station. The Respondent submits that the City has not given up its intention to pursue expropriation proceedings against Enkev Polska.<sup>398</sup>

295. Commenting on the Claimant's argument that the expropriation decision will be expedited, the Respondent notes that the proceedings will be conducted in compliance with procedures under Polish law and will not derogate from the scenario described in paragraph 84 of the Tribunal's Order on Interim Measures.<sup>399</sup> In other words, there will be no imminent danger for Enkev Polska to be evicted from its Łódź Premises without prior notification and an opportunity to challenge the potential expropriation decision.<sup>400</sup> The Respondent submits that, if the Polish authorities really had the legal means to take over the Premises within a day (as the Claimant suggests), the expropriation would already have taken place.<sup>401</sup>
296. The Respondent reiterates that the Tribunal rejected the Claimant's original request for interim measures on the grounds that "the likely harm to the Claimant [was] adequately reparable by an award of damages [paragraph 77 of the Order on Interim Measures, dated 8 March 2013]" and that nothing has changed since that time.<sup>402</sup> Article 26(3) of the UNCITRAL Arbitration Rules requires the requesting party to show that the issuance of an interim measure is necessary; it does not place the burden on the responding party to show to the contrary.<sup>403</sup>
297. For the Respondent, it remains important that the timing for the EU funding does not change. The City of Łódź is under pressure to have the modernisation project finished by the end of 2015.<sup>404</sup> In her witness statement, [redacted] confirmed that the inability to complete the Nowotargowa construction would constitute a material threat to the modernisation project which might, in turn, jeopardise the co-financing agreement between the City and its other partners.<sup>405</sup> In the Respondent's submission, the acquisition of the Premises is essential for the application to be successful. A potential order on interim measures would endanger the timing

---

<sup>398</sup> Respondent's e-mail to the Tribunal and the Claimant, dated 6 September 2013.

<sup>399</sup> Respondents Statement of Rejoinder, ¶ 106.

<sup>400</sup> Respondents Statement of Rejoinder, ¶ 102; Hearing Transcript (13 June 2013), 85:23–25 to 86:1–5.

<sup>401</sup> Hearing Transcript (13 June 2013), 86:1–5; 75:8–10.

<sup>402</sup> Respondent's e-mail, dated 9 August 2013, at 4.

<sup>403</sup> Respondent's e-mail, dated 9 August 2013, at 4.

<sup>404</sup> Hearing Transcript (13 June 2013), 85:17–22.

<sup>405</sup> Respondent's Post-Hearing Brief, ¶ 146.

of the construction of the Nowotargowa Street and the modernisation project, resulting in a risk of losing the City approximately PLN 2,000,000,000, plus interest.<sup>406</sup>

298. As a final point, the Respondent reiterates that the City of Łódź is a self-government area. The Republic of Poland as the addressee of a potential order on interim measures would, therefore, not be in a position to issue a binding instruction to the City.<sup>407</sup>
299. Accordingly, the Respondent requests that the Tribunal reject the Claimant's Renewed Request for Interim Measures. Should the Tribunal decide to grant any interim measures, the Respondent requests that the Claimant be ordered to provide appropriate security in accordance with Article 26(6) of the UNCITRAL Arbitration Rules.<sup>408</sup>

*(The remainder of this page left intentionally blank.)*

---

<sup>406</sup> Respondent's Post-Hearing Brief, ¶ 146.

<sup>407</sup> Hearing Transcript (13 June 2013), 86:5–13.

<sup>408</sup> Respondent's Statement of Rejoinder, ¶ 108; Respondent's Response to the Request for Interim Measures, ¶¶ 73–74.

## VIII. THE TRIBUNAL'S ANALYSIS AND DECISIONS

300. *The Claimant's Application:* The Tribunal first addresses the Claimant's procedural application to add Enkev Polska as a second claimant to this arbitration. As already indicated above, this application is opposed by the Respondent.
301. The Claimant necessarily acknowledges that Enkev Polska, its majority-owned Polish subsidiary, is not at present a claimant in or a party to these arbitration proceedings and that the only claimant party is the Claimant itself, as result of its own Request for Arbitration of 6 August 2012 which names the Claimant as the sole claimant party. The Claimant maintains that its application was triggered, as a precautionary measure, by the Respondent's "new" argument in the Respondent's subsequent Counter-Memorial of 15 May 2013 to the effect that the Claimant has no standing in this arbitration in regard to Enkev Polska. Accordingly, so it submits, the Claimant makes a conditional application under Article 22 of the UNCITRAL Arbitration Rules to add Enkev Polska as a co-claimant in these arbitration proceedings.
302. The Tribunal notes that the Claimant's application is made conditionally on the assumption that the Tribunal should decide that the Claimant had a limited standing in regard to harm suffered by its subsidiary, Enkev Polska. In the Tribunal's view, such a conditional application cannot properly be made under Article 22 of the UNCITRAL Arbitration Rules (or German law as the *lex loci arbitri*, if and to the extent relevant), being expressly dependent upon a future decision in the Tribunal's Award. If made, such an application must be made at least unconditionally and in a timely manner, long before the Award.
303. Further, the Claimant's interpretation of Article 22 overlooks the procedural rights of the Respondent under Article 17 of the UNCITRAL Arbitration Rules: the Respondent would have insufficient opportunity to present its case against Enkev Polska if Enkev Polska were only joined as an additional party to this arbitration by this Award. It is no answer for the Claimant to assert that the Respondent has or could have done so in presenting its case in response to the Claimant's own case. The Claimant is not Enkev Polska; and their respective cases cannot be assumed to be identical in all factual and legal respects.
304. Moreover, the Tribunal does not consider that Enkev Polska could be joined as an additional party under Article 22 of the UNCITRAL Arbitration Rules. That provision addresses only amendments to a claim or defence by an existing party: it does not address the addition (without consent) of a third person not party to the arbitration. At this late stage of this arbitration, the Tribunal does not consider that it has any power to add Enkev Polska as a co-claimant to these arbitration proceedings.

305. In the Tribunal's view, even if it were a matter of discretion, there is no good reason why the Claimant should not have sought to name Enkev Polska as a co-claimant from the outset of this arbitration, given that the Respondent's argument was reasonably foreseeable even before the beginning of this arbitration.
306. Further, whenever made, any such application regarding Enkev Polska would have to satisfy the requirements of Article 8, paragraphs (1) and (2) of the Treaty. The Tribunal does not here address, still less decide, whether any application could or not be made by Enkev Polska under Article 8 of the Treaty in this arbitration (or another arbitration), basing its decision here solely upon Article 22 of the UNCITRAL Arbitration Rules.
307. More importantly, given that the Tribunal decides below that the Claimant does have sufficient standing in its own right in regard to relevant claims for indirect harm to itself suffered directly by its subsidiary, Enkev Polska, it follows that the Claimant's application is, at least in part, unnecessary.
308. Accordingly, the Tribunal decides to dismiss the Claimant's conditional application to add Enkev Polska as a co-claimant. It follows that the Claimant remains, as from the outset of this arbitration, the only claimant party in this arbitration against the Respondent.
309. *Article 1 of the Treaty:* The Tribunal next addresses the status of the Claimant as an "investor" with an "investment" under the Treaty. The Tribunal accepts that the Claimant qualifies on the facts of this case as an "investor" within the meaning of Article 1(b)(ii) of the Treaty; i.e., the Claimant is a legal person constituted under the law of the Netherlands as a Contracting Party to the Treaty.
310. The Tribunal also accepts on the facts of this case that the Claimant's shareholding in Enkev Polska from 2001 onwards is an "investment" under Article 1(a)(ii) of the Treaty, being shares and "rights derived from shares" held by the Claimant in Enkev Polska. The Tribunal does not accept that the Claimant's "investment" extends beyond such rights, whether under Article 1 of the Treaty or under Polish law. In other words, the Tribunal rejects the Claimant's submission that, as a claimant, it can stand in the shoes of its subsidiary, Enkev Polska, as regards the latter's movable and immovable property (including intellectual property), contracts, assets and monies (including profits): the Claimant's rights derive only from its majority shareholding in Enkev Polska; and whilst its rights extend beyond its shareholding (being also "rights derived from" its shareholding), the Claimant has no standing to make a claim on its subsidiary's behalf for harm suffered directly by its subsidiary.

311. The Tribunal notes that a claimant's investment as a shareholder was broadly interpreted by the tribunal in *Eureko v. Poland*.<sup>409</sup> Under the Netherlands-Poland BIT (i.e., the Treaty), the claimant's investment was held to comprise not only its minority shareholding in a Polish company, but also corporate governance rights and rights under an initial public offering. In the Tribunal's view, these other "investments" were all rights "derived from shares" held by that claimant and were not independent investments unrelated to those shares and associated rights. This decision does not therefore support the Claimant's submission that it can effectively stand in the same shoes as Enkev Polska.
312. The Tribunal also rejects the Claimant's submission that retention of Enkev Polska's profits constitutes a further investment by the Claimant; and it also rejects the Claimant's further submissions that Enkev Polska's goodwill and know-how, as well as the Claimant's own management of Enkev Polska can constitute separate investments by the Claimant under Article 1 of the Treaty. It may well be that these elements could indirectly affect the value of the Claimant's shares and the Claimant's rights derived from those shares; but, in the Tribunal's view, the Respondent is correct, both under the Treaty and Polish law, in submitting that none can constitute separate investments by the Claimant, given (in particular) that the Claimant is a different juridical person from Enkev Polska.
313. Accordingly, the Tribunal decides that the Claimant is a covered investor with a covered investment under the Treaty. It cannot claim directly for any harm suffered directly by Enkev Polska; but it can claim in its own right under the Treaty for harm suffered by itself, e.g., from the diminution or total loss of rights derived from its shares in Enkev Polska. In the Tribunal's view, subject to issues regarding quantum (including double recovery) which are not addressed in this Award, it follows that the Claimant has sufficient standing to advance, in its own right, the relevant substantive claims made by the Claimant in this arbitration.
314. *Article 8 of the Treaty:* As regards Article 8 of the Treaty, the Respondent submits that the Claimant resorted to arbitration prematurely on the grounds that the Claimant: (i) failed to comply with Article 8(1) to provide sufficient notice of its claims to the Respondent and to seek any amicable settlement before resorting to arbitration; and (ii) failed to comply with Article 8(2) requiring a six-month waiting period before commencing this arbitration.

---

<sup>409</sup> *Eureko BV v. Poland*, Partial Award of 19 August 2005 (Exhibit C-4).



315. The Claimant denies that its claims cannot be considered by this Tribunal on the merits, i.e., with no bar under Article 8 regarding jurisdiction or admissibility. As regards the waiting period under Article 8(2) of the Treaty, the Claimant also invokes the more favourable three-month waiting period contained in Article 8(1) of the UK-Poland BIT, Article 8(2) of the Finland-Poland BIT and Article 26 of the Energy Charter Treaty, applied to this arbitration (so it submits) by virtue of Articles 3(2) and 3(6) of the Treaty, its Most Favoured Nation Clause. In the Tribunal's view, this lesser period of three months does not materially assist the Claimant on the facts of this case. Accordingly, the Tribunal considers it unnecessary to decide whether or not a period less than six months applies to the Claimant's claim in this arbitration.
316. In the Tribunal's view, the relevant chronological facts are simply these: the Claimant commenced this arbitration on 6 August 2012; prior to that date, the Claimant had not articulated to the Respondent its own particular claims under the Treaty, still less sought any amicable settlement between the Claimant and the Respondent for those particular claims; and yet, before 6 March 2012, there were several interventions with the City of Łódź made by and on behalf of the Claimant's subsidiary, Enkev Polska.
317. In these circumstances, as a matter of form, the Claimant began these proceedings prematurely against the Respondent. In the Tribunal's view, the Claimant (not being synonymous with Enkev Polska) should have formalised its own particular claims by adequate notice to the Respondent (not being synonymous with the City of Łódź), indicating specifically how the Claimant's shareholding was or was to be affected by the actual or threatened measures by the City of which the Claimant here complains; the Claimant should then have engaged with the Respondent in an attempt amicably to settle those particular claims under the Treaty; and accordingly the Claimant should have waited at least three, if not six, months after such an attempt before resorting to these arbitration proceedings.
318. For several reasons, the Tribunal does not consider that these collective failures require this Tribunal to declare that it has no jurisdiction to address the merits of the Claimant's claims in this arbitration. It is clear on the facts of this case that the Claimant's subsidiary, Enkev Polska, was in active discussions with the City of Łódź over the likely effects of any measures upon its own business in Łódź, from November 2010 onwards. It is clear that if those effects had also included any effects upon the Claimant's own shareholding in Enkev Polska, it would have made no material difference to those discussions or the events which subsequently ensued.
319. Further, both Enkev Polska and the City of Łódź acted in good faith, albeit unsuccessfully and with increasing difficulty, to find an amicable solution to what was fast becoming an irreconcilable dispute between Enkev Polska and the City of Łódź, before March 2012. It is

clear that, even if the Claimant had formally become a party to such attempts at an amicable settlement (in regard to its own particular claims) under the Treaty, that also would have made no material difference to the events which subsequently ensued.

320. Finally, this is not a case where the Claimant has ever deliberately shied away from pressing its case whenever, wherever or to whomsoever it could in Poland. If the Respondent had even opened the door half ajar to any amicable discussions regarding the Claimant's own particular claim (as distinct from *Enkev Polska*), the Claimant would have seized that opportunity without any hesitation. Hence, in the Tribunal's view, this is manifestly not a case where a claimant has consciously defied its obligation to engage in amicable discussions with the host State.
321. With these cumulative explanatory factors, the Tribunal considers that it would not be right to construe the terms of Article 8 of the Treaty as barring absolutely the Claimant's claims in this arbitration as a matter of jurisdiction; nor, for the same reason and on the facts of this case, to consider such claims inadmissible as regards the exercise of jurisdiction by this Tribunal. Having regard to the object and purpose of Article 8 under Article 31 of the Vienna Convention on the Law of Treaties, given also the context of the Treaty intended (by its preamble) expressly to encourage and protect foreign investments in Poland, the Tribunal decides that the over-strict meaning, for which the Respondent contends, is too semantic in its approach and unduly harsh in its result. This is particularly so where the Claimant's non-compliance is only formalistic and where the Respondent has suffered no prejudice which could not be compensated by an appropriate order by this Tribunal for legal and arbitration costs unnecessarily incurred or wasted by reason of the Claimant's undue haste in commencing this arbitration.
322. The Tribunal notes that other arbitration tribunals have taken a similar approach, in the absence of clear wording in the particular BIT requiring a different decision as to jurisdiction or admissibility. The Tribunal has considered these and other legal materials in order to confirm its own approach to Article 8. It need here only refer to the Decision on Jurisdiction in *Ambiente v. Argentina*.<sup>410</sup> That tribunal decided that Articles 8(1)-8(3) of the Italy-Argentina BIT, as regards the pre-requisite for amicable consultation, imposed requirements of admissibility rather than jurisdiction: see paragraphs 577 to 588 of the Decision. The tribunal therefore dismissed the respondent's objections as to both jurisdiction and admissibility in a case where the claimant had deliberately eschewed any form of amicable consultation with the

---

<sup>410</sup> *Ambiente v. Argentina*, Award of 8 February 2013 (Bruno Simma, Karl-Heinz Boeckstiegel and, dissenting, Dr. Santiago Torres Bernardez).

respondent, facts significantly more extreme than the facts of the present case. The Tribunal could cite further legal materials in support of this general approach; but it seems unnecessary to do so here.

323. Accordingly, subject to any order for costs under Article 40 of the UNCITRAL Rules (as to which the Tribunal reserves its full jurisdiction, powers and discretion), the Tribunal decides both that it has jurisdiction and that it can exercise such jurisdiction over the merits of the Claimant's claims in this arbitration made under Articles 3 and 5 the Treaty.
324. *General Approach:* It is however necessary at the outset to record two significant factors in the general approach taken by the Tribunal in this case towards the merits of these claims, as regards respectively procedure and substance.
325. First, this Tribunal is an arbitration tribunal mandated to address and decide by one or more awards a particular dispute in existence between two named parties. The Tribunal's mandate derives from the Parties' consent to be found in the Treaty, the UNCITRAL Arbitration Rules and (to the extent relevant) German law as the *lex loci arbitri*. It is no part of that mandate, however broadly interpreted, to deliver any advisory opinion to the Parties: this Tribunal is not permitted to act in the role of a legal adviser to the Parties; nor is it authorised as an *amiable compositeur* or to act *ex aequo et bono* by the Parties under Article 35(2) of the UNCITRAL Arbitration Rules; nor is it a Court empowered specifically to issue advisory opinions to interested persons, such as the International Court of Justice or the European Court of Justice. It is, indeed, no court at all, but only a tribunal with its powers limited by the boundaries of the Parties' own consent to arbitration. The Tribunal does not accept the Claimant's submission that Article 11 of the Treaty permits this Tribunal to act otherwise: this Tribunal can derive no authority from Article 11 to interpret the Treaty, that role being confined expressly to the Treaty's Contracting Parties.
326. As a matter of procedure, the Tribunal therefore accepts generally the submission made by the Respondent that this Tribunal has no power to advise the Parties as to any future or non-existent dispute, however imminent or grave that potential dispute might be. The Tribunal recognises the difficult commercial position in which the Claimant is placed by this approach: the Claimant's submission to the contrary was made in good faith and doubtless reflected the pressing need for legal certainty and predictability as regards future events shared both by the Claimant and its subsidiary, Enkev Polska. Nonetheless, however tempting that submission might be on commercial grounds for the Claimant, the Tribunal's general approach is necessarily rooted in the wording of Article 8 of the Treaty, limiting the Tribunal's jurisdiction

to a dispute relating to the effects of a measure taken by the Respondent, i.e., a measure taken in the past and not a future measure as yet undertaken.

327. Second, this Tribunal is not an appellate court inserted into the Polish legal system. Nor is it entrusted by the Parties with the general task of judicially reviewing the legality or reasonableness of administrative acts by Polish state entities under Polish law. As already explained, this Tribunal's mandate derives from the Treaty and international law. In particular, it cannot act as the ultimate town planner for the City of Łódź. It is certain that this Tribunal is no more fitted to decide issues of town planning in the City of Łódź than its town planners are fitted to apply and interpret the Treaty as an international arbitration tribunal: each has different roles.
328. This Tribunal therefore accepts generally the submission made by the Respondent that it is not the Tribunal's task, in addressing the substance of the Claimant's claims, "to act as an administrative review body to conduct oversight over the said proceedings" [i.e., the administrative and judicial expropriation proceedings to which Enkev Polska's premises are subjected in Poland]: see paragraphs 6, 17 and 27 of the Respondent's Submission of 28 February 2014.
329. *Article 5:* Article 5 of the Treaty provides that the Respondent shall not "take any measures depriving, directly or indirectly," the Claimant of its investment unless three stated conditions are met by the Respondent. In summary, these conditions relate to: (a) public interest and due process of law; (b) non-discrimination and compliance with any undertaking which the Respondent may have given to the Claimant; and (c) the provision for the payment of "just compensation." Such compensation "shall represent the real value of the investment affected and shall, in order to be effective for [the Claimant], be paid and made transferable, without undue delay, to [e.g., the Netherlands as the country likely to be designated by the Claimant] in any freely convertible currency accepted by the Claimant."
330. The wording of Article 5 does not use the word "expropriation," but rather the broader legal concept of "depriving."<sup>411</sup> In the Tribunal's view, these different terms bear somewhat different legal meanings; but these differences are not material to this case. It is however clear that deprivation can take many different forms, not limited to nationalisation, formal transfer of title or outright physical seizure. It is also clear that the general meaning of lawful deprivation implies conditions as to the taking of the investment for a public purpose provided by law in a

---

<sup>411</sup> Here, as elsewhere, the Tribunal refers to "expropriation" by reference to Polish law and to "deprivation" by reference to Article 5 of the Treaty.

non-discriminatory manner and with adequate compensation, as reflected in the wording of Article 5. The Tribunal notes that Article 1 of Protocol 1 of the 1952 European Convention of Human Rights, being part of EU law and thus also Polish law, contains a materially similar provision.

331. *Direct Deprivation:* In the Tribunal's view, on the facts of this case, it is not possible for the Claimant to contend that any measure taken by the Respondent (including the City of Łódź) has deprived "directly" the Claimant of its rights as a shareholder in Enkev Polska. Those rights under both international law and Polish law are materially identical today as when the Claimant first acquired those shares between 2001 and 2009. The Claimant remains a shareholder in Enkev Polska; it can still exercise its shareholder rights within Enkev Polska, as before; and none of the measures alleged by the Claimant affects directly any of the Claimant's shares or any of the rights associated with those shares. The Claimant does not allege (nor could it) that the Respondent or the City of Łódź has ever intended or expressed any intention to expropriate the Claimant of its shares in Enkev Polska. The Tribunal concludes, as of the date of this Award, that there is therefore no case for the Respondent to answer as regards any "direct" deprivation of the Claimant's investment under Article 5 of the Treaty.
332. *Indirect Deprivation:* Accordingly, the relevant question here is whether the Claimant has been "indirectly" deprived of its rights in Enkev Polska's shares. As regards Article 5, the Claimant submits that the relevant test is whether there exists such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the property owner will not be able to use, enjoy or dispose of its property within a reasonable period of time after the inception of such interference. The Claimant submits that, whatever the position might have been before the "new developments," the position with such developments is now clear with the formal notification of 7 January 2014 of the "Decision" of 30 December 2013 to commence decision-making on a motion for an immediately enforceable expropriation decision by the City of Łódź, namely Exhibit C-150 (the "Notification").
333. Given that these "new developments" from December 2013 onwards are now presented as the high point of the Claimant's case, the Tribunal concentrates on these events for the purpose of its decisions below, albeit that it has kept much in mind the factual context in which the Claimant has earlier presented its case.
334. With the Notification of 7 January 2014, the Claimant submits that the expropriation by the Respondent of at least a material part of Enkev Polska's real property (as a usufruct) is not hypothetical but now, more than ever, both near-inevitable and imminent. The Claimant has not infrequently resorted to invoking the idea of a bulldozer arriving at Enkev Polska's factory

gates within a short time-period, without any prior notice to Enkev Polska and with catastrophic consequences for Enkev Polska's business. It is not necessary for the Tribunal to go as far as that.

335. The Tribunal finds, on the factual evidence in this case, that it is now highly probable that at least a material part of Enkev Polska's real property will be expropriated by the City of Łódź at a future date. That may not be weeks or months away (because there remain several administrative and legal steps to be completed), but such an act of expropriation is most unlikely to be years away. In planning terminology, Enkev Polska's business premises are affected by "planning blight"; and, in order to survive as a successful business with a significant plant and many employees, Enkev Polska is required to prepare in advance of expropriation by moving its business to new premises elsewhere, as soon as reasonably practicable. Such a decision was made by Enkev Polska in September 2013, as evidenced by the Claimant's email message dated 27 September 2013 to the Respondent and the Tribunal; and that decision's implementation has recently been accelerated.
336. The current predicament facing Enkev Polska is well described in the Claimant's Submission of 17 February 2014 to the Tribunal, in regard to the Notification's immediate legal effect under Polish law, namely Article 11d, section 9 and 10 of the Road Legislation [Exhibit C-19]. According to the Claimant, as a matter of Polish law, Enkev Polska can no longer transfer any of its rights pertaining to its real property to any third person, including its use, as security in order to obtain funding to find alternative business premises. Again, according to the Claimant, the legal effect of the Notification encompasses the entirety of Enkev Polska's real property and not only that part which is likely to be the subject of expropriation by the City of Łódź; i.e., only 6,760 m<sup>2</sup> of a total area of 22,306 m<sup>2</sup> (30 percent).
337. As a practical matter, Enkev Polska's inability to use its existing premises as security is, according to the Claimant, gravely impeding Enkev Polska's attempts to fund its alternative location under its contract of 27 January 2014 with the vendor of its new premises. The Claimant submits that Enkev Polska can neither provide such security in the form of its existing real property (given the effect of the Notification); nor can Enkev Polska (in practice, for the same reason) give any security right over any future compensation payable by the City of Łódź to Enkev Polska for the expropriation of its property (see paragraphs 2.11 to 2.14 of the Claimant's Submission).
338. The Tribunal notes that this legal description of Enkev Polska's predicament is not materially challenged by the Respondent. During the procedural meeting held on 7 February 2014, Dr. Wisniewski for the Respondent confirmed: "that the legal effect of the commencement of

the proceedings [i.e., the Notification], which is an *ex lege* effect, so it is not the result of any decision but the pure result of the commencement of the proceedings [...] one of the provisions of the Road Legislation referring to the property which is owned by the State Treasury of Communities [...]” which the Respondent also confirmed as being Article 11d, section 9 and 10, of the Road Legislation of 2003 [Transcript, pp. 19-20]. The Respondent explained these effects further in its Submission of 28 February 2014: “[...] Such effects, preventing the owner – or, in case of Enkev Polska, the perpetual usufructuary – of the land from transferring or encumbering the right to land, only occur upon notification of the announcement to the affected party”: paragraph 41 of the Respondent’s Submission, see also paragraphs 49 and 54.

339. Despite these legal effects since 7 January 2014, it remains a fact that no actual decision has yet been taken by the Respondent to expropriate any part of Enkev Polska’s premises under the Road Legislation, still less any actual expropriation of any part of Enkev Polska’s premises. Moreover, as decided above, the Claimant’s investment is limited to its shares in Enkev Polska (with associated rights) and does not extend to Enkev Polska’s own property. The Claimant’s shares in Enkev Polska have not been expropriated and, on the evidence available to the Tribunal, these shares will not be expropriated under the Road Legislation.
340. In the Tribunal’s view, however, there can be little doubt that, as of now, the commercial value of the Claimants’ rights in its shareholding in Enkev Polska has been adversely affected, albeit not destroyed, by the predicament facing Enkev Polska. The question therefore arises whether such diminution in value amounts in this case to an indirect deprivation of the Claimant’s investment within the meaning of Article 5 of the Treaty.
341. As regards such indirect deprivation, the Tribunal considers that Article 5 of the Treaty requires the Claimant to establish that the practical effect upon its investment of Enkev Polska’s predicament, as regards severity and duration, is materially the same as if its investment in Enkev Polska had been directly deprived by the Respondent. In other words, the Claimant must prove, on the facts of this case, that its investment in the form of shares in Enkev Polska and rights deriving from such shares has lost all or almost all significant commercial value.

342. As described by Professors Paulsson and Douglas in regards to the test under international law, equally applicable to Article 5 of the Treaty, "... the analysis should focus on the nature or magnitude of the interference to the investor's property interests in its investment caused by the measures attributable to the Host State to determine whether those acts amount to a taking."<sup>412</sup> Similarly, Professor Schreuer assessed a challenged measure's severity as follows: "... the decisive criterion when it comes to deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place [is supported by] a broad consensus in academic writings that the intensity and duration of the economic deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure."<sup>413</sup> Professor Dolzer commented to similar effect: "No one will seriously doubt that the severity of the impact upon the legal status, and the practical impact on the owner's ability to use and enjoy his property, will be a central factor in determining whether a regulatory measure effects a taking."<sup>414</sup>
343. The Respondent argued for such an interpretation of Article 5, citing a significant number of other legal materials constituting a "*jurisprudence constante*," including the awards in *Starrett* (1983), *Tippetts* (1984), *Pope & Talbot* (2000), *S.D. Myers* (2000), and *CME* (2001).<sup>415</sup> In *Starrett*, the tribunal stated the test under international law as requiring an interference with property rights "to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the legal owner" (paragraph 154). In *Tippetts*, the tribunal also emphasised the need under international law for the deprivation of the investor's "fundamental rights of ownership" (paragraph 225).
344. It is unnecessary for the Tribunal here to add to these citations or other legal materials. In short, the Tribunal considers that the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for indirect expropriation, taking or deprivation, consistently albeit in different terms, the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or their virtual annihilation and effective neutralisation.

---

<sup>412</sup> J. Paulsson & Z. Douglas, "Indirect Expropriation in Investment Treaty Arbitration," in N. Horn & S. Kröll (eds), *Arbitrating Foreign Investment Disputes* 145, 148 (2004).

<sup>411</sup> C. Schreuer, "The Concept of Expropriation under the ECT and other Investment Protection Treaties," in C. Ribeiro (ed.), *Investment Arbitration and the Energy Charter Treaty*, 144 (2006).

<sup>414</sup> R. Dolzer, "Indirect Expropriations: New Developments," 11 *N.Y.U. Environmental L.J.* 64, 79 (2002).

<sup>415</sup> *Starret Housing Corp v. Iran* (1983) 4 Ir-USCTR 122; *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 Ir-USCTR 219; *Pope & Talbot Inc. v. Canada*, Interim Award of 23 June 2000, NAFTA; *S.D. Myers Inc. v. Canada*, Partial Award of 13 November 2000, NAFTA; *CME Republic v. Czech Republic*, Final Award dated 14 March 2003, UNCITRAL.



345. On the facts of this case, having regard to the magnitude and intensity of the effects upon the Claimant's investment from Enkev Polska's predicament (even with the "new developments" to date), the Tribunal finds that the rights attaching to the Claimant's shares in Enkev Polska have not been rendered "so useless"; nor has the Claimant suffered any loss to its "fundamental rights of ownership" regarding its shareholding in Enkev Polska; nor has the Claimant been deprived of such rights or their exercise as to amount in effect to their neutralisation or annihilation. (The Tribunal does not base its decision on the relatively short duration, so far, of these effects.)
346. Accordingly, the Tribunal decides that the Claimant's claim fails under Article 5 of the Treaty and must be dismissed: there is no measure taken by the Respondent indirectly depriving the Claimant of its investment. This decision suffices to dispose of the Claimant's claim under Article 5 of the Treaty. Nonetheless, as a matter of courtesy to the Parties and their Counsel, given the elaborate and not inconsiderable efforts made by them all in these arbitration proceedings, the Tribunal addresses briefly below the other issues arising under Article 5 of the Treaty in respect of the Claimant's claim, before addressing the Claimant's claims under Article 3 of the Treaty.
347. These other requirements of Article 5 of the Treaty relate, as concerns this case: (i) public interest; (ii) due process of law; (iii) any undertaking by the Respondent to the Claimant; and (iv) just compensation. It is appropriate to take each of these in turn.
348. *Public Interest:* From the evidence adduced in these arbitration proceedings, the Tribunal finds that all measures by the City of Łódź (as alleged by the Claimant) have been and are being taken in the public interest, within the meaning of Article 5(a) of the Treaty. The factual story over the years is long and complicated; and the Tribunal can do no better here than state its acceptance of the statement made in the motion dated 30 September 2013 by the City of Łódź for an immediately enforceable expropriation under the Road Legislation [Exhibit C-151, as here translated into English by the Claimant]:

The investment project that is the subject of this request is a part of the task that involves upgrading of the Warsaw - Łódź railway line stage II, Lot B 2- segment Łódź Widzew Łódź Fabryczna including the Łódź Fabryczna station and the construction of the underground part of the Łódź Fabryczna train station to be used for dispatching and receiving trains and to serve passengers. The reconstruction of the road system and the infrastructure around the multimodal Łódź Fabryczna train station - the construction of the integrated transfer node (hub) above and under the planned Nowotargowa street. In conjunction with the implementation of the task the main train station of the City of Łódź - the Fabryczny train station, was shut down. The main passenger streams are currently served by the Łódź Widzew train station. This situation is very disadvantageous for the operations of the railway transportation, as well as for the passengers. It has a significant impact upon additional transportation difficulties on the main axis of the city: East - West.

It is in the public interest to reduce the implementation time of this investment project as much as possible in order to restore the original location of the city's main train station.

The roads planned to be constructed that are within the scope of this request are a very important element of the task under way. These streets constitute elements of the main transportation services' system that encompasses the train station, the bus station, the city transportation system's bus stops and the parking area. The completion (duration) of the construction of these streets is the essential factor that determines the date of completing (putting into operation) the entire task.

The investment project is carried out in the very downtown area of the city. The acceleration of the investment project's implementation will reduce the difficulties for the city's inhabitants and will decrease the social costs of the investment project under way.

Taking into account the above elements the requesting party [i.e., the City of Łódź] is of the opinion that in accordance with art. 17 clause 1 of the law of April 10, 2003 on special rules for preparing and implementing investment projects related to public roads (Journal of Laws of 2003 no. 80, item 721 as subsequently amended) [i.e., the Road Legislation] it is justified to request granting of the immediate enforcement clause due to the justified economic and public interest.

(The Notification of 7 January 2014 refers to this motion of 30 September 2013; and the latter can therefore be taken as the continued position of the City of Łódź for the purposes of this Award).

349. The Claimant complains that the urban planning proposals made by and on behalf of the City of Łódź have significantly changed over the years. (For ease of explanation, the Tribunal appends overleaf a map submitted by the Claimant). Even if this were materially correct as regards the Premises (which the Tribunal assumes in the Claimant's favour for the sake of its argument), such changes do not support the Claimant's case. To the contrary, it is notorious that urban planners constantly adjust their proposals as any major and complex project moves forward, being subject to (*inter alia*) the vicissitudes of changing priorities, the demands of financing, budgetary limitations and both public and appropriate political influences. In the Tribunal's view, the changes identified by the Claimant support the Respondent's case: it could have been suspicious if the planning proposals of the City of Łódź had constantly targeted Enkev Polska's premise in exactly the same way from beginning to end, despite major changes in the City's urban plans over many years. That is not this case. In the Tribunal's view, there is no evidence of any improper targeting, malice or bad faith on the part of the City of Łódź, still less by the Respondent.

Situation according to Studium 2012

(= NCL)

Nowe Centrum Łodzi



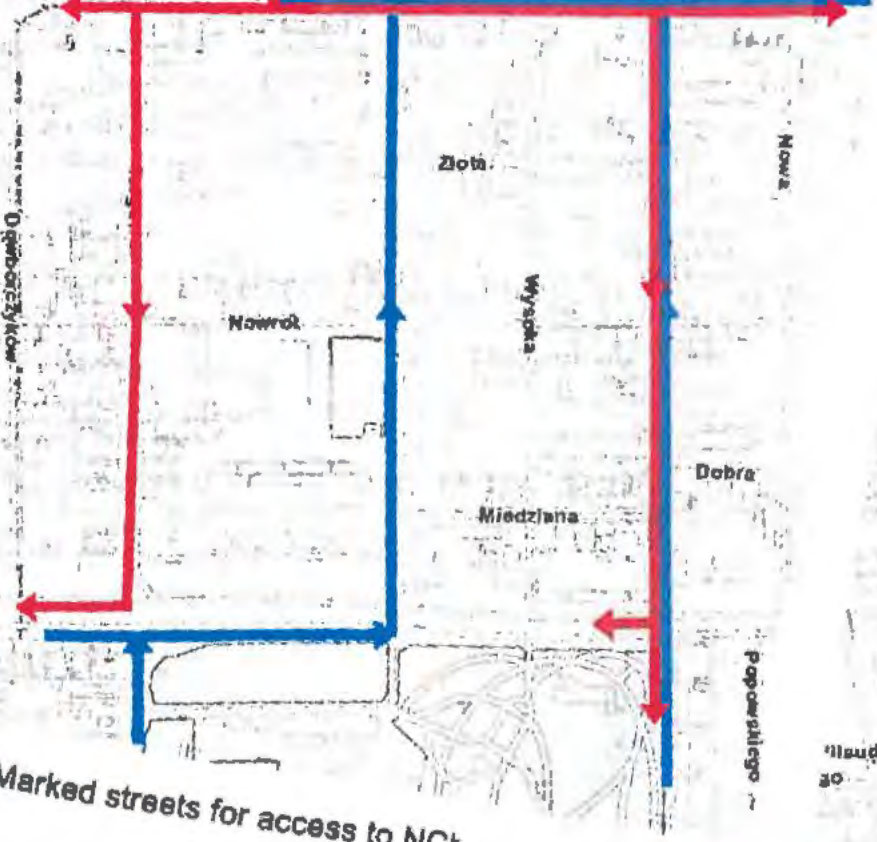
Marked streets for access to NCL according Studium 2002

Marked streets for access to NCL

Variant 1

Nowe Centrum Łodzi

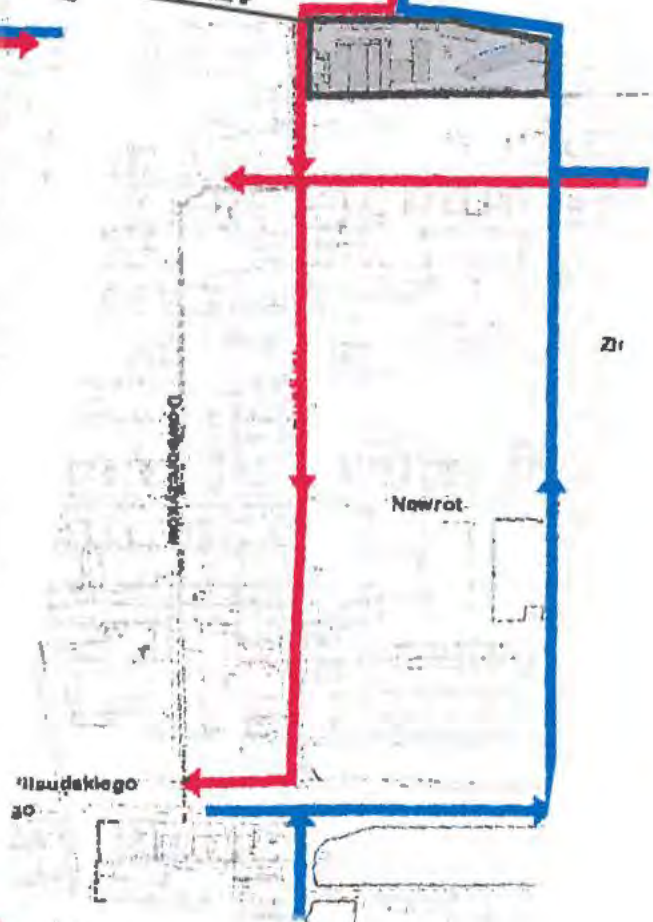
ENKEV



Tribunal note: This map is found in the record of the Expert Report of Mr. Biliński, CE-1, Annex 1.

Nowe Centrum Łodzi

ENKEV



Marked streets for access to NCL

350. *Due Process of Law:* Towards the beginning of this arbitration, the Respondent helpfully supplied a “road-map” of the different and successive administrative, legal and judicial steps which could lead to the eventual expropriation of Enkev Polska’s real property. (It was used at the Hearing on Interim Measures in Berlin on 13 February 2013 and is repeated in the Respondent’s Submission of 28 February 2014.) The Tribunal accepts this road-map as a useful and accurate summary of the legal situation facing Enkev Polska under Polish law. (For ease of reference, a copy of this road-map is appended overleaf).
351. The road-map consists of seven steps, of which the Notification of 7 January 2014 forms only the first step. The second step has not yet been reached, still less any further administrative, legal or judicial step culminating in the actual expropriation of Enkev Polska’s real property under the Road Legislation. In these circumstances, the Tribunal finds that the Claimant has not established any want of due process under Polish or international law: that process has far to go in Poland, including the possibility for several judicial interventions by the Polish courts. In the Tribunal’s view, the Claimant’s complaint is premature. Moreover, there is no reason to assume that the Polish legal system, including the procedures and practices of Polish administrative bodies and Polish courts, would violate in the future the Respondent’s obligations under Article 5(a) of the Treaty.
352. *Any Undertaking:* The Tribunal finds that the Claimant has failed to establish any relevant undertaking by the Respondent within the meaning of Article 5(b) of the Treaty. To the contrary, from the outset of its investment in 2000, the Claimant knew or should reasonably have known that Enkev Polska’s industrial premises, located in the centre of Łódź, were subject to expropriation for urban renewal under Polish law, as any like premises could be in the cities of other European countries, including the Netherlands. Such lawful expropriation for urban planning (with compensation) is a business risk to be accepted by a foreign investor in Poland, just as it must be for a domestic Polish investor. It would have been extraordinary and contrary to Polish law for the City of Łódź to undertake to the Claimant that Enkev Polska would be immune from the rules and procedures imposed by Polish legislation, including the Road Legislation. The Tribunal does not accept the Claimant’s interpretation of the email message of 25 November 2009 sent by [redacted] of the Camerimage Centre and the City of Łódź to [redacted] of the Claimant. It contained no undertaking inconsistent with the Road Legislation; and the Tribunal finds that no other undertaking took place which could support the Claimant’s case. Nor is there any evidence of any discrimination within the meaning of Article 5(b) of the Treaty.

LEGAL BASIS	STEPS TOWARD EXPROPRIATION	ENTITY IN CHARGE	DEADLINE
<b>ADMINISTRATIVE PROCEEDINGS</b>			
1 art. 11a Road Legislation (RL)	Ex parte request for the expropriation decision.  The <u>investor receives notification</u> of commencement of the procedure leading to issuance of the expropriation decision after the request is made with and formally controlled by the administrative body in charge (Article 11d.5 RL).	Road administrator (in practice the Mayor of the Lodz City)	
2 art. 11a RL	Expropriation decision	Relevant administrative body (in practice Office of the city of Lodz; Department of Town Planning and Architecture)	Up to 60 days after receiving the request (no. 1) (Article 11a.3 RL)
3 art. 11i.3 RL	<u>Notification of the decision to the investor</u> ; the deadline for appeal starts from the date of receiving the decision.	Relevant administrative body (in practice Office of the city of Lodz; Department of Town Planning and Architecture)	
4 art. 11g RL, Article 106, 130 Administrative Procedure Code (APC)	<u>Appeal against the expropriation decision.</u>	Enkav may appeal to the administrative body of the second instance (województwo)	14 days after receiving the expropriation decision by the party.
5 art. 11g RL	Examination of the appeal	Administrative body of the second instance (województwo)	30 days after submission of the appeal  Note: Expropriation decision becomes final and enforceable if the appeal is dismissed. If the appeal is granted, the administrative body of the second instance will amend the decision or annul it and order reconsideration.
<b>PROCEEDINGS BEFORE ADMINISTRATIVE COURTS</b>			
6 art. 53 Act on proceedings before administrative courts (PAC)	Complaint to an administrative court  Note: <u>Enkav may request</u> the administrative court to suspend the enforceability of the expropriation decision if this is supported by the <u>possibility harm to the Enkav's interests.</u>	Party to the expropriation decision (Enkav and/or the Mayor of the City of Lodz)	30 days after receiving the expropriation decision of the administrative body of the second instance (no. 4).
7 art. 11g RL	Examination of the complaint	Provincial Administrative Court	2 months from receiving the complaint.
8 art. 173 PAC	Cassation claims (only if violation of substantive law by its erroneous interpretation or improper application; violation of procedure if such violation could have a significant impact on the outcome of the case) to the Main Administrative Court.  Note: If the Main Administrative Court finds the appeal against the award of the Provincial Administrative Court <u>justified, it will – as a rule – annul the award and order the Provincial Administrative Court to re-examine the case.</u>	Party to the proceedings before the Provincial Administrative Court	30 days after receiving the award of Provincial Administrative Court with its justification.

353. *Just Compensation*: Unlawful deprivation is not generally to be regarded as an ordinary risk of foreign investment because it assumes a breach by the host State of its obligations under international law. Conversely, lawful deprivation is generally to be regarded by a foreign investor as a risk ordinarily to be run in the host State. As regards the measure of compensation for lawful deprivation, a State should not be unjustly enriched by taking an investment, whether by direct or indirect deprivation, without paying appropriate compensation for that investment.
354. Accordingly, lawful deprivation, under international law, assumes the payment by the host State to the foreign investor of adequate, effective and prompt compensation, to use the phrasing of the Hull formula.<sup>416</sup> In effect, when a foreign investor makes its investment in the host State, by necessary implication, that State represents to that investor that there will be no deprivation without such compensation in accordance with the host State's international obligations.
355. The Tribunal sees no different result, in principle, from the phrase "just compensation" in Article 5(c) of the Treaty, read with its subsequent explanation; namely: "such compensation shall represent the real value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned in any freely convertible currency accepted by the claimants."
356. No foreign investor should have any reason to suppose that a host State under the Treaty would deprive a foreign investor of its investment without adequate, effective and prompt, i.e., "just compensation" in accordance with its obligations assumed in the Treaty under international law. The Tribunal has considered whether the word "just" bears any other meaning, including its equivalent wording in the Dutch and Polish texts of Article 5, to be interpreted in accordance with the customary rules of interpretation codified in Articles 31 and 32 of the Vienna Convention of the Law of Treaties.

---

<sup>416</sup> See T.W. Wälde and B. Sabahi, "Compensation, Damages, and Valuation" in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* 1049, 1082 (2009).

357. At the Tribunal's request, the Respondent submitted the official texts of the Polish, Dutch and English versions of Article 5(c) of the Treaty. The Respondent emphasised that the English language version would prevail in case of any differences of interpretation; but it noted at the same time that all three language versions concur with each other, underlining the phrase (in each version) "representing the real value of the investment."<sup>417</sup>

*The Polish Version*

5c: decyzjom tym towarzyszy zapewnienie wypłaty sprawiedliwej rekompensaty. Przedmiotowa rekompensata stanowić będzie rzeczywista wartość danych inwestycji i w celu zadośćuczynienia rościcielom będzie wypłacana bez zbędnej zwłoki do kraju wskazanego przez rościciela w dowolnej walucie wymiennej, zaakceptowanej przez rościciela.

*The Dutch Version*

5c: de maatregelen gaan vergezeld van een regeling voor de betaling van een billijke schadeloosstelling. Deze schadeloosstelling dient overeen te komen met de werkelijke waarde van de desbetreffende investeringen en dient, wil zij doeltreffend zijn voor de gerechtigden, zonder onredelijke vertraging te worden betaald en te kunnen worden overgemaakt in een vrij inwisselbare valuta die door de gerechtigden wordt aanvaard.

*The English Version*

5c: the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the real value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned in any freely convertible currency accepted by the claimants.

358. In response, the Claimant commented on the Dutch language version of Article 5(c) of the BIT by stating (i) that the term "billijk" corresponds to the English word "just" meaning "redelijk en rechtvaardig," (ii) that the term "werkelijke waarde" corresponds to the English word "real," and (iii) that "werkelijk" is a term that has two meanings—first, "wezenlijk bestaand" (i.e., genuinely in existence) and, second, "feitelijke verricht, verkregen, verdiend" which has a connotation expressing functionality and usefulness.<sup>418</sup>

359. In simple terms, the dispute between the Parties over the interpretation of Article 5(c) turns on its different possible results, with the Claimant arguing essentially for a valuation based on the replacement (or relocation) value of its investment,<sup>419</sup> and the Respondent arguing essentially

---

<sup>417</sup> Respondent's letter to the Tribunal, dated 18 February 2013, at 1–2.

<sup>418</sup> Claimant's letter to the Tribunal, dated 18 February 2013, ¶ 3.

<sup>419</sup> Claimant's Request for Arbitration, ¶ 4.19; Claimant's Addendum to the Request for Arbitration ¶¶ 2.32–2.34.

for a valuation based on the fair market value of the investment.<sup>420</sup>

360. Fair market value usually means the sales value of an investment at a particular date, immediately before the time at which the expropriation occurred or the decision to expropriate the asset became publicly known. The *World Bank Guidelines on the Treatment of Foreign Direct Investment* (Section 6 of Guideline IV) defines fair market value as “an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.”<sup>421</sup>
361. Replacement (or relocation value) may mean a greater amount because an operating investment cannot usually be replaced by simply acquiring the same tangible assets as the expropriated investment.<sup>422</sup> Such additional factors may include, but are not limited to, the costs of relocation, the technological standard of the different assets, contractual rights, employee costs and customer relationships. The Claimant claims here the costs for the relocation of its investment and the refurbishment of a new building, as well as a sufficient period of transition to avoid the discontinuation of production.<sup>423</sup>
362. The Tribunal has considered whether guidance on this disputed issue of interpretation may be derived from published judgments and awards applying similar wording under international law, together with scholarly texts.
363. *Factory at Chorzów (Germany v. Poland) (PCIJ)*:<sup>424</sup> This well-known case has become the leading precedent on the question of compensation for expropriation. The Permanent Court of International Justice found that the standard of compensation for lawful expropriation would be the “value of the undertaking at the moment of dispossession, plus interest to the day of

---

<sup>420</sup> Respondent’s Response to the Request for Arbitration, Section C, ¶¶ 1.3.4–1.3.6.

<sup>421</sup> *World Bank Guidelines on the Treatment of Foreign Direct Investment* (undated), available at <<http://italaw.com/documents/WorldBank.pdf>>.

<sup>422</sup> W.C. Lieblich, “Determining the Economic Value of Expropriated Income-Producing Property in International Arbitrations,” 8 *J. Int’l Arb.* 59, 69 *et seq.* (1991): “The only way to replace an enterprise is to reassemble every tangible and intangible asset and other elements that contributed to its generation of cash flows.”

<sup>423</sup> Claimant’s Request for Arbitration, ¶ 3.4.

<sup>424</sup> *Factory at Chorzów (Germany v. Poland)* (1928) PCIJ Ser. A No. 17.



payment.”<sup>425</sup> However, in this case, Poland had taken the factory at Chorzów in violation of international law; and thus the judicial statements apply to unlawful expropriation and compensation as a form of restitution under international law. Compensation for unlawful expropriation may entail more than compensation for lawful expropriation. Therefore, it is questionable whether the approach in *Factory at Chorzów* is directly relevant to the present issue of interpretation under the Treaty. For the same reason, the Tribunal has derived no decisive assistance from Article 31 of the International Law Commission’s Articles on State Responsibility and its Commentary.

364. *Norwegian Shipowners’ Claim (Norway v. USA) (PCA)*:<sup>426</sup> In this case the tribunal concluded that compensation was due regardless of whether the expropriatory measures taken by the USA against Norwegian shipowners were lawful or not. In order to determine the compensation standard to be applied, the tribunal relied on international law and U.S. law which entitled the expropriated shipowners to “just compensation.” The Tribunal stated that: “[...] it is common ground that such compensation is measured not only by: (a) the fair actual value of the property taken, but also (b) at the time and place it was taken, and (c) in view of all the surrounding circumstances.”<sup>427</sup> The tribunal also noted that the circumstances of the possible compensation should be based upon a fair market value of the property and that: “[j]ust compensation implies a complete restitution of the *status quo ante*, based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property.”<sup>428</sup> It was common ground between the Parties that just compensation “should be based upon the net value of the property taken.”<sup>429</sup> Due to the unusual circumstances in this case—expropriation for war-like purposes—the tribunal found it somewhat difficult to fix the “real market value of some of these shipbuilding contracts,”<sup>430</sup> and it therefore assessed such value *ex aequo et bono*. Apart from these contracts, the tribunal took into consideration all the circumstances pertaining to the net value of the property.<sup>431</sup>

365. *CME Republic v. Czech Republic*:<sup>432</sup> Article 5(c) of the Netherlands-Czech Republic BIT

---

<sup>425</sup> *Chorzów*, p. 47.

<sup>426</sup> *Norwegian Shipowners’ Claim (Norway v. USA)*, Award of 13 October 1922, XI RIAA, 309.

<sup>427</sup> *Norwegian Shipowners*, 334.

<sup>428</sup> *Norwegian Shipowners*, 338.

<sup>429</sup> *Norwegian Shipowners*, 339.

<sup>430</sup> *Norwegian Shipowners*, 339.

<sup>431</sup> *Norwegian Shipowners*, 341.

<sup>432</sup> *CME*, *supra* note 415.

provides that a lawful expropriation must be accompanied by the payment of just compensation representing the “genuine value of the investments affected.” The tribunal (by a majority) interpreted this requirement as mirroring the Hull formula providing for the payment of prompt, adequate and effective compensation for the taking of foreign property. The tribunal took the view that the standard in investment treaties is the payment of “just compensation,” representing the “genuine” or “fair market” value of the property taken.<sup>433</sup> It concluded that: “[s]ome treaties provide for prompt, adequate and effective compensation amounting to the market value of the investment expropriated immediately before the expropriation or before the intention to embark thereon become public knowledge. Others provide that compensation shall represent the equivalent of the investment affected. These concordant provisions are variations on an agreed, essential theme, namely, that when a State takes foreign property, full compensation must be paid.”<sup>434</sup> The tribunal noted further that its interpretation was supported by the provisions of the Dutch-Czech BIT itself which provides “most favoured nation” treatment to foreign investors. As the (more favourable) Czech-U.S. BIT provided expressly that compensation shall represent the fair market value of an investment, the tribunal decided that this standard could be applied also to Dutch investors by virtue of Article 3(5) of the Dutch-Czech BIT.<sup>435</sup>

366. *Rumeli v. Kazakhstan (ICSID)*:<sup>436</sup> The tribunal, applying the Kazakhstan-Turkey BIT and the Kazakh Foreign Investment Law (“FIL”), equated the term “real value” with the “fair market value.” Article III of the Kazakh-Turkish BIT provides that compensation “shall be equivalent to the real value of the expropriated investment before the expropriatory action was taken or became known”; and Article 7(2) of the FIL provides that “compensation must be equal to the fair market value of the expropriated investments at the moment when the investor learnt of the expropriation.”<sup>437</sup> The tribunal concluded that no relevant distinction could be drawn between the two expressions “real value” and “fair market value.”<sup>438</sup> Interpreting both provisions, the tribunal applied the method of valuation which would most closely reflect the value of the expropriated investment to the investor. Accordingly, the correct approach would be to award such compensation as would give back to the claimants the value of their shares at the time

---

<sup>433</sup> *CME*, ¶ 497.

<sup>434</sup> *CME*, ¶ 497.

<sup>435</sup> *CME*, ¶ 500.

<sup>436</sup> *Rumeli v. Kazakhstan*, Award of 29 July 2008, ICSID Case No ARB/05/16.

<sup>437</sup> *Rumeli*, ¶ 785.

<sup>438</sup> *Rumeli*, ¶ 786.

when the expropriation took place.<sup>439</sup> Regarding the concrete method of valuation, the tribunal relied on the fair market value as defined in the *World Bank Guidelines on the Treatment of Foreign Direct Investment* as a starting point but reminded itself that the Guidelines do not imply the exclusive validity of a single standard, being described only as “an illustration.”<sup>440</sup>

367. *Sistem Mühendisklik v. Kyrgyz Republic (ICSID)*:<sup>441</sup> Article III(2) of the Turkey-Kyrgyzstan BIT provides that, in cases of expropriation, compensation “shall be equivalent to the real value of the expropriated investment before the expropriatory action was taken or became known.” The tribunal stressed that “conceptual clarity in valuing assets for the purposes of calculating compensation payable was desirable; and that it was conscious of the criticism of ‘triangulation’ methods, which select a figure that lies somewhere in the middle ground of estimates put forward by the parties.”<sup>442</sup> The tribunal distinguished between: (i) cost-based valuations that focus on the value of what the investor has invested and lost; and (ii) profit-based approaches that focus on the value of the asset and the expected profits that the investor has lost (being the distinction between what the asset cost and what it was worth).<sup>443</sup> In this case, in which an unlawful expropriation had taken place, the tribunal noted that: “[i]f investors are given compensation which represents a net income stream that is the same as that which the investor could rationally and reasonably have expected, at the time of the taking, to derive from the expropriated investment, and which also reflects the residual value of the investment that would have generated that income stream, then that compensation will ordinarily discharge the liability of the State.”<sup>444</sup> After rejecting the “replacement value approach”<sup>445</sup> and a “multiple deals approach,” the tribunal turned to the Discounted Cash Flow method as the appropriate standard.<sup>446</sup> It applied the definitions set out in the *World Bank Guidelines on the Treatment of*

---

<sup>439</sup> *Rumeli*, ¶ 794.

<sup>440</sup> *Rumeli*, ¶¶ 801–805.

<sup>441</sup> *Sistem Mühendisklik v. Kyrgyz Republic*, Award of 9 September 2009, ICSID Case No. ARB(AF)/06/1.

<sup>442</sup> *Sistem Mühendisklik*, ¶ 154.

<sup>443</sup> *Sistem Mühendisklik*, ¶ 157.

<sup>444</sup> *Sistem Mühendisklik*, ¶ 159.

<sup>445</sup> The tribunal defined this phrase as follows: “The ‘replacement value’ approach to valuation looks to what the investor has put in, not what the investor could expect to derive from the investment — at what the investment cost rather than at what it was worth. But there is no necessary relationship between cost and value. It may take some years before an investment builds up a reputation and turnover which raises its value above the amount that was needed to create it. Indeed, it may never rise to that value; and if that is so, it is not the role of a BIT to turn a bad investment into a good one. The investment was worth what it was worth, regardless of how much it cost.” (para. 160). That is not the Claimant’s claim in the present case, despite the similar terminology.

<sup>446</sup> *Sistem Mühendisklik*, ¶¶ 164 *et seq.*

*Foreign Direct Investment* (Guideline IV) and, without labeling it as such, equated the term “real value” with “fair market value.”

368. *RosInvest UK Ltd. v. The Russian Federation (SCC)*:<sup>447</sup> Article 5(1) of the UK-USSR IPPA (BIT) provides that compensation shall amount to the “real value” of the investment. The tribunal equated that term with “true value,” taking into account the speculative nature of the investment itself, as made by the claimant investor: “While it is difficult to make an assessment of the ‘true value’ at the time of purchase, Respondent’s contention that the market price of the shares reflected the likelihood of Yukos ceasing to exist as a viable company is plausible;” with the claimant admitting that “some of [its] investments turn out to be profitable, and some do not, and the investor may be presumed to understand the market risks when it makes the investment.” Having regard to the speculative nature of the investment, the tribunal decided that any award of damages that rewarded the claimant’s speculation with an amount based on an ex-post analysis would be “unjust.” The tribunal refused to apply the most optimistic assessment of an investment and its return: “Claimant is asking the Tribunal not only to realise and implement the [Claimant’s] ‘buy low and sell high’ strategy, but to go further and apply a best-case approximation of today’s value.”<sup>448</sup>

369. *Funnekotter v. Zimbabwe (ICSID)*:<sup>449</sup> This was a case where the claimants claimed compensation for unlawful expropriation of their farms by the respondent, by reference (*inter alia*) to Article 6(c) of the Netherlands-Zimbabwe BIT of 1996. This text provides for the payment of: “... just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any free convertible currency accepted by the claimants. The genuine value of the investments shall include, but not exclusively, the net asset value thereof as certified by an independent firm of auditors.” The claimants did not seek the restitution of the expropriated farms; and as regards compensation the parties disputed (*inter alia*) the method of calculating the compensation due to the claimants. The tribunal first noted: “that compensation under Article 6(c) must represent the ‘genuine value of the investment [.]’ In certain cases, the net asset value, i.e., the value as

---

<sup>447</sup> *RosInvest UK Ltd. v. The Russian Federation*, Final Award dated 12 September 2010, SCC Arbitration V (079/2005).

<sup>448</sup> *RosInvest*, ¶¶ 667–670.

<sup>449</sup> *Bernardus Henricus Funnekotter & Ors v. Republic of Zimbabwe*, Award of 22 April 2009, ICSID Case No. ARB/05/6.

recorded in the accounts, will not correspond to the genuine value. If the net asset value is lower than the genuine value, compensation will be higher than the net asset value. [...] Whatever may be the basis of evaluation – general international law or Article 6 – the damages must correspond to the genuine value of the properties at the time of expropriation [...] The Tribunal observes that, under general international law as well as under the BIT, investors have a right to indemnities corresponding to the value of their investment, independently of the origin and past success of their investment, as well as of the number and aim of the expropriations done. It will accordingly proceed to the evaluation of the damages suffered in each case at the date of dispossession on the basis of the market value at that date” [footnotes omitted].<sup>450</sup>

370. The Tribunal has also considered whether the issue of disputed interpretation is materially assisted by legal scholars. *Wälde & Sabahi* state that, historically, the position of capital-exporting countries has been to provide for “full compensation” expressed in terms such as “prompt, adequate and effective” (i.e., the Hull formula), “market” or “genuine value.”<sup>451</sup> *Ripinsky & Williams* note that the prevailing BIT standard is “fair market value” and that even where a BIT refers to “genuine,” “actual,” “true” or another value, this term can be interpreted to mean the “fair market value.”<sup>452</sup> However, it is recognised that terms other than fair market value may need additional interpretation to establish their specific meaning.<sup>453</sup> These authors refer to the *Black’s Law Dictionary* (8th ed., 2004) which equates “genuine value,” “actual value,” “just value” or “real value” with “fair market value.”<sup>454</sup> However, *Black’s Law Dictionary* (9th ed., 2009) equates the term “fair market value” with “actual value,” “just value” or “full value” but not longer with “genuine value” or “real value.”<sup>455</sup> *Salacuse*, after having identified the term “market value” as common in investment treaties, notes that: “[a] few treaties are less specific in establishing standards of compensation. Instead of market value, they may require ‘real value’, ‘reasonable compensation’, or simply ‘compensation.’ These formulations of a treaty’s standard for compensation provide ample room for controversy as to their meaning and application in specific expropriation cases.”<sup>456</sup> By distinguishing the terms

---

<sup>450</sup> *Bernardus Henricus Funnekotter & Ors*, ¶¶ 122-124.

<sup>451</sup> T.W. Wälde & B. Sabahi, “Compensation, Damages, and Valuation” in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* 1049, 1082 (2009).

<sup>452</sup> S. Ripinsky & K. Williams, *Damages in International Law*, 79, 183 (2008).

<sup>453</sup> Ripinsky & Williams, 79.

<sup>454</sup> *Black’s Law Dictionary* 1587 (8th ed., 2004).

<sup>455</sup> *Black’s Law Dictionary* 1691 (9th ed., 2009).

<sup>456</sup> J.W. Salacuse, *The Law of Investment Treaties*, 324–325 (2009).

“market value,” “real value,” etc., this author suggests that “market value” and “real value” are different standards of compensation.

371. In *Commentaries on Selected Model Treaties* (ed. Chester Brown), the authors on the Netherlands Model BIT of 2004 (Nico Schrivjer and Vid Prislan) address the wording of Article 6(c), cited in English: “Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with: [...] (c) the measures are taken against just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.”<sup>457</sup> The linguistic similarities (albeit not identical) with Article 5(c) of the Treaty are, of course, self-evident, particularly with the Claimant’s comments on the Dutch version made by its letter dated 18 February 2013 (cited above).
372. These same authors comment on the “very capacious and comprehensive compensation clause” contained in Article 6(c) of the Model BIT, concluding:

By and large, the latter reflects the famous Hull formula as it requires that the payment of compensation be prompt (namely, ‘without delay’), adequate (that is, representing ‘the genuine value of the investments affected’ including ‘interest at a normal commercial rate until the date of payment’) and effective (namely, ‘be paid and made transferable in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants’). The breadth of the clause reflects the position traditionally maintained by the Netherlands’ Government that, in case of expropriation, ‘a just and prompt indemnity shall be immediately and effectively guaranteed [footnote here omitted]. Practically all Dutch BIT’s contain clauses that are similar or identical to the one used in the Model Text. [...] The clause defines ‘just compensation’ with the concept of ‘genuine value’, instead of the notion of ‘fair market value’ which sometimes appears in investment treaties [footnote omitted]. However, there is nothing that would suggest that the concept of ‘genuine value’ may have been intended to represent a standard that is substantially different from that of ‘fair market value’ [footnote omitted]. This view has been adopted by several arbitral tribunals in cases where the applicable Dutch BIT’s required compensation to represent the ‘genuine value of the investment.’ Hence, according to the tribunal in *CME v. Czech Republic*, “‘fair market value’ equates with “just compensation” that represents the “genuine value” of the property affected’ [footnote omitted]. The tribunal in *Funkekotter v. Zimbabwe* similarly proceeded to the evaluation of

---

<sup>457</sup> *Commentaries on Selected Investment Treaties* (ed. Chester Brown), 573 (2013). (Unfortunately, this work does not specifically address this point in respect of the Treaty at issue in these arbitration proceedings.)

the damages on the basis of the market value of the investments at the date of dispossession, while recalling that the compensation under the BIT must represent the 'genuine value of the investment' [footnote omitted] [...].<sup>458</sup>

373. The Tribunal has thought it right to set out these materials at some length to demonstrate that the issue of interpretation dividing the Parties is not straightforward, with even more that could be said by each Party in support of its case. The starting-point under Article 5(c) of the Treaty is "just compensation", the "real value" of the affected investment events (with the Hull formula); but it is clear from the legal materials cited above that both legal terms could be interpreted and applied with a number of different meanings and effects. The Tribunal cannot decide these matters in the abstract. More significantly, it is premature for the Tribunal to decide the issue of interpretation in this Award. If it were a straightforward issue easily answerable, the Tribunal might succumb to the temptation of providing an answer which could eventually save much time and trouble for both Parties in the future, particularly if it might preclude the Parties' entire dispute and both Parties requested such an answer. That is manifestly not the present case. Nor is it even clear to the Tribunal that compensation payable and paid to the Claimant under Polish law would be any different from compensation payable under the Treaty. As already indicated above, this Tribunal can only address a dispute under Article 8 of the Treaty; and it cannot act as a legal adviser to the Parties, as a form of *deus ex machina*. In the Tribunal's view, it would be wrong to decide prematurely a complex issue which could become critical to both Parties in the future, depending on different material events.
374. Accordingly, for these reasons, the Tribunal declines here to go any further in addressing the scope of compensation under Article 5(c) of the Treaty, given that it cannot address a legal dispute which does not yet exist juridically between the Parties.
375. *Article 3:* The Tribunal now turns briefly to the Claimant's claims under Articles 3(1), 3(2) and 3(5) of the Treaty, for ease of reference described by the Parties as the provisions respectively for "Fair and Equitable Treatment" (FET), "Full Security and Protection" (FSP) and the "Umbrella Clause." In the light of the Tribunal's several decisions above, it is appropriate to decide these claims summarily.
376. As regards the FET Standard (which includes a non-impairment provision), the Tribunal does not accept the Claimant's characterisation of conduct by or attributable to the Respondent in the form of improper 'threats'. There is no doubt that relations between Enkev Polska and the City

---

<sup>458</sup> *Commentaries*, 577.

of Łódź became difficult and disputatious with impatience and misunderstandings on both sides. That is insufficient to constitute unlawful conduct by the City, nor indeed by Enkev Polska or the Claimant. In particular, the Tribunal rejects the Claimant's treatment as a "threat" of the letter dated 17 October 2012. It could have been better expressed; but, in the Tribunal's view, the Claimant is wrong to interpret its text in such extreme terms given its overall context and surrounding circumstances. As already decided above, there is no cogent evidence of any arbitrary, capricious or discriminatory conduct by the City of Łódź or the Respondent; nor indeed any act or omission amounting to a breach of the FET Standard, whether interpreted as an autonomous standard or as the minimum standard under international law.

377. The Tribunal rejects the Claimant's case under the FSP Standard. The Tribunal does not consider that the City mistreated the Claimant (or Enkev Polska) over the failed attempts to value the Premises; nor was there any material omission to keep the Claimant informed as to the City's intentions towards the Premises. The Tribunal also notes, again, that the procedures for the City's planned expropriation under the Road Legislation have only recently reached the first step, with several further administrative and legal steps still lying in the future. Poland is a Member State of the European Union, operating under the rule of law (including EU law); and whilst that provides at most only a rebuttable presumption, there is no due process violation established by the Claimant on the evidence adduced in this case at this early stage of these procedures. The Claimant's complaint is, at the very least, premature.
378. The Tribunal rejects the Claimant's case under the Umbrella Clause, for want of any obligation existing by the Respondent towards the Claimant (including Enkev Polska). The so-called "assurances" of 2010 and 2011 invoked by the Claimant were directed at Enkev Polska (not the Claimant); and, from their terms, neither can be considered as an obligation within the meaning of the Umbrella Clause. In the Tribunal's view, such "assurances" fell far short of creating any new legal obligation not already imposed upon the City by Polish law towards Enkev Polska.
379. In conclusion, but most importantly of all, none of these complaints alleged by the Claimant impugn the Respondent's treatment of the Claimant's rights derived from its shares in Enkev Polska: all such complaints, as pleaded by the Claimant, are directed solely at the treatment of Enkev Polska itself and its Premises. That suffices to cause the Tribunal to dismiss the Claimant's claims under Article 3 of the Treaty.
380. *Summary:* Accordingly, for these reasons, the Tribunal dismisses all the Claimant's substantive claims under Articles 5 and 3 of the Treaty. It remains only for the Tribunal to address the consequences of such dismissal.



381. First, the Tribunal discharges all orders for interim measures made to date; and it confirms its rejection on 23 March 2014 of the Claimant's application for further interim measures made by Procedural Order No 7 of 10 February 2014.
382. Second, in principle but here only provisionally, the Tribunal indicates that it is at present minded to allocate all legal and arbitration costs of these proceedings against the Claimant as the overall unsuccessful party under Article 42(1) of the UNCITRAL Arbitration Rules, subject to their assessment and subject also to the Claimant showing cause why such a provisional indication should not be made as a final decision pursuant to Articles 40(1) and 42(2) of the UNCITRAL Arbitration Rules, under a procedure to be fixed in consultation with the Parties following their receipt of this Award.
383. Nonetheless, the Tribunal makes no order for legal and arbitration costs in this Award, reserving in full its jurisdiction, powers and discretion to do so under a further order or award.

*(The remainder of this page left intentionally blank.)*

**IX. OPERATIVE PART**

384. For the reasons set out earlier in this Award, the Tribunal finally decides and awards that:

- (i) The Tribunal has jurisdiction to decide the Claimant's pleaded claims in this arbitration;
- (ii) The Claimant's pleaded claims in this arbitration are admissible;
- (iii) The Tribunal dismisses, on their merits, all the Claimant's pleaded claims in this arbitration (save costs);
- (iv) Save as aforesaid, all claims made by both Parties are rejected (excepting costs); and
- (v) The Tribunal reserves in full its jurisdiction, powers and discretion regarding legal and arbitration costs, to be the subject of a further award.

**Legal Place (or Seat) of Arbitration: Berlin, the Federal Republic of Germany**

**Date: 29 April 2014**

**The Tribunal:**

**V.V. Voeder (President):**

*Kim Helton Yoma*

**Professor Albert Jan van den Berg:**

*Albert Jan van den Berg*

**Dr. Klaus M. Sacks:**

*Klaus M. Sacks*