

**IN THE MATTER OF AN ARBITRATION**

**PURSUANT TO THE UNITED NATIONS COMMISSION ON INTERNATIONAL  
TRADE LAW RULES OF ARBITRATION (“UNCITRAL Rules”)**

**ADMINISTERED BY THE PERMANENT COURT OF ARBITRATION (“PCA”)  
PCA CASE NO. 2010-8**

**- between -**

**POLIS FONDI IMMOBILIARI DI BANCHE POPOLARE SGR.p.A (Italy)  
(the “Claimant”)**

**- and -**

**INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (IFAD)  
(the “Respondent” and together with the Claimant, the “Parties”)**

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**AWARD**

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**Tribunal:**

Professor August Reinisch (Presiding Arbitrator)  
Avv. Filippo Canu  
Professor Brigitte Stern

**Secretary to the Tribunal:**

Dirk Pulkowski (PCA)

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**LIST OF DEFINED TERMS**

| <b>TERM</b>               | <b>DEFINITION</b>   |
|---------------------------|---|
| Claimant or Polis Fondi   | Polis Fondi Immobiliari Di Banche Popolari SGR.p.A., the managing company of the Investment Fund <i>Polis – Fondo comune di investimento immobiliare di tipo chiuso</i> , acting on behalf of the Investment Fund     |
| Respondent or IFAD        | International Fund for Agricultural Development   |
| Headquarters Agreement    | Agreement signed between the Respondent and the Italian Republic on 26 July 1978 regarding the Respondent's provisional headquarters  |
| Lease Agreement           | Agreement signed between the Respondent and Unione Immobiliare S.p.A. on 30 December 1999 for the rental of the building on Via Del Serafico 121, Rome, Italy   |
| Integrative Agreement     | Proposal of an agreement for the extension of the lease submitted on 30 July 2007 by Ms. Giovanna Spina, an employee of the Claimant, to Ms. Theresa Panuccio, Director of Administrative Services for the Respondent |
| rental period             | 3 October 2001 to 2 October 2007  |
| renewal period            | 3 October 2007 to 30 May 2008   |
| UNIM                      | Unione Immobiliare S.p.A.   |
| UNIDROIT Principles       | UNIDROIT Principles of International Commercial Contracts adopted in 2004   |
| MSMC                      | M.S.M.C. Immobiliare S.r.L.   |
| UTE                       | <i>Ufficio del Territorio</i>   |
| MFA                       | Ministry of Foreign Affairs of the Italian Republic   |
| Via del Serafico Building | Building located on Via del Serafico 121, Rome, Italy   |

## I. INTRODUCTION

1. The Claimant is Polis Fondi Immobiliari Di Banche Popolari SGR.p. (hereinafter “Polis Fondi” or the “Claimant”), a company incorporated under the laws of Italy with its office at Foro Buonaparte, 24, 20121 Milan, Italy. The Claimant is represented in these proceedings by:

Messrs. Marco and Paolo Villani, Esq.  
Studio Legale Villani – Associazione Professionale  
Viale Regina Margherita, 43  
20122 Milan  
Italy  
Tel.: +39 02 5462827  
Fax: +39 02 5468430  
E-mail: pvillani@studiolegalevillani.it  
mvillani@studiolegalevillane.it

2. The Respondent is the International Fund for Agricultural Development (hereinafter “IFAD” or the “Respondent”), a specialized agency of the United Nations, with its headquarters at Via Paolo di Dono, 44, 00142 Rome, Italy. The Respondent is represented in these proceedings by:

Mr. Rutsel S.J. Martha (Director of the Legal Service) and  
Ms. Sylvie Martin (Assistant General Counsel)  
Office of the General Counsel  
International Fund for Agricultural Development  
Via Paolo di Dono, 44  
00142 Rome  
Italy  
Tel.: +39 06 54591  
Fax: +39 06 5043463  
E-mail: r.martha@ifad.org  
s.martin@ifad.org

3. The dispute between the Parties arises out of a lease agreement (the “Lease Agreement”) entered into by Unione Immobiliare S.p.A. (“UNIM”) and the Respondent on 30 December 1999 for the Respondent’s rental of a building in Rome situated at Via del Serafico 121 (the “Via del Serafico Building”).
4. The Claimant is the managing company of the Investment Fund *Polis – Fondo comune di investimento immobiliare di tipo chiuso* and acts on behalf of the Investment Fund.

5. The Claimant has filed, on its own behalf and on behalf of the Investment Fund *Polis – Fondo comune di investimento immobiliare di tipo chiuso*, a Statement of Claim in which it sought relief and claimed damages for:
- (i) a sum of €265,734.47 as outstanding balance of the rental amount due for the Respondent's occupation of the Via del Serafico Building from 1 October 2007 to 30 May 2008 as well as for damages in the amount of €12,360.00 as indicated in the Claimant's invoice no. 137 dated 25 July 2008;
  - (ii) costs associated with these proceedings, including all professional fees and disbursements;
  - (iii) interest at a rate to be fixed by the Tribunal starting from the dates of the related invoices mentioned in the Statement of Claim; and
  - (iv) such further relief that counsel may advise and that the Tribunal may deem appropriate.
6. In its additional written submissions - its Reply and its Post-Hearing Brief - the Claimant restated its request for relief without any substantive changes.
7. The Respondent has filed a Statement of Defence and Counterclaim in which it requested the Tribunal to reject the Claimant's claim for €253,734.00 in purportedly unpaid rent. In addition, the Respondent sought a refund of the amount of €179,141.00 plus interest at a rate to be fixed by the Tribunal from the relative dates of payment as the rental amount which the Respondent overpaid, against which the amount of €12,360, plus interest to be decided by the Tribunal, should be set off (corresponding to the amount of damages indicated in the Claimant's invoice no. 137 dated 25 July 2008 which the Respondent accepts). In its Rejoinder, the Respondent amended its Statement of Defence and Counterclaim requesting additionally for the payment of costs associated with these proceedings, including all professional fees and disbursement, as well as such further relief that the Tribunal may deem appropriate within the exercise of its jurisdiction.

## II. PROCEDURAL HISTORY

8. By a Notice of Arbitration dated 10 November 2009, the Claimant initiated arbitration proceedings against the Respondent "on its own behalf and on behalf of the Investment Fund *Polis – Fondo comune di investimento immobiliare di tipo chiuso* in accordance with Article 3 of the UNCITRAL Arbitration Rules of 1976 (the "UNCITRAL Rules") and Article 15 of the Lease Agreement. Article 15 of the Lease Agreement provides:

[...]

*Without prejudice to the foregoing, any dispute or controversy arising from the interpretation or implementation of the present contract shall be resolved in the following manner. The parties will attempt to settle the matter amicably through direct contact.*

*If no agreement is reached within sixty days, the matter will be referred to arbitration at the request of any of the parties. There will be three arbiters: one appointed by IFAD, the other by the Lessor and the third, appointed as President, by mutual agreement between the first two.*

*In the case of disagreement, the third arbiter will be appointed according to the regulations of UNCITRAL (United Nations Commission on International Trade Law). The UNCITRAL regulations will apply to the arbitration proceedings.*

*Arbitration will take place in Rome and the official language of the proceedings shall be English. The parties agree that (the) [sic] award pronounced with what is set forth in this article is the final decision of the dispute.*

9. In its Notice of Arbitration, the Claimant appointed Avv. Filippo Canu, Via Lattuada, 20, 20135 Milan, Italy as the first arbitrator in these proceedings. By letter dated 14 December 2009, the Respondent appointed Professor Brigitte Stern, 7 rue Pierre Nicole, 75005 Paris, France as the second arbitrator in these proceedings.
10. By letter dated 8 February 2010, Avv. Canu and Professor Stern jointly requested Professor August Reinisch, Universität Wien, Schottenbastei 10-16/2/5, 1010 Wien, Austria to serve as the Presiding Arbitrator in these proceedings, and by letter dated 16 February 2010 Professor Reinisch accepted the appointment.
11. On 22 February 2010, the Presiding Arbitrator sought the Parties's views on procedural matters that the Tribunal intended to address in the Terms of Appointment and Procedural Order No. 1. In particular, the Presiding Arbitrator invited the Parties to indicate any points of agreement on applicable procedural rules, documentary and witness evidence, and the timetable for the written submissions.
12. On 1 March 2010, the Claimant sent a letter to the Tribunal, setting out *inter alia*, the Parties' points of agreement and disagreement regarding the matters set out in the Presiding Arbitrator's letter. By letter of the same date, the Respondent confirmed that the Claimant's letter of 1 March 2010, "accurately reflected" the Parties' points of agreement and disagreement.
13. By letter dated 17 March 2010, the Tribunal invited the Parties to indicate their views on the Tribunal's alternative proposal on the timetable for the written submissions. By letters

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dated 18 March 2010 and 19 March 2010, the Claimant and the Respondent respectively agreed with the Tribunal's proposed timetable contained in its 17 March 2010 letter.

14. On 19 March 2010, the Tribunal issued Procedural Order No. 1, which memorialized the Parties' points of agreement and provided further direction from the Tribunal with respect to these proceedings.
15. In a letter dated 7 April 2010, the PCA asked the Parties to indicate their availability for an oral hearing either on 20 September 2010 or on 27 September 2010 at the Peace Palace, The Hague or in Italy. By separate letters dated 9 April 2010, the Parties indicated their availability for an oral hearing in The Hague on 20 September 2010. The Tribunal confirmed in its letter to the Parties dated 16 April 2010 that the oral hearing would be held at the Peace Palace in The Hague on 20 September 2010.
16. On 15 April 2010, the PCA sent the Parties signed copies of the Terms of Appointment.
17. The Claimant submitted its Statement of Claim with documentary evidence on 3 May 2010.
18. On 14 June 2010, the Respondent submitted its Statement of Defence and Counterclaim with documentary evidence.
19. On 14 July 2010, the Claimant submitted the Claimant's Reply with documentary evidence as well as a written witness statement by Ms. Giovanna Spina, property manager at Polis Fondi.
20. On 10 August 2010, the Respondent submitted its Rejoinder with documentary evidence.
21. On 20 August 2010, the Tribunal issued Procedural Order No. 2, in which it invited the Claimant to submit by 6 September 2010 a short additional brief addressing only the arguments regarding the counterclaim contained in the Rejoinder dated 10 August 2010.
22. In Procedural Order No. 2, the Tribunal also requested the Parties to confer with each other and inform the Tribunal by 27 August 2010 if they are able to agree on a date by which they must notify the names of witnesses to be called or requested to be produced. The Tribunal stated that, absent such an agreement, it intended to set a time limit on its own motion without delay. The Tribunal also proposed to schedule a pre-hearing telephone conference on 1 September 2010. On 23 August 2010, both Parties confirmed their availability for the pre-hearing telephone conference.

23. On 1 September 2010, the Tribunal held a pre-hearing telephone conference with the Parties. During the telephone conference, the Parties confirmed to the Tribunal that they did not wish to avail themselves of the opportunity pursuant to Section 2.4.4 of Procedural Order No. 1 to call, or request the production of, witnesses at the oral hearing. The Parties also confirmed that the Tribunal could take account of Ms. Giovanna Spina's written witness statement for its award. The Tribunal likewise indicated that it was not requesting the presence of witnesses at the oral hearing.
24. During the pre-hearing telephone conference on 1 September 2010, the Parties indicated their preference not to prepare an agreed timeline of undisputed facts before the hearing, and the Tribunal agreed that no additional documentation would be required from the Parties. The Tribunal also reserved its decision as to whether post-hearing briefs should be submitted, until the hearing. Finally, the Parties agreed on a provisional schedule of pleadings during the oral hearing.
25. On 6 September 2010, the Claimant submitted the Claimant's Authorized Second Reply.
26. On 20 September 2010 the hearing was held.
27. On 21 September 2010, the Tribunal issued Procedural Order No. 3 in which it requested, *inter alia*, the Respondent to confirm by 5 October 2010, whether it had requested and/or received from the Italian Government the reimbursement of any rental or other expenses paid for the Via del Serafico Building and if such reimbursements were requested and/or paid, to indicate the amount of such reimbursements. In Procedural Order No. 3, the Tribunal also requested the Parties to submit post-hearing briefs by 20 October 2010.
28. On 5 October 2010, the Respondent provided documentary evidence to the Tribunal pursuant to paragraph 2 of Procedural Order No. 3, submitting in particular and among others, a witness statement from Ms. Antonella Favia dated 5 October 2010.
29. On 20 October 2010, the Parties submitted their respective Post-Hearing Briefs.

### **III. SUMMARY OF UNDISPUTED FACTS**

30. What follows is a chronological summary of the essential facts that are relevant to this dispute, without prejudice to the full factual record that the Tribunal has considered. Based on the Parties' submissions and the oral hearing, it appears to the Tribunal that the essential facts underlying this dispute are as follows:

31. On 26 July 1978, the Respondent signed the Headquarters Agreement with the Italian Republic regarding its provisional headquarters (the “Headquarters Agreement”). Section 3 of the Headquarters Agreement provides, *inter alia*:

*The Government shall provide or cause to be provided to the Fund, as long as its seat is in Rome, suitable premises and facilities required for its functioning. Such premises shall be provided free of charge, excepting those expenses specified in sub-sections (c) and (d) below. In implementation of this provision:*

*(a) The Government shall assist the Fund in the renting of the premises described in the Annex hereto, and in particular shall reimburse to the Fund all rental paid for the premises.*

[...]

32. Section 104 of the IFAD Manual entitled *Administrative Implementation of the Provisional Headquarters Seat* “sets out the policies and procedures governing the administrative implementation of [...] Section 3 of the Headquarters Agreement [...] regarding the provision by the [Italian Government] of suitable premises and facilities required for the functioning of IFAD [...].”<sup>1</sup> Section 104(1.2.1) states that “[i]t is implicit in [Section 3(a) of the Headquarters Agreement] that no reimbursement will be claimed by [*sic*] office premises rented without the consent of the Italian Government”.<sup>2</sup>
33. Beginning in 1978, the Respondent’s offices in Rome were located at Via del Serafico 107.<sup>3</sup> In 1998, the Respondent began negotiations to rent the building located at Via del Serafico 121 – the Via del Serafico Building – with its then owner, UNIM.<sup>4</sup>
34. In a letter to UNIM dated 7 May 1998, the Respondent invited UNIM to specify the final terms of the rental contract for the Via del Serafico Building.<sup>5</sup> In the same letter, the Respondent also stated that “as [UNIM was] aware, [IFAD], before signing a new lease agreement, will have to forward everything to the competent Italian [a]uthorities that will arrange for the carrying out of the necessary procedure”.<sup>6</sup>

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<sup>1</sup> Para. 1.1, IFAD Manual, Section 104, Administrative Implementation of the Provisional Headquarters Seat [R11].

<sup>2</sup> Para. 1.2.1, IFAD Manual, Section 104, Administrative Implementation of the Provisional Headquarters Seat [R11].

<sup>3</sup> Statement of Defence and Counterclaim, p. 2.

<sup>4</sup> *Id.*

<sup>5</sup> Letter to UNIM from the Respondent dated 7 May 1998, (translated from Italian to English), [R1].

<sup>6</sup> *Id.*

35. On 2 October 1998, the Respondent's representatives met with representatives of UNIM and the Italian Ministry of Foreign Affairs (the "MFA"). The minutes of that meeting state that "[...] the process of handing over the [Via del Serafico Building] to the legal owner [may be delayed but] this will not delay the whole process of jointly ([the MFA], [UNIM] and [IFAD]) reviewing the building and negotiating a rental proposal".<sup>7</sup> The minutes further state that "[...] any decision taken by the proprietor will need to be ratified by their Executive Board (which will probably take place in November) and also the [*Ufficio del Territorio* ("UTE")] (the Italian [a]uthority which will ascertain the fairness of the rental cost) will need to be involved from the beginning of the whole process".<sup>8</sup>
36. By letter to the Respondent dated 10 May 1999, UNIM outlined its best terms and conditions for leasing the Via del Serafico Building. These terms and conditions included, *inter alia*:
- (i) an annual rent set at 3,480,000,000 Lire;
  - (ii) annual ISTAT increases pursuant to the provisions of article 1.9, section 6, of Law 5.4.1985 No. 118, starting from the second year of the lease;
  - (iii) effective date of the contract from 1 January 2001 except that the date will be brought forward to the first day of the month after the date on which the work on the Via del Serafico Building is concluded if that occurs before 1 January 2001;
  - (iv) delivery of the building on the date on which the work is concluded, pursuant to attachments A and B, and in any case by 31 December 2000;
  - (v) contract duration of six years, renewable for an additional six years;
  - (vi) building maintenance and improvements by UNIM as outlined in attachment A and customization work by UNIM as requested by IFAD; and
  - (vii) validity of the proposal until 30 June 1999 after which the terms and conditions will cease to have effect and IFAD and UNIM will be free to enter into other negotiations.
37. In its letter to UNIM of 22 June 1999, a copy of which UNIM signed "as confirmation of its contents" and "to confirm full acceptance", the Respondent informed UNIM that "[the Respondent] will immediately transmit [UNIM's offer] to the competent Italian authorities, in application of the Headquarters Agreement, for their evaluation and possible acceptance of the signing of the proposed lease contract".<sup>9</sup> The Respondent added that it "will inform UNIM as soon as such approval has been granted by the Italian authorities".<sup>10</sup> In the same

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<sup>7</sup> Minutes of the Meeting between UNIM, the MFA and the Respondent, 2 October 1998, [R2].

<sup>8</sup> *Id.*

<sup>9</sup> Letter to UNIM from the Respondent dated 22 June 1999 (translated from Italian to English), [R4].

<sup>10</sup> *Id.*

letter, the Respondent likewise stated that “[i]n the event that the Italian authorities do not furnish [IFAD] with the necessary authorizations to enter into the contract by 31 December 1999 [which is the date to which the validity of UNIM’s proposed terms and conditions was extended] [IFAD] undertakes to reimburse UNIM for the costs incurred, upon presentation of appropriate justifications with regard to the final design, based on the estimate of [UNIM’s] consulting architect (see attached) up to the amount of Italian Lire 250,000,000 (two hundred and fifty million)”.<sup>11</sup>

38. It appears that a copy of the letter dated 22 June 1999, a draft lease agreement and “additional information” was transmitted to the “Italian authorities” on 24 August 1999.<sup>12</sup> It was the Respondent’s “understanding” that the documents were forwarded to UTE and “the approval [was at that time] awaited”.<sup>13</sup>
39. During a meeting on 23 October 1999 between the Respondent’s representatives and UTE, it was stated that “after [the officer responsible for the approval of the rental proposal] expresses his opinion, it needs to be confirmed by other officers [...] from other divisions of [UTE]”.<sup>14</sup>
40. It is stated by the Respondent that in December 1999, the MFA “informally informed” the Respondent that the rental amount proposed by UNIM was acceptable.<sup>15</sup>
41. By a Note Verbale dated 16 December 1999 which was copied to the MFA and UTE, the Respondent transmitted to the Italian Permanent Representation to IFAD the “last version” of the rental contract for the Via del Serafico Building which the Respondent and UNIM agreed to sign. The rental contract was “to be transmitted to the competent Italian offices for their comment and clearances”.
42. On 30 December 1999, the Respondent and UNIM signed the Lease Agreement. The signature of the Lease Agreement on the penultimate day of the year must be understood in the context of an agreement between the Parties contained in a letter from the Respondent to UNIM dated 22 June 1999 pursuant to which IFAD would be obligated to pay up to Lire 250,000,000 to compensate UNIM for expenses advanced for its architect, unless IFAD signed the Lease Agreement in 1999.

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<sup>11</sup> Letter to UNIM from the Respondent dated 22 June 1999 (translated from Italian to English), [R4].

<sup>12</sup> Statement of Defence and Counterclaim, p. 2.

<sup>13</sup> Respondent’s Note Verbale dated 15 November 1999 [R6].

<sup>14</sup> Note to File dated 27 October 1999 [R5].

<sup>15</sup> Statement of Defence and Counterclaim, p. 3.

43. By a letter to the MFA dated 30 December 1999, which was copied to the Respondent and received on 11 January 2000, UTE informed the Respondent that “an annual overall amount of rent of Lire 2,837,000,000 (two billion eight hundred and thirty seven million) may be considered fair, with reference to current prices, instead of the Lire 3,480,000,000 as requested by the owners”.<sup>16</sup>
44. On 20 January 2000, the Respondent’s representatives met with the representatives of UNIM and the MFA “to ask for the [MFA’s assistance] in seeking a revision of [UTE’s] decision”.<sup>17</sup> A Note to File dated 25 January 2000 states that during that meeting, an MFA representative stated that “[UTE’s] opinion authori[z]ing a smaller amount than that requested by UNIM was received very late ([30 December 1999]) and for this reason [the Respondent] and [the MFA] could not negotiate any change with UNIM”.<sup>18</sup> The Note to File further states that “[the Respondent] was forced to accept UNIM’s proposal [because] it would have [otherwise] had to pay a penalty and lose the option to rent the [Via del Serafico Building]”.<sup>19</sup> The Note to File also states that during the meeting, the Respondent “agree[d] to request [for] the [MFA’s approval] before extending the contract”.<sup>20</sup>
45. By a letter to the MFA dated 10 March 2000, UTE reconfirmed the annual rental amount of Lire 2,837,000,000 for the Via del Serafico Building and determined that Lire 643,000,000 would be the fixed annual amount not subject to any re-evaluation that will be added to the rent for a period of six years.<sup>21</sup> According to the Respondent, UTE’s letter of 10 March 2000 stated that the rental amount agreed by the Parties on 30 December 1999 could be accepted if it was redefined as: (i) “one for rent (subject to increase in accordance with the ISTAT index)”; and (ii) “one for amortization of building works (which would not be subject to increase)”.<sup>22</sup>
46. In the course of the year 2000, the ownership of the Via del Serafico Building was transferred from UNIM to M.S.M.C. Immobiliare S.r.L. (“MSMC”). By deed dated 25 June 2001, MSMC transferred the ownership of the Via del Serafico Building to the Claimant. By letter dated 9 November 2001, Pirelli & Co. Property Management, on behalf of

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<sup>16</sup> Letter to the MFA and copied to the Respondent from the *Ufficio del Territorio di Roma* dated 30 December 1999 and received on 11 January 2000 (translated from Italian to English) [C7].

<sup>17</sup> Statement of Defence and Counterclaim, p. 3.

<sup>18</sup> Note to File dated 25 January 2000 [C8].

<sup>19</sup> *Id.* The letter to the MFA from UTE dated 30 December 1999 was received on 11 January 2000.

<sup>20</sup> Note to File dated 25 January 2000 [C8].

<sup>21</sup> Letter to the Respondent from the *Ufficio del Territorio* dated 10 March 2000 [C11]. The annual rental amount of Lire 2,837,000,000 and the fixed annual amount of Lire 643,000,000 for the customization works was confirmed in a Note Verbale dated 26 April 2001 by the Permanent Diplomatic Representation of Italy to the United Nations, Rome. Note Verbale dated 26 April 2001 (translated from Italian to English) [R8].

<sup>22</sup> Statement of Defence and Counterclaim, p. 3.

MSMC, informed the Respondent that the ownership of the Via del Serafico Building was transferred from MSMC to the Claimant on 25 June 2001.<sup>23</sup> In the same letter, Pirelli & Co. Property Management informed the Respondent that as of 25 June 2001, “[the Claimant] ha[d] taken over the relationship with [the Respondent] in connection with the [Lease Agreement] currently in effect”.<sup>24</sup>

47. Because of renovation work on the Via del Serafico Building, the premises were only handed over to the Respondent on 3 October 2001.
48. On 29 October 2001, the Claimant issued to the Respondent invoice no. 32 for the rental of the Via del Serafico Building for the period 3 October 2001 to 31 March 2002, which was for the amount of €925,589.13. By letter dated 22 November 2001, the Respondent informed the Claimant that it had initiated a bank transfer for the lesser amount of €918,334.29<sup>25</sup>, an amount which according to the Respondent, corresponded to the amount that the Respondent owed according to UTE’s decision dated 10 March 2000.<sup>26</sup> In the letter of 22 November 2001, the Respondent “reserve[d] the right to return to th[e] issue once the meetings foreseen ha[d] been finalized”.<sup>27</sup>
49. On 3 December 2001, the Claimant informed the Respondent that the calculations that the Respondent had sent to the Claimant via facsimile not only indicated a lesser rental amount than that stipulated in the Lease Agreement but also specified an amount of Lire 643,000,000 payable as amortization of building work.<sup>28</sup> The Claimant stated that “th[o]se circumstances [we]re completely different from the terms of the Lease Agreement and from the other documents [that the Respondent had sent to the Claimant]”.<sup>29</sup> The Claimant further added that the Respondent had not provided the Claimant “with any document showing a valid agreement amending the terms of [the Lease Agreement]”.<sup>30</sup> Finally, the Claimant stated that it awaited the Respondent’s prompt payment of €925,589.13 which was the amount effectively due under invoice no. 32 dated 29 October 2001.<sup>31</sup>

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<sup>23</sup> Letter to the Respondent from Pirelli & Co. Property Management dated 9 November 2001 (translated from Italian to English) [R10].

<sup>24</sup> *Id.*

<sup>25</sup> Letter to the Claimant from the Respondent dated 22 November 2001 (translated from Italian to English) [C5].

<sup>26</sup> Statement of Defence and Counterclaim, para. 2.16. *See* Letter to the Claimant from the Respondent dated 22 November 2001 (translated from Italian to English) [C5].

<sup>27</sup> *Id.*

<sup>28</sup> Letter to the Respondent from the Claimant dated 3 December 2001 (translated from Italian to English) [C6].

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

50. To address the matters that formed the subject of these exchanges, the Parties held a meeting in early February 2002. The Parties disagree as to the exact date and content of that meeting, and the differences between the Parties in that regard are explained in the subsequent section.
51. By letter dated 4 March 2002, the Respondent confirmed to the Claimant that, should the Respondent exercise the option of renewing the Lease Agreement, the Respondent “will in good time initiate the procedure for such renewal with the [MFA], as per the Headquarters Agreement”.<sup>32</sup> In the same letter, the Respondent stated that “[t]he option for renewal of the [Lease Agreement] is understood to be on the same conditions, indicating as amount of annual rental the amount specified under Article 6 of the [Lease] [A]greement as determined with reference to the date of handing over of the building and as subsequently updated at the end of the six year period”.<sup>33</sup>
52. Between 18 March 2002 and 19 October 2007, the Claimant issued invoices for an amount which was calculated by applying an adjustment based on the increase in the ISTAT index to the amortization of the building works and the rental amount, which the Respondent paid in full. According to the Claimant, the Respondent paid €7,254.84 on 8 May 2002 as “the difference with respect to [invoice no. 32] dated 29 October 2001 [...]”.<sup>34</sup> The Claimant stated that the Respondent paid the rental amount stipulated in the Lease Agreement for the entire duration of the rental period.<sup>35</sup>
53. On 4 July 2007, the Respondent confirmed its request to the Claimant “to prolong the lease agreement [...] for a period of six (6) months from 2 October 2007 to 2 April 2008 [...]”.<sup>36</sup> In the letter, the Respondent stated that “the rent is reimbursed by the Italian Government which has already assessed the fairness of the rent and of the reimbursement of the costs of adapting the building, for the previous six year period”.<sup>37</sup> The Respondent stated that since the “building work has been fully reimbursed”, it was necessary to define the rent to be paid for the extension period by means of a new agreement.<sup>38</sup>
54. On 30 July 2007, Ms. Giovanna Spina, an employee of the Claimant “[r]esponsible for [l]ease [m]anagement” sent Ms. Theresa Panuccio, Director of Administrative Services for

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<sup>32</sup> Letter to the Claimant from the Respondent dated 4 March 2002 (translated from Italian to English) [C13].

<sup>33</sup> *Id.*

<sup>34</sup> Statement of Claim, p. 7.

<sup>35</sup> *Id.* See C12.

<sup>36</sup> Letter to the Claimant from the Respondent dated 4 July 2007 (translated from Italian to English) [C14].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

the Respondent, an e-mail attaching a draft integrative agreement (the “Integrative Agreement”) for the extension of the Lease Agreement from 3 October 2007 until 2 April 2008.<sup>39</sup> The Integrative Agreement indicated that the rental amount for the period until 2 April 2008 was €1,043,114.48 which was calculated based on the rental amount in the Lease Agreement, updated using the ISTAT index. In her witness statement dated 5 July 2010, Ms. Spina asserted that the rental amount for the renewal period was “an amount of rent identical to the [...] amount paid under the Lease Agreement”.<sup>40</sup> Ms. Spina further recalled that the Respondent did not object to the rental amount and itself stated that “[the Respondent] would contact the [MFA] only for the purposes of establishing the form of the new [lease] [a]greement, namely either a document integrating the first [a]greement or a new [a]greement”.<sup>41</sup>

55. On 19 September 2007, the Claimant issued invoice no. 119 for the period 1 October 2007 to 31 March 2008 for the amount of €1,016,946.90.
56. By letter dated 24 September 2007, the Respondent informed the Claimant that the MFA had requested that a new lease agreement be drawn up, a draft of which was enclosed with that letter for the Claimant.<sup>42</sup> The Respondent then stated that if the Claimant did not have any comments on the draft of the new lease agreement, the Respondent would send it to the MFA “to start the relative authorization procedures”.<sup>43</sup>
57. As stipulated in Article 4 of the Lease Agreement, the duration of the lease was six years beginning on 3 October 2001, when the Via del Serafico Building was handed over to the Respondent. The original rental period thus expired on 2 October 2007.
58. By letter dated 16 November 2007, the Respondent informed the Claimant that “while awaiting the [MFA’s approval]”, it was proceeding to make payment of €508,473.45 which was 50% of the rental amount stipulated in invoice no. 119 dated 19 September 2007.<sup>44</sup> The Respondent made the payment on 4 December 2007 and, on 30 April 2008, paid the remaining 50% of the balance of the rental amount for the period 1 October 2007 to 31 March 2008.<sup>45</sup>

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<sup>39</sup> E-mail to Ms. Theresa Panuccio from Ms. Giovanna Spina dated 30 July 2007, with attachment (translated from Italian to English) [C15].

<sup>40</sup> Witness Statement of Ms. Giovanna Spina dated 5 July 2010 (translated from Italian to English).

<sup>41</sup> *Id.*

<sup>42</sup> Letter to the Claimant from the Respondent dated 24 September 2007 [C16].

<sup>43</sup> *Id.*

<sup>44</sup> Letter to the Claimant from the Respondent dated 16 November 2007 (translated from Italian to English) [C18].

<sup>45</sup> Statement of Claim, p. 8. *See* C12.

59. In a letter dated 17 April 2008, the *Agenzia del Demanio* – the Italian public property agency – informed the MFA that the appropriate rental amount for the period after the expiration of the Lease Agreement “should be the rental as previously approved [...] updated to the present”.<sup>46</sup>
60. On 9 May 2008, the Claimant issued invoice no. 73 for the period from 1 April 2008 to 31 May 2008 for the amount of €355,086.29.<sup>47</sup>
61. By letter dated 5 June 2008, the Respondent informed the Claimant that pursuant to an MFA Ministry Note dated 20 May 1998, it “can” pay the amount of €1,118,658.72 for the period from 1 October 2007 to 30 May 2008.<sup>48</sup> Since it had already paid the Claimant €1,016,946.90 as payment for invoice no. 119 dated 19 September 2007, the Respondent stated that it would proceed to pay €101,711.82 as the difference due against invoice no. 73 dated 9 May 2008.<sup>49</sup>
62. The Respondent surrendered possession of the Via del Serafico Building on 16 June 2008.<sup>50</sup>
63. As is undisputed by the Parties, during its occupation of Via del Serafico Building, the Respondent had conducted certain works on the wiring system and had equipped the premises with furniture. The Respondent did not remove all of the furniture placed inside the premises nor the works carried out on the wiring system.
64. On 25 July 2008, the Claimant issued invoice no. 137 for the amount of €12,360 relating to the expenses that the Claimant incurred in relation to the transfer of furniture outside of the Via del Serafico Building after the Respondent left and work carried out on the wiring system.<sup>51</sup>

#### IV. SUMMARY OF DISPUTED FACTS

65. While the basic facts underlying the dispute are undisputed between the Parties, the Parties do disagree with regard to some of the factual underpinnings of the case. Specifically, while both Parties agree that a meeting among their representatives took place in early February

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<sup>46</sup> Letter to the MFA from the *Agenzia del Demanio* dated 17 April 2008 (translated from Italian to English) [R12].

<sup>47</sup> [C41].

<sup>48</sup> Letter to the Claimant from the Respondent dated 5 June 2008 (translated from Italian to English) [C19].

<sup>49</sup> *Id.*

<sup>50</sup> The Parties initially disagreed as to the date on which the Respondent vacated the Via del Serafico Building. *See* Statement of Defence and Counterclaim, p. 5 and Statement of Claim, p. 8.

<sup>51</sup> Invoice no. 137 dated 25 July 2008 [C42].

2002, the Parties differ as regards the date and - more importantly - the exact content of the discussion at that meeting.

66. While the Claimant submitted that a meeting was held between its representatives and the Respondent's representatives on 11 February 2002, the Respondent suggested that the meeting actually occurred on 8 February 2002.<sup>52</sup> The Parties are in agreement, however, that this difference is ultimately immaterial for the legal qualification of the case.
67. As regards the content of the meeting, the Parties are roughly in agreement that the following matters were discussed:
- (i) That UTE stated in a note dated 30 December 1999 received by the Respondent on 11 January 2000 that the fair rent for the Via del Serafico Building was Lire 2,837,000,000 and not Lire 3,480,000,000 as set forth in the Lease Agreement;<sup>53</sup>
  - (ii) That, prior to the receipt of UTE's opinion on the fairness of the rental amount, the Respondent signed the Lease Agreement which stipulated a rental amount of Lire 3,480,000,000;<sup>54</sup>
  - (iii) That, in a note dated 11 March 2000, UTE confirmed the rental amount of Lire 2,837,000,000 as a fair annual rent for the Via del Serafico Building, specifying that because of the alterations done on the property the rent could be increased by Lire 643,000,000 for each of the six years in the rental agreement, such amount not being subject to revaluation by ISTAT;<sup>55</sup>
  - (iv) That the overall rent of Lire 3,480,000,000 was ultimately accepted by UTE with the stipulation that part of the amount was to be considered as amortization of renovation expenses and not subject to revaluation.<sup>56</sup>
68. In addition, however, the Claimant alleged that Polis' representatives expressly objected to the Respondent's contention that any relevant agreement had been reached with regard to the amount of the rent in addition to the terms of the Lease Agreement of 30 December

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<sup>52</sup> Statement of Defence and Counterclaim, p. 4.

<sup>53</sup> Statement of Claim, p. 5.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; Statement of Defence and Counterclaim, p. 4.

<sup>56</sup> *Id.*

1999. In the Claimant's submission, Polis made its position clear that "the relationship between Polis and IFAD was governed exclusively by the [Lease Agreement]."<sup>57</sup>

69. The Respondent, in turn, noted that it emphasized during the meeting that MSMC, the owner of the Via del Serafico Building immediately before the Claimant, was fully aware of the circumstances of the conclusion of the Lease Agreement when it acquired the property from UNIM.<sup>58</sup>

## V. POSITIONS OF THE PARTIES

70. The Parties' arguments, as set out in their written submissions and presented during the oral hearing, can be summarized as follows.

### A. THE CLAIMANT'S POSITION

#### 1. The Statement of Claim

71. The Claimant argued that the Lease Agreement should be interpreted and applied according to the Headquarters Agreement and the recognized principles of international trade law, thereby excluding reference to Italian laws on leasing except when specific references are made to such laws. Accordingly, the Claimant submitted that the Lease Agreement and "international legal principles in commercial transactions shall rule the relations between the Parties, irrespective of any [n]ational [l]aw or international convention".<sup>59</sup>
72. According to the Claimant, although its claim refers exclusively to the period from 1 October 2007 to 31 May 2008, it is necessary to examine the Parties' "entire contractual relationship [...] from the start of their business relations".<sup>60</sup> The Claimant submitted that it shall address the periods from 31 December 1999 to 30 September 2007 and 1 October 2007 to 31 May 2008.<sup>61</sup>
73. With regard to the period from 31 December 1999 to 30 September 2007, the Claimant averred, among others that:

- (i) Neither Party ever objected to the validity of the Lease Agreement; and

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<sup>57</sup> Statement of Claim, p. 5.

<sup>58</sup> Statement of Defence and Counterclaim, p. 4.

<sup>59</sup> Statement of Claim, p. 12.

<sup>60</sup> *Id.* at p. 13.

<sup>61</sup> *Id.*

- (ii) The validity of the Lease Agreement was not in any manner subordinate to authorizations by third parties, including private citizens, Italian authorities or international authorities.<sup>62</sup>

74. The Claimant stated that, notwithstanding the Italian Government's observations that the rental amount stipulated in the Lease Agreement could not be considered "fair" unless it covered renovation costs, the Respondent fully complied with its financial obligations falling due under the Lease Agreement.<sup>63</sup> According to the Claimant, the Respondent was, from a legal perspective and in any event, obligated to comply with the Lease Agreement.<sup>64</sup>

75. The Claimant argued that under the Lease Agreement, the validity or enforceability of the Respondent's obligations were not subordinate to prior approval by the Italian Government. Likewise, the Claimant averred that the Headquarters Agreement did not explicitly or implicitly stipulate that the Lease Agreement's validity or "the determination of [its] financial aspects" were subject to the Italian Government's prior approval. Referring to Section 3(a) of the Headquarters Agreement, the Claimant argued that the section "simply stat[es] that [Italy] will reimburse the [Respondent] for rent outlay" and not, as the Respondent contended, that the Lease Agreement is subject to the Italian Government's prior approval.<sup>65</sup>

76. The Claimant further argued that pursuant to Section 11(b) of the Headquarters Agreement, the Respondent had full capacity to contract independently, without the Italian Government's prior authorization to agreements which the Respondent was a party to.<sup>66</sup>

77. Further, the Claimant averred that the general principles of international law confirm the validity of the Lease Agreement and the Claimant's "grounds for complaint". According to the Claimant, the two "super principles" of international trade law, *pacta sunt servanda* and *bona fide* imply that:

- (i) The Lease Agreement is binding on the Parties;
- (ii) The Lease Agreement is enforceable on the Parties; and
- (iii) The Lease Agreement must be performed by the Parties in good faith.<sup>67</sup>

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<sup>62</sup> Statement of Claim, p. 12.

<sup>63</sup> *Id.*, p. 14.

<sup>64</sup> *Id.*

<sup>65</sup> Section 3(a) of the Headquarters Agreement provides that: "The Government shall assist the [Respondent] in the renting of the premises described in the Annex thereto, and in particular shall reimburse to the [Respondent] all rental paid for the premises".

<sup>66</sup> Section 11(b) of the Headquarters Agreement provides that: "The Government recognizes the juridical personality of the [Respondent], and in particular, its capacity: (i) to contract [...]".

<sup>67</sup> Statement of Claim, p. 15.

78. The Claimant argued that the Respondent fully acquiesced to the Lease Agreement by paying the rent stipulated in the agreement for the entire rental period.<sup>68</sup> The Claimant also cited the Respondent's letter to the Claimant dated 4 March 2002 in which the Respondent stated that "[t]he option for renewal of the [Lease Agreement] is understood to be on the same conditions, indicating as amount of annual rental the amount specified under Article 6 of the [Lease Agreement] as determined with reference to the date of handing over of the building and as subsequently updated at the end of the six year period".<sup>69</sup> The Claimant interpreted the Respondent's statement to mean that the Respondent fully accepted the Lease Agreement and that it expressly committed to pay a similar rental amount for the renewal period.<sup>70</sup>
79. Citing the Respondent's Note to File dated 25 January 2000, the Claimant argued that the Respondent and the Italian Government both knew of the impossibility of "imposing amendments" to the Lease Agreement.<sup>71</sup> The Note to File dated 25 January 2000 states that an MFA representative noted during a meeting between the MFA and UNIM on 20 January 2000, that "UTE's opinion authori[z]ing a smaller amount than that requested by UNIM was received very late [...] and for this reason [the Respondent and the MFA] could not negotiate any change with UNIM".<sup>72</sup>
80. The Claimant further averred that it cannot be claimed that the Claimant's predecessor-in-title accepted UTE's opinion on the fairness of the rental amount stipulated in the Lease Agreement given that:
- (i) UNIM's representative to the meeting stated that "[...] since UNIM had been taken over by another company and their EB was changing, he was not in a position to revise their request (which [wa]s still 3.5 bln)";
  - (ii) The Claimant objected to the applicability of UTE's opinion on the fairness of the rental amount stipulated in the Lease Agreement and demanded payment for the rental amount stipulated in the Lease Agreement from the time that the Claimant became the owner of the Via del Serafico Building;
  - (iii) By always paying the rental amount in compliance with the Claimant's requests and in accordance with the Lease Agreement, the Respondent fully

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (citing Respondent's Letter to the Claimant dated 4 March 2002, [C13 ]).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Note to File dated 25 January 2000 [C8].

performed its obligations under the Lease Agreement irrespective of the determinations of the MFA.<sup>73</sup>

81. With regard to the period 1 October 2007 to 30 May 2008, the Claimant noted that:
- (i) The Respondent initially asked the Claimant for an extension of the Lease Agreement for a period of six months, that is, from 2 October 2007 to 2 April 2008;
  - (ii) The Respondent proposed, alternatively, that either a new agreement or a document integrating the Lease Agreement be executed;
  - (iii) In response to the Respondent's proposal in (ii) above, the Claimant submitted to the Respondent the draft of an Integrative Agreement to the Lease Agreement stipulating a rental amount calculated with reference to the rental amount stipulated in the Lease Agreement updated to June 2007;
  - (iv) Because the MFA requested that a new lease agreement be executed, the Respondent submitted to the Claimant a draft lease agreement which neither specified the amount of rent nor indicated that the amount of rent was subject to a third party's approval;
  - (v) The Respondent "performed the subsequent agreement" by continuing to occupy the Via del Serafico Building and by paying "to a large extent" the sums that the Claimant requested.<sup>74</sup>
82. According to the Claimant, the Respondent did not, in any correspondence relating to the renewal of the Lease Agreement, implicitly or explicitly state that the new lease agreement or the rental amount for the period 2 October 2007 to 30 May 2008 would be subject to the MFA's approval.<sup>75</sup>
83. Because the Parties never applied the MFA's determinations throughout the term of the Lease Agreement, the Claimant interpreted the Respondent's reference to the MFA's "approval" of the new lease agreement<sup>76</sup> as "merely an internal procedure, of no external significance, and not opposable to third parties".<sup>77</sup> According to the Claimant, the agreements between the Respondent and the MFA are at most *res inter alios acta*, "which take [no] importance [on the relations between the Parties]".<sup>78</sup>

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<sup>73</sup> Statement of Claim, p. 16.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at p. 18.

<sup>76</sup> The Claimant quoted the Respondent's letters to the Claimant dated 16 November 2007 and 28 January 2009 wherein the Respondent referred to the approval of the MFA.

<sup>77</sup> Statement of Claim, p. 18.

<sup>78</sup> *Id.* at p. 19.

84. The Claimant noted that for the period 1 October 2007 to 31 March 2008, the Respondent *medio tempore* paid the rental amounts due “without reserve or right to request refund of sums paid”.<sup>79</sup>
85. The Claimant added that it would never have accepted that the validity of the Lease Agreement or that the determination of the rental amount be submitted to the MFA’s determination.<sup>80</sup> Additionally, the Claimant stated that it would not have allowed the Respondent to remain in the Via del Serafico Building if it had been aware that the rental amount was subject to the MFA’s approval.<sup>81</sup>
86. The Claimant rejected the Respondent’s assertion that the Claimant implicitly accepted that the Lease Agreement was subject to the MFA’s approval because the Claimant did not object to the Respondent’s previous correspondence which referred to the need for the MFA’s approval. According to the Claimant, it was not “required” to raise specific objections to those correspondence because the “tenor of the letters” and the Respondent’s behaviour did not lead the Claimant to think that the Respondent would refuse to comply with the terms of the Lease Agreement.<sup>82</sup> Furthermore, the Claimant sent the Respondent invoices for the rental amount to which the Respondent made no challenges or refusals.<sup>83</sup>
87. According to the Claimant, the Respondent “acted in an illegitimate manner and not in good faith” and, therefore, the Respondent “should be declared to be under a legal obligation to pay the amounts requested”.<sup>84</sup>
88. The Claimant argued that after the Lease Agreement ceased to be valid, the Parties entered into an Integrative Agreement covering the occupation of the Via del Serafico Building for a rental amount indicated in the Claimant’s e-mail dated 30 July 2007.<sup>85</sup> The Claimant averred that “the execution of the contractual agreement was in th[at] instance replaced by behaviour univocally aimed at performing the agreement, and must therefore be deemed tacit acceptance of the agreement by performance”.<sup>86</sup> To that end, the Claimant noted that the Respondent remained in the Via del Serafico Building and paid “part” of the rental amount which the Claimant requested in compliance with the terms of the Claimant’s Integrative Agreement by *facta concludentia*.<sup>87</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at p. 20.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Statement of Claim, p. 21.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

89. Alternatively, if it could not be considered that the Respondent entered into the Integrative Agreement as a result of *facta concludentia*, the Claimant stated that the Respondent then continued to occupy the building *sine titulo* in the absence of a valid contractual relationship.<sup>88</sup> In such a case, the Respondent's obligation to pay the disputed rental amount would not arise out of a contractual relationship. Instead, the Respondent would be liable to pay "an indemnity [as] compensation for damages caused to the [Claimant]".<sup>89</sup> Because the relations between the Parties were previously governed by a contractual agreement, the Claimant added that the compensation for damages should be determined based on the Lease Agreement. To that end, the Claimant argued that a lesser amount than the rental amount stipulated in the Lease Agreement could not be considered as the proper amount for damages, because for the duration of the Lease Agreement's validity the Claimant "categorically refused the [MFA]'s parameters".<sup>90</sup>
90. The Claimant also argued that the Respondent was liable for the amount of €10,680 as the cost for the disposal of furniture that the Respondent neglected to dispose before it handed the Via del Serafico Building back to the Claimant.<sup>91</sup> The Claimant also expended €1,680 for which it considers the Respondent liable because the Respondent "unforeseeably connected the electrical wiring and the data and telephone cables to an adjacent building [...] without having informed the [Claimant] of the same and without obtaining authorization to do so".<sup>92</sup>

## 2. The Claimant's Reply

91. In its Reply, the Claimant argued that the Respondent's Counterclaim was inadmissible because Article 15 of the Lease Agreement required the Respondent with regard to its Counterclaim to commence arbitration only "after settlement of the controversy ha[d] been attempted".<sup>93</sup> The Claimant noted that "[o]nly in the Counterclaim has the Respondent indicated its intention to request payment of the sum of €179,141.00 [as refund]".<sup>94</sup> As a result, the Claimant averred that the Respondent failed to comply with the procedural prerequisite of settlement negotiations as required by the Lease Agreement.
92. Noting the Respondent's statement in its Counterclaim that, among other things, "[t]he [Respondent's] administrative budget [...] does not provide any amount to be used as rent",

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at p. 22.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Claimant's Reply, p. 3.

<sup>94</sup> *Id.* at p. 4.

the Claimant submitted that the entity which may “legitimately request” for a refund of the rental amount is the entity which paid those amounts, that is, the Italian Government and not the Respondent.<sup>95</sup> The Claimant argued that since the Respondent expended no funds for the payment of the rent, the Respondent correspondingly did not have the right to request a refund of the rent.

93. The Claimant reiterated its argument that the Headquarters Agreement did not stipulate that the rental amount or any lease agreement is subject to the approval of the Italian Government. More so, the Claimant added that under the Headquarters Agreement, the Italian Government “itself may [not] refuse to reimburse [the Respondent] for the [rental amount] [...]”.<sup>96</sup>
94. The Claimant stated that the application of the UNIDROIT Principles was not self-evident, since the Lease Agreement applicable between the Parties did not contain any express reference to these Principles even though the UNIDROIT Principles had already been adopted at the time of the conclusion of the Lease Agreement.<sup>97</sup>
95. Rebutting the Respondent’s argument that the Parties had reached agreement on the rental amount based upon a serious mistake, the Claimant argued that the Respondent’s approval of the Lease Agreement in the absence of appropriate documentation from the Italian Government cannot be considered “excusable or [a] relevant mistake”.<sup>98</sup> According to the Claimant, the Respondent’s actions constituted “knowing imprudence” or “gross negligence” because the Respondent “should have waited for the conclusion of the procedure with the Italian Government”.<sup>99</sup> In any event, the Claimant submitted that the Respondent did not prove its assertion that “[the Respondent] was informally informed by [the MFA] in December 1999 that the rental amount proposed by UNIM was acceptable”.<sup>100</sup>
96. The Claimant also rejected the Respondent’s argument that the agreement that remained in force between the Parties was “in a form ‘re-interpreted’ by the Italian [a]uthorities”.<sup>101</sup> The Claimant argued that the Italian authorities did not have the authority to re-interpret the Lease Agreement nor did the Parties authorize them to do so. On the contrary, the Claimant asserted that the validity of the Lease Agreement is confirmed by Article 13 of the UNIDROIT Principles which provides that “a contract validly entered into is binding upon

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<sup>95</sup> *Id.* at pp. 4-5.

<sup>96</sup> *Id.* at p. 5.

<sup>97</sup> *Id.* at pp. 8-9.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Claimant’s Reply, p. 9.

<sup>101</sup> *Id.*

the Parties [and] can only be modified or terminated in accordance with its terms or by agreement”.<sup>102</sup>

97. The Claimant submitted that “[p]ursuant to Sections 1599 and following [...] the Italian Civil Code, which necessarily applies”, the Claimant succeeded *ex lege* to UNIM.<sup>103</sup> Stating that the Claimant succeeded exclusively to the Lease Agreement and that the Claimant only became aware of the correspondence between UNIM and the Respondent upon reading the Statement of Defence and Counterclaim, the Claimant argued that the correspondence between UNIM and the Respondent may not be considered part of the Lease Agreement. The Claimant submitted that “any understanding” that the Parties may have expressed during the course of their pre-contractual negotiations must be deemed superseded by “a later meeting of the minds” embodied in the Lease Agreement itself.<sup>104</sup>
98. The Claimant added that although it was aware of the content of the Lease Agreement, of the regulations applicable to it and of the Respondent’s nature as an international organization, those factors cannot lead to an interpretation of the Lease Agreement that is contrary to the Agreement’s literal meaning.
99. With regard to the renewal of the lease, the Claimant reiterated its position that the Parties entered into an Integrative Agreement, which the Respondent adhered to by *facta concludentia*, behaving in a manner directed at performing the agreement. The Claimant noted that the rental amount it requested was exactly the amount that the Respondent had paid up to that date. The Claimant rejected the Respondent’s assertion that the Parties had not agreed on the rental amount for the renewal of the lease because “agreement had been concluded with respect to the rent which [the Respondent] had effectively paid [...]”.<sup>105</sup>
100. The Claimant submitted that, if the Respondent had not adhered to the agreement by *facta concludentia*, the Respondent occupied the Via del Serafico Building *sine titulo* and the compensation to the Claimant must be determined in reference to the rental amount stipulated in the Lease Agreement considering that “the relations between the Parties had previously been governed by [that agreement]”.<sup>106</sup>
101. The Claimant rejected the Respondent’s request for a refund of rental amounts paid beyond that authorized by Italian authorities because by paying the rental amount stipulated in the Lease Agreement, the Respondent “waive[d] [its] rights” and “accept[ed] [...] the

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<sup>102</sup> Article 13, UNIDROIT Principles of International Commercial Contracts 2004.

<sup>103</sup> Claimant’s Reply, p. 11.

<sup>104</sup> *Id.* at p. 12.

<sup>105</sup> Claimant’s Reply, p. 14.

<sup>106</sup> *Id.*

amounts”.<sup>107</sup> The Claimant added that even if the Respondent’s staff paid the rental amounts in contravention of internal procedures, the Respondent “should bear the consequences of its actions”.<sup>108</sup> The Claimant asserted that the Respondent’s “conclusive and unequivocal behavi[o]r demonstrat[ed] acceptance” of the Lease Agreement and its payments “did not happen by mistake”.<sup>109</sup>

102. The Claimant also submitted that since it has not been demonstrated that the Italian Government abstained from paying the Respondent the amount of €179,141.00, it must be assumed that the Italian Government reimbursed the Respondent for that amount. The Claimant explained that if such were the case, a refund of that amount to the Respondent “would become an *iniusta locupletatio* without any justification”.<sup>110</sup>

### 3. The Claimant’s Authorized Second Reply

103. The Claimant reiterated its position that the Counterclaim is inadmissible because the Respondent did not attempt to resolve the subject matter of the Counterclaim amicably with the Respondent as required by the Lease Agreement.
104. Regarding the argument that the Respondent was not entitled to a refund for the rental amounts it purportedly overpaid, the Claimant stated that the Respondent exhibited in that regard “contradictory behavio[r] which is both ambiguous and lacking in good faith”.<sup>111</sup> The Claimant stated that the merits of the Counterclaim cannot be discussed absent any showing by the Respondent that: (i) it requested reimbursement from the Italian Government for the sums paid; and (ii) the Italian Government had refused to make the reimbursement.<sup>112</sup> According to the Claimant, if the Respondent had neglected to request such a reimbursement, then it should not expect to remedy its own negligent conduct by requesting payment from the Claimant.

### 4. Oral Arguments

105. During the oral hearing, the Claimant reiterated its arguments made in its written submissions. The Claimant further stated that there was no direct evidence that the Italian Government imposed a particular re-interpretation of Article 6 of the Lease Agreement on the Parties, thus raising the question whether the Italian Government had the power to re-interpret provisions of the Lease Agreement. Regarding the Respondent’s Counterclaim,

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<sup>107</sup> *Id.* at p. 15.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at p. 16.

<sup>110</sup> *Id.* at p. 17.

<sup>111</sup> Claimant’s Authorized Second Reply, p. 5.

<sup>112</sup> *Id.*

the Claimant explained its view that the Respondent's Counterclaim was "technically" inadmissible because it was not a direct consequence of the Claimant's Claim.

### **5. The Claimant's Post-Hearing Brief**

106. In its Post-Hearing Brief, the Claimant argued that Ms. Antonella Favia's Witness Statement dated 5 October 2010 proved that the Respondent knowingly made rental payments through individuals whose job it was to make such payments.<sup>113</sup> Specifically, the Claimant explained that Ms. Favia's statement showed that "the invoices and the subsequent payments were carefully evaluated and monitored" and that contrary to the Respondent's assertion, the Respondent had not paid the rental amounts in error.<sup>114</sup> The Claimant argued that as a result, the Respondent complied *facta concludentia* with the Lease Agreement proposed by the Claimant for the renewal period.<sup>115</sup>
107. Regarding the Respondent's Counterclaim, the Claimant reiterated its argument that, in order for the Respondent to be legitimately entitled to the refund claimed in the Counterclaim, the Respondent must show that: (i) it requested reimbursement from the Italian Government for the rental amounts paid; and (ii) the Italian Government had refused to reimburse the amounts.<sup>116</sup> According to the Claimant, it is clear from the documentation submitted by the Respondent, including Ms. Favia's written statement, that the above two conditions were not met. Therefore, the Claimant argued that the Respondent was not entitled to claim the refund.

## **B. THE RESPONDENT'S POSITION**

### **1. The Statement of Defence and Counterclaim**

108. In its Statement of Defence and Counterclaim, the Respondent argued that the Lease Agreement must be interpreted and applied in accordance with the Headquarters Agreement and the recognized principles of international commercial law, excluding the application of any domestic law, particularly the Italian law on leasing except for technical provisions which, according to the Respondent, are not at issue in this case.<sup>117</sup>
109. The Respondent submitted that the best source for the recognized principles of international commercial law is the UNIDROIT Principles of International Commercial Contracts adopted in 2004 (the "UNIDROIT Principles"). Although not intended to provide binding rules which must be applied by the Tribunal, the Respondent averred that any citations to

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<sup>113</sup> Claimant's Post-Hearing Brief, p. 2.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 3.

<sup>117</sup> Statement of Defence and Counterclaim, p. 5.

the UNIDROIT Principles serve as an indication of the recognized principles of international commercial law.<sup>118</sup>

110. The Respondent noted that its administrative budget does not provide for any amounts to be used as rent.<sup>119</sup> The IFAD President was also barred by Regulation VI(2) of the Respondent's Financial Regulations to authorize any payment for rent.<sup>120</sup>

111. The Respondent recalled the negotiations for the rental of the Via del Serafico Building, noting in particular:

- (i) The Respondent's letter to UNIM dated 7 May 1998 stated "a fact which was well known to the owner [...] the fact that the amount of rent paid by the [Respondent] for any building which it occupied must, in accordance with the Headquarters Agreement, be approved by the Italian [G]overnment";
- (ii) At each step of the negotiations for the rental of the Via del Serafico Building, the Respondent reiterated that the rental amount was subject to approval by the Italian authorities;
- (iii) UNIM insisted that the Lease Agreement be signed before the end of 1999 and had it not been signed, the Respondent would have been obliged to pay UNIM the cost of planning work;
- (iv) Oral confirmation was received by the Respondent that the rental amount was acceptable to the Italian authorities. The Respondent and UNIM were convinced that the rental amount was acceptable to the Italian authorities even absent written confirmation.<sup>121</sup>

112. The Respondent noted that it received on 11 January 2000 a letter dated 30 December 1999 in which the Italian authorities stated that the rental amount stipulated in the Lease Agreement was "too high". In that regard, the Respondent argued that the Parties had reached agreement on the rental amount based on a serious mistake (UNIDROIT Principles 3.4).<sup>122</sup> The Respondent explained that it would not have signed the Lease Agreement if it had known that the Italian authorities had not approved the rental amount. Conversely, UNIM also would not have signed the Lease Agreement considering that it was aware that the Headquarters Agreement did not permit the Respondent to accept a rental amount that had not been approved and that the Respondent was unable to pay the difference between the approved rental amount and the rental amount in the Lease Agreement.

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<sup>118</sup> *Id.* at p. 7.

<sup>119</sup> *Id.* at p. 8.

<sup>120</sup> *Id.*

<sup>121</sup> Statement of Defence and Counterclaim pp. 8-9.

<sup>122</sup> *Id.* at p. 9.

113. The Respondent also noted that in a letter from the Italian authorities dated 10 March 2000, it was proposed that the rental amount stipulated in the Lease Agreement could be accepted if it was characterized as being made up of the rental amount and an amount which represented a yearly amortization of the cost of improving the Via del Serafico Building. According to the Respondent, the Lease Agreement could only stand as written if the Respondent and UNIM accepted the Italian authorities' proposed reinterpretation of the agreement.<sup>123</sup> Otherwise, the Respondent averred, it was obligated to "avoid" the Lease Agreement.<sup>124</sup> The Respondent submitted that the parties to the Lease Agreement must have accepted the decision of the Italian authorities since the contract continued in force and the Respondent did not "avoid" it.<sup>125</sup>
114. The Respondent stated that when the ownership of the Via del Serafico Building was transferred from MSMC to the Claimant, MSMC declared that the property had been leased to the Respondent in accordance with the Lease Agreement.<sup>126</sup> According to the Respondent, the deed of sale did not mention that the contract "was based on a fundamental mistake of fact and it did not refer to the subsequent communications from the Italian authorities".<sup>127</sup>
115. The Respondent argued that the deed of sale between MSMC and the Claimant contained misleading covenants, particularly stating that MSMC "declares and guarantees [...] that there are no cases or proceedings of any kind underway before any judicial, administrative or fiscal authority concerning the property or its use" and that "no appeals to the Tax Commissions, or any determinations of value are underway".<sup>128</sup> The Respondent submitted that contrary to that statement in the deed, the process for obtaining UTE's approval was a "proceeding before an administrative authority" involving a determination of the value of the property for the purposes of rental.<sup>129</sup>
116. According to the Respondent, MSMC did not fully inform the Claimant of the special circumstances governing the Lease Agreement.<sup>130</sup> The Respondent argued that the Lease Agreement was not the full agreement and that MSMC should have informed the Claimant that the rental amount stipulated in the Lease Agreement was subject to the approval of the Italian authorities. The Respondent added that because the Claimant was aware of the

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<sup>123</sup> *Id.* at p. 10.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Statement of Defence and Counterclaim, p. 11.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

Respondent's "special status", the Claimant should have made appropriate inquiries.<sup>131</sup> Likewise, the Respondent stated that the Claimant should have noted that the Lease Agreement was subject to the principles of international commercial law and that the transfer of the Lease Agreement from MSMC to the Claimant required the Respondent's consent (UNIDROIT Principles, Article 9.3.3).<sup>132</sup> The Respondent would have informed the Claimant regarding the reinterpretation mandated by the Italian authorities, had the Claimant sought the Respondent's consent.

117. Assuming that the Claimant first learned that the Lease Agreement did not represent the entire agreement between the Respondent and MSMC when the Claimant first received the Respondent's payment on 22 November 2001, the Respondent submitted that the Claimant should have sought recourse from MSMC because it appeared that MSMC may have misled the Claimant with respect to the nature of the Lease Agreement and neglected to inform the Claimant that an administrative procedure which affected the rental amount was still then outstanding.<sup>133</sup>
118. The Respondent further argued that the Claimant did not exercise adequate due diligence. That the Lease Agreement was with an international organization subject to the principle of specialty and other relevant rules of international law should have alerted the Claimant that the Lease Agreement was unlike other contracts with ordinary parties and was therefore likely governed by "special rules and circumstances".<sup>134</sup>
119. Further, the Claimant should not have ignored the absence of a "merger" or "integration" clause in the Lease Agreement because the absence of such a clause meant that extrinsic evidence supplementing or contradicting a written contract is admissible (UNIDROIT Principles, Article 2.1.17, comment).<sup>135</sup> In light of the absence of such a clause, the Claimant should have been put on notice regarding the possibility that the Lease Agreement did not embody the whole agreement.
120. According to the Respondent, the Claimant should have also noted that the Lease Agreement provided that it should be "interpreted and applied in accordance with the Headquarters Agreement [...]".<sup>136</sup> Discussing the Headquarters Agreement, the Respondent explained that although the Italian Government agreed to reimburse the Respondent for "all of the rental paid for the premises", it would be unreasonable to assume that the Italian

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at p. 12.

<sup>134</sup> Statement of Defence and Counterclaim, p. 12.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at p. 13 (quoting the Headquarters Agreement).

Government would reimburse any amount paid by the Respondent for rental.<sup>137</sup> Further, since the Headquarters Agreement is founded on the obligations of cooperation and good faith by the Respondent and the Italian Government, the assertion that the Respondent can agree to a rental amount which had not been approved by the Italian Government is contrary to the Headquarters Agreement.<sup>138</sup>

121. The Respondent disagreed with the Claimant's argument that the Claimant stayed at the Via del Serafico Building *sine titulo* after the expiration of the Lease Agreement.<sup>139</sup> According to the Respondent, the Parties had "essential agreement on all other points" aside from the rental amount for the rental of the Via del Serafico Building during the renewal period. The Respondent submitted that for the renewal period, the lease was renewed "[indefinitely] at the same terms [as the original rental period]".<sup>140</sup>
122. The Respondent rejected the Claimant's assertion in the Statement of Claim that the Respondent had suggested that it could pay a rental amount for the period after the expiration of the Lease Agreement that was greater than the amount approved by the Italian authorities. The Respondent clarified that, when it stated that the rental amount for the period after the expiration of the lease should be "the amount specified under Article 6 of the [L]ease [A]greement as determined with reference to the date of handing over of the building", it was proposing to pay Lire 2,837,000,000 as updated by the inflationary factor.<sup>141</sup>
123. Referring to Article 4.8 of the UNIDROIT Principles, the Respondent averred that if the rental amount during the renewal period is an omitted term in the Parties' contractual agreement, the Parties' intention was for the rent to "remain the same".<sup>142</sup> Specifically, the Respondent submitted that the rental amount should be the amount finally approved by the Italian authorities on 17 April 2008.
124. The Respondent noted that all of the payments except for the first payment made on 8 May 2002 "were made for the full amount of the invoices" and exceeded the amount which the Respondent actually owed under the Lease Agreement.<sup>143</sup> According to the Respondent, it did not waive its rights or accept the higher amounts by making those payments.<sup>144</sup> The Respondent explained that it made those payments because the Claimant's invoices were

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at p. 14.

<sup>140</sup> *Id.*

<sup>141</sup> Statement of Defence and Counterclaim, p. 15.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at p. 16.

<sup>144</sup> *Id.*

processed in the normal course of business by the Respondent's staff and made in contravention of Section 104 of the IFAD Manual entitled *Administrative Implementation of the Provisional Headquarters Seat*.<sup>145</sup>

125. Finally, the Respondent admitted liability for costs caused to the Claimant after the handover of the building in the amount of €12,360. The Respondent thus accepted the Claimant's claim for the repayment of invoice no. 137/2008 and requested that such amount be set off against the amount of the Respondent's Counterclaim, plus interest to be decided by the Tribunal.<sup>146</sup>

## 2. The Rejoinder

126. In its Rejoinder, the Respondent noted that the Claimant did not provide any alternative source for the recognized principles of international commercial law and even cited the UNIDROIT Principles themselves. The Respondent stated that the Claimant's objection to the UNIDROIT Principles as the applicable law must therefore be disregarded.<sup>147</sup>
127. The Respondent also rebutted the Claimant's argument that the Counterclaim was inadmissible and argued that its Counterclaim is permissible without any requirement of prior consultation, a practice that has been confirmed by other tribunals constituted under the UNCITRAL Rules.<sup>148</sup> The Respondent noted that the Counterclaim arises out of the same issue as the Claimant's Claim and requiring the Respondent to initiate separate arbitration proceedings would entail relitigating the same issues involved in these proceedings.<sup>149</sup>
128. Replying to the Claimant's argument that the Respondent was not entitled to a refund because the Italian Government and not the Respondent paid for the rental amounts, the Respondent asserted that the Italian Government did not reimburse the Respondent for the amounts for which it was requesting refunds.<sup>150</sup> The Respondent reasoned that the Italian Government only reimbursed the Respondent for the rental amounts it had approved and the amount that the Respondent overpaid was therefore never reimbursed. According to the Respondent, it had the right to reclaim amounts which it was not obligated to pay and which the Claimant was not entitled to receive. The Respondent added that "when a party

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<sup>145</sup> *Id.* at p. 17.

<sup>146</sup> Statement of Defense and Counterclaim, pp. 17 and 18.

<sup>147</sup> Rejoinder, p. 2.

<sup>148</sup> *Id.* at pp. 2-3.

<sup>149</sup> Rejoinder, p. 4.

<sup>150</sup> *Id.* at p. 5.

has paid to another party by mistake what he was not bound to pay either in fact or in law, he may recover it back by an action called *condictio indebiti*".<sup>151</sup>

129. The Respondent clarified that even if the Respondent paid the rental amount stipulated in the Lease Agreement, it did not waive its rights or acknowledge the Claimant's position with respect to the rental amount.<sup>152</sup> The Respondent noted that a party dealing with an international organization such as IFAD "must be aware that it acts in accordance with rules and procedures, rather than the decisions of individuals".<sup>153</sup> According to the Respondent, the Claimant should not expect the Italian Government to be bound by the acts of a low-level official and should not rely, to its detriment, on the act of such an official unless the Claimant has ascertained that the official was acting within his authority and in conformity with the applicable rules.<sup>154</sup> According to the Respondent, the Claimant must show that it acted reasonably in reliance and to its detriment on the Respondent's actions, if the Respondent is to be estopped from "asserting its rights".<sup>155</sup>
130. With regard to the Headquarters Agreement, the Respondent argued that by virtue of the Lease Agreement's reference to the Headquarters Agreement, the Lease Agreement was subordinate to the "completion of the procedure with the Italian [G]overnment".<sup>156</sup> According to the Respondent, it is unreasonable to interpret the procedure involving the Italian Government set out in the Headquarters Agreement as "merely consultative and non-binding".<sup>157</sup>
131. Addressing the Claimant's argument that the Respondent did not act with due diligence when it signed the Lease Agreement without the written approval from the Italian authorities, the Respondent argued that no further due diligence on the Respondent's part was necessary. As later became manifest in the fact that the Lease Agreement continued in force for seven years, the Parties to the Lease Agreement were prepared to accept a decision of the Italian authorities concerning the appropriate rental amount.<sup>158</sup>
132. The Respondent explained that "[t]he purchaser of a property takes the property subject to all of the rights and defences which may be asserted by the tenant" and "[i]f the seller does not disclose a right or defence which might be asserted by the tenant, the purchaser has a

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at p. 6.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at p. 7.

<sup>157</sup> Rejoinder, p. 7.

<sup>158</sup> *Id.*, at p. 10.

claim against the seller”.<sup>159</sup> The Respondent reiterated its position that the Claimant failed to exercise due diligence when it assumed that the contractual relationship between UNIM and IFAD, and then MSMC and IFAD, was governed “solely and entirely” by the Lease Agreement.<sup>160</sup>

133. Responding to the issue of how much rental amount the Respondent owed for the renewal period, the Respondent argued that it was not obligated to pay a rental amount equivalent to that which it paid during the validity of the Lease Agreement. Further, the Respondent argued that if it were to accept the Claimant’s argument that the Respondent occupied the Via del Serafico Building *sine titulo* during the renewal period, then the Claimant’s claim in that regard cannot be the subject of an arbitration arising from a provision in the Lease Agreement.<sup>161</sup> This is because, in the Claimant’s words, the Respondent’s “obligation to pay rent would [then] not be contractual in nature, but extra-contractual”.

### 3. Oral Arguments

134. During the oral hearing, the Respondent restated and provided further context to the arguments advanced in its written submission. In addition, the Respondent argued that the Lease Agreement did not constitute the entire contractual agreement between the Parties. Citing the Vienna Convention on the Law of Treaties, the Respondent submitted that the “ordinary meaning” rule codified in Article 31(1) was only applicable in cases of the “simple kind”. According to the Respondent, the relevant rules of international law must be taken into account in accordance with Article 31(3)(c).

### 4. The Respondent’s Post-Hearing Brief

135. In its Post-Hearing Brief, the Respondent submitted that it selected Rome as the seat of its Permanent Headquarters because the Italian Government guaranteed the Respondent suitable premises free of charge and that this condition could only be fulfilled if “any rental contract entered into by the Respondent [wa]s subject to the approval of the Italian Government [...]”.<sup>162</sup> According to the Respondent, the condition that any rental contract is subject to the Italian Government’s approval is why the Lease Agreement is subject to the Headquarters Agreement.<sup>163</sup>

136. The Respondent also reiterated the argument it expounded on during the oral hearing, stating that the Headquarters Agreement must be interpreted in accordance with Articles 31 to 34 of the Vienna Convention on the Law of Treaties. Referring to Article 31(1) of the

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<sup>159</sup> *Id.* at p. 11.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at p. 12.

<sup>162</sup> Respondent’s Post-Hearing Brief, para. 11.

<sup>163</sup> *Id.*

Vienna Convention on the Law of Treaties, the Respondent argued that interpreting a treaty according to the ordinary meaning given to the terms of a treaty in accordance with their context and in light of the treaty's object and purpose only operates "in cases of the simplest kind".<sup>164</sup> The Respondent further argued that "[i]n most cases it is impossible to decide a point of disputed interpretation by the application of the "plain meaning doctrine [...]"<sup>165</sup>

137. Addressing the Claimant's argument that the Respondent had contractual capacity and hence had the capacity to conclude the Lease Agreement on its own, the Respondent argued that whether the Respondent had contractual capacity was a separate issue from whether the Respondent "has complete freedom and independence of action with regard to renting premises to serve as its headquarters".<sup>166</sup> To that end, the Respondent argued that according to the chapeau of Section 3 of the Headquarters Agreement, the Italian Government had to decide on the moneys involved in arranging the Respondent's headquarters.<sup>167</sup>
138. In the Post-Hearing Brief, the Respondent referred to the principle that a treaty provision must be interpreted by taking account of relevant rules of international law.<sup>168</sup> Citing Judge Sette-Camara's Separate Opinion in the *Egypt/WHO Case*, the Respondent argued that a "Host-State and the international organization [cannot] go about their own ways, claiming freedom of action without taking into account each other's interest."<sup>169</sup> Further, the Respondent cited the ICJ's decision in the *Egypt/WHO Case* in arguing that international law requires a "body of mutual obligations of co-operation and good faith" in the relations between international organizations and host States.<sup>170</sup> In applying that principle to this case, the Respondent argued that the "Respondent cannot simply negotiate and agree to rental amounts with third parties, which Italy is then bound to pay, no matter what".<sup>171</sup> Therefore, according to the Respondent, the only reasonable interpretation of Section 3 of the Headquarters Agreement is that the Respondent did not have the freedom to negotiate and agree on the rental amount without either the Italian Government's prior approval or *ex-post* ratification.<sup>172</sup>

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<sup>164</sup> Respondent's Post Hearing Brief, para. 14.

<sup>165</sup> *Id.*

<sup>166</sup> Respondent's Post-Hearing Brief, para. 18.

<sup>167</sup> *Id.* at para. 19.

<sup>168</sup> *Id.* at para. 23.

<sup>169</sup> Respondent's Post-Hearing Brief, para. 23. The Respondent quoted Judge Sette-Camara's Separate Opinion in the *Egypt/WHO Case* in which Judge Sette-Camara stated: "The relationship between the host country and the international organization should always be one of full understanding and Co-operation, in order to create that climate of stability and security which is indispensable to the steady enhancement of the important role of multilateral diplomacy". *Id.*

<sup>170</sup> *Id.* at para. 25.

<sup>171</sup> *Id.* at para. 26.

<sup>172</sup> *Id.* at para. 27.

139. In light of the need for the Italian Government’s approval of the rental amount, the Respondent averred that when it signed the Lease Agreement it was obligated to take into consideration the Italian Government’s interests.<sup>173</sup> The Respondent submitted that one of the interests that it took into consideration was the concept of *parere di congruita* – that is, the “process whereby before a public authority purchases or otherwise acquires a good or service, it is necessary for a qualified authority to assess the appropriateness of the price to be paid”.<sup>174</sup> The Respondent then reiterated its argument that the rental amount was subject to the UTE’s approval.
140. Regarding the choice-of-law clause in Article 14 of the Lease Agreement, the Respondent argued that since the clause states that the Lease Agreement is to be interpreted and applied “according to” the Headquarters Agreement, the Respondent was obligated to ensure that the Italian Government’s role and interests were respected in the Respondent’s relations with the landlord.<sup>175</sup> The Respondent added that Article 14 subjects the Lease Agreement to the Headquarters Agreement<sup>176</sup> and that the significance of Article 14 was manifested “both before and after the signing of the Lease Agreement”.<sup>177</sup>
141. In the Post-Hearing Brief, the Respondent also argued that MSMC should have informed the Claimant that the rental amount was subject to the interpretation proposed by the Italian authorities and that the Claimant should have consulted the Respondent prior to acquiring the Via del Serafico Building.<sup>178</sup> According to the Respondent, the Claimant should shoulder the consequences of its failure to conduct due diligence.<sup>179</sup>
142. Regarding the Claimant’s objections to the admissibility of the Respondent’s Counterclaim, the Respondent argued that many national legal systems allowed a party to make a counterclaim that would be time-barred if it were made as a main claim and that the Claimant’s Claim requires the determination of the same facts that govern the Counterclaim.<sup>180</sup> Therefore, according to the Respondent, the primary rationale for time limitations that claims in which facts are too remote and too difficult to determine are barred, does not apply in the case at hand.<sup>181</sup>

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<sup>173</sup> *Id.* at para. 28.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at para. 38.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at para. 40.

<sup>178</sup> Respondent’s Post-Hearing Brief, paras. 73-74.

<sup>179</sup> *Id.* at para. 77.

<sup>180</sup> *Id.* at para. 89.

<sup>181</sup> *Id.*

143. The Respondent also rejected the Claimant's argument that in paying the rental amount stipulated in the Lease Agreement for the duration of the rental period, the Respondent waived its right to object and is estopped from claiming a refund. The Respondent argued that "[a] waiver, to be effective, must be unambiguous".<sup>182</sup> According to the Respondent, it did not make an unambiguous statement concerning its rights when it paid the full rental amount.<sup>183</sup> With regard to the Claimant's argument that the Respondent was estopped from claiming a refund, the Respondent argued that in order for that argument to succeed, the Claimant had to show that it relied on the Respondent's payment of the rental amount to its own detriment.<sup>184</sup> The Respondent added that the Claimant failed to show that it suffered any detriment beyond the obligation to refund the excess rental amount and that if the Claimant relied on MSMC's representations on the Via del Serafico Building, then the Claimant should be compensated by MSMC.
144. Finally, the Respondent gave its formal consent to publication of the final award of this Tribunal by the PCA.<sup>185</sup>

## VI. ANALYSIS OF THE TRIBUNAL

### A. APPLICABLE LAW

145. Before dealing with the merits of the Claim and Counterclaim, the Tribunal will address the issue of the applicable law in this dispute which, though largely uncontroversial, has received slightly diverging interpretations by the Parties during the proceedings.
146. The Parties are largely in agreement that their relationship is governed by the Lease Agreement which contained a choice of law clause pursuant to which it

*will be interpreted and applied according to the headquarters agreement between IFAD and the Government of the Italian Republic [...] and the recognized principles of international commercial law, thereby excluding any reference to Italian laws on leasings, with the exception of specific references made.*<sup>186</sup>

147. General principles of commercial law are also applicable in order to decide the logically preceding question whether contractual relations existed between the Parties after the expiry of the initial Lease Agreement during the period for which rent is claimed in this arbitration.

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<sup>182</sup> *Id.* at para. 94.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at para. 95.

<sup>185</sup> *Id.* at para. 111.

<sup>186</sup> Article 14, Lease Agreement.

148. In general, all major systems of contract law recognize that a contract may be entered into both in a formal/express way as well as in an implied fashion through behaviour that indicates that the parties intended to be bound. In its assessment whether the “continuation” of the lease of the premises was based on a contractual relationship between the Parties, the Tribunal will be guided by these considerations. It will particularly take into account how an objective third party in the situation of the Claimant or the Respondent may interpret the behaviour of the other party.
149. Concerning the interpretation of the Lease Agreement, the Tribunal has to apply primarily the terms of the Lease Agreement itself, which it will interpret and apply according to the Headquarters Agreement and the “recognized principles of international commercial law”. As to the latter, the Tribunal noted a divergence of opinion between the Parties concerning the value of the UNIDROIT Principles. However, the Tribunal also noted that, in the course of their submissions, both Parties extensively relied on the said UNIDROIT Principles.
150. The Tribunal further notes that the central point of controversy concerning the rental amount owed under the Lease Agreement cannot be directly solved by having recourse to the Headquarters Agreement, which may be relevant to the issue whether the rental fee required approval from the host State’s authorities and, if so, whether the legal effect of this requirement was restricted to the relationship between the host State and the Respondent or extended in some way to the Claimant. To this Tribunal, it appears that the gist of the controversy is governed by the Lease Agreement interpreted and applied in light of the recognized principles of international commercial law.
151. In the Tribunal’s view, the UNIDROIT Principles may indeed be regarded as indicative of recognized principles in the field of international commercial law. However, it considers that it need not formally base its decision on those Principles since it may find answers to the questions raised in this arbitration primarily in a contextual interpretation of the Lease Agreement, focusing on the conduct of the Parties.

## **B. CLAIMS FOR ALLEGEDLY OUTSTANDING PAYMENTS**

### **1. Claim for Rental Payments**

152. In its Claim, the Claimant requested from the Respondent the payment of purportedly outstanding rental amounts for the Respondent’s use of the Via del Serafico Building which the Respondent occupied as its headquarters until the end of May 2008.<sup>187</sup> The amount in

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<sup>187</sup> Statement of Claim, p. 23.

issue is characterized as rental payment for the months of April and May 2008 plus the ISTAT adjustment for the preceding 6-month period from October 2007 to March 2008.

153. The Parties do not dispute that the Respondent has not paid any rent for the months of April and May 2008. What is in dispute is the entitlement of the Claimant, the owner of the premises, to receive such payment.
154. While the Claimant characterized the requested sum as rent payment pursuant to a contractual obligation, or in the alternative as adequate compensation for use of the premises *sine titulo*, the Respondent objected to the amount arguing that it owed only a rental amount which was approved by the Italian authorities and that the amount requested by the Claimant and withheld by the Respondent is equivalent to the non-approved portion of the rent for the period from October 2007 to May 2008.

*1.1 Existence of a Contractual Relationship Between the Parties After 2 October 2007*

155. The Parties' disagreement as to the rental amount due for April and May 2008 originates from their initial disagreement concerning the rental amount due under the Lease Agreement. Before discussing this point of controversy which was extensively addressed by the Parties both in their written submissions and during the hearing, the Tribunal considers it necessary to determine whether, after the termination of the Lease Agreement in October 2007, a contractual basis existed for use of the premises by the Respondent.
156. It is clear from the established facts and also not in dispute between the Parties that no formal contract covering the renewal period was signed. The Parties were aware of the expiry of the Lease Agreement and, starting in July 2007, exchanged views on a prolongation, renewal or other form of adopting a new contractual basis for the continued use of the premises by the Respondent.<sup>188</sup> However, those steps did not lead to the formation of a new written contract.
157. In July 2007, the Claimant proposed an "Integrative Agreement" which envisaged the extension of the Lease Agreement until 2 April 2008 with a rental amount calculated on the basis of the Lease Agreement.<sup>189</sup> In September 2007, the Respondent sent a draft lease agreement which resembled the Lease Agreement in large part but did not indicate the rental amount due for the renewal period.<sup>190</sup> Neither of those documents nor any other document was signed as a new contractual basis for the Respondent to remain on the

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<sup>188</sup> Letter to the Respondent from the Claimant dated 4 March 2002 (translated from Italian to English) [C14].

<sup>189</sup> Integrative Agreement proposed by the Respondent (translated from Italian to English) [C15].

<sup>190</sup> Draft Lease Agreement for Renewal Period [C16].

premises. Instead, the Respondent continued to use the premises until it finally vacated the Via del Serafico Building in June 2008, while the Claimant invoiced IFAD for such continued use.<sup>191</sup>

158. In the Tribunal's view, the Parties' behaviour during the renewal period indicated that they accepted that a contractual relationship existed between them even after the expiry of the Lease Agreement considering that:

- (i) The Respondent requested an extension of the contractual relationship for a period of six months;
- (ii) The Claimant made the Via del Serafico Building available and invoiced the Respondent regularly;
- (iii) The Respondent used the Via del Serafico Building and paid the rental amount due, though not immediately as invoiced for the first 6 month period and not with regard to the last invoice which is in dispute, but in principle in accordance with the rental amount stipulated in the Lease Agreement.

159. Since the Parties disagree on the amounts due under the Lease Agreement, they also disagree on the rental amount due for the renewal period. Even so, that the Claimant issued invoices and the Respondent made corresponding, albeit partial, payments, indicates that the Parties believed they were bound by a contractual obligation, interpreted in their diverging ways.

160. In the Parties' written submissions, the Parties also agreed that the continued occupation of the Via del Serafico Building during the renewal period was governed by contractual relations.<sup>192</sup> It is apparent that the Parties agree that the terms of the contractual relationship they entered into for the renewal period were similar to the terms of the Lease Agreement, particularly to the rental amount provided for in the Lease Agreement, although each Party interprets the initial rental amount differently, and as a consequence also the rental amount due for the last six months.

161. The Claimant issued invoice no. 119 to the Respondent on 19 September 2007 for a rental amount of €1,016,946.90 for the 6-month period from October 2007 to March 2008.<sup>193</sup> That amount constituted half of the annual rent and was based on the annual rental amount stipulated in the Lease Agreement updated through the ISTAT index as of 2 October 2007.

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<sup>191</sup> The Parties agree that the Respondent stayed in the Via del Serafico Building until June 2008. The Claimant however has only issued invoices for the Respondent's occupation of the Building until May 2008.

<sup>192</sup> Statement of Claim, p. 21 and Statement of Defence and Counterclaim, p. 14.

<sup>193</sup> Invoice no. 119 dated 19 September 2007 issued by the Claimant to the Respondent [C40].

162. The Respondent, however, initially disputed the correctness of the rental amount stipulated in invoice no. 119 and paid only 50% of the amount while awaiting approval from the Italian authorities. When the Respondent finally disputed the total outstanding amounts for April and May 2008, it clarified that it considered that only roughly 80% of the total requested rental amounts were due since 80% of the amount stipulated in invoice no. 119 was roughly equivalent to the rental amount over the same period under the Lease Agreement. By maintaining these arguments which were reiterated during the arbitral proceedings, the Parties clearly demonstrated that they considered that their contractual relationship was in essence governed by the terms of the initial Lease Agreement.

*1.2 The Amount of Rent Agreed Upon by the Parties*

163. Thus, the central issue to be determined by this Tribunal is how much the Respondent owed to the Claimant for the renewal period.

164. As already mentioned, the Parties's views originated from their initial disagreement on the rental amount due under the Lease Agreement. Both Parties apparently considered that the old terms continued to apply. However, they markedly differ as to the content of the rent payment obligation under the old terms.

165. In the Claimant's view, the rental amount due for the renewal period is the amount stipulated in Article 6 of the initial Lease Agreement. The Respondent argued on the other hand that the rental amount stipulated in the Lease Agreement was modified by the fact that the Italian authorities did not approve of that amount, and instead re-characterized the rental amount stipulated in the Lease Agreement as comprised of a reduced rental amount added to payments for the renovation work on the Via del Serafico Building. The latter payments should have been equally paid in periodic instalments over the lease time.

166. In the Respondent's view, it is the reduced rental amount which continued to be owed for the renewal period and – since the payments for renovation work had been fully paid during the initial lease – no payments in corresponding amounts would be owed.

167. The Respondent's view on the reduced rental amount, diverging from the sum provided for in Article 6 of the Lease Agreement, is based on the Italian authorities' re-interpretation of the Lease Agreement which was purportedly accepted by the Parties according to the Respondent.<sup>194</sup>

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<sup>194</sup> Statement of Defence and Counterclaim, p. 10.

168. In its written submissions and during the oral hearing, the Respondent maintained that the Lease Agreement had to be interpreted in light of the Headquarters Agreement, which purportedly requires that any rental amount paid by the Respondent be first approved by the Italian authorities.
169. For the reasons laid out below, the Tribunal does not share the view that the Headquarters Agreement requires that any rental amounts paid by the Respondent must be first approved by the Italian authorities.
170. Section 3 of the Headquarters Agreement, entitled “The Headquarters Seat”, obliges the Government of Italy “to provide or cause to be provided to the Fund [...] suitable premises and facilities [...]” It further states that, with the exception of some costs related to the operation of the premises and their insurance against third party claims, “[s]uch premises shall be provided free of charge.” Since Italy may either make premises directly available or cause them “to be provided”, Section 3 further states that “[i]n implementation of this provision: (a) The Government shall assist the Fund in the renting of the premises described in the Annex hereto, and in particular shall reimburse to the Fund all rental paid for the premises”.
171. A literal interpretation of Section 3 of the Headquarters Agreement does not support the Respondent’s view that Italy would have to give its prior approval to the rental amounts that would then have to be reimbursed by Italy. While the Tribunal accepts that prior approval by the Italian Government may be a sensible requirement in cases when a host State has agreed to reimburse the office rental costs of international organizations, the ordinary meaning of the words actually chosen by the Contracting Parties and codified in the Headquarters Agreement cannot be altered.
172. On its face, Section 3(a) of the Headquarters Agreement imposes an unlimited obligation on Italy to reimburse the Respondent’s rental costs. Even so, the Respondent’s apparent freedom to agree to any rental fees may be limited by the Respondent’s general duty of good faith. Thus, Italy may object to any exorbitant rental fee agreed upon by the Respondent when requested to reimburse such fee. But this is not in issue. The fee that was agreed upon by the Respondent and UNIM apparently did not meet the host Government’s expectations. However, the difference between the rental amount stipulated in the Lease Agreement and the rental amount that the Italian authorities considered appropriate (100% to 80%) was rather modest. Considering that the Respondent repeatedly requested the Italian authorities’ opinion on the rental amount and that the Italian authorities’ provided their opinion only after considerable delay, it would appear to the Tribunal that the Italian Government is still under an obligation pursuant to Section 3(a) of the Headquarters Agreement to reimburse the Respondent the entire rental amount that the Respondent paid

to the Claimant. More so, the MFA had apparently provided to the Respondent an oral indication that the rental amount in the Lease Agreement would be acceptable and the Respondent proceeded to sign the Lease Agreement, at least in part, because it relied on the MFA's oral representations.

173. That the IFAD Internal Manual provides that “[i]t is implicit in sub-paragraph (a) that no reimbursement will be claimed by [*sic*] office premises rented without the consent of the Italian Government” does not change the Tribunal’s assessment as stated in the preceding paragraph.<sup>195</sup> Sub-paragraph (a) of the IFAD Manual merely restates that under “Section 3 of the Headquarters Agreement, the Italian Government undertakes, *inter alia*, to provide the Fund with suitable premises and under sub-paragraph (a) undertakes to reimburse to the Fund rental paid for such premises.”<sup>196</sup> This internal guideline for the administrative implementation of the Headquarters Agreement<sup>197</sup> stipulating that the Respondent would seek Italy’s prior agreement to the rental of premises may be seen as a prudent internal measure designed to promote good relations with the host Government. However, this does not modify the clear language of the Headquarters Agreement.
174. The Headquarters Agreement does not require the Italian Government’s prior approval for rental amounts to be paid by the Respondent for the rental of its offices. Had the Respondent and Italy intended for any rental to require such approval, then they would have stipulated such a requirement in the Headquarters Agreement. In the absence of an explicit approval requirement for the rental fee for the Respondent’s premises, the Respondent’s argument that the rental amount agreed upon in Article 6 of the Lease Agreement was conditioned upon the Italian Government’s approval must necessarily fail.
175. Even if one accepted that an approval requirement was an inherent corollary to the Government’s reimbursement obligation, there is no reason why this should be more than a requirement binding on the Respondent *vis-à-vis* Italy. The Respondent appears to argue that any private party contracting with the Respondent must be presumed to conclude from the Headquarters Agreement that the Respondent’s capacity to contract pursuant to Section 11(b)(i) was limited by the implicit approval requirement under Section 3 of the Headquarters Agreement. This interpretation of the Headquarters Agreement would impose an exceptionally onerous burden on private parties. More importantly, such an expectation is unreasonable because it requires private parties to have an unreasonable level of

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<sup>195</sup> Para. 1.2.1, IFAD Manual, Section 104, Administrative Implementation of the Provisional Headquarters Seat [R11].

<sup>196</sup> IFAD Manual, Section 104 Administrative Implementation of the Provisional Headquarters Seat, 1.2 a) [R 11].

<sup>197</sup> Indeed, para. 1.1 of the IFAD Manual states that “[the] Manual Section sets out the policies and procedures governing the administrative implementation of Article III, Section 3 of the Headquarters Agreement [...]”.

familiarity regarding the intricacies of international organizations as subjects of private law. Imposing such a requirement on private parties might deter private parties from contracting with international organizations.

176. However, the Respondent did not only argue that the Claimant should have inferred from the text of the Headquarters Agreement that the rental amount in the Lease Agreement was subject to the Italian Government's approval. Rather, the Respondent also argued that the purported approval requirement had actually been communicated to the Respondent's predecessors-in-title in a number of communications.
177. Indeed, in a letter to UNIM dated 22 June 1999, the Respondent stated that, during the negotiations for the Lease Agreement in June 1999, it informed its co-contractor that it would transmit the offer to the Italian authorities for their "evaluation and possible acceptance" of the proposed lease agreement.<sup>198</sup> However, the Respondent did not make clear that such acceptance would be a condition for entry into force of the Lease Agreement. Moreover, the fact that the Respondent subsequently signed the Lease Agreement on 30 December 1999 must have been interpreted by UNIM as an indication that the Respondent had received the necessary approval.
178. Most importantly, the Respondent refrained from including in the Lease Agreement a clear reference to an approval requirement which would have put its contract partner on notice that such approval was not merely an internal requirement for the Respondent but rather a condition for the effectiveness of the rental amount agreed upon in Article 6.
179. More so, when it became apparent in January 2000 after the signing of the Lease Agreement that the Italian authorities did not approve of the agreed rental amount, the Respondent did not unequivocally communicate to UNIM that it considered the rental fee partly invalid. Instead, the Respondent sought a pragmatic solution with the Italian authorities according to which it would pay roughly 80% of the rental amount (corresponding to what the authorities qualified as adequate rent) as rent and the remaining roughly 20% as amortization payments for renovation work carried out by UNIM on the premises.
180. The factual record in this case does not show that the purported re-interpretation of the Lease Agreement was communicated to and accepted by the Claimant. In fact, the Respondent's own arguments in its written submission assume that the contrary was the case. In its Statement of Defence and Counterclaim, the Respondent argued that MSMC did

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<sup>198</sup> Letter to UNIM from the Respondent dated 22 June 1999 (translated from Italian to English) [R4].

not fully inform the Claimant of the special circumstances governing the Lease Agreement.<sup>199</sup>

181. The Respondent asserted that during a meeting between the Claimant's and the Respondent's representatives in February 2002, the Respondent's representatives stated that MSMC was fully aware of the purported re-interpretation of the Lease Agreement. In a Witness Statement submitted to the Tribunal, the property manager of MSMC, Ms. Giovanna Spina, stated that during the February 2002 meeting, MSMC "denied categorically that it had agreed [to] a lower rent with [the Respondent], or that it had accepted the determinations made by UTE [...]".<sup>200</sup> Although the Parties have varying versions of what transpired during the February 2002 meeting, the Tribunal does not consider the exact contents of that meeting as central for deciding the Claim and the Counterclaim. Although it is clear that MSMC was aware of the purported re-interpretation of the Lease Agreement, it has not been shown that the purported re-interpretation was communicated to and accepted by the Claimant. More importantly, the Respondent's subsequent behavior would lead an objective third party to conclude that the Respondent had accepted that the entire amount that it paid constituted the rental payment subject to ISTAT increase.
182. The Respondent protested against the first rental invoice sent by the Claimant in 2001 because in the Respondent's view it contained a miscalculation of total outstanding fees in that the rental amount (80%) and the amortization share (20%) were both adjusted according to the ISTAT index. While this and the ensuing discussions with the Respondent clearly put the Claimant on notice regarding the Respondent's interpretation of the rental fee obligation, it is also undisputed from the facts that the Claimant immediately rejected this interpretation and demanded payment according to the Lease Agreement.
183. It appears significant that the Respondent not only made the outstanding payment of the ISTAT adjustment of the amortization share it had initially withheld; the Respondent also made all subsequent payments as requested by the Claimant which issued invoices to the Respondent for the full rental amounts in accordance with Article 6 of the Lease Agreement, with no comments or reservations.
184. The Tribunal thus concludes that the Parties accepted the rental amounts stipulated in Article 6 of the Lease Agreement. The Claimant issued invoices for the full rental amount pursuant to Article 6 and the Respondent paid them in full. Therefore, the rental amount for the initial rental period is the rental amount stipulated in the Lease Agreement.

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<sup>199</sup> Statement of Defence and Counterclaim, p. 11.

<sup>200</sup> Witness Statement of Giovanna Spina, 5 July 2010.

185. Since the Parties are basically in agreement that the rental amounts due for the renewal period were renewed at the same rental amount due under the Lease Agreement, the Claimant is entitled to rental payments as stipulated in Article 6 of the Lease Agreement, *i.e.* the Euro equivalent of the original Lire sum plus the ISTAT valorization.

**2. Claim for Invoice No. 137/2008 Relating to the Cleaning of the Via del Serafico Building and for Electrical Work**

186. In its Statement of Claim, the Claimant sought damages of €12,360 as stipulated in invoice no. 137 dated 25 July 2008. The amount is comprised of payment for various cleaning measures of the premises after the Respondent had left them and for electrical work done on the building.<sup>201</sup>

187. Since the Respondent has accepted the Claimant's request for payment of the amount of €12,360 due under invoice no. 137,<sup>202</sup> the Tribunal will award to the Claimant the requested sum.

**C. COUNTERCLAIM FOR RENT OVERPAYMENTS**

188. In its Statement of Defence and Counterclaim, the Respondent raised a Counterclaim relating to the amortization share of its rental payments. The Respondent argued that, since the rental fee's reinterpretation after the intervention of the Italian authorities permitted an ISTAT inflation adjustment only for the rent share (80%) and not for the amortization share (20%), IFAD was overcharged, and had in fact overpaid, when invoices were prepared by Polis applying an ISTAT inflation adjustment to the entire rental amounts charged.

189. The Claimant challenged both the admissibility and the merit of this Counterclaim.

**1. Admissibility of the Counterclaim**

*1.1 Purported Inadmissibility Because the Procedural Requirements of the Lease Agreement Were Not Followed*

190. In the Claimant's view, the Counterclaim should be declared inadmissible because the Respondent did not follow the procedure laid down in the arbitration clause of the Lease Agreement. In its view, the Respondent should have attempted to amicably settle this claim according to Article 15 of the Lease Agreement before raising it in this arbitration.

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<sup>201</sup> Statement of Claim, p. 9.

<sup>202</sup> Statement of Defence and Counterclaim, p. 18.

191. The Tribunal rejects this argument since it misinterprets the nature of a counterclaim as commonly understood in international arbitration. Pursuant to Article 19(3) UNCITRAL Rules, a respondent may raise a “counter-claim arising out of the same contract” on which the claim is based in its statement of defence. To arise out of the same contract on which the claim is based, a counter-claim “cannot be based on a contract which is not covered by the arbitration clause or agreement [...]”.<sup>203</sup> No other requirements for the admissibility of a counterclaim are posited in the UNCITRAL Rules, which govern the present proceedings. Hence, the Tribunal sees no basis for requiring in addition (as the Claimant has argued) that the counterclaim constitute “a direct consequence”<sup>204</sup> of the claim that is the subject of these proceedings.
192. In the case at hand, there is no doubt that the Respondent’s claim to recover alleged overpayments arises from the Lease Agreement and results from the Respondent’s interpretation of the Parties’ obligations under that contract. Therefore, it is a counterclaim that was timely raised in the Respondent’s Statement of Defence.
193. Because a counterclaim may be considered as “a legal device designed to enhance judicial efficiency by coordinating the handling of multiple claims at once”,<sup>205</sup> the Tribunal also considers that allowing the Respondent to file its Counterclaim in this case promotes arbitral efficiency by allowing the same issues to be litigated and considered in the same proceedings. Indeed, given that it is clear that the Parties disagree as to the rental amount due under the Lease Agreement, it is reasonable to conclude that any attempt at an amicable settlement of the Respondent’s Counterclaim would serve no effective purpose in resolving the dispute between the Parties.
194. The Tribunal thus rejects the Claimant’s argument that the Counterclaim should be declared inadmissible because it was not brought according to the special procedure provided for in the Lease Agreement.

### *1.2 Purported Inadmissibility Because of Lack of Standing*

195. The Claimant further challenged the standing of the Respondent to bring the specific Counterclaim it had raised arguing that since the rental fees were in fact paid by the Italian

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<sup>203</sup> D. CARON *ET AL.*, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 414 (2006). A counterclaim that falls within the scope of an arbitration agreement may be heard since “[t]he only disputes that are meant to be heard [in a particular arbitration] are those that fall within the scope of the arbitration agreement”. Michael Jones et al., *Cognisable Counterclaims: UNCITRAL Article 19(3) and the UNCITRAL Model Arbitration Clause*, p. 1. See Alison Dundes Renteln, *Encountering Counterclaims*, 15 DENV. J. INT’L L. & POLY. 379 390 (1986-1987) (arguing that the counterclaim must be directly related to the original claim and that both must be related to the contract in dispute).

<sup>204</sup> Claimant’s opening statement on the Counterclaim at the oral hearing of 20 September 2010.

<sup>205</sup> Renteln, *Encountering Counterclaims*, *supra* note 203 at 380.

Government and not the Respondent, the latter did not have the right to request a refund of the rent.

196. The Tribunal notes that whether or not the Respondent had in fact been reimbursed for the allegedly overpaid portions of the rental invoices was a question addressed by the Parties at different stages of the proceedings – in particular in the Respondent’s written submissions,<sup>206</sup> during the oral hearing, in documents provided by the Respondent with its Post-Hearing Briefs, and in Ms. Antonella Favia’s Witness Statement dated 5 October 2010.
197. However, the Tribunal does not consider this issue to be determinative in the present case, and, accordingly, the Tribunal does not find that it is required to discuss in detail the evidence submitted by the Respondent on this point. It is undisputed between the Parties that the rental payments – now subject to the Counterclaim – have been made by the Respondent to the Claimant. In dispute is the question whether or not such payments were owed according to the Lease Agreement, which is a matter concerning the two Parties to this contract. Any right to reimbursement by a third party does not alter the fact that only the Claimant may request payment, if such is owed under the Lease Agreement, and only the Respondent may claim to be repaid, if it had made payments not owed under the Lease Agreement.
198. Thus, the Tribunal decides that the Respondent has standing to make the Counterclaim concerning alleged overpayments.

### *1.3 Limitation Period for the Counterclaim*

199. Finally, the Claimant argues that the Counterclaim should be considered time-barred because it was not brought within the three-year limitation period provided for in the UNIDROIT Principles.
200. At the outset, the Tribunal wishes to note that, customarily, periods of limitation do not automatically lead to the extinction of a claim; rather, adjudicators are bound to take account of periods of limitation only if the debtor of an obligation invokes the alleged time bar in a timely fashion. In the present case, it is not beyond doubt whether the Claimant has properly raised the defence of statutory limitation in relation to the Respondent’s Counterclaim. Conspicuously, there is no express reference in the Claimant’s Reply – the written submission in which the Claimant first responded to the Counterclaim raised with the Statement of Defence – to any period of limitation. The possibility that the

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<sup>206</sup> Rejoinder, p. 5.

Counterclaim may be time-barred is expressly espoused by the Claimant<sup>207</sup> only after the Respondent, in its Rejoinder, presented detailed arguments in this respect.

201. Be this as it may, the Tribunal takes the view that it is not required to rule on the question as to whether the Counterclaim is time-barred in the present case. Under Article 10.1 of the UNIDROIT Principles, “[t]he exercise of rights governed by [the] Principles is barred by the expiration of a period of time”<sup>208</sup> and according to Article 10.2, “[t]he general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee’s rights can be exercised.”<sup>209</sup> Article 10.2(2) states that “[...] the maximum limitation period is ten years beginning on the day the right is exercised”.
202. There are two approaches with respect to the influence of the passage of time on rights. Limitation periods may be considered as a matter of procedural law in which case “the passage of time extinguishes rights and actions”<sup>210</sup> or as a matter of substantive law<sup>211</sup> in which case “either the obligation is extinguished (strong effect)”<sup>212</sup> or the obligation continues to exist but the obligor is granted a right to refuse performance (weak effect).<sup>213</sup> While, in some legal systems, the invocation of a period of limitation will render a claim *inadmissible* (thus pre-empting the jurisdiction of the adjudicator), in other legal systems, the invocation of a period of limitation leads to the *substantive extinction* of a claim (thus requiring the adjudicator to reject a claim on the merits). The UNIDROIT Principles have adopted the weak substantive approach pursuant to Article 10.9 under which (i) the time-barred right still exists; (ii) the expiry of the limitation period must be asserted to have effect; and (iii) the time-barred right may still be relied on as a defence.<sup>214</sup>
203. In view of the fact that both Parties have argued the question of time limitation on the basis of the UNIDROIT Principles, the Tribunal considers it appropriate to follow, for purposes

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<sup>207</sup> Claimant’s Authorized Second Reply, p. 5.

<sup>208</sup> Article 10.1, UNIDROIT Principles.

<sup>209</sup> Article 10.2, UNIDROIT Principles.

<sup>210</sup> Comment to Article 10.13, UNIDROIT Principles. See William Tetley, Q.C., *Mixed jurisdictions: common law vs civil law (codified and uncodified) Part II*, UNIF. L. REV. 877, 878 (1999-4).

<sup>211</sup> Foreign limitation periods are being treated more as substantive rather than procedural matters in common law jurisdictions. Tetley, *supra* note 200 at 878. The Supreme Court of Canada has held that limitation periods are to be treated as substantive law in Canadian common law conflict of laws. See also William. Tetley, *New Development in Private International Law: Tolofson v Jensen and Lucas v Gagnon*, 44 AM. J. COMP. L. 647 (1996).

<sup>212</sup> COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL CONTRACTS (PICC) 1085 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1085-86. See Michael Joachim Bonell, *UNIDROIT Principles 2004 – The New Edition of the Principles of International Contracts adopted by the International Institute for the Unification of Private Law*, 9 UNIF. L. REV. N.S. 5, 28-29 (2004).

of the present award, the substantive approach. Accordingly, assuming that the Claimant has properly asserted the defence of time limitation in relation to the Respondent's Counterclaim, the question whether the Counterclaim is time-barred does not affect the admissibility of, and the Tribunal's jurisdiction over, the Counterclaim. Rather, any time limitation that may apply is properly characterized as a substantive defence against the Counterclaim, which the Tribunal will consider only if and when it has satisfied itself that the Respondent's Counterclaim is meritorious.

## **2. Merits of the Counterclaim**

204. The Claimant's rejection of the substance of the Respondent's Counterclaim is mainly based on the Claimant's interpretation of the Lease Agreement according to which the rental amount stipulated in Article 6 was due and thus correctly paid by the Respondent.
205. For the following reasons, the Tribunal finds that the Counterclaim is unfounded.
206. After the re-interpretation of the rent due under the Lease Agreement in order to be acceptable to the Italian authorities, the Respondent initially tried to integrate this re-interpretation in its relations with the Claimant. For instance, when the Claimant issued its first invoice, invoice no. 32/2001, in October 2001, the Respondent did not pay the amount which corresponded to the ISTAT inflation adjustment for the amortization share (pursuant to the re-interpreted Lease Agreement) and which is now subject to the Counterclaim. However, upon the Claimant's prompt request to receive payment in full as provided for in Article 6 of the Lease Agreement in December 2001, the Respondent did not appear to further attempt to maintain its interpretation vis-à-vis the Claimant. Instead, the Respondent made payment of the sum outstanding on invoice no. 32/2001 in May 2002, thus paying the full invoice according to the calculations laid down in Article 6 of the Lease Agreement.
207. Furthermore, throughout the rental period, the Respondent continued to make payments as invoiced, which included ISTAT adjustments of the entire rental fee. The Respondent never challenged a single invoice again nor did it reserve its legal position based on the re-interpretation agreed upon by the Italian authorities.
208. In the Tribunal's view, this implies that the Respondent in fact accepted the terms of the Lease Agreement as originally formulated. Its behaviour can only be interpreted as an implicit recognition of the original lease terms.
209. Thus, the Respondent did in fact owe the sums it had actually paid during the rental period. It is thus not entitled to any refunds for alleged overpayments.

210. The Tribunal therefore rejects the Respondent's Counterclaim.

#### **D. INTEREST**

211. Both the Claimant and the Respondent have applied for an award of interest on their respective claims at a rate to be fixed by the Tribunal.

212. The Tribunal considers that its discretion to determine the appropriate interest rate is most appropriately exercised by taking as a starting point the twelve-month London Interbank Offered Rate (LIBOR) applicable at the end of the renewal period, as this rate is widely accepted as a reliable indicator of the level of international interest rates and frequently used for calculating interest in international arbitral proceedings. In May 2008, the average LIBOR for a one-year loan was 3.0306%.<sup>215</sup>

213. Reviewing the historical LIBOR since May 2008, one notices a slight increase in interest rates until October 2008, followed by a dramatic decline in the level of interest paid on the capital markets – as a result of the financial crisis – to a low point of 0.7681% in October 2010. In these circumstances, the Tribunal does not consider it necessary to make any further increases to the interest rates applicable in May 2008 for inter-bank loans.

214. In the interest of practicability, the Tribunal determines that, in the present case, interest shall be paid at a flat rate of 3% starting from 1 June 2008 until the date of full payment.

#### **E. COSTS**

215. The Claimant requests that the Tribunal orders the Respondent to reimburse costs associated with these proceedings, including all professional fees and disbursements.<sup>216</sup>

216. Conversely, the Respondent requests that the Tribunal orders the Claimant to reimburse costs associated with these proceedings, including all professional fees and disbursements.<sup>217</sup>

217. Article 38 of the UNCITRAL Rules empowers the Tribunal to fix the costs of the arbitration and provides that "costs" include, among other things, the fees of the members of the Tribunal and their travel and other expenses; the costs of assistance to the Tribunal; the costs for legal representation and assistance for the successful party "if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal

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<sup>215</sup> Data available on LIBOR Rates History: Historical LIBOR Rate Information, [http://www.wsjprimerate.us/libor/libor\\_rates\\_history.htm](http://www.wsjprimerate.us/libor/libor_rates_history.htm).

<sup>216</sup> Statement of Claim, p. 23.

<sup>217</sup> Rejoinder, para. 64.

determines that the amount of such costs is reasonable” (Article 38(e) of the UNCITRAL Rules) and the fees and expenses of the appointing authority as well as the expenses of the PCA Secretary-General.

218. The fees incurred by the Tribunal pursuant to Article 38(a) of the UNCITRAL Rules were as follows:

|                        |            |
|------------------------|------------|
| i. Professor Reinisch: | €36,400.00 |
| ii. Avv. Canu:         | €28,466.67 |
| iii. Professor Stern:  | €27,200.00 |

219. The travel and other expenses incurred by the arbitrators in connection with the present proceedings pursuant to Article 38(b) of the UNCITRAL Rules were as follows:

|                              |           |
|------------------------------|-----------|
| i. Professor Reinisch:       | €1,062.72 |
| ii. Avv. Canu:               | €1,293.32 |
| VAT and local taxes on fees: | €7,074.18 |
| iii. Professor Stern:        | €937.29   |
| VAT on fees:                 | €5,311.60 |

220. The fees and expenses of the PCA, which form part of the costs of the arbitration pursuant to Article 38(c) of the UNCITRAL Rules, amount to €24,149.34. This amount includes the fees incurred by the Secretary to the Tribunal for registry support (€22,125) as well as all hearing-related expenses, communication charges and charges for courier deliveries (€2,024.34).

221. The Parties have not, at this stage, substantiated their claims for the reimbursement of costs of legal representation pursuant to Article 38(e) of the UNCITRAL Rules. However, in view of the Tribunal’s decision regarding the allocation of costs below, the Tribunal finds that further submissions on this point from the Parties are not required.

222. The Tribunal has broad discretion under the UNCITRAL Rules with respect to the allocation of costs. Article 40(1) and (2) of the UNCITRAL Rules provides:

*1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*

*2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the*

*circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*

223. Considering all the circumstances of the present proceedings, the Tribunal finds it reasonable that the Parties bear an equal share of the costs of arbitration fixed by the Tribunal. It is common practice in international arbitration that tribunals require the parties to share the arbitration costs. Especially in the context of international commercial arbitration, it has been noted that “the most widely used ‘truly international’ arbitration rules do not require a tribunal to award costs to the successful party”<sup>218</sup> and that “as far as legal costs is concerned the outcome of the merits does not serve as the prevailing yardstick”.<sup>219</sup> Indeed, in many commentators’ opinion, “the ‘loser-pays rule’ seems to be the exception rather than the rule”<sup>220</sup> and “cannot be called the traditional approach in international arbitration”.<sup>221</sup> Rather, it is asserted that “[a]n arbitral tribunal in an international commercial arbitration is generally reluctant to order the unsuccessful party to pay the whole of the winning party’s legal costs”<sup>222</sup> thus, rejecting the existence of “any presumption of compensation for the successful party”.<sup>223</sup>
224. Other commentators have observed that, “in most cases, the tribunals simply ordered each party to bear half of the procedural costs”,<sup>224</sup> bearing in mind that “a party should not be necessarily penalised for presenting claims or defences which are not ultimately successful”.<sup>225</sup> Therefore, in international arbitration, it is common that “where the losing party has behaved itself properly, arbitrators are less likely to grant the winner an award of costs of attorneys”.<sup>226</sup>

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<sup>218</sup> Michael Bühler, *Awarding Costs in International Commercial Arbitration: An Overview*, 22 ASA BULLETIN 249, 260 (2004).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*, p. 261.

<sup>221</sup> *Id.*

<sup>222</sup> REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 547 (2009). Also, as Born points out, in a number of international commercial arbitrations, “where claimants were largely successful, they were awarded a substantial portion of the arbitration costs in most cases (*i.e.*, in 39 of 48 cases) and [were awarded] a substantial portion of their legal costs in about half of all cases (*i.e.*, in 24 of 38 cases)”; GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2499 (2009); *see also* ICC Case no. 9466, NAI Case no. 1930.

<sup>223</sup> D. CARON *ET AL.*, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 949 (2006). Also, as Redfern and Hunter point out, “the practice under which the unsuccessful party is expected to pay towards the other party’s legal costs is by no means universal practice”; REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 547 (2009). As Michael Bühler points out, “[...] costs follow the event, this principle is by no means made absolute”; Bühler, *Awarding Costs*, *supra* note 218, at 265.

<sup>224</sup> Bühler, *Awarding Costs*, *supra* note 218, at 261.

<sup>225</sup> Murray L. Smith, *Costs in International Commercial Arbitration*, in HANDBOOK OF INTERNATIONAL COMMERCIAL ARBITRATION 127, 132 (Thomas E. Carbonneau ed., 2006).

<sup>226</sup> Noah D. Rubins, *The Allocation of Costs and Attorney’s Fees in Investor-State Arbitration*, 18 ICSID REV. FOREIGN INVESTMENT L. J. 111, 112 (2003). Also, as Michael Bühler points out “[i]n ICC Case No.

225. In the present case, both Parties have behaved professionally in presenting their claims and defences. It is obvious that the Claimant cannot be considered the “unsuccessful party” in these proceedings within the meaning of Article 40(1) of the UNCITRAL Rules; after all, the Claimant ultimately succeeded both in its Claim and in its defence against the Respondent’s Counterclaim. On the other hand, however, the Tribunal is mindful of the fact that the Claimant prevailed on both counts – the Claim and the Counterclaim – because the Tribunal has decided to interpret the Parties’ conduct in relation to the Lease Agreement in a manner that supports the Claimant’s reading of the Lease Agreement, rather than the Respondent’s. Everything in this arbitration ultimately turned on the threshold issue of the interpretation of the Parties’ conduct, and it was not conceivable for either Party to prevail in part on the Claim or the Counterclaim.
226. In the Tribunal’s view, the Respondent developed a plausible and coherent line of argument in support of its contention that the Parties adjusted the rate of the rental payment by agreement, taking particular account of the Headquarters Agreement. Having reviewed the facts of the case, the Tribunal disagrees with the Respondent’s contention that such an adjustment was indeed agreed between the Parties. The fact that the Respondent’s theory did not prevail, however, does not necessarily mean that the Respondent should therefore be penalized with the entirety of the costs of the proceedings. Instead, consistently with the common practice in international commercial arbitration, the Tribunal finds that it is appropriate for the Parties to share the costs of the present proceedings.
227. As an advance for the costs of the arbitration, the Parties have deposited a total amount of €131,895.12 with the PCA (€65,947.56 per Party). This amount corresponds to the total amount of the costs of the Tribunal and the PCA’s registry services. Accordingly, there is no unused balance to be returned pursuant to Article 41(5) of the UNCITRAL Rules.
228. As regards the Parties’ costs of legal representation, each Party shall bear its own costs of legal representation and assistance.

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8332, the tribunal held that since the dispute arose out of the unclear terms of the parties agreement, each party should ‘bear a share of the responsibility for this uncertainty and the resulting costs’, even though the claimant prevailed on all material issues”; Bühler, *Awarding Costs*, *supra* note 218, at, 267 (quoting ICC Case no 8332). Conversely, arbitral tribunals have ordered the unsuccessful party to bear the costs of the arbitration in cases where the misconduct and wrongdoing of that party during the proceedings is patent and when its claims can be considered frivolous and a waste of the tribunal’s time; *see* MURRAY L. SMITH, *The Costs in International Commercial Arbitration*, in *Handbook of International Commercial Arbitration* (2006) p. 131; Jenny W.T. Power & Christian W. Konrad, *Costs in International Commercial Arbitration – A Comparative Overview of Civil and Common Law Doctrines*, in *AUSTRIAN ARBITRATION YEARBOOK* 262, 266 (2007).

## VII. DISPOSITIF

229. For the foregoing reasons, the Tribunal, having deliberated, unanimously determines that:

- (a) Polis Fondi's Claim for outstanding rent payments for the period 1 October 2007 to 30 May 2008 is upheld. Accordingly, the Respondent (the International Fund for Agricultural Development) shall pay the amount of €265,734.47 to the Claimant (Polis Fondi Immobiliari Di Banche Popolari SGR.p.A.).
- (b) In addition, in accordance with invoice No. 137/2008 and following the Respondent's recognition of its liability in this respect during the present proceedings, the Respondent (the International Fund for Agricultural Development) shall pay the amount of €12,360.00 to the Claimant (Polis Fondi Immobiliari Di Banche Popolari SGR.p.A.).
- (c) The Respondent is further liable to pay interest at a rate of 3% starting on 1 June 2008 and until full payment of the amounts indicated under (a) and (b).
- (d) The Respondent's Counterclaim, while admissible, is dismissed as unfounded.
- (e) The Parties shall bear equally the total costs of fees and expenses of the Tribunal and the PCA, which the Tribunal has fixed at €131,895.12. Thus, each Party's share of those costs is €65,947.56.
- (f) Each Party shall bear its own costs of legal representation and assistance.

Polis Fondi Immobiliari Di Banche Popolari SGR.p.A. (Italy)  
v. International Fund for Agricultural Development  
Award

Done at the place of arbitration, Rome, Italy

on 17 December 2010:



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Professor Brigitte Stern  
Arbitrator



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Avv. Filippo Canu  
Arbitrator



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Professor August Reinisch  
Presiding Arbitrator