

**IN THE MATTER OF AN ARBITRATION COMMENCED PURSUANT TO THE
AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF NORWAY AND
THE GOVERNMENT OF THE REPUBLIC OF POLAND ON THE PROMOTION AND
RECIPROCAL PROTECTION OF INVESTMENTS, SIGNED ON 5 JUNE 1990**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW 1976**

- between -

MR. KRISTIAN ALMÅS AND MR. GEIR ALMÅS

(the 'Claimants')

- and -

THE REPUBLIC OF POLAND

(the 'Respondent')

AWARD

27 June 2016

Arbitral Tribunal:

Judge James R. Crawford, AC (Presiding Arbitrator)
Professor Ola Mestad
Professor August Reinisch

Registry:

Permanent Court of Arbitration

Secretary to the Tribunal:

Judith Levine

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
A.	THE PARTIES.....	1
B.	OVERVIEW OF THE DISPUTE.....	1
II.	PROCEDURAL HISTORY	2
III.	THE UNCONTESTED FACTUAL BACKGROUND	8
A.	NEGOTIATION AND ENTRY INTO THE LEASE AGREEMENT	8
B.	POL FARM’S INVESTMENTS IN THE FARM 1995-2007.....	10
C.	ANR’S INSPECTIONS OF AND COMPLAINTS ABOUT THE FARM.....	12
D.	DETERIORATION OF POL FARM’S FINANCIAL SITUATION	15
E.	TERMINATION OF THE LEASE AGREEMENT	18
F.	POL FARM’S BANKRUPTCY.....	20
G.	SUBSEQUENT CRIMINAL PROCEEDINGS	21
IV.	RELIEF SOUGHT.....	22
V.	THE ARGUMENTS OF THE PARTIES AS TO JURISDICTION AND MERITS.....	23
A.	SUMMARY OF PRELIMINARY OBJECTIONS.....	23
B.	ATTRIBUTION OF ANR’S CONDUCT TO POLAND	23
1.	The Respondent’s Arguments	23
(a)	ANR is not a State organ under Article 4 of the ILC Articles.....	24
(b)	ANR’s conduct is not attributable to the Respondent under the ‘functional test’ of Article 5 of the ILC Articles.....	25
(c)	ANR’s conduct is not attributable to the Respondent under the ‘control test’ of Article 8 of the ILC Articles	27
2.	The Claimants’ Arguments.....	27
(a)	ANR acted as a State organ, or at least in a sovereign capacity, when terminating the Lease Agreement, and its conduct is attributable to Poland..	27
(b)	ANR is an organ of the State for the purpose of Article 4 of the ILC Articles	28
(c)	ANR’s conduct is attributable to the Respondent based on its function and control under Article 5 of the ILC Articles	29
C.	POL FARM’S CONTRACTUAL RIGHTS UNDER THE LEASE AGREEMENT AS PROTECTED INVESTMENTS OF THE CLAIMANTS.....	31
1.	The Respondent’s Arguments	31
2.	The Claimants’ Arguments.....	31
D.	USE OF THE MFN CLAUSE TO EXTEND JURISDICTION BEYOND EXPROPRIATION CLAIMS.....	32
1.	The Respondent’s Arguments	32
2.	The Claimants’ Arguments.....	34

E.	USE OF MFN CLAUSE TO INCORPORATE AN UMBRELLA CLAUSE	35
1.	The Respondent's Arguments	35
2.	The Claimants' Arguments.....	35
F.	THE PARTIES' CHARACTERISATION OF THE FACTUAL RECORD.....	36
1.	The Claimants' Arguments.....	36
(a)	ANR was not justified in terminating the Lease Agreement under any of its provisions.....	36
(b)	ANR acted to terminate the Lease Agreement for political reasons	40
2.	The Respondent's Arguments	42
(a)	Pol Farm's financial troubles and bankruptcy were due to the Claimants' poor investment decisions	43
(b)	ANR's termination of the Lease Agreement was justified by Pol Farm's consistent failure to properly manage the leased property and to perform its contractual obligations.....	45
(c)	ANR's choice to terminate the Lease Agreement followed applicable procedures and was free of political motives	51
G.	THE PARTIES' ARGUMENTS ON THE MERITS: EXPROPRIATION.....	53
1.	The Claimants' Arguments.....	53
2.	The Respondent's Arguments	55
H.	OTHER ARGUMENTS ON THE MERITS.....	56
1.	Failure to Accord Equitable and Reasonable Treatment and Protection	56
2.	Unreasonable and Discriminatory Measures	56
3.	The Umbrella Clause.....	57
VI.	THE TRIBUNAL'S CONCLUSIONS	58
A.	JURISDICTION OVER THE CLAIMS.....	58
B.	THE SCOPE OF THE CLAIMANTS' CASE ON THE MERITS	59
C.	ATTRIBUTION.....	60
1.	ILC Article 4 – Is ANR a State Organ?	60
2.	ILC Article 5 – Was the Termination of the Lease performed in the Exercise of Governmental Functions?.....	63
(a)	Was termination authorised under the Lease Agreement?	65
i.	Was ANR limited to the grounds cited in the Notice of Termination?	65
ii.	The available grounds for termination	67
a.	Misuse of the object.....	67
b.	Overdue payment of rent.....	72
c.	Payment of public dues	72
d.	The Tribunal's provisional conclusions on available grounds of termination	74

(b) Was the termination of the Lease Agreement an exercise of unlawful policy?	76
3. ILC Article 8 – Was the Termination of the Lease performed on the Instructions of the Polish Government?	82
D. OTHER ISSUES	84
VII. COSTS AND EXPENSES	89
A. COSTS CLAIMED BY THE PARTIES	89
1. The Claimants’ Arguments	89
2. The Respondent’s Arguments	91
B. THE TRIBUNAL’S RULING ON COSTS	92
1. Relevant Rules on Costs	92
2. Fixing the Costs of the Arbitration	93
3. Allocating the Costs of Arbitration	94
C. REIMBURSEMENT OF DEPOSIT	95
AWARD	96

LIST OF DEFINED TERMS

1991 Act	Act on Managing Agricultural Property Owned by the State Treasury 1991
Agency	Polish Agricultural Property Agency (<i>Agencja Nieruchomości Rolnych</i>) (alternatively, the ‘ANR’)
ANR	Polish Agricultural Property Agency (<i>Agencja Nieruchomości Rolnych</i>) (alternatively, the ‘Agency’)
ANR Memorandum	Internal ANR memorandum dated 8 May 2009
BIT	Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments, signed on 5 June 1990, entered into force on 24 October 1990 (alternatively, the ‘Treaty’)
Claimants	Mr Kristian Almås and Mr Geir Almås
Company	Pol Farm Sp. z oo (alternatively, ‘Pol Farm’)
Dutch-Poland BIT	Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments, signed 7 September 1992, entered into force on 1 February 1994
Croatia-Poland BIT	Agreement between the Republic of Croatia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, signed 21 February 1995, entered into force on 4 October 1995
Farm	Farmland comprising 4200 hectares in Świdwin Commune, Poland
ILC Articles	International Law Commission, <i>Draft Articles on Responsibility of States for Internationally Wrongful Acts</i> , dated 2001
Lease Agreement	Lease Agreement between Pol Farm and the Polish Agricultural Property Agency dated 14 February 1997 (alternatively, the ‘Lease’)
MFN Clause	Most Favoured Nation clause
PCA	The Permanent Court of Arbitration
Parties	The Claimants and the Respondent
Poland	The Republic of Poland
Pol Farm	Pol Farm Sp. z oo (alternatively, the ‘Company’)
Pol Rol	Pol Rol Sp. z oo, company that was lessee of the Farm before Pol Farm
Statement of Claim	Statement of Claim dated 29 April 2015
Statement of Defence	Statement of Defence dated 18 September 2015
Statement of Reply	Statement of Reply dated 12 December 2015
Statement of Rejoinder	Statement of Rejoinder dated 19 February 2016
Respondent	The Republic of Poland (alternatively, ‘Poland’)
Rules of Land Lease	Appendix to Order no. 11/08 of the President of ANR, ‘Lease of the Property of the Agricultural Property Stock of the State Treasury,’ dated January 2008
Treaty	Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments, signed on 5 June 1990, entered into force on 24 October 1990 (alternatively, the ‘BIT’)
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules (1976)

I. INTRODUCTION

A. THE PARTIES

1. The Claimants in this arbitration are Mr Kristian Almås and Mr Geir Almås, nationals of the Kingdom of Norway. The Claimants' addresses are, respectively, Skådalsveien 23E, 0781 Oslo, Norway; and Gaustadalléen 21, 0349 Oslo, Norway. The Claimants were the only shareholders in Pol Farm Sp. z oo ('**Pol Farm**'), a limited liability company with a registered address at Street No. 11A, 78-300 Krosino, Poland. The Claimants are represented in these proceedings by Mr Magnus Hellesylt and Ms Kristin Hallsjø Aarvik of Advokatfirmaet Wiersholm AS, Dokkveien 1, 6th Floor, 0250 Oslo, Norway.
2. The Respondent in this arbitration is the Republic of Poland ('**Poland**'). The Respondent is represented in these proceedings by Ms Julita Zimoch-Tuchołka and Dr Marek Świątkowski of Domański Zakrzewski Palinka sp. k, Rondo ONZ 1, 00-124 Warsaw, Poland. The Respondent is also represented by Ms Joanna Jackowska-Majernowska, Ms Barbara Kotlarek-Kmin, and Ms Milena Pluta of the Polish Office of the General Prosecutor, located at the following address: Prokuratoria Generalna Skarbu Państwa, Główny Urząd Prokuraturii Generalnej, ul. Hoża 76/78, 00-682 Warsaw, Poland.

B. OVERVIEW OF THE DISPUTE

3. A dispute has arisen between the Claimants and the Government in respect of which the Claimants commenced arbitration pursuant to Article X of the Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments, which was signed on 5 June 1990 and entered into force on 24 October 1990 (the '**BIT**' or '**Treaty**').
4. The dispute concerns the Claimants' investment, by way of their shareholding in Pol Farm, in a lease of approximately 4200 hectares of land in Świdwin Commune, Poland. The lease was pursuant to an agreement dated 14 February 1997 (the '**Lease**' or '**Lease Agreement**') between Pol Farm and the Polish Agricultural Property Agency (*Agencja Nieruchomości Rolnych*, hereinafter '**ANR**' or '**Agency**'), whereby Pol Farm took over a 30-year lease granted by ANR in 1994 to another lessee. Following ANR's termination of the Lease in 2009, the justifications for which are disputed by the Parties, Pol Farm was liquidated under the judicial supervision of the District Court in Koszalin.

5. The Claimants seek declarations that Poland has breached the Treaty and international law by expropriating the Claimants' investment without adequate compensation, by failing to accord the Claimants equitable and reasonable treatment and protection, and by subjecting the Claimants to unreasonable and discriminatory measures. They also argue that the lease termination constituted a breach of an applicable umbrella clause. The Claimants claim compensation for loss suffered as a result of Poland's Treaty violations, in the amount of approximately EUR 23 million. They also seek interest and costs.
6. The Respondent argues that the claims fall outside the jurisdiction of the Tribunal. But even if the Tribunal were to uphold its jurisdiction, the Respondent submits that the claims that it violated the Treaty are flawed in law and fact and must fail on the merits. Accordingly, it requests the Tribunal to dismiss the claims and order the Claimants to pay all costs.

II. PROCEDURAL HISTORY

7. The Claimants wrote to the Respondent on 6 July 2012,¹ 16 October 2012,² and 18 April 2013,³ requesting that the Parties' dispute be amicably settled. On 10 July 2013, the Polish Embassy in Oslo replied that the Polish Ministry of Agriculture had considered the complaint and adjudged it to have 'no substantiation'.⁴ On 1 November 2013, the Claimants commenced these proceedings by Notice of Arbitration pursuant to the Treaty and the United Nations Commission of International Trade Law Arbitration Rules of 1976 ('**UNCITRAL Rules**').
8. The Claimants invoked Article X of the Treaty, which provides:

1. Disputes between a contracting party and an investor of the other contracting party concerning an obligation of the latter under Article 6 of the present agreement in relation to the investment of the former which have not been amicably settled within 6 months from the date of a written notification of a claim shall be submitted to settlement before an ad hoc international arbitration tribunal if either party to the dispute so wishes.
2. The ad hoc international arbitration tribunal shall be constituted for each individual case in the following way:

Within two months of the receipt of the request for arbitration, each party to the dispute shall appoint one member of the tribunal. These two members shall then select jointly within two months the chairman of the tribunal who is not

¹ Letter dated 6 July 2012 from the Claimants to the Respondent (**Exhibit C-17**).

² Letter dated 16 October 2012 from the Claimants to the Respondent (**Exhibit C-18**).

³ Letter dated 18 April 2013 from the Claimants to the Respondent (**Exhibit C-20**).

⁴ Letter dated 10 July 2013 from the Polish Embassy in Oslo (**Exhibit C-21**).

a national of either contracting party. Each party to the dispute may in the absence of any other agreement invite the president of the International Court of Justice to make the necessary appointments. The tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL) of December 15, 1976. The tribunal reaches its award by a majority of votes.

The tribunal reaches its award on the basis of the provisions of the present agreement as well as on the general principles and rules of international law. The award shall be final and binding and shall be carried out according to domestic legislation. Each contracting party shall ensure the recognition and execution of the arbitral award in accordance with the appropriate provisions of its legislation.

3. Each party shall bear the costs of participation of its member in the arbitration procedure.

The costs of participation of the chairman shall be borne in equal parts by both parties. The tribunal may, however, in its award decide on a different proportion of costs to be borne by the parties and this award shall be binding on both parties.

9. On 24 April 2014, pursuant to Article 7(1) of the UNCITRAL Rules and Article X(2) of the Treaty, the Respondent notified the Claimants of its appointment of Professor August Reinisch as arbitrator. Professor Reinisch's contact details are:

Professor August Reinisch
Department of European, International and Comparative Law
University of Vienna
Schottenbastei 10-16
A-1010 Vienna
Austria
Tel: +43 1 4277 35307
E-mail: august.reinisch@univie.ac.at

10. On 5 May 2014, pursuant to Article 7(1) of the UNCITRAL Rules and Article X(2) of the Treaty, the Claimants notified the Respondent of their appointment of Professor Ola Mestad as arbitrator. Professor Mestad's contact details are:

Professor Ola Mestad
Karl Johans gate 47
Domus Media
0162 Oslo
Norway
Tel: +47 2285 9376
E-mail: ola.mestad@jus.uio.no

11. On 23 June 2014, pursuant to Article 7(1) of the UNCITRAL Rules and Article X(2) of the Treaty, the co-arbitrators appointed H.E. Judge James R. Crawford, AC as the presiding arbitrator. Judge Crawford's contact details are:

Judge James R. Crawford, AC
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands
Tel: +31 70 302 23 23
E-mail: j.crawford@icj-cij.org

12. On 29 April 2015, the Claimants submitted their Statement of Claim (the '**Statement of Claim**') and accompanying documents.
13. On 13 May 2015, each arbitrator signed declarations confirming that he is and shall remain impartial and independent of the Parties.
14. On 18 June 2015, the Tribunal convened a preliminary procedural teleconference with the Parties, minutes of which were circulated on 19 June 2016.
15. On 23 June 2015, the Tribunal invited the Parties to express their preferences in regard to the confidentiality of the arbitral proceedings.
16. On 26 June 2015, the Parties informed the Tribunal that they had agreed that the 1976 version of the UNCITRAL Rules would apply, that the place of the arbitration would be Brussels, and that hearings would be held at the premises of the Permanent Court of Arbitration ('PCA') in The Hague, the Netherlands. The Parties communicated that they had not reached an agreement with respect to confidentiality, with the Claimants preferring a fully public approach, and the Respondent preferring the proceedings be kept confidential in general, but agreeing to publication of the award with any appropriate redactions.
17. The Parties and the Tribunal signed Terms of Appointment taking effect from 28 July 2015. Pursuant to the Terms of Appointment, the Parties and the Tribunal confirmed their agreement that the PCA would serve as registry and that PCA Senior Legal Counsel, Ms Judith Levine, would serve as Tribunal Secretary. Among other things, the Terms of Appointment also confirmed the valid constitution of the Tribunal, identified the representatives of the Parties, fixed Brussels as the legal seat of arbitration and The Hague as the venue for hearings, confirmed the

language of the arbitration to be English, and set in place arrangements for the payment of fees and expenses.

18. On 19 August 2015, the Tribunal issued Procedural Order No. 1, in which the Tribunal set out procedural rules and a schedule for the proceedings. The Tribunal also set out rules with respect to public disclosure about the arbitration, publication of awards, and confidentiality of non-public materials and information provided in the context of the arbitration.
19. On 18 September 2015, Respondent submitted its Statement of Defence (**‘Statement of Defence’**) and accompanying documents, including (i) Exhibits R-1 to R-20, with translations and enclosures; and (ii) Legal Authorities RLA-1 to RLA-14.
20. On 30 September 2015, the Claimants submitted a request for the production of documents to the Respondent, which in turn submitted its objections on 12 October 2015. The Respondent did not request document production from the Claimants.
21. On 19 October 2015, the Claimants replied to the Respondent’s objections and submitted a revised request for document production. The Respondent responded with additional objections on 22 October 2015. On 23 October 2015, the Claimants informed the Tribunal that the Parties had agreed to an extension of time for the submission of outstanding document production requests to 28 October 2015, including an extension of time for the Tribunal to issue its decision on any outstanding requests to 7 November 2015.
22. On 28 October 2015, the Claimants submitted to the Tribunal their outstanding document production requests in the form of a completed Redfern schedule. On 29 October 2015, the Respondent was granted leave to file additional comments on new issues raised in the Claimants’ request. The Respondent submitted its comments on 30 October 2015.
23. On 6 November 2015, the Tribunal issued Procedural Order No. 2, in which it narrowed the scope of two of the Claimants’ amended requests and ordered the production of the remaining requests. The Tribunal ordered the Respondent to produce those documents ‘that are in its possession, custody or control, and/or to use its best efforts to obtain such documents from ANR, without prejudice to any finding the Tribunal may make with respect to the status of ANR or its relationship with the Respondent.’
24. On 10 November 2015, the Claimants requested an extension of the deadline for the submission of their Reply to 4 December 2015 and of the Respondent’s Rejoinder to 11 February 2016, respectively. On 10 November 2015, the Tribunal granted the extensions.

25. On 13 November 2015, the Respondent requested an extension for the production of documents as outlined in Procedural Order No. 2. The Tribunal approved an extension for the production of outstanding documents to 20 November 2015, and correspondingly amended Procedural Order No. 1 to permit the Claimants to submit their Reply on 11 December 2015.
26. On 18 November 2015, the Respondent requested an extension for the submission of its Rejoinder to 4 March 2016. Following exchanges amongst the Parties, on 20 November 2015, the Tribunal amended Procedural Order No. 1 to permit the submission of the Respondent's Rejoinder on 19 February 2016, and to adjust deadlines for notification of witnesses and the Parties' prehearing conference call.
27. On 12 December 2015, the Claimants submitted their Reply ('**Statement of Reply**') and accompanying documents, including (i) Exhibits C-27 to C-63, with translations and enclosures; (ii) Legal Authorities CLA-1 to CLA-52; and (iii) witness statements of Mr Geir Almås (CWS-1) and Mr Kristian Almås (CWS-2), both dated 11 December 2015. The Claimants' Reply noted the Respondent's failure to produce certain documents purportedly held by ANR and requested that the Tribunal convene a teleconference with the Parties in order to resolve the Parties' disagreement.
28. On 18 January 2016, the Tribunal noted the Claimants' proposal and reserved the right to order further document production in respect of ANR, at or subsequent to the merits hearing, in order to permit the Claimants an opportunity to supplement their submissions on quantum.
29. On 19 February 2016, Respondent submitted its Rejoinder ('**Statement of Rejoinder**') and accompanying documents, including (i) Exhibits R-21 to R-25, with translations and enclosures; (ii) Legal Authorities RLA-15 to RLA-47; and (iii) witness statements of Mr Marek Gil (RWS-1), Mr Tomasz Wroński (RWS-2), and Ms Anna Zając-Plezia (RWS-3), dated 22 January 2016, 2 February 2016, and 18 January 2016, respectively.
30. On 4 March 2016, the Parties each submitted a list of the witnesses they intended to call for examination.
31. On 10 March 2016, the Tribunal held a pre-hearing teleconference with the Parties in which arrangements for the hearing were agreed.
32. On 11 March 2016, the Tribunal circulated minutes of the pre-hearing teleconference and advised that, following the teleconference, the Tribunal had conferred on the outstanding question of how to deal with quantum issues and had agreed as follows:

In the event quantum becomes an issue, the Tribunal will conduct a separate process involving an exchange of expert reports and (if necessary) further disclosure of documents. In addition, a second hearing may be necessary. The procedure for and timing of this separate process will be determined after the end of the merits hearing.

33. Between 4 and 7 April 2016, the Tribunal held oral hearings on jurisdiction and the merits at the Peace Palace in The Hague. The following individuals were in attendance:

Tribunal:

Judge James R. Crawford, AC (presiding)
Professor Ola Mestad
Professor August Reinisch

Claimants:

Mr Magnus Hellesylt (counsel)
Ms Kristin Hallsjø Aarvik (counsel)
Mr Geir Almås (Claimant and witness)
Mr Kristian Almås (Claimant and witness)

Respondent:

Ms Julita Zimoch-Tuchołka (counsel)
Dr Marek Świątkowski (counsel)
Ms Magdalena Krzysztoporska (counsel)
Ms Milena Pluta (counsel)
Mr Marek Gil (witness)
Mr Tomasz Wroński (witness)

PCA:

Ms Judith Levine
Mr Philipp Kotlaba

Assistant to Judge Crawford:

Mr Douglas Pivnichny

Interpreters:

Ms Hanne Mørk
Ms Nina Reier
Mr Bartosz Rogowski
Ms Magdalena Skoć

Court Reporter:

Ms Karen Mckendry

34. At the end of the hearing, the Tribunal requested the Parties to identify possible issues for post-hearing submissions. The Claimants denied the need for any such submissions.⁵ The Respondent sought leave to make further submissions on the basis for termination of the Lease Agreement,

⁵ Hearing Tr. (Day 4), p. 98.

and the alleged ‘fact that in 2009 Pol Farm did not use about 900 hectares of land’.⁶ In view of the fact that the principal ground for the requested post-hearing submissions relates to issues raised by the Respondent during the hearing at a late stage and which would require further document disclosure, and that the Claimants nevertheless preferred to proceed without post-hearing submissions, the Tribunal decided not to request post-hearing submissions.

35. The Tribunal further raised a number of translation issues which were duly resolved in correspondence. At the request of the Tribunal, both Parties confirmed their final requests for relief and made brief submissions as to costs on 22 April 2016.
36. By letter of 15 April 2016, the Respondent requested the Tribunal to reconsider its decision on post-hearing submissions in order to afford the Respondent an opportunity to provide additional information relating to an issue raised during witness testimony concerning the area of land allegedly used by Pol Farm. The Respondent attached a document from the Agency for Restructuring and Modernisation of Agriculture. On 11 May 2016, the Tribunal recalled and confirmed its earlier communication, deciding not to request post-hearing submissions. In this connection, the Tribunal disregarded the attachment to the Respondent’s letter.

III. THE UNCONTESTED FACTUAL BACKGROUND

A. NEGOTIATION AND ENTRY INTO THE LEASE AGREEMENT

37. The present dispute stems from a Lease Agreement between the Claimants and the Agricultural Property Agency (*Agencja Nieruchomości Rolnych*), a Polish institution under the supervision of the Ministry of Agriculture and Rural Development that is responsible for administering, leasing, and selling Polish State-owned land. ANR is the successor body to the Agricultural Property Agency of the State Treasury, which was originally created to supervise Poland’s transition from State-owned agriculture to a market-based economy pursuant to the 1991 Act on Managing Agricultural Property Owned by the State Treasury (the ‘**1991 Act**’).⁷
38. On 18 February 1994, Danish investors, acting through a company, Pol Rol Sp. z oo (‘**Pol Rol**’), began a 30-year lease with ANR on a 4296.47-hectare estate in Świdwin Commune, Poland (the

⁶ Hearing Tr. (Day 4), p. 99.

⁷ Statement of Claim, §2.1; Statement of Defence, §52.

‘**Farm**’),⁸ which had been previously run by a State-owned farm now in liquidation.⁹ Pol Rol was unable to cultivate the land in such a way as to turn a profit, however, and entered into negotiations to transfer its leasehold interest to Mr Kristian Almås and Mr Atle Almås (the brothers of Mr Geir Almås).¹⁰

39. On 13 February 1996, the Claimants incorporated Pol Farm Sp. z oo (‘**Pol Farm**’) for the purpose of entering into the Lease.¹¹ On 14 February 1997, Pol Farm and ANR finalised a consolidated lease agreement for the Farm (the ‘**Lease**’ or ‘**Lease Agreement**’) in which Pol Farm replaced Pol Rol as lessee.¹²

40. Pursuant to the Lease Agreement, Pol Farm was to pay an annual rent equivalent to the market value of approximately 700 tons of wheat to ANR.¹³ Additionally, the Lease Agreement contained limitations on Pol Farm’s use of the land, including in Section 5 a clause requiring Pol Farm to ‘use and manage the rented property properly in order to conduct their business activity there’ and prohibiting it from changing ‘the required use of the property’ without ANR’s written consent.¹⁴

41. Section 5 provided, in relevant part:

1. The Lessee commits themselves to use and manage the rented property properly in order to conduct their business activity there. At the same time they cannot change the required use of the property without Lessor's consent.
2. Moreover, the Lessee agrees to take over all the rights and duties resulting from employment agreements signed by and between PGR Świdwin and its 94 employees and becomes a party in a employment relationship with these employees under art. 23 1§2 of the Polish Labor Code. The Lessee takes over all the duties with respect to these people as specified elsewhere.¹⁵

⁸ Statement of Claim, §2.2.

⁹ Statement of Claim, §2.2; Statement of Defence, §8.

¹⁰ Witness Statement of Mr Geir Almås, §3 (CWS-1).

¹¹ Pol Farm Company Registration Documents (**Exhibit C-2**); Statement of Claim, §2.1.

¹² Lease Agreement dated 14 February 1997 (**Exhibit C-3**); Notice of Arbitration, §2.2; Statement of Claim, §2.2; Statement of Defence, §3.

¹³ Lease Agreement §15(1). The rent was negotiated on a fixed basis in return for Pol Farm’s obligation, in §5(3) of the Lease Agreement, to take over the existing Pol Farm workforce and to keep at least 60 of them employed for a minimum of one year. Statement of Claim, §2.2.

¹⁴ Lease Agreement §5(1); Notice of Arbitration, §2.2.

¹⁵ Subparagraph 3 of Section 5 relates to a requirement that Pol Farm ‘keep employed at least 60 of the employees mentioned in point 2 for a period of at least one year.’

Section 7 provided:

1. The Lessee commits themselves to maintain the subject of this Agreement on their own cost in such a way and manner that its specific parts will not be subject to deterioration apart from the normal tear and wear.
2. In particular, the Lessee commits themselves to maintain and repair buildings and structures as well as plant and machinery that are subject of the Lease Agreement on their own cost. The frequency of repair shall result from the principles of proper exploitation.

Finally, Section 14(1) provided:

Apart from the rent, the Lessee will bear all the regulatory liabilities connected with the rented property for which, according to legal provisions, either the owner or the possessor is liable. In this case these include: real estate tax, agricultural tax and other liabilities resulting from possessing the property including obligatory insurance.

42. Section 17 of the Lease Agreement provided the conditions under which it could be terminated prior to its expiration in 2024. That clause provides, in relevant part, that the Agreement may be terminated ‘without statutory notice if the Lessee lags behind with rent for a minimum of two terms of payment or when [it] fails to fulfil the duties described in § 5 and § 14 point 1.’

B. POL FARM’S INVESTMENTS IN THE FARM 1995-2007

43. From 1995 to 2004, Pol Farm made investments and operational changes to the Farm. In 1998, Pol Farm hired additional staff. Additionally, Pol Farm spent approximately PLN 14 million (EUR 3.4 million) by way of additional investments in this period.¹⁶
44. Despite Pol Farm’s investments, the Company failed to turn a profit in those years, and by 2003, the Company was near bankruptcy. Between 2003 and 2004, Mr Kristian Almás and Mr Geir Almás, the present Claimants, bought out other ownership interests in Pol Farm, including that of their brother Mr Atle Almás.¹⁷
45. In 2004, the Republic of Poland acceded to the European Union. The Lease Agreement’s value rose, along with other property prices in Poland.¹⁸ As a result of Poland’s EU accession, the Farm began to receive approximately EUR 500,000 in agricultural subsidies each year.¹⁹

¹⁶ Statement of Claim, §2.3.

¹⁷ Notice of Arbitration, §2.3.

¹⁸ Notice of Arbitration, §2.4; Statement of Claim, §2.4.

¹⁹ Statement of Claim, §2.4; Statement of Defence, §8.

46. That same year, Pol Farm received a letter from ANR in which the Agency expressed its interest in renegotiating the Lease Agreement.²⁰ ANR enclosed with the letter a new lease agreement with its signature. Under this proposed renegotiation, ANR could reassume control of up to 20 percent of the productive farmland.²¹ Pol Farm declined to accept the offer.²²
47. From 2005 to 2007, Pol Farm made additional investments in the Farm.²³ In 2005, Pol Farm acquired stock and cattle at Bierwznica, a nearby farm, and was granted a short-term lease by ANR for the buildings there. In exchange, Pol Farm entered into additional agreements for the continued employment of workers,²⁴ whose numbers grew from 35 to 120 full-time employees between 2004 and 2007.²⁵ Pol Farm also invested substantially in dairy production during this period.²⁶
48. In 2006, Pol Farm requested from ANR a cancellation of 32 percent of the rent due under the lease for the first half of 2006, as well as an extension for payment of the remaining amount from 15 November 2006 to 31 January 2007.²⁷ According to the Respondent, ANR agreed with Pol Farm's request.²⁸
49. In 2007, Pol Farm, according to the Claimants, submitted a letter to ANR in which it proposed to purchase the buildings on the Farm outright.²⁹ Subsequently, Pol Farm attended a meeting in the autumn of 2007, during which ANR again proposed the renegotiation of the Lease Agreement and suggested that the agreement be amended to the pre-signed proposal it had sent in its earlier letter.³⁰ Pol Farm declined the offer. During the course of the meeting, Pol Farm claims it informed

²⁰ Notice of Arbitration, §2.4; Statement of Claim, §2.4; Witness Statement of Mr Geir Almås, §17 (**CWS-1**).

²¹ As the original form of the offer appears not to have been submitted as part of the record, the Claimants drew attention to a purportedly identical version of the offer submitted to Pol Farm in 2007. Annex 6 to Proposed Lease Agreement No. 88865, §3(3)(1) (**Exhibit C-63**) (agreed translation submitted by the Claimant on 12 April 2016) ('The Parties govern that the following may become excluded from the leased object: land of total area up to 20% of the original area'). See also Hearing Tr. (Day 1), p. 9; Witness Statement of Mr Geir Almås, §§109, 112 (**CWS-1**). The Respondent did not deny this. See Hearing Tr. (Day 3), pp. 19-21.

²² Notice of Arbitration, §2.4; Statement of Claim, §2.4; Hearing Tr. (Day 1), p. 9.

²³ Notice of Arbitration, §2.5; Statement of Claim, §2.5.

²⁴ Statement of Claim, §2.5.

²⁵ Statement of Claim, §2.5.

²⁶ Statement of Claim, §2.5.

²⁷ Statement of Defence, §19.

²⁸ Statement of Defence, §19.

²⁹ Statement of Claim, §2.5.

³⁰ Notice of Arbitration, §6.4.2; Statement of Claim, §2.5; Witness Statement of Mr Geir Almås, §112 (**CWS-1**); Annex 6 to Proposed Lease Agreement No. 88865 (**Exhibit C-63**).

ANR it would start producing raspberries on the farm from the spring of 2008, receiving, in its view, no apparent objection.³¹ Taking this as implied consent, Pol Farm did not ask for a ‘change of purpose’ of the Lease.

C. ANR’S INSPECTIONS OF AND COMPLAINTS ABOUT THE FARM

50. On 3 October 2005, in response to what ANR considered to be the dilapidated condition of various buildings on the Farm, ANR concluded two contracts with Pol Farm which set a deadline of 30 May 2006 for the demolition of the buildings.³²
51. On 6 July 2006, ANR met with Pol Farm employees Mr Marian Kiwkowicz and Ms Monika Wójcik, during which ANR expressed its disappointment with Pol Farm’s failure to comply with earlier agreements regarding the renovation and maintenance of buildings leased from the Agency.³³ On 7 December 2006, Mr Geir Almås wrote to ANR agreeing that Pol Farm had failed to implement previously agreed measures.³⁴
52. Between 2007 and 2009, ANR conducted various inspections of the Farm.³⁵ On 23 November 2007, ANR conducted an inspection.³⁶ Section II.7 of the ensuing report, summarising the inspector’s conclusions, set out the following remarks:
1. The physical liquidation of the heifer buildings must be commenced immediately as there is a risk of their collapse - the demolition decision was issued by the Agency Branch in Koszalin in 2005.
 2. The fallow meadows set aside, approx. area of 200 hectares, must be restored to use until 2015, however approx. 100 hectares should be utilized earlier until 2010.
 3. The arable land which is not currently used, approx. 50 hectares, must be rehabilitated. The deadline is until 2010.
 4. According to the lease agreement (§7.2), the leaseholder must regularly renovate the existing buildings. The deadline is now.

³¹ Statement of Claim, §2.5.

³² Statement of Defence, §25; Agreements dated 3 October 2005 (**Exhibit R-10**).

³³ Statement of Defence, §19 (citing Letter dated 7 December 2006 from Pol Farm to ANR (**Exhibit R-8**)).

³⁴ Letter dated 7 December 2006 from Pol Farm to ANR (**Exhibit R-8**).

³⁵ Statement of Defence, §20.

³⁶ Statement of Claim, §2.6.

5. The building protection against third-party access must be strengthened to avoid fire (arson).³⁷
53. How far and when the Claimants were informed of ANR's concerns is in dispute.³⁸ The record indicates, however, that Pol Farm had obtained a copy of the inspection report by 15 January 2008.³⁹
54. On 15 February 2008, ANR sent a letter to Pol Farm with a copy of the report.⁴⁰ The letter noted the detection of several 'irregularities' during the inspection, demanded certain improvements to buildings and land, and requested that Pol Farm act by 31 December 2010 to make the land 'cultivated and developed'.⁴¹ The letter stated:
 1. The Company is obliged to liquidate immediately the buildings of the heifers in physical terms (as they are about to collapse), to which the decision on disassembly was given by the Branch of ANR in Koszalin in 2005;
 2. The Company is obliged to develop the meadows with the area of about 200ha by 31 December 2015, however, by 31 December 2010, about 100ha of meadows are to be developed;
 3. By 31 December 2010, the agricultural lands are to be cultivated and developed with the area of 50ha. The deadline for performance by 31 December 2010.
 4. In accordance with the lease agreement concluded, par. 7 points 2, the lessor shall be obliged to make systematic repairs of the buildings. The deadline - now.
 5. The security of buildings should be increased from the entry of third persons so as to not allow fires (arson).
 6. The Company is obliged to establish and conduct on a currently basis the books of the construction facilities. The deadline for establishing and introducing the book by 31 June 2008.⁴²
55. In response, Pol Farm made certain repairs to the buildings identified by ANR's report as in need of maintenance.⁴³ The timing of other measures is in dispute. The Claimants state that Pol Farm

³⁷ ANR Inspection Report dated 23 November 2007 (**Exhibit C-4**).

³⁸ Statement of Claim, §2.6; Statement of Defence, §§22-24.

³⁹ Copy of ANR Inspection Report dated 23 November 2007, with signature of Mr Geir Almås dated 15 January 2008 (**Exhibit R-9**) (Polish original).

⁴⁰ Statement of Claim, §2.6.

⁴¹ Letter dated 15 February 2008 from ANR to Pol Farm (**Exhibit C-5**); Notice of Arbitration, §§2.6.

⁴² Letter dated 15 February 2008 from ANR to Pol Farm (**Exhibit C-5**).

⁴³ List of repair works dated 19 September 2008 (**Exhibit R-13**); Statement of Defence, §28.

fenced off parts of the land and undertook security measures to comply with ANR's fifth recommendation, including through the installation of security cameras and the hiring of security guards,⁴⁴ but the Respondent suggests these measures preceded ANR's 2007 inspection,⁴⁵ and that further promised measures were not taken.

56. On 30 May 2008, the Mayor of Świdwin wrote a letter to ANR expressing support for Pol Farm as a substantial local employer, and stating that '[a]ny slowdown of the Company's operations, and especially a case of its full withdrawal from the local market, would lead to serious repercussions for the economy of the Commune.'⁴⁶ He added:

Considering the above, when re-negotiating the lease agreement made with Polfarm we kindly ask that such circumstances be analysed, taking into account the interests of both the Agency as well as Świdwin Commune which is looking forward [to] keeping the strategic investor on the local market.⁴⁷

57. On 19 September 2008, ANR conducted a second inspection of Pol Farm.⁴⁸ During the inspection, the Claimants provided ANR with a list of repair work carried out in accordance with ANR's letter of 15 February 2008.⁴⁹
58. On 7 October 2008, ANR sent a letter to Pol Farm referring to a number of observations the Agency had made during its inspection and noting that further 'irregularities' had been detected, including the continued presence on the Farm of several heifer buildings that had, under the 2005 agreements, been due to be demolished by 30 May 2006.⁵⁰ In its letter, ANR: (i) requested that Pol Farm 'provide written explanations of why the arrangements concerning demolition . . . had not been performed';⁵¹ (ii) acknowledged the Company's improvements with regard to ANR's previous request to conduct other maintenance and repairs on the Farm; (iii) noted that Pol Farm's

⁴⁴ Statement of Claim, §2.6.

⁴⁵ Statement of Defence, §30.

⁴⁶ Letter dated 30 May 2008 from the Mayor of Świdwin to ANR (**Exhibit C-6**); Notice of Arbitration, §2.7; Statement of Claim, §2.7.

⁴⁷ Letter dated 30 May 2008 from the Mayor of Świdwin to ANR (**Exhibit C-6**).

⁴⁸ Notice of Arbitration, §2.8; Statement of Claim, §2.9; Statement of Defence, §25.

⁴⁹ List of repair works dated 19 September 2008 (**Exhibit R-13**); Statement of Defence, §28.

⁵⁰ Letter dated 7 October 2008 from ANR to Pol Farm (**Exhibit C-7**); Statement of Claim, §2.9; Statement of Defence, §25.

⁵¹ Letter dated 7 October 2008 from ANR to Pol Farm (**Exhibit C-7**).

building logbooks were incomplete;⁵² and (iv) demanded an explanation for why raspberries had been planted on parts of the land. It wrote:

The lessor presented the structure of crops constituting annex no 2 to the note, from which it results that on the plots no 21/28, 23, 86, 150, the Klepczewo district, the multi-year plantation of raspberries was established with the area of 50 ha, as a result, the Lessor shall submit an explanation in writing why the plantation was founded without the consent of the Agency. The deadline for submitting the explanation is 31 October 2008.⁵³

59. In Pol Farm's response of the same month, the Company requested ANR to extend the deadline for a written response to 30 November 2008.⁵⁴ Pol Farm also requested that ANR clarify the basis in the Lease Agreement for requiring consultation regarding the plantation of raspberries.⁵⁵ ANR did not respond to the letter.⁵⁶
60. On 11 December 2008, ANR conducted a third inspection of the Farm. The inspection revealed that no further demolition work had been carried out.⁵⁷

D. DETERIORATION OF POL FARM'S FINANCIAL SITUATION

61. In 2008, drought and financial recession reduced Pol Farm's profits.⁵⁸ Pol Farm's potato and grain crops failed and prices, particularly for dairy, fell significantly. Pol Farm defaulted on lease payments on both due dates in 2008, although enough was paid to avoid triggering ANR's right to terminate the lease (see paragraph 245 below).⁵⁹
62. On 30 April 2009, the Claimants signed a letter of intent with a German company, Agrar Invest Holding, to sell Pol Farm for PLN 75 million (EUR 18 million).⁶⁰ Under the proposed terms of the deal, the Claimants would transfer their shareholdings in Pol Farm to Norwegian investment companies Hermod Farms AS and Skogbrynet Eiendom AS, which were accordingly included as

⁵² Statement of Defence, §31.

⁵³ Letter dated 7 October 2008 from ANR to Pol Farm (**Exhibit C-7**).

⁵⁴ Letter dated October 2008 from Pol Farm to ANR (**Exhibit C-8**); Statement of Defence, §25.

⁵⁵ Letter dated October 2008 from Pol Farm to ANR (**Exhibit C-8**); Notice of Arbitration, §2.9; Statement of Claim, §2.9.

⁵⁶ Statement of Claim, §2.9.

⁵⁷ Statement of Defence, §25; December 2008 Memorandum dated 11 December 2008 (**Exhibit R-11**).

⁵⁸ Notice of Arbitration, §2.8; Statement of Claim, §2.8.

⁵⁹ Statement of Defence, §33.

⁶⁰ Letter of Intent dated 30 April 2009 (**Exhibit C-9**).

parties to the letter of intent.⁶¹ Agrar Invest Holding failed to make an advance payment of PLN 7 million, however, and the attempted sale was ultimately abandoned.⁶²

63. On 6 May 2009, ANR received a letter from Kancelaria Radców Prawnych Nosowski, Konratowski i Wspólnicy, a law firm representing one of Pol Farm's creditors, requesting information as to Pol Farm's liabilities to ANR.⁶³
64. On 8 May 2009, ANR's Koszalin branch held an internal meeting attended by Deputy Director Marek Gil, ANR's deputy chief accountant, a legal advisor, and other employees to discuss Pol Farm's financial situation.⁶⁴ An internal ANR memorandum (the '**ANR Memorandum**'), authored by Mr Witold Nowak, records multiple internal ANR meetings about Pol Farm and notes, with respect to the 8 May 2009 meeting, ANR's observations that: (i) Pol Farm's debts might exceed the total value of its assets; (ii) several enforcement proceedings were pending against the Company; and (iii) that there was 'a real threat' that Pol Farm's creditors could file a petition in bankruptcy in response to Pol Farm's financial difficulties and late payments.⁶⁵ Those present at the meeting also interpreted the 6 May 2009 enquiry into Pol Farm's liabilities as 'a signal that the Company has multiple public-law, civil-law and loan obligations of significant value.'⁶⁶ Mr Gil concluded that ANR would file a claim against Pol Farm for outstanding rent and contractual penalties.
65. The ANR Memorandum makes reference to the fact that on 6 May 2009, Pol Farm twice contacted ANR, transferred PLN 50,000 in outstanding rent due, and requested an urgent meeting.⁶⁷ As a result of these interventions, the minutes of ANR's meeting indicate that Mr Gil 'decided to withhold submitting the statement of claim' pending an assessment of whether Pol Farm would comply with its earlier representations.⁶⁸

⁶¹ Notice of Arbitration, §2.10; Statement of Claim, §2.10.

⁶² Statement of Claim, §2.10.

⁶³ ANR Memorandum dated 8 May 2009, p. 1 (**Exhibit R-18**); Statement of Defence, §33.

⁶⁴ Statement of Defence, §33.

⁶⁵ ANR Memorandum dated 8 May 2009, p. 1 (**Exhibit R-18**).

⁶⁶ ANR Memorandum dated 8 May 2009, p. 1 (**Exhibit R-18**).

⁶⁷ ANR Memorandum dated 8 May 2009, p. 1 (**Exhibit R-18**); Statement of Rejoinder, §26.

⁶⁸ ANR Memorandum dated 8 May 2009, p. 1 (**Exhibit R-18**); Statement of Defence, §33.

66. On 12 May 2009, Mr Geir Almås met with representatives of ANR to discuss Pol Farm's financial situation.⁶⁹ At the conclusion of the meeting, Mr Almås undertook, according to the ANR Memorandum, that Pol Farm would pay off its outstanding debt in monthly instalments of PLN 100,000, and promised to 'submit such a proposal in writing'.⁷⁰ The ANR Memorandum records ANR's interpretation of Mr Almås' promise as 'a play for time'.⁷¹ Nevertheless, Mr Gil determined that ANR would refrain from terminating the Lease Agreement pending Pol Farm's subsequent actions:

Termination of the agreement will be considered depending on whether the Company complies with its proposal as regards handling the debt and on the basis of other information that shows the Company's current financial and organisational status.⁷²

67. On 14 May 2009, Pol Farm wrote to ANR and informed it that 'difficulties in paying off debts due to you are only transitory and are caused by factors unrelated to the Company'.⁷³
68. On 15 May 2009, the Claimants wrote to the Świdwin Municipality requesting the deferral of an instalment of agricultural tax due.⁷⁴ By letter dated 21 May 2009, the municipality agreed to defer the deadline for payment to 30 September 2009.⁷⁵
69. On 21 May 2009, ANR wrote to Pol Farm to demand payment of liquidated damages⁷⁶ for Pol Farm's alleged failure to demolish a building as required under two agreements signed by Mr Marian Kiwkowicz, Pol Farm's field manager, in 2005.⁷⁷ ANR subsequently referred the matter to debt collection.⁷⁸ Pol Farm disputed the claim on the ground that Mr Kiwkowicz lacked authority to sign them, and obtained a preliminary injunction against collection. Further debt collection was stayed pending resolution of the dispute.⁷⁹

⁶⁹ ANR Memorandum dated 8 May 2009, p. 2 (**Exhibit R-18**); Statement of Defence, §34.

⁷⁰ ANR Memorandum dated 8 May 2009, p. 2 (**Exhibit R-18**); Statement of Defence, §34.

⁷¹ ANR Memorandum dated 8 May 2009, p. 2 (**Exhibit R-18**).

⁷² ANR Memorandum dated 8 May 2009, p. 2 (**Exhibit R-18**).

⁷³ Letter dated 14 May 2009 from Pol Farm to ANR (**Exhibit R-5**).

⁷⁴ Statement of Reply, §2.6.2.

⁷⁵ Letter dated 21 May 2009 from the Świdwin Municipality to Pol Farm (**Exhibit C-29**).

⁷⁶ Letter dated 21 May 2009 from ANR to Pol Farm (**Exhibit C-57**). *See also* Notice of Arbitration, §2.10; Statement of Claim, §2.10.

⁷⁷ Witness Statement of Mr Geir Almås, §54 (**CWS-1**).

⁷⁸ Statement of Claim, §2.10.

⁷⁹ Notice of Arbitration, §2.10; Statement of Claim, §2.10.

E. TERMINATION OF THE LEASE AGREEMENT

70. On 30 June 2009, ANR held another internal meeting at which it discussed Pol Farm's non-performance of its obligations under the Lease Agreement, including the Company's failure to provide ANR with its financial documents and to pay PLN 300,000 in late rent.⁸⁰ At the meeting, ANR resolved to terminate the Lease Agreement.
71. On 7 July 2009, ANR served Pol Farm with a Notice of Termination purporting to terminate the Lease Agreement with immediate effect.⁸¹ ANR justified the termination by reference to the clause in the Lease Agreement requiring ANR's prior written consent in order to change the use of the land: 'In connection with infringing the conditions of the lease . . . i.e. par. 5 it. 1 involving the change of the purpose of the subject of the case – [ANR's Koszalin branch] – quoting par. 17 – hereby terminates the Agreement without the preservation of the statutory notice period.'⁸² Pol Farm was given until 31 August 2009 to relinquish control over the land to ANR and to sign a handover protocol.⁸³
72. On 14 July 2009, Pol Farm, acting through its legal representatives, requested further clarification of the grounds for termination of the Lease Agreement.⁸⁴ Pol Farm also proposed a meeting with ANR to discuss the circumstances concerning ANR's decision to terminate the Lease.⁸⁵
73. On 16 July 2009, ANR and Pol Farm met to discuss ANR's termination of the Lease Agreement.⁸⁶ During the meeting, Pol Farm undertook to settle outstanding payments and to provide ANR with a 'recovery plan'.⁸⁷ An ANR Memorandum of 8 May 2009, which incorporates ANR's observations from events subsequent to the termination of the Lease Agreement, including this meeting, suggests that the meeting ended unsuccessfully:

During the meeting, the representatives of the Company failed to provide any particular proposal or declaration that would show that their approach to [the] Company's problems is serious They declared that they will submit a formal

⁸⁰ ANR Memorandum dated 8 May 2009, p. 2 (**Exhibit R-18**); Statement of Defence, §34.

⁸¹ Letter dated 7 July 2009 from ANR to Pol Farm (**Exhibit C-10**); Notice of Arbitration, §2.11; Statement of Claim, §2.11.

⁸² Letter dated 7 July 2009 from ANR to Pol Farm (**Exhibit C-10**); Statement of Claim, §2.11.

⁸³ Letter dated 7 July 2009 from ANR to Pol Farm (**Exhibit C-10**).

⁸⁴ Letter dated 14 July 2009 from Pol Farm to ANR (**Exhibit C-11**); Statement of Claim, §2.11.

⁸⁵ Ibid.

⁸⁶ Statement of Defence, §36.

⁸⁷ Statement of Defence, §36.

proposal or a recovery programme within 10 days, and analysing which would allow the Agency to change its mind. In response, Mr Marek Gil declared that he is waiting for a full and documented . . . financial standing of the Company, based on which it will be possible to assess the Company's proposal. This expectation has dramatically changed the approach of the Company's representatives, who ended the meeting and stated that the matter will be left for lawyers to handle.⁸⁸

74. Lawyers for Pol Farm sent a second letter to ANR on 6 August 2009, requesting that ANR 'take a stance' with regard to the Company's previous request for clarification as to the grounds for the termination of the Lease Agreement.⁸⁹
75. On 3 August 2009, ANR conducted a further inspection of the Farm. Its post-inspection memorandum from this period noted that several buildings not in use were 'not secured against third parties' and that 'only a few' were fenced as originally requested by ANR in its letter to Pol Farm dated 15 February 2008.⁹⁰
76. On 12 August 2009, Mr Gil of ANR wrote to Pol Farm. He denied that ANR's behaviour was contrary to the terms of the Lease Agreement and reiterated the deadline for Pol Farm to return the land.⁹¹ Further, the Agency provided additional reasons for its Notice of Termination. Those included charges that the Claimants: (i) excluded some land from cultivation, thereby using the property contrary to its purpose and to the rules of proper management; (ii) did not properly maintain the buildings, and that, in consequence, the state of the property had deteriorated to a greater extent than if it had been normally and properly used; and (iii) did not pay all of its public fees.⁹² The letter stated:

I would also like to clarify that the basis for the renouncement of the Agreement without the statutory notice period was the breach of the provisions of § 5 item 1, namely the change of the purpose of the lease object (land structures) as well as using the lease object to conduct business in a manner non-compliant with the principles of good administration which hereby present as the cause of the renouncement.

The obligation of Pol Farm sp. z o. in Krosino under the agreement was to maintain the lease object so that its individual elements did not deteriorate except for normal wear and tear. This obligation concerned especially maintaining and renovating buildings and structures as frequently as dictated by the principles of the correct use. The lessee did not duly perform those obligations.

⁸⁸ ANR Memorandum dated 8 May 2009, p. 4 (**Exhibit R-18**).

⁸⁹ Letter dated 6 August 2009 from Pol Farm to ANR (**Exhibit C-12**).

⁹⁰ Statement of Defence, §30; ANR Memorandum dated 3 August 2009 (**Exhibit R-17**).

⁹¹ Letter dated 12 August 2009 from ANR to Pol Farm (**Exhibit C-13**).

⁹² Letter dated 12 August 2009 from ANR to Pol Farm (**Exhibit C-13**); Notice of Arbitration, §2.11; Fee Receipts dated 28 August 2009 (**Exhibit C-25**).

The breach of § 5 item 1 of the Agreement regarding the use of the lease object in accordance with the principles of good administration consisted also in turning some part of the lands into fallow lands which contradicted those principles.

I would like to additionally raise as the basis for the renouncement of the agreement the lack of regulation of any statutory charges regarding the lease objects (§ 14 item regarding § 17 of the Agreement).⁹³

77. On 28 August 2009, Pol Farm wrote objecting to the legal basis for the termination of the Lease Agreement.⁹⁴ On 31 August 2009, the seven-week deadline set by ANR to hand over the premises passed.
78. Further meetings between ANR and Pol Farm took place in September and October 2009.⁹⁵ All, however, were unsuccessful: they neither led to the withdrawal of the termination of the Lease Agreement nor to any agreed plan for the continued use of the land.
79. On 4 September 2009, Pol Farm informed ANR that its shareholders wished to transfer their shares in the Company to a Polish food manufacturer.⁹⁶ Pol Farm also indicated its readiness to accept ANR's earlier proposal of renegotiating a more limited lease agreement for a smaller area of land, such that ANR would take over part of the land 'in order to transfer them to the farmers nearby.'⁹⁷ Neither of these eventualities occurred.

F. POL FARM'S BANKRUPTCY

80. On 4 September 2009, Al-Samer LLC, a Pol Farm creditor, submitted a petition in bankruptcy against Pol Farm.⁹⁸ A second petition was filed by a creditor on 7 September 2009. On 7 October 2009, the VII Commercial Division for Bankruptcy and Repair of the District Court in Koszalin

⁹³ Letter dated 12 August 2009 from ANR to Pol Farm (**Exhibit C-13**).

⁹⁴ Letter dated 28 August 2009 from Pol Farm to ANR (**Exhibit C-14**); Notice of Arbitration, §2.11; Statement of Claim, §2.11.

⁹⁵ Notice of Arbitration, §2.11; Statement of Claim, §2.11.

⁹⁶ Letter dated 4 September 2009 from Pol Farm to ANR (**Exhibit C-15**); Notice of Arbitration, §2.11; Statement of Claim, §2.11.

⁹⁷ Letter dated 4 September 2009 from Pol Farm to ANR, p. 2 (**Exhibit C-15**); Statement of Claim, §2.11.

⁹⁸ Ruling of the Court of Koszalin dated 4 December 2009, p. 1 (**Exhibit C-16**).

opened bankruptcy proceedings, at which time Pol Farm was officially declared bankrupt.⁹⁹ The court entered a liquidation order for Pol Farm on 22 October 2009.¹⁰⁰

81. On 4 December 2009, the Claimants' appeal against the liquidation order was rejected, as was Pol Farm's petition for a preliminary meeting with creditors.¹⁰¹
82. Subsequent to the order, Pol Farm was liquidated, with its remaining assets distributed to creditors. ANR assumed control over the Farm in December 2009.¹⁰² An external expert report assessing the damage to the buildings on the Farm estimated damage exceeding normal wear at PLN 718,500.¹⁰³

G. SUBSEQUENT CRIMINAL PROCEEDINGS

83. On 22 October 2009, subsequent to the initiation of bankruptcy proceedings, the court receiver, Mr Andrzej Wojtalik, requested the regional prosecutor's office in Białogard to investigate perceived irregularities in Pol Farm's financial statements and allegations that the Claimants had misappropriated the Company's funds.¹⁰⁴ The complaint related, in particular, to allegations that the Claimants had 'tried to embezzle valuable assets' by transferring Pol Farm's assets to another company which they owned, Gospodarstwo B.¹⁰⁵
84. Following an investigation, on 2 August 2013, the prosecutor's office filed an indictment against the Claimants in connection with several allegations: (i) damage to Pol Farm; (ii) Pol Farm acting to the detriment of its creditors; (iii) failure of Pol Farm to file for bankruptcy; and (iv) alleged irregularities in Pol Farm's statements of account.¹⁰⁶ On 8 October 2015, the Criminal Division of the Regional Court in Koszalin found the Claimants guilty of misappropriation and several

⁹⁹ Ruling of the Court of Koszalin dated 4 December 2009, p. 1 (**Exhibit C-16**); Statement of Claim, §2.12; Statement of Defence, §17.

¹⁰⁰ Notice of Arbitration, §2.12.

¹⁰¹ Final Order dated 4 December 2009 by the District Court of Koszalin (**Exhibit C-16**); Notice of Arbitration, §2.12.

¹⁰² Statement of Defence, §29.

¹⁰³ Expert Opinion of Ms Bożena Kamczycka dated 15 February 2010 (**Exhibit R-16**).

¹⁰⁴ Indictment dated 2 August 2013, p. 6 (**Exhibit R-4**); Statement of Defence, §18.

¹⁰⁵ Indictment dated 2 August 2013, p. 6 (**Exhibit R-4**).

¹⁰⁶ Indictment dated 2 August 2013 (**Exhibit R-4**); Statement of Defence, §18.

other charges, and handed down a sentence of 22 months' imprisonment suspended for five years.¹⁰⁷ The judgment is currently under appeal.¹⁰⁸

85. In his oral testimony at the hearing, Mr Kristian Almås admitted that invoices issued by Pol Farm had been altered to show the bank account of Gospodarstwo B, and that this was irregular.¹⁰⁹ He asserted, however, that Gospodarstwo B had made equivalent payments on behalf of Pol Farm.¹¹⁰

IV. RELIEF SOUGHT

86. Following the Tribunal's invitation to the Parties to submit their final requests for relief, on 22 April 2016, the Claimants stated their final 'Claim for Relief' requesting the Tribunal to:

1. DECLARE that the Respondent:
 - (i) has breached Art. VI of the Treaty by subjecting the Claimants' investment to measures amounting to expropriation;
 - (ii) has breached Art. III of the Treaty by failing to accord the Claimants' investment equitable and reasonable treatment and protection; [and]
 - (iii) has breached Art. III and VI [of the Treaty] by subjecting the Claimants' investment to unreasonable and discriminatory treatment.
2. DECLARE that the Respondent is liable to pay damages to the Claimants for the loss that the Claimants have suffered as result of the Respondent's breaches of the Treaty, as set out in section 1 above. The amount of damages payable, which shall include interest, shall be decided by the Tribunal in a procedure to be set out in a separate Procedural Order.
3. ORDER the Respondent to pay the fees and expenditures of the Arbitral Tribunal and of the Permanent Court of Arbitration.
4. ORDER the Respondent to pay the Claimants' legal costs and costs of experts and advisers in the proceedings to date. The Respondent shall bear its own legal costs.¹¹¹

¹⁰⁷ Statement of Reply, §10.

¹⁰⁸ Witness Statement of Mr Geir Almås, §33 (CWS-1); Statement of Rejoinder, §13.

¹⁰⁹ Hearing Tr. (Day 2), pp. 145-146. Mr Geir Almås also acknowledged that invoices of Pol Farm had listed the bank account number of Gospodarstwo B. Hearing Tr. (Day 2), p. 92.

¹¹⁰ Hearing Tr. (Day 2), p. 146.

¹¹¹ Letter dated 22 April 2016 from the Claimants to the Tribunal. Earlier articulations of the relief sought by the Claimants were set out in their Statement of Claim, §8 and Statement of Reply, §14, including a damages claim estimated at PLN 100 million. Although the Claimants' prayer for relief does not explicitly mention it, the Claimants are also claiming a breach of an umbrella clause 'imported' via the Treaty's MFN Clause. *See* Statement of Reply, §11.

87. On 22 April 2016, the Respondent also submitted its final ‘Claim for Relief’ requesting the Tribunal to:

dismiss all the claims submitted by Claimants in this arbitration and order Claimants to pay all costs, disbursements and expenses incurred by Respondent in its defence against these claims including, but not limited to, legal, consulting and witness fees and expenses, travel and administrative expenses, and the arbitration costs.¹¹²

V. THE ARGUMENTS OF THE PARTIES AS TO JURISDICTION AND MERITS

A. SUMMARY OF PRELIMINARY OBJECTIONS

88. As a preliminary matter, the Parties disagree as to whether the Tribunal has jurisdiction. The Respondent questions the Tribunal’s jurisdiction on the following grounds: (i) any conduct of ANR is not attributable to the Respondent; (ii) the Claimants’ protected investments must be limited to their shares in Pol Farm only, and do not include their contractual rights under the Lease Agreement; (iii) in any event, the MFN Clause in the Treaty cannot extend the Tribunal’s jurisdiction to consider claims other than expropriation of the Claimants’ shares; and (iv) similarly, the MFN Clause cannot extend jurisdiction to cover the breach of an umbrella clause.
89. The Claimants maintain that: (i) ANR’s conduct is attributable to Poland; (ii) the Claimants’ contractual rights under the Lease Agreement are protected investments; (iii) the Treaty permits the Claimants to claim in an arbitration not only for expropriation but also, by operation of the MFN Clause, for failure to offer equitable and reasonable treatment; and (iv) the MFN Clause also permits arbitration of claims for breach of an umbrella clause.

B. ATTRIBUTION OF ANR’S CONDUCT TO POLAND

1. The Respondent’s Arguments

90. In the Respondent’s view, the Claimants have failed to show that the conduct of ANR is attributable to Poland for the purpose of establishing jurisdiction. It notes that the party to the Lease Agreement, ANR, is a legal entity separate from the Republic of Poland. ANR’s conduct, which amounts to that of an ordinary commercial party, cannot be attributed to the Respondent.

¹¹² Letter dated 22 April 2016 from the Respondent to the Tribunal. Earlier articulation of the relief sought by the Respondent was set out in its Statement of Defence, §80 and Statement of Rejoinder, §236.

91. The Parties agree that the question of attribution is to be determined by applying the International Law Commission's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (the '**ILC Articles**').¹¹³
92. In Poland's view, ANR does not meet any of the criteria under the ILC Articles to permit attribution of State responsibility. First, ANR is not a 'State organ' for the purposes of Article 4 of the ILC Articles. Second, and considering Articles 5 and 8 of the ILC Articles as alternative bases on which to attribute State responsibility, the Respondent concludes that the conduct of ANR 'does not meet' either of the tests posed under those provisions.

(a) ANR is not a State organ under Article 4 of the ILC Articles

93. In the Respondent's view, ANR is not a 'State organ' for the purposes of Article 4 of the ILC Articles. Article 4 reads:
1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.¹¹⁴
94. Article 4, in referring to status 'in accordance with the internal law of the State',¹¹⁵ requires reference to Polish law.¹¹⁶ In this regard, the Respondent notes that Article 3 of the 1991 Act states that ANR holds independent legal personality, acts separately from the Respondent, and performs obligations under contracts with third parties in its own name.¹¹⁷ On this basis, Polish law clearly distinguishes ANR from State organs.
95. The Respondent admits that Article 4(2) of the ILC Articles, and investment case law, permit an entity to be considered a 'de facto organ' of the State even in situations where that entity is not a

¹¹³ Statement of Defence, §49; Statement of Reply, §7.1 (citing International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* 2001, in: Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, 43, UN Doc. A/56/10 (2001). (**CLA-19** and **RLA-1**) (hereinafter '**ILC Articles**').

¹¹⁴ ILC Articles, art. 4 (**CLA-19** and **RLA-1**).

¹¹⁵ Ibid.

¹¹⁶ Statement of Rejoinder, §82.

¹¹⁷ Statement of Rejoinder, §83.

State organ under the terms of applicable domestic law.¹¹⁸ In its view, however, two factors are relevant in assessing whether an entity qualifies as a *de facto* organ: (i) the level of State involvement in the entity; and (ii) the level of control ‘actually exercised’ by the State over the entity.¹¹⁹ ANR complies with neither of these, according to the Respondent. In this regard, the Respondent contests the Claimants’ argument that the classification of an entity’s act as ‘governmental’ in character can suffice to consider it an organ of the State.¹²⁰ Rather, the government must be ‘substantially involved’ and exercise a ‘high level of control’, a high threshold not met in this case.¹²¹

96. Where, as here, the entity enjoys appreciable autonomy and receives only directions ‘of a general nature’ from the government, attribution under Article 4 of the ILC Articles is inapposite.¹²² The Respondent notes that ANR enjoys a wide degree of autonomy under the 1991 Act, controls its own budget, and selects nominees for its governing board through a public appointments committee.¹²³
97. Accordingly, the Respondent concludes that ANR cannot be considered a ‘*de facto*’ organ of the State under Article 4(2), any more than it qualifies as an actual organ.

(b) ANR’s conduct is not attributable to the Respondent under the ‘functional test’ of Article 5 of the ILC Articles

98. Article 5 of the ILC Articles provides that the conduct of an entity that is not an organ of the State but which is nevertheless ‘empowered by the law of that State to exercise elements of governmental authority’ is to be considered an act of the State under international law.¹²⁴ Under Article 5, for ANR’s conduct to be attributable to it, ANR must have acted ‘in [a] governmental capacity in the particular instance.’¹²⁵
99. The Respondent submits that ANR fails to satisfy the so-called ‘functional test’ embodied in Article 5. This is because, in its view, an act can only be considered an ‘exercise of such

¹¹⁸ Statement of Rejoinder, §84.

¹¹⁹ Statement of Rejoinder, §85.

¹²⁰ Statement of Rejoinder, §91.

¹²¹ Statement of Rejoinder, §94.

¹²² Statement of Rejoinder, §94.

¹²³ Statement of Rejoinder, §95-98.

¹²⁴ ILC Articles, art. 5 (CLA-19 and RLA-1); Statement of Defence, §51.

¹²⁵ Statement of Defence, §51.

governmental authority’ if the act is not one that could be performed by a commercial entity.¹²⁶ Under Polish law, the Respondent submits that ANR is expressly recognised as acting in ‘a commercial capacity (*dominium*) as an ordinary contracting party and does not exercise any sovereign powers (*imperium*).’¹²⁷ This also holds true, in the Respondent’s view, for the specific acts complained of by the Claimants:

The termination of the Lease Agreement was an act of an ordinary contracting party and it was not done in the exercise of any sovereign powers. The evidence submitted by Respondent clearly demonstrates that the termination was for commercial reasons only and due to Polfarm’s repeated breaches of the provisions of the agreement.¹²⁸

100. The Respondent reiterates that ANR exercises its powers under its own name, including when it enters into contracts for the lease of agricultural land.¹²⁹ In this respect, the Respondent distinguishes *Vigotop v. Hungary* (on which the Claimants rely for the proposition that political grounds for a decision suffice to demonstrate that an entity acted in a sovereign capacity).¹³⁰ In that case the Hungarian State, not a separate entity, acted to terminate a contract to which it was itself a party.
101. In any event, the Respondent rejects the Claimants’ submission that ANR’s Notice of Termination was motivated by a policy to redistribute land to Polish farmers at the expense of foreign lessees.¹³¹ It contests, for instance, the press articles cited by the Claimants to support their allegations that illegitimate political motives—either in favour of local farmers or as part of a more general drive to reduce the number of leases in effect—drove ANR to terminate the Lease Agreement.¹³² In the Respondent’s view, the articles do not demonstrate that ANR’s termination occurred *because* of a desire to subsequently lease the land to Polish family farmers, only that it was (in part) subsequently so leased.¹³³

¹²⁶ Statement of Defence, §51.

¹²⁷ Statement of Defence, §52 (citing Judgment dated 5 March 2010 of the Voivodship Administrative Court in Warsaw, No. I SA/Wa 2169/09 (**RLA-4**)).

¹²⁸ Statement of Defence, §53.

¹²⁹ Statement of Defence, §52.

¹³⁰ Statement of Defence, §55 (citing *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award dated 1 October 2014 (**CLA-11**)).

¹³¹ Statement of Defence, §53. The Respondent’s arguments with regard to ANR’s reasons for terminating the Lease Agreement, and its assessment of ANR Memorandum of 8 May 2009, appear in the factual discussion at paragraphs 174 to 176, below.

¹³² Statement of Defence, §54.

¹³³ Statement of Defence, §55.

(c) ANR's conduct is not attributable to the Respondent under the 'control test' of Article 8 of the ILC Articles

102. Finally, the Respondent considers Article 8 of the ILC Rules, which holds the conduct of a separate entity to be attributable to the State under international law 'if such entity is in fact acting on the instructions of, or under the direction or control of,' that State.¹³⁴ According to the Respondent, the 'opposite is true' in the present case.¹³⁵ ANR's decision to terminate the Lease Agreement, it suggests, was an autonomous decision based on lawful or at least arguable grounds of contractual breach. The ANR Memorandum of 8 May 2009 'confirms beyond any doubt that the decision to terminate the Lease Agreement was made autonomously' and that there was 'no involvement of any representatives of Respondent in the decision-making process.'¹³⁶
103. For these reasons, the Respondent regards ANR to have acted independently of Poland in terminating the Lease Agreement, and the Claimants to have failed to prove any conduct attributable to the Respondent which could constitute a violation of the Treaty.

2. The Claimants' Arguments

(a) ANR acted as a State organ, or at least in a sovereign capacity, when terminating the Lease Agreement, and its conduct is attributable to Poland

104. The Claimants consider ANR to qualify as an 'organ' of the State of Poland for the purposes of Article 4 of the ILC Articles. In the view of the Claimants, Article 4 must be read so as to include a 'broad range' of entities.¹³⁷
105. In the alternative, the Claimants suggest that, under Article 5 of the ILC Articles, ANR's conduct should nevertheless be attributed to the Respondent on the basis that ANR exercised 'elements of . . . governmental authority' when it terminated the Lease Agreement.¹³⁸ They urge the Tribunal to consider ANR 'based on a joint assessment' of Articles 4 and 5 of the ILC Articles, noting that

¹³⁴ Statement of Defence, §57.

¹³⁵ Statement of Defence, §57.

¹³⁶ Statement of Defence, §57.

¹³⁷ Statement of Reply, §7.2 (citing *MCI Power v. Ecuador*, ICSID Case No. ARB/03/6, Award dated 31 July 2007).

¹³⁸ Statement of Reply, §7.1.

previous tribunals have, to establish State attribution, considered the two alternatives ‘in conjunction’, rather than strictly as separate tests for attribution.¹³⁹

(b) ANR is an organ of the State for the purpose of Article 4 of the ILC Articles

106. Citing decisions of other arbitral tribunals, such as *MCI Power v. Ecuador*,¹⁴⁰ the Claimants submit that an entity with competence to exercise public powers and to enter into contracts with private operators, and possessing an ‘institutional structure and composition’ indicative of State control or influence, should qualify as an ‘organ’ of the State for the purposes of attributing that entity’s conduct to the State under international law.¹⁴¹

107. In the case of ANR, the Claimants argue that the Agency’s founding documents are strongly indicative of ANR’s status as an extension of the Respondent itself:

(a) Under Article 3 of the 1991 Act, ANR is defined as ‘a state legal entity . . . supervised by the Minister for rural development.’¹⁴²

(b) Polish law further describes ANR as a ‘state legal person . . . established in order to enable to realisation of “important economic tasks that should be supported from the state budget”.’¹⁴³

(c) ANR’s official website, at a governmental address,¹⁴⁴ describes the Agency as ‘a state institution . . . a trust organization authorized by the state treasury.’¹⁴⁵ The website provides, further, that ANR acts pursuant to federal legislation, enjoys rights of pre-emption and buyout for purchasing agricultural land on the free market, and

¹³⁹ Statement of Reply, §7.1.

¹⁴⁰ Statement of Reply, §7.2 (citing *MCI Power v. Ecuador*, ICSID Case No. ARB/03/6, Award dated 31 July 2007).

¹⁴¹ Statement of Reply, §7.2.

¹⁴² Statement of Reply, §7.2 (citing **CLA-17**).

¹⁴³ Statement of Reply, §7.2.

¹⁴⁴ Statement of Reply, §7.2. ANR’s website is at www.anr.gov.pl (last visited 5 June 2016).

¹⁴⁵ Statement of Reply, §7.2. The Tribunal notes an earlier apparent disagreement over the translation of ‘państwowa osoba prawna’ from the ANR’s website, a term that is also used in Article 3 of the 1991 Act (**Exhibit RLA-3**). Although the website in its English version translated this term as ‘state institution’, the Respondent in its Rejoinder considered that a more accurate translation would be ‘State legal personality’. Statement of Rejoinder, p. 34, fn. 78; Hearing Day 1, p. 65. The Polish interpreters confirmed that this phrase should be translated as ‘State legal personality.’ (See Letter dated 8 April 2016 from the PCA to the Parties).

exercises ownership rights over companies considered by the Ministry of Agriculture and Rural Development ‘as particularly important for [the] national economy.’¹⁴⁶

108. While the Claimants acknowledge that ANR performs duties in its own name, they consider this point neither ‘particularly relevant’ nor inconsistent with the observation in the Commentary to Article 4 of the ILC Articles that ‘characterization as a state organ under international law does not depend on the status of the entity’ under domestic law.¹⁴⁷ ANR acts as an agent of Poland in managing and disposing of State land; whether or not it is considered an ‘ordinary’ contracting party under Polish law is not dispositive.

(c) ANR’s conduct is attributable to the Respondent based on its function and control under Article 5 of the ILC Articles

109. Even if ANR is not a State organ under Article 4 of the ILC Articles, the Claimants submit that, at a minimum, the Agency’s conduct must be considered attributable on the basis of ANR’s overall function and control.

110. To demonstrate that ANR falls within the scope of Article 5, the Claimants cite the ILC Commentary for the proposition that the article covers a ‘wide variety of bodies’ empowered to exercise ‘elements of governmental authority.’¹⁴⁸ In the view of the Claimants, the ‘formal designation in the domestic legal system’ is not decisive; rather, factors to be taken into account include (i) the manner in which the entity is empowered by the State to exercise authority, (ii) the content of the powers conferred, and (iii) the links between the entity and the State itself.¹⁴⁹

111. In this regard, the Claimants emphasise that ANR’s conduct, regardless of how it is domestically characterised, is guided by State policy. They cite, among others, the following factors as examples in support of the proposition that ANR acts to further the Respondent’s public policy:

- (a) Leading board members of the Agency are appointed by the Polish Minister of Agriculture or by the Prime Minister upon motion by the Minister of Agriculture, and annual reports of ANR activities are submitted by the agriculture ministry to the Polish

¹⁴⁶ Statement of Reply, §7.2.

¹⁴⁷ Statement of Reply, §7.2.

¹⁴⁸ Statement of Reply, §7.3.

¹⁴⁹ Statement of Reply, §7.3.

parliament.¹⁵⁰ Similarly, the leadership of ANR routinely changes based on shifting political coalitions in government.¹⁵¹

(b) Article 6(1) of the 1991 Act expressly states that ANR ‘shall perform tasks arising from State policy.’¹⁵²

Of particular significance for the Claimants is Article 6(a) of the 1991 Act under which ANR is given the policy aim of ‘creating and improving the area structure of family farms’.

112. Finally, the Claimants reject the Respondent’s assertion that the functional test of Article 5 requires specific acts of a separate entity to be classified as ‘governmental’ in nature in order to be attributable to the State. Citing decisions such as *Vigotop v. Hungary*,¹⁵³ *Noble v. Romania*,¹⁵⁴ and *Salini v. Morocco*,¹⁵⁵ the Claimants submit that, under Article 5, even acts of an ‘ordinary contracting party’ must be attributed to a respondent State where the entity ‘stepped out of the contractual shoes,’¹⁵⁶ as when that entity’s conduct is motivated by considerations of State policy rather than by commercial considerations. Stated differently, attribution can occur ‘as long as the conduct is an expression of policy,’ even if the outcome—in this case, the termination of a lease—could ‘in theory [] also be performed’ by commercial actors.¹⁵⁷

113. The Claimants submit that ANR terminated the Lease Agreement out of deference to the Respondent’s public policy favouring Polish famers, and not for commercial reasons. Accordingly, ANR’s conduct must be attributed to the Respondent.

¹⁵⁰ Statement of Reply, §7.3.

¹⁵¹ Statement of Reply, §7.3.

¹⁵² Statement of Reply, §7.3.

¹⁵³ Statement of Reply, §§2.1, 7.3, 12.3 (citing *Vigotop Limited v Hungary*, ICSID Case No. ARB/11/22, Award dated 1 October 2014 (CLA-11)).

¹⁵⁴ Statement of Reply, §7.3 (citing *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award dated 12 October 2005 (CLA-28)).

¹⁵⁵ Statement of Reply, §7.3 (citing *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction dated 23 July 2001 (CLA-27)).

¹⁵⁶ Statement of Claim, §6.2 ((citing *Vigotop Limited v Hungary*, ICSID Case No. ARB/11/22, Award dated 1 October 2014, §§327-328 (CLA-11)).

¹⁵⁷ Statement of Reply, §7.3.

C. POL FARM'S CONTRACTUAL RIGHTS UNDER THE LEASE AGREEMENT AS PROTECTED INVESTMENTS OF THE CLAIMANTS

1. The Respondent's Arguments

114. According to the Respondent, the Lease Agreement is not a protected investment under Article I(1) of the Treaty over which the Claimants are entitled to arbitrate. Although the Treaty provides for 'a broad definition of assets' regarded as protected investments, the Respondent submits that it is 'well established that in order to qualify as a protected investment a contractual right must belong to the investor under the BIT, i.e. the investor must be party to the relevant contract.'¹⁵⁸ In this case, the Respondent submits, the contractual rights under the Lease Agreement did not belong to the Claimants, but rather to Pol Farm. Accordingly, the Respondent concludes that the investment protected by the BIT does not extend to 'the contractual rights under Lease Agreement' itself, only the Claimants' shares in Pol Farm.¹⁵⁹

2. The Claimants' Arguments

115. The Claimants submit that their claim for expropriation of Pol Farm's contractual rights is within the jurisdiction of the Tribunal. In their view, the investment 'in and through their company Pol Farm' qualifies as a valid investment eligible for protection under the Treaty.¹⁶⁰

116. Article I(1) of the BIT provides a 'broad definition' of investment, including 'every kind of asset', and specifically lists shares as one type of qualifying asset.¹⁶¹ The Claimants argue that the Treaty 'clearly gives an independent standing to shareholders' such that shareholding of a company qualifies as an investment.¹⁶² Indeed, in the Claimants' view, any other outcome would render the Treaty's protection of any investments rendered through intermediary companies 'meaningless' especially since most disputes will centre not on a host State's imposition of measures directly on investors' shares themselves, but rather on the corporate investment vehicle.¹⁶³

¹⁵⁸ Statement of Defence, §59 (citing *BG Group Plc v. Republic of Argentina*, UNCITRAL, Award dated 24 December 2007, §214 (RLA-5)).

¹⁵⁹ Statement of Defence, §59.

¹⁶⁰ Statement of Reply, §8.

¹⁶¹ Statement of Reply, §8.1.

¹⁶² Statement of Reply, §8.1.

¹⁶³ Statement of Reply, §8.1.

117. The Claimants submit that arbitral case law makes it equally clear that, even where a local company is not granted the status of an investor under a bilateral investment treaty, an investor's participation in that company 'will be seen as an investment in itself',¹⁶⁴ permitting the shareholder to proceed against the State in the company's name.
118. Accordingly, by virtue of their shareholding in Pol Farm, the Claimants maintain their ability to claim against the Respondent for actions impacting any and all of the Company's assets, including Pol Farm's rights under the Lease Agreement.¹⁶⁵

D. USE OF THE MFN CLAUSE TO EXTEND JURISDICTION BEYOND EXPROPRIATION CLAIMS

1. The Respondent's Arguments

119. In the Respondent's view, the Tribunal only has jurisdiction to decide claims arising under Article VI of the Treaty, namely those pertaining to expropriation.¹⁶⁶ All other claims, including those of fair and equitable treatment, are excluded from jurisdiction. Article VI, which is expressly referred to in the dispute resolution provisions of Article X, provides:

Expropriation

1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party cannot be expropriated, nationalized or subjected to other measures having the same effect (all such measures hereinafter referred to as 'expropriation'), unless the following conditions are fulfilled:
 - (i) the expropriation shall be done for public interest and under domestic legal procedures;
 - (ii) it shall not be discriminatory;
 - (iii) it shall be done only against compensation.
2. Such compensation shall amount to the market value of the investment immediately before the date of expropriation and shall be paid without undue delay within such period as normally required for the completion of transfer formalities, in any case not exceeding three months. The compensation shall include interest, computed from the first day following the above mentioned period until the date of payment, at a rate based on LIBOR for the appropriate currency and corresponding period of time.

¹⁶⁴ Statement of Reply, §8.1 (citing *GAMI Investments Inc. v. The Government of the United Mexican States*, Award dated 15 November 2004 (CLA-31); *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction dated 11 May 2005 (CLA-32)).

¹⁶⁵ Statement of Reply, §8.1.

¹⁶⁶ Statement of Defence, §60.

120. In this connection, the Respondent rejects the Claimants' suggestion in the alternative, namely that they may bring non-expropriation claims under the most favoured nation clause in Article IV of the BIT. Article IV provides:

Investments made by investors of one contracting party in the territory of the other contracting party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by investors of any third state.

121. In the Respondent's view, the MFN Clause cannot allow the Claimants to access dispute resolution provisions in another BIT. It argues that international jurisprudence and academic commentary support the proposition that MFN clauses 'cannot be applied in such a way as to permit a claimant to avail itself of dispute resolution provisions in a BIT between the host State and a third State, unless the MFN clause explicitly provides' for such application.¹⁶⁷ Citing awards such as *Sanum v. Laos*,¹⁶⁸ *Kiliç v. Turkmenistan*,¹⁶⁹ and *Plama v. Bulgaria*,¹⁷⁰ among others,¹⁷¹ the Respondent submits that extending the application of MFN clauses to matters of jurisdiction (rather than to substantive protections only, once jurisdictional requirements have been met), would 'subvert the common intention' of the contracting States.¹⁷² Absent a 'deliberate choice' on the part of Poland and Norway to extend the application of the MFN Clause to matters of jurisdiction, the Respondent submits that it cannot be used to overcome jurisdictional deficits.¹⁷³

122. In this regard, the Respondent rejects the Claimants' interpretation¹⁷⁴ of decisions such as *Maffezini v. Spain*, *Gas Natural v. Argentina*, and *RosInvestCo UK Ltd. v. Russia* in support of their submission that an MFN clause can apply to procedural as well as substantive provisions. Unlike the present case, the Respondent considers these awards to have related to attempts 'not to replace the entire dispute settlement provisions' in the BIT, 'but merely to waive a preliminary

¹⁶⁷ Statement of Rejoinder, §120.

¹⁶⁸ Statement of Rejoinder, §121 (citing *Sanum Investments Limited v. Laos*, PCA Case No. 2013-13, Award on Jurisdiction dated 13 December 2013, §358 (**RLA-25**)).

¹⁶⁹ Statement of Rejoinder, §122 (citing *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award dated 2 July 2013, §7.9.1 (**RLA-26**)).

¹⁷⁰ Statement of Rejoinder, §§129-133 (citing *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 February 2005, §227 (**RLA-29**)).

¹⁷¹ Statement of Rejoinder, §§126-138.

¹⁷² Statement of Rejoinder, §135.

¹⁷³ Statement of Rejoinder, §§120, 137 (citing *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award dated 13 September 2006 (**RLA-10**)).

¹⁷⁴ Statement of Reply, §9.

step’ to accessing arbitration, such as by allowing claimant investors to avail themselves of shorter waiting periods.¹⁷⁵

123. Similarly, while the *RosInvestCo* case did allow the claimant to resort to a broader arbitration clause, this was ‘only because the MFN clause . . . pertained to the treatment of ‘investors’.’¹⁷⁶ The Respondent notes that the MFN Clause in the present dispute is narrower, pertaining to ‘investment’ only; since the Claimants are proceeding in their personal capacities, the MFN Clause is unavailing in this case.¹⁷⁷

2. The Claimants’ Arguments

124. The Claimants rely on Article X(2) of the BIT, which provides that ‘the tribunal reaches its award on the basis of the provisions of the present Agreement as well as on the general principles and rules of international law.’¹⁷⁸ In their view, the applicable ‘provisions’ include not only Article VI, relating to expropriation, but also other provisions, including Article III, relating to promotion and protection of investments. The wording of Article X, in any event, ‘cannot be interpreted’ to prevent investors from enforcing other provisions of the Treaty, a position that would render the Treaty’s promise of investor protections ‘illusory’.¹⁷⁹
125. In the event that the applicability of the dispute resolution provision in Article X is limited to cover only breaches of Article VI, however, the Claimants submit, in the alternative, that the MFN Clause in Article IV permits them a greater degree of protection that would allow them to advance claims not limited to expropriation.¹⁸⁰ Because the MFN Clause contains no limiting language, it ‘will apply to both procedural and material provisions,’ permitting the Claimants a wider range of substantive protections from which to claim.¹⁸¹ In favour of this interpretation, the Claimants cite a range of cases including *Maffezini v. Spain*, *Gas Natural v. Argentina*, and *RosInvestCo UK Ltd. v. Russia*.¹⁸²

¹⁷⁵ Statement of Rejoinder, §140.

¹⁷⁶ Statement of Rejoinder, §153.

¹⁷⁷ Statement of Rejoinder, §153.

¹⁷⁸ Statement of Reply, §9.

¹⁷⁹ Statement of Reply, §9.

¹⁸⁰ Statement of Reply, §9.

¹⁸¹ Statement of Reply, §9.

¹⁸² Statement of Reply, §9 (citing *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction dated 25 January 2000 (CLA-20); *Gas Natural SDG, SA v. Argentine Republic*, ICSID

126. Accordingly, and having regard to the expanded protections given to investors under Article 7 of the BIT between the Republic of Poland and the Republic of Croatia (the ‘**Croatia-Poland BIT**’),¹⁸³ the Claimants argue that they may invoke protections relating to the fair and equitable treatment clause in Article 7 of the Croatia-Poland BIT.¹⁸⁴

E. USE OF MFN CLAUSE TO INCORPORATE AN UMBRELLA CLAUSE

1. The Respondent’s Arguments

127. The Respondent submits that the Claimants cannot claim protection for their investment under the umbrella clause contained in a BIT with a third party by virtue of the MFN Clause in Article IV of the Treaty.

128. In keeping with its previous jurisdictional objection to the invocation of the MFN Clause, the Respondent submits that the arbitration clause in Article X of the BIT covers only treaty claims under Article VI, limited to expropriation.¹⁸⁵ Accordingly, claims regarding breach of some other provision of the Treaty or in another BIT, including the Dutch-Poland BIT, are outside the scope of the Tribunal’s jurisdiction.

129. Second, even if the MFN Clause permitted recourse to an umbrella clause in a third-party BIT in general, the Respondent notes that the Croatia-Poland BIT, on which the Claimants rely, does not contain an umbrella clause and accordingly cannot cover claims pertaining to the breach of one.¹⁸⁶

2. The Claimants’ Arguments

130. Consistent with their previous submissions as to the scope of Article IV of the Treaty, the Claimants argue that the MFN Clause permits them to avail themselves of an umbrella clause in BITs with third States.¹⁸⁷

Case No. ARB/03/10, Decision on Jurisdiction dated 17 June 2005 (**CLA-34**); *RosInvestCo UK Ltd v. Russian Federation*, SCC Case No. 079/2005, Final Award dated 12 September 2010 (**CLA-35**)).

¹⁸³ Agreement between the Republic of Croatia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments dated 21 February 1995 (**Exhibit C-46**).

¹⁸⁴ Statement of Reply, §9.

¹⁸⁵ Statement of Rejoinder, §193.

¹⁸⁶ Statement of Rejoinder, §194 (citing Statement of Reply, §9).

¹⁸⁷ Statement of Reply, §11.

131. Accordingly, the Claimants seek to benefit from substantive protections under Article 3(5) of the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments (the ‘**Dutch-Poland BIT**’).¹⁸⁸ That article provides:

Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.¹⁸⁹

F. THE PARTIES’ CHARACTERISATION OF THE FACTUAL RECORD

132. Central to the dispute over the merits is a question of characterisation. The Claimants allege that ANR’s termination of the Lease Agreement was unjustified under its provisions but was motivated by impermissible political aims, specifically the redistribution of land to Polish farmers. In contrast, the Respondent argues that ANR duly terminated the Lease Agreement owing to the Claimants’ repeated violations of specific provisions, including Pol Farm’s failure to maintain the land as required under that Agreement.

1. The Claimants’ Arguments

(a) ANR was not justified in terminating the Lease Agreement under any of its provisions

133. Section 17 of the Lease Agreement permits ANR to terminate the lease without the one-year statutory notice period when certain conditions are met, specifically ‘if the Lessee lags behind with rent for a minimum of two terms of payment or when [it] fails to fulfil the duties described in § 5 and § 14 point 1.’ The Claimants argue, accordingly, that premature termination without notice would have been permissible only where:

- (i) Pol Farm was in delay with payments of rent for more than two calculation periods;
- (ii) Pol Farm violated its obligations under § 5 (concerning the manner of use of the leased property and requirements regarding minimum number of employees); or
- (iii) Pol Farm violated its obligations under § 14(1) (concerning duty to pay regulatory fees and taxes and other public fees relating to the leased property).¹⁹⁰

¹⁸⁸ Statement of Reply, §11 (citing Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, dated 7 August 1992, art. 3(5) (**CLA-39**)).

¹⁸⁹ Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments, dated 7 August 1992, art. 3(5) (**CLA-39**).

¹⁹⁰ Statement of Claim, §6.4.2.

134. In the Claimants' view, ANR's termination of the Lease Agreement cannot be justified on any of these grounds. They argue, in particular, that: (i) Pol Farm never changed the use or purpose of the leased land; (ii) in any event, the plantation of raspberries (of which specific complaint was made) was duly communicated to ANR; and (iii) Pol Farm complied with all other provisions of the Lease Agreement, including its obligation to pay rent and other applicable fees and taxes. Accordingly, the Claimants submit that ANR was not justified in terminating the Lease.

(i) The Claimants did not change the 'required use' of the land

135. Section 5(1) of the Lease required Pol Farm 'to use and manage the rented property in order to conduct their business activity there.'¹⁹¹ It specified, further, that Pol Farm could not 'change the required use' of the property absent ANR's explicit consent.¹⁹²

136. ANR's Notice of Termination dated 7 July 2009, only briefly specified the reasons for termination:

infringing the conditions of the lease . . . i.e. par. 5. it. 1 involving the change of the purpose of the subject of the case . . . hereby terminates . . . without the preservation of the statutory notice period.¹⁹³

137. On 12 August 2009, in response to a letter from the Claimants requesting clarification, ANR provided further reasons:

I would also like to clarify that the basis for the renouncement of the Agreement without the statutory notice period was the breach of the provisions of § 5 item 1, namely the change of the purpose of the lease object (land, structures) as well as using the lease object to conduct business in a manner non-compliant with the principles of good administration which I hereby present as the cause of the renouncement.

. . .

The breach of § 5 item 1 of the Agreement regarding the usage of the lease object in accordance with the principles of good administration consisted also in turning some part of the lands into fallow lands, which contradicted those principles.¹⁹⁴

138. In light of their correspondence with ANR, the Claimants consider the principal justification on which ANR relies to be the allegation that Pol Farm changed the use or purpose of the land without

¹⁹¹ Lease Agreement dated 14 February 1997, §5(1) (**Exhibit C-3**).

¹⁹² Lease Agreement dated 14 February 1997, §5(1) (**Exhibit C-3**).

¹⁹³ Letter dated 7 July 2009 from ANR to Pol Farm (**Exhibit C-10**) (emphasis added); Statement of Claim, §6.4.2.

¹⁹⁴ Letter dated 12 August 2009 from ANR to Pol Farm (**Exhibit C-13**).

consulting ANR and without obtaining the required consent, pursuant to Section 5(1) of the Lease Agreement. In the Claimants' view, Pol Farm cannot be said to have violated this provision.

139. First, and proceeding on the assumption that ANR's arguments regarding the 'change of use' of the Farm are ultimately grounded on Pol Farm's decision, in 2008, to plant raspberries on the land, the Claimants argue that this action did nothing to deprive the land of its original purpose under the Lease Agreement.
140. As a threshold matter, the Claimants note that the Lease Agreement does not specify the 'agreed purpose' of the property at all, referring only to Pol Farm's 'business activity'.¹⁹⁵ That term, they submit, should be interpreted in light of Poland's statutory definition of conduct constituting 'proper management' of leased property, a term of art that relates to maintenance, investment, and other activities necessary to prevent a diminution of value of land during the duration of a lease.¹⁹⁶
141. In this connection, the Claimants argue that the planting of raspberries, in itself, neither affected the 'proper management' of the leased property nor altered the character of the Farm or its land. In his witness statement, Mr Geir Almås observes that raspberries constituted only 50 out of 4,200 hectares then in use by the Farm.¹⁹⁷ The Claimants note that the Farm was a 'multi-purpose' enterprise used for the production of, among other things, grain, milk, and meat. In this context, the production of raspberries 'cannot be seen as outside an agricultural purpose, as it is horticulture, using traditional farming principles.'¹⁹⁸ Indeed, the Claimants submit that horticultural activities are 'included in the purpose of the Lease Agreement'¹⁹⁹ and also fall within the statutory definition of 'land intended for agricultural use' under Polish law.²⁰⁰ Article 46 of the Polish Civil Code, for instance, provides:

Agricultural real estate (agricultural land) is any real estate which is or may be used to conduct agricultural production, both crop and animal farming, including gardening, horticulture and fish farming.²⁰¹

¹⁹⁵ Statement of Claim, §6.4.2 (citing Lease Agreement dated 14 February 1997, §5(1) (**Exhibit C-3**)).

¹⁹⁶ Statement of Claim, §6.4.2.

¹⁹⁷ Witness Statement of Mr Geir Almås, §82 (**CWS-1**). *See also* Hearing Tr. (Day 1), p. 13.

¹⁹⁸ Statement of Claim, §6.4.2. *See also* Witness Statement of Mr Geir Almås, §83 (**CWS-1**).

¹⁹⁹ Statement of Claim, §6.4.2.

²⁰⁰ Statement of Claim, §6.4.2; Legal Opinion no. 2 of Atamanczuk & Deboa (undated) (**Exhibit C-28**).

²⁰¹ Polish Civil Code of 23 April 1964 (**CLA-14**) (hereinafter 'Civil Code').

142. Second, and in any event, the Claimants submit that ANR was duly informed of the development. In particular, the Claimants imply that ANR was effectively put on notice of the development as early as October 2008, when Pol Farm informed ANR in a letter of its decision to plant raspberries on the area of land in question. ANR did not reply to this letter.
143. In the Claimants' view, ANR's subsequent silence amounted to 'implied consent' from ANR.²⁰² In light of ANR's non-objection over repeated occasions to Pol Farm's raspberry plantation—only raising the issue in its inspection report of May 2009—the Claimants submit that 'change of purpose' of the land cannot have been a *bona fide* reason underlying ANR's decision to terminate the lease.
144. Finally, the Claimants suggest that the Tribunal should not allow the Respondent to rely on grounds other than those stated in its Notice of Termination on 7 July 2009.²⁰³ They argue that, given ANR's belated response to the Claimants' requests for clarification of the grounds on which ANR terminated the Lease, ANR's conduct justifies an inference that the reasons for its decision had to be 'construct[ed]' on artificial premises.²⁰⁴ The Claimants note, in any event, that to exclude subsequent reasons provided after the termination itself is 'consistent with Polish contract law' and rely on an expert report to that effect.²⁰⁵

(ii) The Claimants complied with the Lease Agreement in all other respects

145. The Claimants submit that the remaining grounds under which immediate termination of the Lease Agreement was permitted (without providing Pol Farm with the one-year statutory notice period) are equally inapplicable. As a factual matter, the Claimants dispute that Pol Farm's delays in paying rent could trigger the effects of Section 5(1) of the Lease Agreement, since Pol Farm, although in arrears, never fell behind by two or more consecutive periods.²⁰⁶ Equally, Pol Farm complied with its obligations to pay other regulatory fees. Its failure to make payments on other amounts due, such as social security, however substantial, could not justify termination of the Lease Agreement because they were not 'connected with' the leased property.²⁰⁷

²⁰² Statement of Claim, §6.4.2; Hearing Tr. (Day 1), p. 95.

²⁰³ Statement of Reply, §2.3 (citing Legal Opinion no. 1 of Atamanczuk & Deboa (undated) (**Exhibit C-27**)); Hearing Tr. (Day 1), p. 15.

²⁰⁴ Statement of Reply, §2.3.

²⁰⁵ Statement of Reply, §2.3 (citing Legal Opinion no. 1 of Atamanczuk & Deboa (undated) (**Exhibit C-27**)).

²⁰⁶ Statement of Claim, §6.4.2.

²⁰⁷ Statement of Reply, §§2.6.2-2.6.3; Hearing Tr. (Day 1), p. 27.

146. In any event, other grounds, unrelated to the change in use or purpose of the leased land, cannot be considered as justifying termination of the Lease Agreement. Citing a Polish legal opinion,²⁰⁸ the Claimants argue that the only ground under which termination is properly assessed is that offered in the Notice of Termination, and not in any subsequent communications offered to elaborate or modify ANR's original reasoning.²⁰⁹ Since ANR's letter of 7 July 2009 only included the 'change of use' clause as purported justification, the Claimants submit that only this ground—and not others added 'retroactively' in later communications with Pol Farm or in this arbitration—can be considered.
147. Accordingly, the Claimants conclude that ANR acted outside the contractual bounds of the Lease Agreement in terminating the Lease.

(b) ANR acted to terminate the Lease Agreement for political reasons

148. According to the Claimants, ANR's termination of the Lease was motivated by a policy to redistribute land to local Polish farmers at the expense of foreign lessees, not on the basis of any of the grounds specified under Section 5(1) of the Lease Agreement. In support of their argument, the Claimants submit expert reports referring to: (i) ANR's purported anticipation of Polish legislation, which entered into force in 2011, requiring ANR to attempt to renegotiate smaller leases with foreign lessees;²¹⁰ (ii) the potential role that the Polish constitutional doctrine of the 'family farmstead' played in guiding ANR to favour Polish farmers and farmers' organisations over foreign lessees;²¹¹ and (iii) two newspaper articles in which ANR officials, in the Claimants' view, indicate that the decision to terminate the Lease Agreement was a political one in line with the motive described above.²¹²
149. In the Claimants' view, even if a contractual right to terminate did exist and was available under the circumstances of the case, the Tribunal nevertheless has an obligation to consider whether those reasons were in fact relied upon to support such termination. In this regard, the Claimants

²⁰⁸ Legal Opinion no. 1 of Atamanczuk & Deboa (undated) (**Exhibit C-27**).

²⁰⁹ Statement of Reply, §2.3.

²¹⁰ Expert Report of Joe Smoczyński (**Exhibit C-48**); Legal Opinion no. 3 of Atamanczuk & Deboa (undated) (**Exhibit C-42**); Hearing Tr. (Day 1), p. 73.

²¹¹ Legal Opinion no. 3 of Atamanczuk & Deboa (undated) (**Exhibit C-42**); Hearing Tr. (Day 1), p. 7.

²¹² Statement of Claim, §6.3.2 (citing Article dated 19 August 2010 in *Kurier Olsztyński* (**Exhibit C-23**); Article dated 9 April 2011 in *Dagens Næringsliv* (**Exhibit C-24**)). See also Witness Statement of Mr Geir Almås, §132 (**CWS-1**); Hearing Tr. (Day 4), p. 4.

rely heavily on *Vigotop Limited v. Hungary*²¹³ for the proposition that, if contractual grounds invoked by a respondent State for termination are not ‘sufficiently well-founded, then this would indicate that those grounds were merely a pretext designed to conceal a purely expropriatory measure.’²¹⁴

150. In this connection, the Claimants assert that ANR’s conduct is an example of contractual grounds for termination of an agreement being used to mask the true motivation for terminating the Lease Agreement. They state:

[T]he termination was discriminatory, in that the apparent reason for ANR’s termination is policy reasons as it wanted to give farm land to [P]olish farmers[.]

...

[T]he ANR had a political agenda, i.e. reducing the number of lease agreements, and . . . the termination was in order to give effect to a change in policy . . . to sell land to [P]olish farmers at the expense of foreign investors[.]²¹⁵

151. The Claimants submit that several factors support their interpretation of ANR’s motivations. The first of these is a series of amendments to ANR’s constitutive legislation, the 1991 Act.²¹⁶ In March 2010, the Polish Constitutional Tribunal found that provisions of the 1991 Act, empowering ANR to repurchase land that it had sold within five years, if the value of the land had significantly increased or if the new owner was considered a speculator, were unconstitutional: this motivated an amendment to the law in December 2011,²¹⁷ which required ANR to submit, within six months, a proposal to all large-scale farmers to reduce the size of their existing leases by 30 percent.²¹⁸
152. While recognising that the amendment was not in place at the time of ANR’s Notice of Termination on 7 July 2009, the Claimants submit an expert report suggesting that ANR’s anticipation of the legislative proposal may have motivated its decision to terminate the lease, largely in furtherance of the policy agenda then under consideration by the Polish parliament.²¹⁹

²¹³ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award dated 1 October 2014 (**CLA-11**).

²¹⁴ Statement of Claim, §6.4.1.

²¹⁵ Statement of Claim, §§6.3.2, 6.4.1. *See also* Witness Statement of Mr Geir Almås, §17 (**CWS-1**).

²¹⁶ Act of 19 October 1991 on the Management of Agricultural Property of the State Treasury (**CLA-17**).

²¹⁷ Statement of Reply, §5.2.

²¹⁸ Statement of Reply, §5.2.

²¹⁹ Legal Opinion no. 3 of Atamanczuk & Deboa (undated) (**Exhibit C-42**); Statement of Reply, §5.2.

153. In this regard, the Claimants refer to several newspaper articles that, in their view, reflect ANR's intention to redistribute land to local farmers at the expense of foreign lessees. They note, in particular, the following material:

(a) An article dated 19 August 2010 in Polish newspaper *Kurier Olsztyński* which quoted Adam Poniewski, an ANR official, as noting that much of the land at ANR's disposal is highly fragmented and that, '[i]n those regions, where there is huge demand for land on the part of the farmers, we do not renew lease agreements Last year we terminated a lease agreement for 4200 hectares with a Norwegian equity company. We let [it] to farmers who took part in a close[d] tender.'²²⁰ It is not disputed that this was a reference to the Pol Farm land.

(b) An article dated 9 April 2011 in the Norwegian newspaper *Dagens Næringsliv* cited ANR spokesperson Michael Koczalski as stating that 'ANR's goal is to sell as much land as possible to [P]olish farmers.'²²¹

154. In the Claimants' view, these articles provide further indication 'that ANR had a political agenda,'²²² namely the renegotiation of lease agreements (where possible) and the termination of leases outright (where necessary) in order to meet demand on the part of local farmers for larger tracts of land.²²³ They reject the Respondent's suggestion that the quotations draw no connection between the underlying cause for the termination and ANR's desire to sell land to Polish farmers, suggesting there is 'a clear correlation' between statements regarding demand for land, ANR's policy of non-renewal of leases, and references to ANR's termination of the Lease Agreement.²²⁴

2. The Respondent's Arguments

155. In the Respondent's view, the Claimants themselves are principally responsible for the financial conditions under which Pol Farm struggled to perform its contractual obligations and which ultimately led to ANR's termination of the Lease Agreement on 7 July 2009. Pol Farm's

²²⁰ Article dated 19 August 2010 in *Kurier Olsztyński* (**Exhibit C-23**).

²²¹ Statement of Claim, §6.3.2 (citing Article dated 9 April 2011 in *Dagens Næringsliv* (**Exhibit C-24**)); Hearing Tr. (Day 1), p. 77.

²²² Statement of Claim, §6.3.2.

²²³ See also Witness Statement of Mr Geir Almås, §132 (**CWS-1**).

²²⁴ Statement of Reply, §6.

liquidation, it submits, was driven by the Claimants' own financial mismanagement, which resulted in material breaches of the Lease Agreement and justified the Lease's termination.

(a) Pol Farm's financial troubles and bankruptcy were due to the Claimants' poor investment decisions

156. Rather than precipitating Pol Farm's financial collapse, the Respondent considers ANR's termination of the Lease Agreement to have been in response to, and justified by, Pol Farm's serious financial difficulties and its resultant failure to comply with its contractual obligations. In this respect, it rejects the narrative that 'Pol Farm was a prosperous business enterprise' before the termination of the Lease forced the Company into bankruptcy.²²⁵
157. Relying on statements by Pol Farm's former accountant, Ms Jadwiga Luzynska, the Respondent submits that Pol Farm's financial difficulties stem from its decision, in 2007, to implement a business strategy focused on large, capital-intensive investments.²²⁶ In its view, the Claimants' strategy proved harmful to Pol Farm's creditors, suppliers, employees, and even the health of its animals. In the period from 2008 to 2009, for instance, the Company's suppliers 'started repeatedly sending summons for overdue payment.'²²⁷ The Company's employees, too, made allegations of mismanagement against Pol Farm, accusing the owners 'of wastefulness and extravagance,' including through the purchase of luxury cars and items unrelated to the Company's business.²²⁸
158. According to the Respondent, Pol Farm's financial difficulties became more severe in the period immediately preceding the termination of the Lease. In 2008, for instance, Pol Farm's auditor observed that the Company suffered a loss of PLN 6,595,033.²²⁹ From April 2009, 'at least 44 court orders for payment and judgments' were issued against Pol Farm.²³⁰ The Respondent points to the following statistics as additional indicators of Pol Farm's viability:

²²⁵ Statement of Defence, §7. *See also* Hearing Tr. (Day 4), p. 73.

²²⁶ Statement of Defence, §12.

²²⁷ Statement of Defence, §12 (citing Indictment dated 2 August 2013, pp. 21-22 (**Exhibit R-4**)).

²²⁸ Statement of Defence, §12 (citing Transcript dated October 2009 of TVP Szczecin documentary '*Krowy i ludzie*' ('Cows and People') (**Exhibit R-3**)).

²²⁹ Statement of Defence, §11.

²³⁰ Statement of Defence, §13.

- (a) According to the court-appointed expert in the criminal proceedings against the Claimants, Pol Farm stopped paying its creditors altogether on 30 September 2008.²³¹
- (b) At the time of the termination of the Lease Agreement, the Company had unpaid wages amounting to PLN 600,000 and unpaid employee insurance contributions totalling PLN 1,200,000.²³²
- (c) Animals on the Farm were allegedly underfed and undernourished.²³³ According to the court-appointed expert's report, Pol Farm's neglect of its livestock resulted in a decrease in the value of the Farm's herd amounting approximately to PLN 3,000,000.²³⁴

159. By the time the Lease Agreement was terminated on 7 July 2009, the Respondent argues that Pol Farm was 'a bankrupt company',²³⁵ estimating Pol Farm's financial liabilities toward various creditors at over PLN 21,000,000 (approximately EUR 5,250,000).²³⁶ Despite Pol Farm's financial distress, the Respondent notes that the Claimants neither filed a petition in bankruptcy for Pol Farm nor provided it with the necessary funding to allow it to meet its liabilities.²³⁷ The ultimate initiation of bankruptcy proceedings, it notes, followed from petitions in bankruptcy filed by Pol Farm's creditors, dated 4 and 7 September 2009.²³⁸

160. In light of the foregoing facts, the Respondent considers the Claimants' observations to ANR that Pol Farm's difficulties in paying off debts were 'transitory' or 'caused by factors unrelated to the Company' to be 'misleading'.²³⁹ While recession and drought 'may have increased' the Company's financial difficulties in 2008, 'they definitely did not trigger it'.²⁴⁰ The Respondent states:

At that point in time the Company was already on the path to insolvency due to Claimants' ever-increasing expenditure and overinvestment. Consequently,

²³¹ Statement of Defence, §13 (citing Opinion of J. Stosio dated 29 December 2010, p. 3 (**Exhibit R-2**)).

²³² Statement of Defence, §13 (citing Indictment dated 2 August 2013, p. 14 (**Exhibit R-4**)). *See also* Hearing Tr. (Day 1), pp. 101-104; Hearing Tr. (Day 4), p. 67.

²³³ Statement of Defence, §13; Hearing Tr. (Day 1), p. 104.

²³⁴ Opinion of J. Stosio dated 29 December 2010, p. 2 (**Exhibit R-2**).

²³⁵ Statement of Defence, §9.

²³⁶ Statement of Defence, §9 (citing Opinion of J. Stosio dated 29 December 2010 (**Exhibit R-2**)).

²³⁷ Statement of Defence, §13.

²³⁸ Statement of Defence, §9.

²³⁹ Letter dated 14 May 2009 from Pol Farm to ANR (**Exhibit R-5**).

²⁴⁰ Statement of Defence, §11.

Claimants' allegation that 'as a direct result of the unlawful termination of the Lease Agreement, Pol Farm's financial situation became impossible' does not reflect the true reasons behind Pol Farm's bankruptcy.²⁴¹

161. The Respondent submits that the subsequent institution of criminal proceedings against the Claimants 'for acting to the creditors' detriment and for misappropriating Pol Farm's funds,²⁴² following a preliminary analysis by the bankruptcy court of Pol Farm's financial documents, is further evidence that the Company's financial failures cannot be blamed on outside forces.²⁴³

(b) ANR's termination of the Lease Agreement was justified by Pol Farm's consistent failure to properly manage the leased property and to perform its contractual obligations

162. In the Respondent's view, Pol Farm's chronic financial distress in the period from 2008 to 2009 led to the result that the Company proved unable to comply with its obligations under the Lease Agreement. In its view, ANR was therefore justified in terminating the Lease Agreement on 7 July 2009.

163. The Respondent argues that the 'first indications' of Pol Farm's looming default became clear in 2006, when Pol Farm requested the cancellation of a significant portion of rent due as well as an extension of the deadline for payment of the remaining balance.²⁴⁴ ANR granted Pol Farm's requests.²⁴⁵

164. Despite ANR's flexibility and its attempts to accommodate Pol Farm's financial difficulties, the Respondent submits that the Company consistently failed to implement measures that would have avoided the need for ANR's ultimate termination of the Lease. As early as 2006, for instance, Pol Farm 'failed to follow ANR's recommendations for maintenance work' on identified buildings.²⁴⁶ The Respondent notes that Mr Geir Almås conceded Pol Farm's failure to perform its obligations in a letter to ANR dated 7 December 2006, which states:

With reference to the conversation on 06/07/2006 between you and my employees, Mr Marian Kiwkowicz and Ms Monika Wójcik, during which you expressed your disappointment that Pol Farm had not complied with earlier arrangements made as regards the buildings leased from the Agency, I have noticed that we do not have the

²⁴¹ Statement of Defence, §11 (citing Statement of Claim, §2.12); Hearing Tr. (Day 1), pp. 101-104.

²⁴² Statement of Defence, §9.

²⁴³ Statement of Defence, §§14-15.

²⁴⁴ Statement of Defence, §19.

²⁴⁵ Statement of Defence, §19.

²⁴⁶ Statement of Defence, §19.

required reports on the renovations carried out in 2006. From my point of view, our behaviour in this matter is not satisfactory.²⁴⁷

165. In the Respondent's view, these early indications of Pol Farm's failure to perform its obligations under the Lease Agreement quickly became the norm. Over the period from 2007 to 2009, ANR conducted at least four inspections of the Farm. ANR's inspection reports from this period indicate that the farmland suffered significantly as a result of Pol Farm's financial difficulties.²⁴⁸ In connection with ANR's December 2007 inspection, for example, the Respondent states:

In addition to the fact that the Company was in financial distress, the Farm itself was in poor condition and devastated, as Claimants had failed to perform their basic obligations to manage it properly and to conduct regular maintenance work. As a result, 50% of the buildings were not in use and were decapitalised, at least 200 ha of arable land was lying fallow and over 50 ha of arable land suitable for cereal cultivation had been turned into horticultural land.²⁴⁹

166. The Respondent argues that Pol Farm's failure to undertake necessary corrections relating to the irregularities detected by ANR in its December 2007 inspection became 'a constant bone of contention between the Parties'.²⁵⁰ In its letter of 15 February 2008, ANR identified six areas which it expected Pol Farm to address: (i) the liquidation of farm buildings 'on the verge of collapsing'; (ii) the development of uncultivated land; (iii) the cultivation of arable land; (iv) the undertaking of maintenance and repair works on various buildings; (v) strengthening the security of the buildings against third-party access; and (vi) the introduction of building logbooks.²⁵¹ Of these six recommendations, the first, fourth, and sixth recommendations were to be implemented 'immediately'. In the Respondent's view, however, Pol Farm failed to address most of ANR's concerns:

- (a) The demolition of heifer farm buildings: As early as 3 October 2005, ANR concluded contracts with Pol Farm to demolish several buildings in danger of collapse.²⁵² ANR was 'particularly surprised' to discover that these buildings continued to stand on the property at the time it conducted its December 2007 inspection; it accordingly requested that Pol Farm immediately carry out the demolitions.²⁵³ ANR's subsequent inspection,

²⁴⁷ Letter dated 7 December 2006 from Pol Farm to ANR (**Exhibit R-8**).

²⁴⁸ Statement of Defence, §20. *See also* Hearing Tr. (Day 1), pp. 90-91.

²⁴⁹ Statement of Claim, §9.

²⁵⁰ Statement of Defence, §21; Hearing Tr. (Day 1), p. 93.

²⁵¹ Statement of Defence, §21.

²⁵² Statement of Defence, §25.

²⁵³ Statement of Defence, §25; Hearing Tr. (Day 1), pp. 93-94.

dated 19 September 2008, revealed that the buildings continued to stand.²⁵⁴ ANR asked for immediate clarification from Pol Farm as to its delay.²⁵⁵ Rather than explain its reasons for the delay, Pol Farm asked for an extension until 30 November 2008; a further inspection on 11 December 2008 revealed that no demolition had been carried out.²⁵⁶

- (b) Letting land lie fallow: ANR's December 2007 inspection report indicated that 200 hectares of land were not being cultivated.²⁵⁷ ANR gave Pol Farm until 2010 to 'make proper use' of the land and ignored Pol Farm's continued noncompliance with the provision in its post-September 2008 inspection memorandum.²⁵⁸ The Respondent argues that Pol Farm had 'not even started preparations' to comply with the request by 2009, and, in light of its financial situation, 'it was obvious it would not be able to do so.'²⁵⁹
- (c) Failure to cultivate arable land: The Respondent notes that Pol Farm attempted to comply with its request that the Company recultivate and develop arable land by planting raspberries on 50 hectares of the Farm.²⁶⁰ In the Respondent's view, because the affected plots were arable land and intended for growing and harvesting crops, they were 'not fit for horticultural activity'.²⁶¹
- (d) Failure to carry out maintenance and repairs: ANR's post-December 2007 inspection report required Pol Farm immediately to 'make systematic repairs to the buildings'.²⁶² The Respondent submits that, in contrast to the Claimants' allegation that this point was fully addressed,²⁶³ Pol Farm conducted repairs on only 'a small fraction' of the buildings identified.²⁶⁴ Furthermore, in the Respondent's view, the work that Pol Farm

²⁵⁴ Letter dated 7 October 2008 from ANR to Pol Farm (**Exhibit C-7**).

²⁵⁵ Letter dated 7 October 2008 from ANR to Pol Farm (**Exhibit C-7**).

²⁵⁶ Memorandum dated 11 December 2008 (**Exhibit R-11**).

²⁵⁷ Statement of Defence, §26; Hearing Tr. (Day 1), p. 94.

²⁵⁸ Statement of Defence, §26.

²⁵⁹ Statement of Defence, §26.

²⁶⁰ Statement of Defence, §27.

²⁶¹ Statement of Defence, §27.

²⁶² Letter dated 15 February 2008 from ANR to Pol Farm (**Exhibit C-5**). *See also* Hearing Tr. (Day 1), p. 97.

²⁶³ Statement of Claim §§2.6, 2.9.

²⁶⁴ Statement of Defence, §28.

did was inadequate and ‘rather cosmetic in nature’.²⁶⁵ The ANR Memorandum confirmed the continuing ‘alarming condition’ of the buildings, including missing windows and roofs.²⁶⁶

- (e) Insufficient security measures: According to the Respondent, ANR’s recommendation that Pol Farm enhance the security of the buildings to prevent third-party access and arson resulted in no additional efforts from Pol Farm.²⁶⁷ Because some of the Farm facilities were already secured with guards and CCTV cameras at the time ANR conducted its December 2007 inspection, the Respondent considers the Claimants’ argument that the hiring of security staff and installation of cameras was undertaken subsequent to ANR’s recommendations in this respect to be ‘hardly possible’.²⁶⁸ In any event, subsequent inspections confirmed that ‘the buildings that are not in use are not secured’ and that, ‘of the leased buildings, only few are fenced’.²⁶⁹
- (f) Lack of building logbooks: Finally, the 2007 report required Pol Farm to introduce and regularly keep building logbooks, which are required under Polish law to document inspections of a building’s technical state and repairs or reconstruction carried out during the building’s use.²⁷⁰ The Respondent notes that ANR’s post-September 2008 inspection memorandum reveals that Pol Farm continued to keep incomplete books.²⁷¹

167. The Respondent views with particular concern the Claimants’ plantation of raspberries on the Farm, which it considers to be contrary to Section 5(1) of the Lease Agreement, stipulating that Pol Farm ‘cannot change the designated use of the property without the Lessor’s consent’.²⁷² In the Respondent’s view, Pol Farm’s decision was ‘incomprehensible’ in light of ANR’s repeated characterisation in its inspection reports of the affected land as ‘arable, not horticultural’.²⁷³ It

²⁶⁵ Statement of Defence, §28.

²⁶⁶ Statement of Defence, §28; ANR Memorandum dated 8 May 2009 (**Exhibit R-18**).

²⁶⁷ Statement of Defence, §30; Hearing Tr. (Day 1), p. 98.

²⁶⁸ Statement of Defence, §. 30.

²⁶⁹ ANR Memorandum dated 3 August 2009 (**Exhibit R-17**).

²⁷⁰ Statement of Defence, §31; Hearing Tr. (Day 1), p. 98.

²⁷¹ Statement of Defence, §31.

²⁷² Statement of Defence, §27; Lease Agreement dated 14 February 1997, §5(1) (**Exhibit C-3**).

²⁷³ Statement of Defence, §27.

suggests, in any event, that Pol Farm was under the duty to apply for ANR's consent to change the use of the leased plots and to 'start horticultural activity on them.'²⁷⁴

168. The Respondent argues that ANR 'patiently and repeatedly' requested Pol Farm to perform its obligations as lessee. In light of the foregoing difficulties with securing Pol Farm's compliance with its obligations under the Lease Agreement, however, it is the Respondent's submission that, despite being given numerous opportunities to rectify the irregularities revealed by ANR inspections, Pol Farm continued to fail to adhere to 'the most basic obligations' by which it was bound under the Lease Agreement, *i.e.*, to (i) use the leased object 'properly' and (ii) preserve the value of the property through regular upkeep.²⁷⁵
169. In the Respondent's view, Pol Farm's serial failure to remedy the deteriorating condition of the Farm constituted a material breach of the Lease Agreement. Though ANR afforded the Claimants 'ample opportunities' to remedy Pol Farm's non-compliance under the lease, the Company, in the Respondent's view, consistently failed to live up to its obligations and 'undermined the trust' that ANR had placed in Pol Farm as a reliable commercial partner.²⁷⁶
170. Accordingly, the Respondent submits that ANR was justified in terminating the Lease Agreement under Section 5(1) of the lease, relating to the 'change in use of the leased object' absent ANR's consent.²⁷⁷ In contrast to the submissions of the Claimants, however, the Respondent argues that ANR's decision to terminate the Lease Agreement did not rest on the plantation of raspberries alone. In the Respondent's view, Pol Farm illegally changed the use of the leased property with regard both to the land and to the buildings on the land, as explained by ANR in its subsequent letter of 12 August 2009.²⁷⁸ In this respect, the Respondent maintains, in any event, that a breach of any of the four requirements under Section 17 of the Lease Agreement—including but not limited to the unauthorised change of use of the property—would have justified ANR's termination.²⁷⁹

²⁷⁴ Statement of Defence, §27.

²⁷⁵ Statement of Defence, §32. *See also* Hearing Tr. (Day 4), pp. 62-63.

²⁷⁶ Statement of Defence, §41. *See also* Hearing Tr. (Day 1), p. 146; Hearing Tr. (Day 4), p. 73.

²⁷⁷ Statement of Defence, §39.

²⁷⁸ Statement of Defence, §§39-49. *See also* Hearing Tr. (Day 1), p. 96.

²⁷⁹ Statement of Rejoinder, §33.

171. To aid in the interpretation of Section 5(1), the Respondent suggests the Tribunal take into account ANR's rules for the termination of land leases, titled 'Lease of the property of the Agricultural Property Stock of the State Treasury' and dated January 2008 ('**Rules of Land Lease**')

- (2) the object of [the] lease is used contrary to proper management rules, and, in particular:
 - inappropriate use of land during the term of the lease agreement
 - deterioration of the object of [the] lease due to the lessee's failure to carry out renovation and maintenance of buildings and structures at its own expense.

...
- (3) changing the intended use of the object of [the] lease without consent of the lessor,

...
- (5) failure to settle liabilities due to public-law charges related to the subject matter of the agreement (i.e. taxes) and other compulsory charges related to possession (i.e. insurance).²⁸⁰

172. In accordance with the Rules of Land Lease, the Respondent considers that Pol Farm's failures to carry out repairs, institute security measures, cultivate and develop land, and make timely rent payments all relate to the obligations of 'proper management' encapsulated by the concept of 'proper use' of the land required under Section 5(1) of the Lease Agreement.²⁸¹ Accordingly, each of the Company's continuing breaches subsequent to ANR's December 2007 inspection constitute grounds under which the Lease Agreement would have entitled ANR to terminate the agreement.

173. Finally, the Respondent also considers that ANR was entitled to terminate the Lease Agreement under Section 14(1) of the Lease Agreement. Under that section, Pol Farm undertook to 'bear all the regulatory liabilities connected with the rented property for which, according to legal provisions, either the owner or the possessor is liable.'²⁸² The Respondent notes, in this regard, Pol Farm's failure to pay public dues as well as employee social security contributions amounting to more than PLN 1,200,000.²⁸³

²⁸⁰ Appendix to Order no. 11/08 of the President of ANR, 'Lease of the property of the Agricultural Property Stock of the State Treasury,' dated January 2008 (**Exhibit R-20**).

²⁸¹ Statement of Defence, §41.

²⁸² Statement of Defence, §41; Lease Agreement dated 14 February 1997, §14(1) (**Exhibit C-3**).

²⁸³ Statement of Defence, §41; Opinion of J. Stosio dated 29 December 2010 (**Exhibit R-2**).

(c) ANR's choice to terminate the Lease Agreement followed applicable procedures and was free of political motives

174. The Respondent maintains that Pol Farm's breaches of the Lease Agreement formed the basis for ANR's termination of the Lease on 7 July 2009. It submits that it complied with applicable procedures and regulations in considering, deciding on, and issuing its Notice of Termination. The Respondent rejects the Claimants' assertion that political motivations, including a desire to reduce the number of leases in force or to redistribute land to Polish farmers, drove the decision to terminate the lease.
175. On 8 May 2009, ANR held a meeting chaired by Deputy Director Marek Gil to consider Pol Farm's financial situation with the aim of 'discussing supervisory measures available to force the Company to perform its obligations as the lessee' under the Lease Agreement.²⁸⁴ The meeting established that Pol Farm's liabilities were sufficiently large as to threaten to exceed the total amount of the Company's assets and revealed the existence of enforcement proceedings against Pol Farm.²⁸⁵ The Respondent notes that ANR's minutes from this meeting clearly demonstrate that these reasons, and not political factors, grounded Mr Gil's request that a notice of termination and statement of claim against Pol Farm be drawn up.²⁸⁶
176. Additionally, the Respondent suggests that ANR's consistent accommodation of Pol Farm's situation and its leniency toward the Company with regard to its performance under the Lease Agreement contradicts any claim that ANR was intent on dispossessing Pol Farm of its lease. The Respondent notes that ANR repeatedly delayed issuing its Notice of Termination in response to late pleas by the Claimants that Pol Farm would improve its financial situation and begin to perform under the terms of the lease.²⁸⁷ ANR only definitively decided on issuing its Notice of Termination, which had been prepared in May 2009, at ANR's meeting of 30 June 2009, by which point the Respondent submits it was clear that: (i) Pol Farm would not submit financial paperwork as requested; (ii) the Company's bank account was empty; (iii) Pol Farm had demolished one of the three milk production facilities on the Farm without seeking ANR's consent; and

²⁸⁴ Statement of Defence, §33; Statement of Rejoinder, §62.

²⁸⁵ Statement of Defence, §33.

²⁸⁶ ANR Memorandum dated 8 May 2009, p. 1 (**Exhibit R-18**); Statement of Defence, §33; Statement of Rejoinder, §63.

²⁸⁷ Statement of Defence, §34; Hearing Tr. (Day 4), p. 63.

(iv) Company loans were being ‘used to partially finance expenses incurred on the private property’ of the Claimants.²⁸⁸

177. Consequently, on 7 July 2009, ANR issued its Notice of Termination and informed Pol Farm that it was to vacate the property within two months.²⁸⁹ The Respondent submits that the termination was ‘standard procedure in cases where a lessee infringes its contractual obligations’²⁹⁰ and followed from the Rules of Land Lease. Section 14.8.1 of those Rules state:

If such reasons are definitely attributable to the lessee (e.g. incompetent management, intentional action reducing the value of the object of lease), the agreement shall be terminated as soon as practicable.²⁹¹

178. Sections 14.8.2 and 14.8.3 of the Rules of Land Lease require, respectively, that termination based on mismanagement of the leased land be (i) accompanied by an inspection report containing video or photographic documentation and (ii) made on the recommendation of a committee appointed by the ANR Director.²⁹² The Respondent submits it complied with both requirements.²⁹³

179. In this regard, the Respondent also rejects the Claimants’ assertion that it violated Section 14.8.3 by failing to send Pol Farm a letter with its comments from its most recent inspection.²⁹⁴ The Respondent argues that Section 14.8.3 permitted, but did not require, ANR to provide lessees with comments on an inspection if the Agency wished to allow ‘rectification of irregularities’.²⁹⁵ It notes, in any event, that ANR determined not to permit Pol Farm additional opportunities to correct for its non-performance under the Lease Agreement.

180. Even following ANR’s termination, the Respondent asserts that ANR remained open to revisiting its decision, and considered doing so during an (ultimately unfruitful) meeting held with Mr Kristian Almås on 16 July 2009.²⁹⁶ Ultimately, however, the Respondent suggests that the

²⁸⁸ Statement of Defence, §34.

²⁸⁹ Letter dated 7 July 2009 from ANR to Pol Farm (**Exhibit C-10**).

²⁹⁰ Statement of Defence, §43.

²⁹¹ Appendix to Order no. 11/08 of the President of ANR, ‘Lease of the property of the Agricultural Property Stock of the State Treasury,’ dated January 2008, §14.8.1 (**Exhibit R-20**).

²⁹² *Ibid.*, §§14.8.2, 14.8.3.

²⁹³ Statement of Rejoinder, §60-63.

²⁹⁴ Statement of Rejoinder, §64.

²⁹⁵ Statement of Rejoinder, §64 (citing Appendix to Order no. 11/08 of the President of ANR, ‘Lease of the property of the Agricultural Property Stock of the State Treasury,’ dated January 2008, §14.8.3 (**Exhibit R-20**)).

²⁹⁶ Statement of Defence, §36.

Claimants failed to take measures necessary to ensure that the Lease Agreement could be reinstated.²⁹⁷

181. In light of the foregoing, the Respondent considers ANR's termination of the Lease Agreement to have been lawful. It therefore rejects the Claimants' 'far-reaching' allegation that the termination was driven by political reasons.²⁹⁸ With respect to the Claimants' reliance on two press articles quoting ANR staff, the Respondent suggests that the text reflects only the fact that the land was in part re-leased to local farmers after a competitive tender following the termination of the Lease Agreement, but not that the termination itself was *caused* by a desire to re-lease the Farm to an entity other than Pol Farm.²⁹⁹ Indeed, according to the Respondent and its witnesses, a determination by ANR to terminate a lease has never come under the influence of other public administrative authorities or other entities.³⁰⁰
182. Finally, and in any event, the Respondent draws attention to Pol Farm's failure to contest the termination under Section 18 of the Lease Agreement.³⁰¹ Section 18 contains an arbitration clause providing that 'any disputes that may arise during performance of this agreement will be resolved through arbitration', subject to a very short (two-week) deadline—in effect a form of summary arbitration.³⁰² The Respondent notes that the Claimants had 'invoked the very same arbitration clause' under Section 18 on a previous occasion, suggesting that it is 'incomprehensible' that Pol Farm failed to challenge the termination under Section 18 in this instance.³⁰³

G. THE PARTIES' ARGUMENTS ON THE MERITS: EXPROPRIATION

1. The Claimants' Arguments

183. The Claimants submit that the termination of the Lease Agreement unlawfully expropriated the Claimants' investment.³⁰⁴ In particular, they argue that the deprivation of Pol Farm's 30-year

²⁹⁷ See Hearing Tr. (Day 4), pp. 64-65.

²⁹⁸ Statement of Defence, §54; Hearing Tr. (Day 1), p. 107.

²⁹⁹ Statement of Defence, §§54-55.

³⁰⁰ Witness Statement of Ms Anna Zając-Plezia (**RWS-3**).

³⁰¹ Statement of Defence, §45; Statement of Rejoinder, §§65-68.

³⁰² Lease Agreement dated 14 February 1997, §18 (**Exhibit C-3**) (agreed translation as submitted in Letter dated 15 April 2016 from Respondent).

³⁰³ Statement of Rejoinder, §§65-66.

³⁰⁴ Statement of Claim, §1; Statement of Reply, §1.1.

contractual right to operate the Farm was a *de facto* expropriation for the purposes of Article VI of the BIT.³⁰⁵

184. The Claimants submit that the deprivation of an investor's contractual rights, whether direct or indirect, may be tantamount to a deprivation in violation of the Treaty's protections against expropriation under international law.³⁰⁶ Relying on *Eureko B.V. v. Poland*, they suggest that 'the deprivation of contractual rights may be expropriatory in substance and in effect.'³⁰⁷
185. While the Claimants acknowledge that '[n]ot every failure to perform or uphold a contract' will amount to an expropriation, they nevertheless consider that ANR's termination of the Lease Agreement suffices.³⁰⁸ In particular, the Claimants submit that: (i) ANR acted in a sovereign capacity when terminating the Lease; (ii) the termination was neither legitimate nor justified under the terms of the Lease Agreement; and (iii) in any event, the termination was abusive and not in good faith.³⁰⁹ With respect to the legitimacy of the termination, the Claimants attach particular importance to what they consider ANR's failure to afford Pol Farm the statutory notice period under the Lease Agreement, as well as its non-response to Pol Farm's letter concerning the plantation of raspberries in October 2008.³¹⁰
186. Even if ANR had a contractual right to terminate the Lease Agreement, however, the Claimants submit that the termination nevertheless operates as an expropriation of their investment since, in their view, it was carried out contrary to ANR's duty to act in good faith.³¹¹ Specifically, the Claimants allege that ANR's termination of the Lease Agreement for the 'very minor violation' of planting raspberries on the Farm—an activity that the Claimants submit 'had no significant consequences' for the land's value—constituted an 'abuse[]' of ANR's position.³¹² Accordingly, the Claimants consider an expropriation to have been established and request compensation for all losses flowing from the Lease's termination.

³⁰⁵ Statement of Claim, §6.1.

³⁰⁶ Statement of Claim, §6.1

³⁰⁷ Statement of Claim, §6.1; Statement of Reply, §10 (citing *Eureko B.V. v. Republic of Poland*, Partial Award dated 19 August 2005, §241 (CLA-10)).

³⁰⁸ Statement of Claim, §6.2.

³⁰⁹ Statement of Claim, §§6.2-6.3; Statement of Reply, §10.

³¹⁰ Statement of Claim, §6.4.2.

³¹¹ Statement of Claim, §6.5.

³¹² Statement of Claim, §6.5.

2. The Respondent's Arguments

187. The Respondent rejects the Claimants' assertion that the termination of the Lease Agreement was a *de facto* expropriation or measure tantamount to the same under Article VI of the BIT.³¹³
188. First, the Respondent argues that the Claimants did not lose control over their investment, *i.e.*, their shares in Pol Farm, as a result of the termination of the Lease Agreement. Citing case law such as *Pope & Talbot Inc. v. Canada* and *Telenor v. Hungary*, the Respondent submits that the 'decisive element in an expropriation is the substantial loss of control or economic value of an investment' as a result of an expropriatory measure.³¹⁴ In the present case, it considers that none of the requirements for loss of control were met, since (i) the Claimants continued to exercise 'effective control' over Pol Farm and continued to own Pol Farm's shares; and (ii) ANR 'has not interfered in the day-to-day management' of Pol Farm.³¹⁵
189. The Respondent dismisses the allegation that the termination of the Lease Agreement itself forced Pol Farm into bankruptcy and liquidation, leading to the loss of the Claimants' control over their investment. Pol Farm was already effectively insolvent at the time of the Notice of Termination; the Respondent observes that the court-appointed expert during bankruptcy proceedings considered Pol Farm to have lost solvency as early as 30 September 2008.³¹⁶ The Respondent notes that the Claimants remained in possession of the Farm on the date that bankruptcy proceedings commenced.³¹⁷
190. Second, the Respondent reiterates that 'ANR did not use any sovereign powers when terminating the agreement but acted as an ordinary contract[ual] party without invoking any sovereign powers.'³¹⁸

³¹³ Statement of Defence, §61.

³¹⁴ Statement of Defence, §§62-63 (citing *Pope & Talbot Inc. v. Canada*, UNCITRAL (NAFTA), Interim Award dated 26 June 2000, §102 (RLA-9); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award dated 13 September 2006, §65 (RLA-10)).

³¹⁵ Statement of Defence, §65.

³¹⁶ Statement of Defence, §66.

³¹⁷ Statement of Defence, §67.

³¹⁸ Statement of Defence, §71.

H. OTHER ARGUMENTS ON THE MERITS

1. Failure to Accord Equitable and Reasonable Treatment and Protection

191. In the Claimants' view, ANR failed to afford Pol Farm 'procedural fairness and due process,' both of which the Claimants consider to be included under the Treaty's requirement that investments be provided with equitable and reasonable treatment and protection under Article III of the Treaty, in its correspondence and conduct vis-à-vis the Company.³¹⁹ In particular, the Claimants note ANR's non-response to Pol Farm's letter, in October 2008, considering clarifications relating to ANR's September 2008 inspection and informing ANR of Pol Farm's decision to plant raspberries on the Farm.³²⁰
192. The Respondent considers the Claimants' claims with respect to equitable and reasonable treatment and protection to be without merit. In particular, they contest the Claimants' suggestion that the termination of the Lease Agreement was against the good faith principle. In the Respondent's view, the Lease's termination was justified and in accordance with both the terms of the Lease Agreement itself and with Polish law.³²¹
193. Rather than constituting an act of bad faith, ANR's termination was reasonable and foreseeable by the Claimants, who had been warned by ANR of the likely termination of the Lease, absent action to remedy Pol Farm's non-compliance under the agreement, in a meeting on 12 May 2009.³²² Accordingly, the Respondent disagrees that the Lease's termination breached any duties of fair and equitable treatment.

2. Unreasonable and Discriminatory Measures

194. The Claimants argue that the Respondent has subjected them to unreasonable, inequitable, and discriminatory treatment.³²³ With regard to their claim of discrimination, the Claimants rely principally on their submission that the 'apparent reason for ANR's termination [are] policy reasons' related to a desire to award farmland to Polish farmers at the expense of foreign lessees.³²⁴

³¹⁹ Statement of Claim, §6.4.2.

³²⁰ Statement of Claim, §6.4.2.

³²¹ Statement of Rejoinder, §226.

³²² Statement of Rejoinder, §227.

³²³ Statement of Claim p. 20.

³²⁴ Statement of Claim, §§6.1, 6.3.

195. The Respondent submits that ANR's termination of the Lease Agreement was prudent and legally justified. It states:

By terminating the Lease Agreement ANR simply acted as any prudent business person and this step was by no means discriminatory. It would have been entirely unreasonable to expect ANR to sit and watch its property being devastated and its recommendations being ignored.³²⁵

196. Accordingly, the Respondent rejects that ANR's conduct vis-à-vis Pol Farm, including the termination of the Lease Agreement, constituted discriminatory treatment.

3. The Umbrella Clause

197. The Claimants have argued that the Treaty's MFN Clause in Article IV permits the Claimants, absent an express prohibition in the Treaty, to avail themselves of provisions in BITs with third States. Accordingly, the Claimants wish to exercise their right to benefit from substantive protections under Article 3(5) of the Dutch-Poland BIT.³²⁶ That article provides:

Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.³²⁷

198. Under the Dutch-Poland BIT, the Claimants submit that the Respondent would be obliged to fulfil contracts that have previously been signed with investors of the Netherlands. Pursuant to their interpretation of the Treaty's MFN Clause, the Claimants argue that they may avail themselves of the umbrella clause in Article 3(5) of the Dutch-Poland BIT.

199. In the Claimants' view, ANR 'did not have the right to terminate and, as such, breached the Lease Agreement' by issuing its Notice of Termination on 7 July 2009.³²⁸ Accordingly, the Claimants submit that the termination violates the umbrella clause in Article 3(5) and, by extension, constitutes a violation of the Respondent's obligations under the present Treaty.³²⁹

200. Even if the Claimants were permitted to proceed against the Respondent under the umbrella clause in the Dutch-Poland BIT, the Respondent submits that such claims would fail. It does so on three grounds: (i) the umbrella clause covers only contractual obligations entered into by a contracting

³²⁵ Statement of Defence, §38.

³²⁶ Statement of Reply, §11.

³²⁷ Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments, dated 7 August 1992, art. 3(5) (CLA-39).

³²⁸ Statement of Reply, §11.

³²⁹ Statement of Reply, §11.

State party to the Treaty, not by ANR;³³⁰ (ii) Pol Farm, not the Claimants, was party to the Lease Agreement, and accordingly only Pol Farm could bring a claim under the umbrella clause;³³¹ and (iii) in any event, an umbrella clause cannot be breached by a non-sovereign act of an ordinary contracting party such as ANR.³³²

VI. THE TRIBUNAL'S CONCLUSIONS

A. JURISDICTION OVER THE CLAIMS

201. The jurisdictional arguments of the Parties are summarised in paragraphs 88 to 131 above. In the Tribunal's view, not all of these objections are properly speaking jurisdictional, and (since the proceedings have not been bifurcated) to the extent they might arguably be treated as such, they overlap substantially with issues belonging to the merits. There is no doubt that the two individual Claimants were themselves investors of long standing in Poland; given their status as such, they have standing to protect the contractual rights of Pol Farm, which formed the core of their investment. Their principal claim is that their investment was indirectly expropriated as a result of ANR's wrongful termination of the Lease Agreement. That claim is within the Tribunal's jurisdiction both *ratione personae* and *ratione materiae*.
202. Other aspects of the claims can hardly be characterised as jurisdictional. In particular, the Respondent objects to the umbrella clause claim by arguing that individual shareholders cannot invoke contractual rights under a contract between ANR and Pol Farm, a Polish corporation.³³³ According to the Respondent, an investor can rely on an umbrella clause only if it has a direct contractual relationship with a host State. But that rule of privity, if it exists, does not prevent the Tribunal from having regard to the Lease Agreement, and the issue of contractual enforcement only arises once certain other obstacles are surmounted, notably whether ANR's termination was attributable to Poland.
203. In the event the Tribunal holds that under the BIT it has jurisdiction over the Claimants' claims arising from ANR's termination of the Lease Agreement.

³³⁰ Statement of Rejoinder, §§196-207.

³³¹ Statement of Rejoinder, §§208-213.

³³² Statement of Rejoinder, §§214-224.

³³³ Statement of Rejoinder, §§196 *et seq.*

B. THE SCOPE OF THE CLAIMANTS' CASE ON THE MERITS

204. Turning to the merits, the Tribunal begins by stressing the restricted character of the claim presented to it. The Claimants have focussed entirely on ANR's conduct and alleged motivation in terminating the Lease Agreement in July 2009. That claim raises an obvious issue of attribution, since ANR is a separate legal entity from Poland and it purported to exercise contractual powers in terminating the Lease Agreement; moreover, the Claimants never challenged the legality of the termination by the prompt arbitration procedure provided for in Section 18 of the Lease Agreement. In strong contrast, two other decisions affecting the Claimants, the bankruptcy order against Pol Farm and the criminal convictions of the two Claimants, were unquestionably taken by organs of the Polish State and are attributable to it. But these are explicitly not the subject of the Claimants' BIT case.³³⁴
205. Moreover, if ANR's termination of the Lease Agreement is not attributable to Poland, this not merely affects the expropriation claim; it fatally undermines all its claims, including the fair and equitable treatment and umbrella clause claims, and renders irrelevant the Claimants' argument that the Tribunal has jurisdiction to apply certain standards by virtue of the MFN Clause in the BIT. Accordingly, the Tribunal will first consider the issue of attribution.
206. In this context, the Tribunal takes note of the Parties' agreement that the International Law Commission's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (the '**ILC Articles**'),³³⁵ widely regarded by investment tribunals 'as a codification of customary international law',³³⁶ provide the legally relevant yardstick to determine whether specific acts can be attributed to a host State for purposes of establishing the latter's responsibility for a breach of international law.

³³⁴ Quite apart from the fact that the criminal convictions are still under appeal, the Claimants do not characterise them as a denial of justice or a continuation of discriminatory action taken by Poland: Hearing Tr. (Day 2), pp. 20-21, 38-39.

³³⁵ Statement of Defence, §49; Statement of Reply, §7.1 (citing International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* 2001, in: Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, 43, UN Doc. A/56/10 (2001). (**CLA-19** and **RLA-1**) (hereinafter '**ILC Articles**').

³³⁶ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated 18 June 2010, §171 (**CLA-29** and **RLA-2**); see also *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award dated 12 October 2005, §69 (**CLA-28**); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award dated 6 November 2008, §156.

C. ATTRIBUTION

1. ILC Article 4 – Is ANR a State Organ?

207. Under Article 4(1), the conduct of any State organ acting as such is attributable to the State. The commentary to Article 4 explains: ‘The reference to a “State organ” covers all the individual or collective entities which make up the organization of the State and act on its behalf.’³³⁷ Article 4(2) further clarifies that ‘An organ includes any person or entity which has that status in accordance with the internal law of the State.’ Thus ‘domestic law is the starting point’ for the determination of the status of an entity as a State organ.³³⁸ However, internal status does not necessarily imply that an entity is not a State organ if other factors, such as the performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy, point the other way.³³⁹
208. As the Respondent notes in the Rejoinder, tribunals have determined that an entity is not a State organ according to the terms of a State’s legal order when it has independent personality in that order.³⁴⁰ For example, in *Bayindir v. Pakistan*, the tribunal rejected the claim that Pakistan’s National Highway Authority was a State organ, because of its separate domestic legal personality.³⁴¹ In *EDF (Services) Ltd. v. Romania*, the tribunal similarly determined that an airport holding company and a State airline, ‘both possessing legal personality under Romanian law separate and distinct from that of the State’, were not State organs.³⁴² Similarly, the tribunal in *Hamester v. Ghana*³⁴³ concluded that the Ghanaian Cocoa Board could not be considered to be a State organ in the sense of Article 4 of the ILC Articles, mainly because it was ‘not classified a

³³⁷ ILC Commentary to art. 4, §1.

³³⁸ Djamchid Momtaz, ‘Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority’ in *The Law of International Responsibility*, p. 243 (James Crawford, Alain Pellet & Simon Olleson eds., 2010). See also *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID ARB/07/24, Award dated 18 June 2010, §183 (CLA-29 and RLA-2).

³³⁹ ILC Commentary to art. 4, §11.

³⁴⁰ Statement of Rejoinder, §§82-91.

³⁴¹ *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID ARB/03/29, Award dated 27 August 2009, §119 (RLA-19).

³⁴² *EDF (Services) Ltd v. Romania*, ICSID Case no ARB/05/13, Award dated 8 December 2009, §190 (RLA-17).

³⁴³ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated 18 June 2010 (CLA-29 and RLA-2).

State organ under Ghanaian law, but [had been] created as a “corporate body,” which [could] be “sued in its corporate name”.³⁴⁴

209. ANR is not a State organ under the domestic law of Poland, and the Claimants do not argue otherwise. It has separate legal personality and exercises operational autonomy. Under Article 3 of the 1991 Act, ANR is ‘a state legal entity’ that is ‘supervised by the minister for rural development’.³⁴⁵ It is authorised under Article 5 of the 1991 Act to ‘perform on its own behalf the rights and obligations’ related to State agricultural property.³⁴⁶ In light of this, ANR cannot be considered a State organ *de jure* under Polish law.
210. Moreover, ANR does not meet the criteria usually applied to determine whether an entity is a *de facto* State organ. The ILC’s commentary to Article 4 suggests that ‘the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government’.³⁴⁷ By contrast, where an entity engages on its own account in commercial transactions, even if these are important to the national economy, this inference will not be drawn. In *Hamester*, it was argued that the Ghanaian Cocoa Board was a *de facto* State organ.³⁴⁸ The tribunal emphasised the lack of direct governmental control over the Board’s activities and concluded that it was not an Article 4 organ.³⁴⁹ *Jan de Nul* concerned the Suez Canal Authority.³⁵⁰ The tribunal concluded that, while the Authority carried out public activities, it was not structurally part of the Egyptian State: its statute required it to be managed in accordance with business practice and it had a private budget and funds.³⁵¹
211. The cases on which Claimants rely, *Maffezini* and *Salini*, are not particularly helpful on this question. *Maffezini* concerned a Spanish regional development agency, SODIGA, whose actions in the exercise of governmental authority the tribunal held were attributable to Spain under

³⁴⁴ Ibid., §184.

³⁴⁵ Act of 19 October 1991 on the Management of Agricultural Property of the State Treasury, art. 3 (CLA-17).

³⁴⁶ Ibid., art. 5(1)-(3) (CLA-17).

³⁴⁷ ILC Commentary to ch. 2, §6.

³⁴⁸ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ISCID ARB/07/24, Award dated 18 June 2010, §§186-88 (CLA-29 and RLA-2).

³⁴⁹ Ibid., §187.

³⁵⁰ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award dated 6 November 2008, §§158-162 (RLA-15).

³⁵¹ Ibid., §161.

ILC Article 5. The tribunal did not treat SODIGA as a State organ, *de jure* or *de facto*.³⁵² *Salini* was a decision on jurisdiction in a dispute over a motorway construction contract entered into by two Italian companies with ADM, a majority State-owned company. The tribunal held it had jurisdiction under the relevant BIT but no jurisdiction in relation to the contractual claim against ADM.³⁵³ It went on to hold, almost as *obiter*, that ADM was a *de facto* organ of Morocco on the basis of effective control and because it was perceived (and apparently treated by the Moroccan State) as performing public functions in the field of infrastructure.³⁵⁴ The relevance of this early decision is limited by its reliance on indeterminate categories of reference ('State company') and above all by its denial of contractual jurisdiction over ADM.

212. In support of the position that ANR is a *de facto* organ, the Claimants argue that it exercises 'executive functions of the state' because it has the power to manage, sell and lease State agricultural property.³⁵⁵ But the power to lease agricultural land is not an executive government function. An agricultural lease is a commercial transaction, even if entered into with a State entity and even if it involves State-owned land.
213. In the present case, ANR shares features with the entities under consideration in *Hamester* and *Jan de Nul*. While ANR is supervised by the Minister for Rural Development,³⁵⁶ Poland's control over ANR's Board is limited to the appointment and removal of its president and vice-president.³⁵⁷ Poland may direct ANR through regulations.³⁵⁸ The Council of Ministers additionally must approve sales of shares held by ANR of stock in companies of strategic importance to agriculture, a limited category of holdings.³⁵⁹ These facts suggest that overall, like the Cocoa Board in *Hamester*, ANR enjoys a level of autonomy not consistent with its being considered a *de facto* organ. This is confirmed by the financial factors which were considered as relevant in *Jan de Nul*. In accordance with Articles 20(b)(1)(e) and 55 of the 1991 Act, ANR has its own bank account.³⁶⁰

³⁵² *Maffezini v. Kingdom of Spain*, ICSID ARB/97/7, Award dated 13 November 2000, §§78, 83 (hereinafter '*Maffezini*'). See paragraph 217 below.

³⁵³ *Salini Costruttori SpA v. Kingdom of Morocco*, ICSID ARB/00/4, Decision on Jurisdiction dated 23 July 2001, §§29-30 (CLA-27).

³⁵⁴ *Ibid.*, pp. 407-409 (§§30-35).

³⁵⁵ Statement of Reply, §7.2.

³⁵⁶ Act of 19 October 1991 on the Management of Agricultural Property of the State Treasury, art. 3(2) (CLA-17).

³⁵⁷ *Ibid.*, art. 9.

³⁵⁸ *Ibid.*, art. 6(2).

³⁵⁹ *Ibid.*, art. 5(6)-(7).

³⁶⁰ *Ibid.*, arts. 20(b)(1)(e), 50.

It holds property in its own name.³⁶¹ In other words, it has financial autonomy similar to that enjoyed by the Suez Canal Authority. In light of its autonomous management and financial status, ANR is not a *de facto* organ of the Polish State.

2. ILC Article 5 – Was the Termination of the Lease performed in the Exercise of Governmental Functions?

214. Under Article 5 of the ILC Articles, the conduct of a separate entity (not a State organ) is nonetheless attributable to the State when the entity exercises governmental authority in performing that conduct.³⁶² Article 5 provides:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.³⁶³

215. As the tribunal explained in *Jan de Nul v. Egypt*, Article 5 has two elements:

- First, the act must be carried out by an entity empowered to exercise governmental authority;
- Second, the act itself must involve the exercise of that governmental authority.³⁶⁴

216. This approach was confirmed by the tribunal in *Hamester v. Ghana*,³⁶⁵ which held that the Ghanaian Cocoa Board, given its broad range of statutory tasks, was ‘an entity exercising elements of governmental authority, as described in Article 5 of the ILC Articles.’³⁶⁶ For purposes of attribution under Article 5, the *Hamester* tribunal correctly insisted that it had to be shown ‘that the precise act in question was an exercise of such governmental authority.’³⁶⁷

217. The Claimants also rely on *Maffezini v. Spain* in support of their claim of attribution under Article 5. In *Maffezini*, the functions of the entity whose acts were said to be attributable to Spain

³⁶¹ Ibid., art. 5(4).

³⁶² ILC Articles, art. 5 (CLA-19 and RLA-1).

³⁶³ Ibid.

³⁶⁴ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, Award, ICSID Case No. ARB/04/13, Award dated 6 November 2008, §163 (RLA-15).

³⁶⁵ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated 18 June 2010 (CLA-29 and RLA-2).

³⁶⁶ Ibid., §192.

³⁶⁷ Ibid., §193.

were ‘the undertaking of studies for the introduction of new industries into Galicia, seeking and soliciting such new industries, investing in new enterprises, processing loan applications with official sources of financing, providing guarantees for such loans, and providing technical assistance.’³⁶⁸ The entity further ‘was charged with providing subsidies and offering other inducements for the development of industries.’³⁶⁹ The tribunal concluded that many of these acts could not be performed by private actors and thus were government functions for the purposes of attribution under international law.³⁷⁰

218. In the present case, the powers of ANR fall into three broad categories. Under Article 5(1)-(3) of the 1991 Act, ANR is entrusted with the State Treasury’s agricultural property and is entitled to ‘perform on its own behalf the rights and obligations’ related to it.³⁷¹ Under Article 6 of the 1991 Act, ANR shall also ‘perform tasks arising from state policy’, specifically in terms of:

- 1) creating and improving the area structure of family farms;
- 2) creating conditions facilitating the rational use of the production potential of the Resources of the Agricultural Property of State Treasury;
- 3) restructuring and privatisation of the property of State Treasury used for agricultural purposes;
- 4) trading in real estate and other assets of State Treasury used for agricultural purposes;
- 5) managing the material resources of State Treasury intended for agricultural purposes;
- 6) securing the property of State Treasury;
- 7) initiating development and agricultural works on the land belonging to State Treasury and supporting the organisation of private agricultural farms on such land.³⁷²

These tasks may be supplemented by regulation.³⁷³ Finally, under the 2003 Act on the Shaping of the Agricultural System, ANR also has a right of first refusal on certain agricultural property

³⁶⁸ *Maffezini*, §86.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ Act of 19 October 1991 on the Management of Agricultural Property of the State Treasury, art. 5(1)-(3) (CLA-17).

³⁷² *Ibid.*, art. 6(1).

³⁷³ *Ibid.*, art. 6(2).

sales.³⁷⁴ Property purchased under this power becomes part of the State Treasury Agricultural Stock.³⁷⁵

219. The Respondent argues that ANR was exercising contractual, not governmental authority in terminating the Lease.³⁷⁶ It is true that it entered into the relevant contract in the exercise of statutory powers to manage State agricultural property. But the key point is that vis-à-vis the Claimants, termination was not an exercise of public power but of a purported contractual right. The management of real property, including the exercise of the contractual right to terminate a lease, derives from the general law; it is a capacity of any entity that holds and rents out land. Because ANR was not exercising whatever Polish government authority it may have had when it terminated the Lease, its action is not attributable to the Polish State on the basis of Article 5.
220. The Claimants seek to counteract this *prima facie* compelling argument in essentially two ways. First, they argue that the termination was not authorised by the Lease Agreement, or alternatively that ANR is precluded from relying retrospectively on grounds not expressly referred to in the Notice of Termination. Secondly, they argue that even if termination was purportedly an act done in the exercise of contractual powers, the underlying policy motivation—redistribution of State land to small Polish farmers—effectively converted the act to one in the exercise of State authority covered by Article 5. These arguments will be addressed in turn.

(a) Was termination authorised under the Lease Agreement?

221. The Parties argued at length their positions on the legality of the termination of the Lease Agreement. These arguments have been summarised in paragraphs 132 to 182 above. Although, for reasons to be explained, it does not need to reach definitive conclusions on these issues, the Tribunal would make the following observations.

i. Was ANR limited to the grounds cited in the Notice of Termination?

222. Claimants argue that ANR is limited to the grounds it raised in the Notice of Termination.³⁷⁷ The relevant portion of the Notice reads:

³⁷⁴ Act on the Shaping of the Agricultural System, arts. 3(4), 4.

³⁷⁵ Ibid., art. 8.

³⁷⁶ See Statement of Rejoinder, §§99-107.

³⁷⁷ Statement of Reply, §2.3 (citing Letter dated 7 July 2009 from ANR to Pol Farm (**Exhibit C-10**)).

In connection with infringing the conditions of the lease . . . , i.e. par. 5 it. 1 involving the change of the purpose of the subject of the case – [ANR Koszalin branch] – quoting par. 17 – hereby terminates the Agreement without the preservation of the statutory notice period.

The Respondent argues that the reasons articulated in the notice of termination do not limit it,³⁷⁸ and that it may rely on other grounds for terminating the Lease. These include those listed in the August 2009 letter of clarification, namely:

the change of the purpose of the lease object (land, structures) as well as using the lease object to conduct business in a manner non-compliant with the principles of good administration which I hereby present as the cause of the renouncement. . . . I would like to additionally raise, as the basis for the renouncement of the agreement, the lack of regulation of any statutory charges regarding the lease object.³⁷⁹

223. The Respondent's legal expert notes that under Polish law, as a general rule, provided valid reasons for termination exist these need not be stated.³⁸⁰ The Claimants did not present their own legal expert before the Tribunal but adduced a legal opinion given to them at the time.³⁸¹ In that opinion the Claimants' lawyer expressed the view that the 12 August 2009 letter from ANR elaborating its reasons for termination³⁸² was merely for information, and that only the termination letter had effect.³⁸³ Reference was made to Article 60 of the Civil Code, which provides:

the intention of a person performing a legal act may be expressed by any behavior of that person which manifests his intention sufficiently.³⁸⁴

Later, however, the Claimants' expert asserts that the grounds given in the letter of 7 July 2009 constitute 'integral elements' of the declaration of intent.³⁸⁵ The Claimants' expert additionally suggests that reliance on alternative grounds for termination should be disallowed as inconsistent with Article 58, Section 2 of the Civil Code, which provides that '[a] legal act contrary to the principles of community life is invalid.'³⁸⁶ It is not explained how reliance on other subsisting grounds for termination is 'contrary to the principles of community life'. If it were necessary to

³⁷⁸ Statement of Rejoinder, §§30-31.

³⁷⁹ Letter dated 12 August 2009 from ANR to Pol Farm (**Exhibit C-13**).

³⁸⁰ Legal Opinion of Adam Brzozowski dated 1 February 2016, pp. 12-13 (**Exhibit R-25**) (citing both jurisprudence and doctrine).

³⁸¹ Legal Opinion no. 1 of Atamanczuk & Deboa (undated), pp. 2-5 (**Exhibit C-27**).

³⁸² Letter dated 12 August 2009 from ANR to Pol Farm (**Exhibit C-13**).

³⁸³ Legal Opinion no. 1 of Atamanczuk & Deboa (undated), p. 5 (**Exhibit C-27**).

³⁸⁴ Civil Code, art 60.

³⁸⁵ Legal Opinion no. 1 of Atamanczuk & Deboa (undated), p. 5 (**Exhibit C-27**).

³⁸⁶ *Ibid*.

decide the point (which, for reasons that will appear, it is not), the Tribunal is inclined to the view that Polish law did not prohibit reliance on other available grounds for termination, especially since the Claimants had asked for clarification of the decision.

ii. The available grounds for termination

224. The Lease allows three reasons for immediate termination: misuse of the object, a two-period arrears in rent payments, and failure to pay certain public dues related to the land (Lease Agreement Sections 5, 14.1, and 17, respectively).

a. Misuse of the object

225. The primary ground for termination relied on by the Respondent is the misuse of the object of the Lease. Section 17 of the Lease makes a violation of Section 5 of the Lease grounds for immediate termination.³⁸⁷ Section 5(1) reads:

The Lessee commits themselves to use and manage the rented property properly in order to conduct their business activity there. At the same time they cannot change the required use of the property.

The Respondent specifically raises the following points as evidence of mismanagement or misuse of the object.

226. Kłępczewo Buildings: In its Statement of Defence, the Respondent challenges Pol Farm's failure to reconstruct certain buildings in Kłępczewo.³⁸⁸ In their Reply, the Claimants acknowledge that they did not reconstruct the buildings, and allege this is because they had not received the insurance payment for the buildings from ANR in advance of reconstruction.³⁸⁹ The Respondent replies that its policy is to forward such insurance payments to lessees after reconstruction has occurred in order to ensure that reconstruction actually takes place.³⁹⁰ The only evidence in this regard is the Witness Statement of the Deputy Director of ANR's Koszalin branch, Mr Marek Gil,³⁹¹ which confirms this (*ex facie* not unreasonable) policy.

227. The Heifer/Berkanowo Buildings: In October 2005, Pol Farm and ANR concluded an agreement regarding the destruction of certain buildings in Berkanowo precinct with a deadline of 30 May

³⁸⁷ Lease Agreement dated 14 February 1997, §17 (**Exhibit C-3**).

³⁸⁸ See Statement of Defence, §§28-29.

³⁸⁹ Statement of Reply, §2.5.4; Witness Statement of Mr Geir Almås, §88 (**CWS-1**).

³⁹⁰ Statement of Rejoinder, §39.

³⁹¹ Witness Statement of Mr Marek Gil, §16 (**RWS-1**).

2006.³⁹² The agreement, and a second, near-identical agreement, also set the same deadline for the demolition of a calving shed.³⁹³

228. The Claimants deny that this agreement was concluded by someone with legal authority to represent Pol Farm.³⁹⁴ ANR raised the issue again in its inspection report of 23 November 2007,³⁹⁵ noting that ‘the physical liquidation of the heifer buildings must be commenced immediately’. ANR notified Pol Farm of this conclusion in its letter of 15 February 2008.³⁹⁶ On 7 October 2008, ANR sent Pol Farm a letter listing concerns reported in a 19 September 2008 ANR inspection.³⁹⁷ Item 3 of this memorandum lists: ‘In accordance with the agreements concluded no 35 and no 36 for the disassembly of heifer[buildings] in Berkanowo, the lessor will provide the explanations in writing why the arrangements concerning the physical liquidation in the abovementioned agreements, despite the lapse of time, were not performed.’ In an undated reply, Pol Farm requested a further delay until 30 November 2008.³⁹⁸ A memorandum of an ANR inspection of 11 December 2008 reports that no demolition works had yet been performed.³⁹⁹ ANR’s inspection memorandum of 8 May 2009 reports that the buildings had finally been demolished, but that heaps of debris remained.⁴⁰⁰
229. This evidence indicates that the heifer buildings were selected for demolition in late 2005. Even if the agreements to demolish them were not binding, Pol Farm was made aware of ANR’s concerns with the buildings by the agreements, and ANR reminded Pol Farm in its letters of 18 February 2008 and 7 October 2008. Concerns had previously been expressed within ANR, by ANR to Pol Farm, and by the Świdwin Gmina to ANR⁴⁰¹ that the Berkanowo buildings posed a safety threat that required proper remediation. Upon their demolition, they appear to have been left as rubble piles in a way inconsistent with the expectations ANR communicated to Pol Farm.

³⁹² Agreements dated 3 October 2005, §§1(1), 2(2) (**Exhibit R-10**).

³⁹³ Agreements dated 3 October 2005, §§1(1), 2(2) (**Exhibit R-10**).

³⁹⁴ *See* Statement of Reply, §2.5.3 (**C-62**); Witness Statement of Mr Geir Almås, §§58, 70 (**CWS-1**).

³⁹⁵ ANR Internal Report dated 23 November 2007, sec. II.7.1, pt. 1 (**Exhibit C-4**).

³⁹⁶ Letter dated 15 February 2008 from ANR to Pol Farm (**Exhibit C-5**).

³⁹⁷ Letter dated 7 October 2008 from ANR to Pol Farm (**Exhibit C-7**).

³⁹⁸ Letter dated October 2008 from Pol Farm to ANR (**Exhibit C-8**).

³⁹⁹ December 2008 Memorandum dated 11 December 2008 (**Exhibit R-11**).

⁴⁰⁰ ANR Inspection Report dated 8 May 2009, p. 2 (**Exhibit R-14**). *See also* *ibid.*, photo 81/11.

⁴⁰¹ ANR Inspection Report dated 20 June 2007 (**Exhibit R-15**).

This points to a failure to manage the Berkanowo buildings, in breach of Section 5 of the Lease Agreement.

230. Other Building Maintenance: In its Statement of Defence, the Respondent alleges Pol Farm's general failure to maintain buildings as a grounds for termination.⁴⁰² In their Reply, the Claimants argue that these buildings were repaired as is reflected in the specification of building works in Exhibit R-13.⁴⁰³ Additionally, the Claimants challenge the Respondent's reliance on a 15 February 2010 expert report on the condition of the Farm⁴⁰⁴ because of the delay in its preparation.⁴⁰⁵ In its Rejoinder, the Respondent claims that this report reflects an inspection of the Farm in December 2009, two-and-a-half months after its transfer to ANR.⁴⁰⁶
231. In the November 2007 inspection, the inspector reported that '[t]he property is maintained in an average condition'⁴⁰⁷ but stressed that, nevertheless, 'the leaseholder must regularly renovate the existing buildings. The deadline is now.'⁴⁰⁸ This demand is repeated in the 15 February 2008 letter from ANR to Pol Farm.⁴⁰⁹ In a 19 September 2008 report to ANR, Pol Farm identifies works that have been done to five sites in Krosino, Klepczewo, and Słowieńsko.⁴¹⁰ The report from the September 2008 inspection calls on Pol Farm to review the condition of its buildings and to consider demolition of some of them.⁴¹¹ But the only two documents which list particular buildings as requiring repairs are the May 2009 inspection report⁴¹² and the report of the post-handover inspection.⁴¹³ The following table lists the status in May 2009 and the estimated excessive damage to the four buildings (all in Klepczewo) that appear in both reports:

⁴⁰² Statement of Defence, §28.

⁴⁰³ Statement of Reply, §2.5.4 (citing list of repair works dated 19 September 2008 (**Exhibit R-13**)).

⁴⁰⁴ Expert Opinion of Ms Bożena Kamczycka dated 15 February 2010 (**Exhibit R-16**).

⁴⁰⁵ *Ibid.*, p. 11.

⁴⁰⁶ Statement of Rejoinder, §38.

⁴⁰⁷ ANR Internal Report dated 23 November 2007, pt. II.2.16 (**Exhibit C-4**)

⁴⁰⁸ ANR Internal Report dated 23 November 2007, pts. II.7.1, III.1.4 (**Exhibit C-4**)

⁴⁰⁹ Letter dated 15 February 2008 from ANR to Pol Farm (**Exhibit C-5**).

⁴¹⁰ List of repair works dated 19 September 2008 (**Exhibit R-13**). These do not include the reconstruction of the Klepczewo buildings discussed in paragraph 226 above.

⁴¹¹ Letter dated 7 October 2008 from ANR to Pol Farm (**Exhibit C-7**).

⁴¹² ANR Inspection Report dated 8 May 2009 (**Exhibit R-14**).

⁴¹³ Expert Opinion of Ms Bożena Kamczycka dated 15 February 2010 (**Exhibit R-16**).

Building type	Registration	Status in May 2009	Excessive wear and tear in December 2009
Cowshed	105/2-13	Flooring and all fittings removed	163,907 PLN
Cowshed	105/3-13	Building adapted for warehouse, fittings removed	163,907 PLN
Cowshed	105/4-13	Building adapted for warehouse, fittings removed	81,954 PLN
Granary	105/75-01	At risk of collapsing, lack of equipment, installations, woodwork in 100% area not secured against third party access, hazardous to residents of nearby buildings; must be secured urgently	40,597 PLN

The state of these buildings is shown in photographs attached to the May 2009 inspection report.⁴¹⁴ They further evidence a failure of Pol Farm to properly maintain the buildings.

232. Status of Meadow Lands: In its Statement of Defence, the Respondent raises the alleged failure of Pol Farm to cultivate 200 hectares of land,⁴¹⁵ describing this as ‘letting land lie fallow’.⁴¹⁶ In their Reply, the Claimants dispute this on two grounds.⁴¹⁷ First, they challenge the categorisation, describing the land as meadow (*lqki*) rather than fallow (*ugor*). Second, they argue that ANR had given Pol Farm a deadline of 31 December 2010 to cultivate the land properly.⁴¹⁸ Because this deadline had not been reached, the Claimants argue, any failure to cultivate this land could not have been a breach of the contract justifying termination. In its Rejoinder, the Respondent adopts the meadow characterisation and argues that the evidence shows the Claimants were allowing the land to turn into wetlands.⁴¹⁹ On the issue of timing, the Respondent argues that, as it became clear that the Claimants would not meet the deadline, it became necessary to terminate on these grounds to protect the Farm.⁴²⁰

⁴¹⁴ ANR Inspection Report dated 8 May 2009 (**Exhibit R-14**).

⁴¹⁵ Statement of Defence, §26.

⁴¹⁶ Ibid.

⁴¹⁷ Statement of Reply, 10.

⁴¹⁸ Ibid.

⁴¹⁹ Statement of Rejoinder, §41.

⁴²⁰ Ibid., §44.

233. As a preliminary matter, the relevant land categorisation seems to be ‘meadows’. This is the term (*łąki*) used in the Polish version of the November 2011 inspection report submitted by the Respondent.⁴²¹ In the 2007 Report,⁴²² ANR notes that 200 hectares of meadow have been set aside and must be ‘restored to use’ progressively—100 hectares by 2010 and the remainder by 2015. Point II.1.2 clarifies that these 200 hectares ‘include reed plants, wetlands and bogs.’ The Respondent additionally relies on the witness statements of Mr Marek Gil⁴²³ and Mr Tomasz Wroński⁴²⁴ to substantiate this point. The Claimants argue in their Reply that the purpose of the land was ‘as pasture or for growing hay’. The slow regression of the land from meadow to wetland seems inconsistent with this use.
234. However, the establishment of deadlines by ANR could raise an expectation by Pol Farm that it had until the deadline to comply with a request. This is confirmed by the practice of ANR, in some instances, to require immediate compliance.⁴²⁵ As the deadline for compliance on the restoration of the meadows had yet to pass, it is difficult to conclude that ANR was justified in relying on this ground for termination of the Lease.
235. Plantation of Raspberries: In its Statement of Defence, the Respondent claims that Pol Farm changed the purpose of the Lease by cultivating raspberries on 50 hectares of ‘arable land’.⁴²⁶ In their Reply, the Claimants argue both that ANR acquiesced in the planting of raspberries and that this was consistent with the required use of the land. In its Rejoinder, the Respondent reiterates its position.⁴²⁷
236. On balance the evidence supports the conclusion that the use of the land for the plantation of raspberries was not anticipated at the time of the conclusion of the Lease. The Lease does not list as part of the object any orchard land for the growing of fruit. The land register is consistent with this. Additionally, Pol Farm was not organised for the purpose of growing fruit or berries. But

⁴²¹ Copy of ANR Inspection Report dated 23 November 2007, with signature of Mr Geir Almås dated 15 January 2008 (**Exhibit R-9**) (Polish original).

⁴²² ANR Internal Report dated 23 November 2007, sec. II.1.2 (**Exhibit C-4**) (English translation).

⁴²³ Witness Statement of Mr Marek Gil, §10 (**RWS-1**).

⁴²⁴ Witness Statement of Mr Tomasz Wroński, §8 (**RWS-2**).

⁴²⁵ See Letter dated 15 February 2008 from ANR to Pol Farm (**Exhibit C-5**); Letter dated 7 October 2008 from ANR to Pol Farm (**Exhibit C-7**).

⁴²⁶ Statement of Defence, §27. The implicit premise is that ‘arable land’ is land suitable for more resource-intensive crops like grains. No authority is offered to define ‘arable land’.

⁴²⁷ Statement of Rejoinder, §§45-46.

despite the extensive pleading on this point, the Tribunal regards it as of only minor significance, affecting as it did only 50 hectares of the Farm.

b. Overdue payment of rent

237. Section 17 of the Lease reads:

The Lessor can terminate the Agreement without statutory notice if the Lessee lags behind with rent for a minimum of two terms of payment.⁴²⁸

238. The Claimants see the condition of two terms of payment as a monetary value, with the consequence that Pol Farm would have had to have been in arrears for two full rent payments to meet the condition of Section 17.⁴²⁹ The Respondent does not contest this.⁴³⁰ Its illustrative exhibit⁴³¹ indicates that at the time of termination, Pol Farm had failed to pay rent in full for two terms but that it was less than two full rent payments in arrears. The Claimants do not challenge the accuracy of this exhibit but rather rely on it.⁴³²

c. Payment of public dues

239. The Respondent also relies on the failure to pay public dues to justify the termination of the Lease.⁴³³ Section 14.1 of the Lease provides that Pol Farm must:

bear all the regulatory liabilities connected with the rented property for which, according to legal provisions, either owner or the possessor is liable. In this case, these include real estate tax, agricultural tax and other liabilities resulting from possessing the property including obligatory insurance.⁴³⁴

Section 17 of the Lease makes a violation of Section 14(1) grounds for termination.⁴³⁵

240. The Respondent focuses primarily on real estate taxes owed to the Świdwin and Sławoborze Gminas and on unpaid social security contributions amounting to approximate total arrears of

⁴²⁸ Lease Agreement dated 14 February 1997, §17 (**Exhibit C-3**).

⁴²⁹ Statement of Reply, §2.6.5.

⁴³⁰ See Statement of Defence, §42.

⁴³¹ ANR Summary of Payments dated 21 August 2015 (**Exhibit R-1**).

⁴³² See Statement of Reply, §2.6.5.

⁴³³ Statement of Defence, §41.

⁴³⁴ Lease Agreement dated 14 February 1997, §14.1 (**Exhibit C-3**).

⁴³⁵ Lease Agreement dated 14 February 1997, §17 (**Exhibit C-3**).

1.3 million PLN. The Claimants respond that Pol Farm was in compliance with relevant payments and that the social security payments are not public dues within the sense of Section 14.⁴³⁶

241. Świdwin Agricultural taxes: The facts support the conclusion that Pol Farm was not in arrears to Świdwin Gmina. The Claimants presented a letter from the Gmina dated 21 May 2009 postponing its payment deadline until 30 September 2009, well after the Notice of Termination.⁴³⁷ The Respondent concedes this in its Rejoinder,⁴³⁸ while noting that it was unaware of the postponement at the time of the termination.⁴³⁹
242. Social Security: The Respondent presents a table from the 2010 expert report⁴⁴⁰ showing Pol Farm's arrears to the Social Security Institution.⁴⁴¹ The Claimants do not challenge the fact that it was seriously in debt at the time of the termination, but claims the debt was not 'connected with the property' in the sense of Section 14.1.⁴⁴²
243. During oral argument, the Claimants disputed the relevance of social security payments to the legality of the termination of the Lease Agreement.⁴⁴³ For its part, the Respondent observed that the Claimants' failure in this regard was relevant in showing Pol Farm's pattern of conduct vis-à-vis its creditors,⁴⁴⁴ and also the absence of a credible recovery plan for the Company.⁴⁴⁵
244. If the Tribunal had to decide the question, it would tend to favour the Claimants' argument that social security arrears were not connected to the property for the purposes of Section 14(1). This lists real estate tax, agricultural tax and mandatory insurance charges as illustrations of liabilities covered, suggesting that the charge must be directly connected to the land in order to fall within the scope of Section 14(1). On the other hand, the failure to meet its social security obligations, very substantial in monetary terms, confirmed the legitimacy of ANR's concerns as to the financial viability of Pol Farm.

⁴³⁶ Statement of Reply, §§2.6.1-2.6.3.

⁴³⁷ Letter dated 21 May 2009 from the Świdwin Municipality to Pol Farm (**Exhibit C-29**).

⁴³⁸ Statement of Rejoinder, §49.

⁴³⁹ Ibid.

⁴⁴⁰ Opinion of J. Stosio dated 29 December 2010, p. 3 (**Exhibit R-2**).

⁴⁴¹ Statement of Defence, §41.

⁴⁴² Statement of Reply, §2.6.3.

⁴⁴³ Hearing Tr. (Day 1), p. 27.

⁴⁴⁴ Hearing Tr. (Day 1), p. 104.

⁴⁴⁵ Hearing Tr. (Day 2), p. 116.

d. The Tribunal's provisional conclusions on available grounds of termination

245. So far, the Tribunal would reach the following provisional conclusions:

- (1) Pol Farm was at the date of termination, and despite various concessions by ANR had long been, in arrears with its rental payments. However, it apparently took care to ensure that the arrears never exceeded two clear rental periods (totalling a year, *i.e.*, six months each), so this ground for immediate termination was not available.
- (2) In a letter dated 20 May 2009 Pol Farm offered a schedule of rental payments to reduce if not remove the arrears, which ANR accepted; but the Company did not attempt to comply with the schedule.⁴⁴⁶
- (3) Pol Farm was persistently in default on substantial payments associated with the running of the farm, including salaries and social security fund payments.
- (4) There were continuing difficulties about the condition and repair of farm buildings. Through its farm manager, Pol Farm agreed to demolish certain buildings in danger of collapse, but failed to do so. Penalty payments due under these agreements were disputed and were not paid.

246. The Tribunal heard evidence from the then regional director of ANR, Mr Marek Gil, who made the termination decision. According to Mr Gil, successive ANR inspections revealed the state of the Farm to be in 'deplorable'⁴⁴⁷ condition, causing ANR to intervene with Pol Farm on numerous occasions prior to making the determination to terminate the Lease. His testimony states that ANR issued its Notice of Termination reluctantly and in accordance with legal requirements. The Tribunal regards Mr Gil's evidence as reliable, and no less so because he seems subsequently to have come into conflict with ANR on unrelated issues.

⁴⁴⁶ There is conflicting evidence on whether ANR accepted the repayment offer. In its response dated 21 May 2009, ANR stated: 'As the request to postpone payment deadlines has been filed after the respective maturity dates, it cannot be approved as anticipated by yourselves. We are expecting immediate repayment of the debt on account of all outstanding legal titles. Furthermore, we accept the debt service timetable submitted by the company as effectively binding.' Letter dated 21 May 2009 from ANR to Pol Farm (**Exhibit C-61**). The Claimants consider the offer to have been rejected by ANR. On cross-examination, for instance, Mr Geir Almás stated that ANR 'didn't accept our proposal' by demanding immediate repayment of the debt. Hearing Tr. (Day 2), pp. 106-107. Mr Kristian Almás noted that an agreement was 'proposed that was never realised.' Hearing Tr. (Day 2), pp. 142-143. It appears that Pol Farm made one partial payment—namely PLN 50,000—but that it abandoned its proposed schedule shortly thereafter, without notifying ANR. Hearing Tr. (Day 1), pp. 108-112.

⁴⁴⁷ Hearing Tr. (Day 3), p. 16.

247. Overall, the Tribunal concludes that the relevant ANR officers had genuine concerns as to the conduct of Pol Farm's operations, as to its solvency and as to its compliance with its agreements and with Polish legal requirements.
248. Mr Gil readily accepted that local Polish farmers were seeking more land, but he denied that this was the motivation for termination of the Lease Agreement.⁴⁴⁸ In support of this conclusion is the fact that local government agencies gave Pol Farm support on several occasions, including the letter of support from the local mayor and various extensions of time to pay.⁴⁴⁹ There is no evidence of official discrimination against or obstruction to Pol Farm either at a local or central level.
249. Jurisdiction over disputes concerning the Lease Agreement was vested by agreement in a local arbitral tribunal under Section 18. There was some uncertainty before the Tribunal as to the correct interpretation of Section 18, but the Parties eventually agreed on the following text, submitted by the Respondent:
1. The parties agree that any disputes that may arise during performance of this agreement will be resolved through arbitration.
 2. In the event of a dispute, the parties will appoint one arbitrator each, who will then choose an umpire from outside their circle as presiding arbitrator of the arbitration panel.
 3. The arbitration court is obliged to adjudicate a case within two weeks of the day the statement of claim is filed by any party. A hearing will take place irrespective of whether the parties appear.
 4. The parties will set the arbitrators' remuneration on each occasion.
 5. Any matters not regulated above will be governed by the Code of Civil Procedure provisions on arbitration courts.⁴⁵⁰
250. In fact, Pol Farm did not resort to arbitration under Section 18. In evidence, Mr Geir Almås said that there was no time to do so,⁴⁵¹ whereas his counsel argued that a 2-week schedule as provided in Article 18 was unrealistic.⁴⁵² But Section 18 was mutually agreed, was applicable in terms to

⁴⁴⁸ Hearing Tr. (Day 3), pp. 16-18, 115.

⁴⁴⁹ Letter dated 30 May 2008 from the Mayor of Świdwin to ANR (**Exhibit C-6**); Letter dated 21 May 2009 from the Świdwin Municipality to Pol Farm (**Exhibit C-29**).

⁴⁵⁰ Lease Agreement dated 14 February 1997, §18 (**Exhibit C-3**) (agreed translation as submitted in Letter dated 15 April 2016 from Respondent).

⁴⁵¹ Hearing Tr. (Day 2), pp. 122-123.

⁴⁵² Hearing Tr. (Day 1), p. 53. The Claimants' counsel also noted, on another occasion, that there 'was no time for arbitration.' Hearing Tr. (Day 1), p. 58.

the dispute over termination, and in fact much more than two weeks elapsed between ANR's Notice of Termination and Pol Farm's actual departure.

251. Especially in the light of Section 18, it is not necessary for the Tribunal to reach a definitive conclusion as to the lawfulness of ANR's termination of the Lease Agreement under Polish law, even if it has jurisdiction to do so. All it needs to decide is that the termination was in purported exercise of contractual powers, and it does so decide. That being so, the termination of the Lease Agreement was not attributable to Poland under ILC Article 5.

(b) Was the termination of the Lease Agreement an exercise of unlawful policy?

252. The Claimants seek to avoid this conclusion by relying on the decision in *Vigotop Limited v. Hungary*.⁴⁵³ *Vigotop* addresses the question whether a measure that is not on its face an exercise of *puissance publique* can nevertheless amount to an expropriation. The claimant there argued that the Hungarian State expropriated its investment by the exercise of a termination provision in a contract between its subsidiary and the Hungarian State.⁴⁵⁴ The tribunal considered that 'the fact that Respondent purported to exercise a contractual right' to terminate 'does not exclude *per se* the possibility that this conduct . . . amounted to an expropriation.'⁴⁵⁵ It held that in order to determine whether an expropriation had occurred, it was first necessary to determine whether the termination was conducted with a 'hidden political agenda, which was the true reason for its termination' and thus that the decision was taken in a sovereign capacity.⁴⁵⁶ If public policy reasons for terminating the contract are found, a tribunal would then have to consider whether contractual grounds to terminate existed and whether a termination consistent with those grounds was consistent with the obligation of good faith.⁴⁵⁷

253. A short answer to the argument based on *Vigotop Limited v. Hungary* would be that it concerned termination of a contract with the State itself whereas in the present case the Lease Agreement was with a separate entity with its own contractual capacity and whose conduct in terminating the Agreement was not attributable to the Respondent under the law of State responsibility. The

⁴⁵³ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award dated 1 October 2014 (CLA-11) (hereinafter '*Vigotop*').

⁴⁵⁴ *Ibid.*, §§5, 312.

⁴⁵⁵ *Ibid.*, §313.

⁴⁵⁶ *Ibid.*, §328 (internal quotations omitted).

⁴⁵⁷ *Ibid.*, §§329-330.

Tribunal will, however, with the aim of being fully responsive to the arguments made before it, consider whether the three conditions articulated by the *Vigotop* tribunal are satisfied here.

254. In applying its test, the *Vigotop* tribunal first considered whether Hungary had public policy reasons for terminating the contract, a so-called ‘hidden agenda’.⁴⁵⁸ The tribunal identified three potential policy reasons why Hungary’s government may have opposed the project: anti-corruption concerns, concerns over the validity of a land-swap agreement concluded by the previous interim government, and a new environmental and tourism policy.⁴⁵⁹ The tribunal considered only anti-corruption, environmental, and tourism concerns to be ‘true public policy reasons’ and considered each in turn.⁴⁶⁰
255. First, as to the anti-corruption concerns, the tribunal considered political statements from a recent general election campaign that this project in particular was one targeted for a corruption investigation. These statements were evidence that this became an important reason to oppose the project upon installation of the new Hungarian government.⁴⁶¹ Additionally, the tribunal considered evidence of the involvement of the government anti-corruption commissioner in the decision to terminate the contract.⁴⁶² This evidence led the tribunal to conclude that anti-corruption was a policy concern for the government, one that may have, but was not proven to have, motivated the decision to terminate, ‘and if so, would . . . constitute a public policy reason for the contractual termination’.⁴⁶³
256. Concerning environmental and touristic policy, the tribunal considered it established that Hungary had a policy reason to prevent the implementation of the project.⁴⁶⁴ The tribunal relied primarily on two witness statements, from a Minister and State Secretary,⁴⁶⁵ to the effect that the government had revoked the special project status granted to the project in question ‘based in part’ on the project’s inconsistency with environmental and ecotourism goals.⁴⁶⁶ Consequently, the tribunal concluded that the claimant had ‘submitted conclusive evidence’ that environmental

⁴⁵⁸ Ibid., §332.

⁴⁵⁹ Ibid., §417.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid., §418, 419.

⁴⁶² Ibid., §§412-15, 421.

⁴⁶³ Ibid., §441.

⁴⁶⁴ Ibid., §440.

⁴⁶⁵ Ibid., §§170, 404.

⁴⁶⁶ Ibid., §§402-404, 440.

and touristic concerns motivated that government's desire to end the project, and that such evidence was 'sufficient to conclude that Respondent acted in its sovereign capacity'.⁴⁶⁷

257. *Vigotop* suggests two conditions that must be met in order for a policy motive to exist. The first is that the motive must be a public policy motive rather than a contractual one. The second, revealed particularly by the tribunal's distinct conclusions regarding corruption policy versus environmental and touristic policy, is that the policy motive must be shown to have decisively influenced the State in terminating the contract. In fact, the *Vigotop* tribunal expressly held that '[i]f the Tribunal were ultimately to conclude that it was indeed legitimate for Respondent to invoke its contractual grounds for terminating the Concession Contract, this would exclude a finding of an expropriation, despite the parallel existence of public policy reasons.'⁴⁶⁸ In the end the tribunal concluded that the claimant had failed to prove that the 'Respondent exercised its contractual termination right contrary to good faith or abused such right in order to avoid its liability to compensate under the Treaty.'⁴⁶⁹

258. In the Statement of Claim in the present arbitration, the Claimants raise two possible policy motives for the termination: a desire to distribute land to Polish farmers and a desire to sell State assets,⁴⁷⁰ although in their Reply as well as in oral argument the emphasis was largely on the first of these.⁴⁷¹ The Respondent argues that the evidence only supports the conclusion that the land was distributed to local farmers after the termination,⁴⁷² and that there was no evidence of an improper motive of terminating the contract in order to benefit third parties.

259. In support of its conclusion that land redistribution motivated the termination, the Claimants offer four exhibits. First is an interview with ANR Szczecin Director Adam Poniewski,⁴⁷³ which the Claimants describe as being from a 19 August 2010 article in the *Kurier Olsztyński* newspaper. In the interview, Director Poniewski says:

In those regions, where there is huge demand for land on the part of the farmers, we do not renew lease agreements. This year alone I have decided not to renew lease agreements for 2 500 hectares of land. Last year we terminated a lease agreement for

⁴⁶⁷ Ibid., §441.

⁴⁶⁸ Ibid., para. 331.

⁴⁶⁹ Ibid., para. 630.

⁴⁷⁰ Statement of Claim, §6.3.2.

⁴⁷¹ Statement of Reply, §§5.1-6.

⁴⁷² Statement of Rejoinder, §72.

⁴⁷³ Article dated 19 August 2010 in *Kurier Olsztyński* (**Exhibit C-23**).

4 200 hectares with a Norwegian equity company. We let it to farmers who took part in a close tender.⁴⁷⁴

Second is an article in the Norwegian business newspaper *Dagens Næringsliv* on 9 April 2011, which reports an email from an ANR spokesperson stating that a general goal is to sell as much land as possible to Polish farmers.⁴⁷⁵ The third is the State Audit report for ANR Szczecin covering the years from 2011 to 2013,⁴⁷⁶ although given its date it is not clear how the Claimants rely on it in this regard. Fourth is a much later (October 2015) article from *Kurier Szczeciński*,⁴⁷⁷ which reports the suspension of Mr Marek Gil, on grounds which the Claimants allege were related to a corruption scandal.⁴⁷⁸

260. Together this evidence does not come close to showing that the decision to terminate the Lease Agreement was made for extraneous reasons unrelated to the conduct of the Lease. The *Dagens Næringsliv* article⁴⁷⁹ establishes that ANR had a goal to sell as much land as possible to Polish farmers. The *Kurier Olsztyński* article⁴⁸⁰ suggests (not entirely accurately) that this was indeed done to the property that had been Pol Farm's leasehold.⁴⁸¹ Missing, however, is evidence, still less convincing evidence, of a decision against Pol Farm motivated by such policy concerns. Instead, as has been demonstrated, the record of ANR's internal discussions leading up to the termination⁴⁸² reflects real concerns regarding Pol Farm's financial health, at protecting ANR's rights in anticipation of bankruptcy, and regarding the proper management of the land. There is nothing illegitimate in a subsequent decision to sell land to local farmers if the decision to terminate an existing lease is made for reasons other than redistribution of the land.

⁴⁷⁴ Article dated 19 August 2010 in *Kurier Olsztyński* (**Exhibit C-23**). The area of Pol Farm was slightly over 4200 hectares (*See* Lease Agreement dated 14 February 1997 (**Exhibit C-3**)). The supports the inference that Director Poniewski was referring to Pol Farm.

⁴⁷⁵ Article dated 9 April 2011 in *Dagens Næringsliv* (**Exhibit C-43**).

⁴⁷⁶ Polish Supreme Audit Office Report dated 14 January 2014 (**Exhibit C-26**).

⁴⁷⁷ Article dated 14 October 2015 in *Kurier Szczeciński* (**Exhibit C-44**).

⁴⁷⁸ Marek Gil did not comment on this during oral arguments, except to note that 'my contract has been terminated and [is] within the termination period.' Hearing Tr. (Day 3), p. 67.

⁴⁷⁹ Article dated 9 April 2011 in *Dagens Næringsliv* (**Exhibit C-43**).

⁴⁸⁰ Article dated 19 August 2010 in *Kurier Olsztyński* (**Exhibit C-23**).

⁴⁸¹ Apparently some but by no means all of Pol Farm's land was acquired by local farmers: Marek Gil noted that 'still the majority of the land was not sold or leased,' Hearing Tr. (Day 3), p. 110, and that the 'potential interest of local farmers, in a way, didn't prove in actual tendering procedures', necessitating an open tender in which 'all citizens of Poland could bid'. Hearing Tr. (Day 3), p. 109.

⁴⁸² ANR Memorandum dated 8 May 2009, p. 1 (**Exhibit R-18**).

261. The Claimants also suggest the desire to liquidate State assets was a policy motive behind the termination.⁴⁸³ But this is not a public policy motive. Any landowner can seek to restructure its assets by selling land previously leased. The fact that ANR sells land to the State Treasury's benefit does not change this: in relation to State land it would inevitably do so. The Tribunal finds that any desire to liquidate the land was not an extraneous policy motive for the termination of the Lease Agreement, but an aspect of general land management.
262. The second step of the *Vigotop* test requires the determination of whether valid contractual grounds exist for the termination.⁴⁸⁴ In the Tribunal's view, ANR had valid grounds for concern based on Pol Farm's financial failings, and its mismanagement and misuse of the object of the lease (see paragraphs 245 to 247). For the reasons already explained, the Claimants' failure to utilise Section 18, the dispute resolution provision in the Lease Agreement, means that the Tribunal does not have to decide for itself whether the termination was in breach of Polish law. Even if it was in breach, it was not an exercise of public power and was not attributable to Poland as a State.
263. If the Respondent had both policy and contractual grounds to terminate, the *Vigotop* test concludes with an inquiry into whether termination rights were exercised in good faith, which that tribunal determined was a requirement of both the Hungarian law governing the contract and of international law.⁴⁸⁵ According to *Vigotop*, the termination of a contract only amounts to an expropriation if the contract was terminated in bad faith.⁴⁸⁶ In Polish law, the principle of good faith is recognised in Civil Code Article 7, which provides that good faith is presumed.⁴⁸⁷ In assessing whether the termination rights were exercised in good faith, the *Vigotop* tribunal focused on whether the investor's legitimate expectations were frustrated.⁴⁸⁸ Because, the tribunal held, none of Hungary's actions, despite their policy motives, violated the contract or frustrated the investor's legitimately held expectations, the termination was held to have been carried out in good faith.⁴⁸⁹

⁴⁸³ Statement of Claim, §6.3.2.

⁴⁸⁴ See *Vigotop*, §442.

⁴⁸⁵ *Vigotop*, §§581-84.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ Civil Code, art. 7. See also Norbert Reich, "'Eastern Contract Law' or Transformation of Contract Law and Civil Justice in New EU Member Countries: The Example of the Baltic States, Hungary and Poland' in Mauro Bussani & Franz Werro (eds.), *European Private Law: A Handbook*, p. 226 (Stämpfli 2009).

⁴⁸⁸ *Vigotop*, §586.

⁴⁸⁹ See *ibid.*, §§628-632.

264. In the present case, neither Party made detailed arguments directly speaking to the issue of good faith, if one sets aside (as the Tribunal has done) the allegation that the dominant motive for termination was the redistribution of the land. However, the Claimants argue that ANR violated its internal rules in two respects, and that this was evidence of bad faith.⁴⁹⁰ First, the Claimants argue that the termination was not recommended by a committee.⁴⁹¹ Rule 14.8.3, *chapeau*, provides: ‘The director of a field branch makes the decision to terminate the Lease agreement upon such request from a committee which is appointed by the director to investigate a given case of Lease.’⁴⁹² The Respondent argues that this is exactly what happened.⁴⁹³ It relies on the internal ANR Memorandum⁴⁹⁴ detailing discussions of the Pol Farm case from May 2009 onward. The ANR Memorandum reflects that the decision to terminate was taken after a meeting, which seems sufficient to satisfy this requirement. Thus, it cannot be concluded that Rule 14.8.3, *chapeau*, was breached.
265. The Claimants’ second argument is that ANR failed to send a letter notifying them of any failure to correct irregularities.⁴⁹⁵ Rule 14.8.3, term 3, provides that:

[a] request for termination of the agreement may be formulated based on the following in particular: . . . 3) the Agency permitted rectification of irregularities, but the tenant has failed to implement its post-inspection recommendations. The Agency will send a letter . . . containing comments from the latest inspection of the leased property, within 14 days of the date of a visit.⁴⁹⁶

The Claimants argue that ANR violated this rule by delaying its notification of various reports.⁴⁹⁷ They claim to have received the 23 November 2007 report⁴⁹⁸ only in January 2008.⁴⁹⁹ ANR’s correspondence that the Parties have submitted in apparent response to that report is actually dated 15 February 2008 and is unreadable in its English copy.⁵⁰⁰ The Claimants note that ANR’s letter

⁴⁹⁰ Statement of Reply, §§3.1, 10, 12.3; Hearing Tr. (Day 4), p. 6.

⁴⁹¹ Statement of Reply, §3.2.

⁴⁹² ANR Rule 14.8.3 (**Exhibit C-31**).

⁴⁹³ Statement of Rejoinder, §62.

⁴⁹⁴ ANR Memorandum dated 8 May 2009, p. 1 (**Exhibit R-18**).

⁴⁹⁵ Statement of Reply, §3.2.

⁴⁹⁶ ANR Rule 14.8.3 (**Exhibit C-31**).

⁴⁹⁷ Statement of Reply, §3.2.

⁴⁹⁸ ANR Inspection Report dated 23 November 2007 (**Exhibit C-4**).

⁴⁹⁹ *Ibid.*

⁵⁰⁰ Letter dated 15 February 2008 from ANR to Pol Farm (**Exhibit C-5**).

of 7 October 2008 claims to follow an inspection on 19 September 2008.⁵⁰¹ The Claimants make no mention of the ANR inspection report of 8 May 2009.⁵⁰² The Respondent replies that the term ‘may’ makes this rule permissive and that, in any event, ANR legitimately decided not to offer Pol Farm a further chance to rectify irregularities present in 2009⁵⁰³ before deciding to terminate the Lease.⁵⁰⁴

266. On the one hand, the Claimants are correct that reports sent to Pol Farm were sent more than 14 days after inspections. On the other hand, the most recent report sent to Pol Farm⁵⁰⁵ was sent in October 2008, nine months before the Notice of Termination, which makes the delay in reporting seem *de minimis* by comparison. Procedural slips are not to be equated with bad faith. Throughout there was substantial contact between ANR and Pol Farm’s managers, who could not have been, and were not, unaware of ANR’s concerns. Mr Geir Almås gave evidence that he was surprised while on holiday to learn of the termination decision;⁵⁰⁶ that may be so, but it does not evidence bad faith on the part of ANR.
267. For these reasons, the Tribunal finds that none of the *Vigotop* criteria for treating a contractual termination as an indirect expropriation attributable to the State are met here. That being so, it is unnecessary to consider whether the *Vigotop* criteria were adequately articulated in relation to contracts with separate State entities such as ANR.

3. ILC Article 8 – Was the Termination of the Lease performed on the Instructions of the Polish Government?

268. Finally, in terms of attribution, there is the possibility that the termination of the Lease Agreement might have been attributable to Poland under Article 8 of the ILC Articles. Under Article 8, the acts of an entity ‘acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’ are attributable to the State. According to the commentary to Article 8, ‘the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.’⁵⁰⁷ In order to satisfy this test, State instructions must have

⁵⁰¹ Ibid. (citing Letter dated 7 October 2008 from ANR to Pol Farm (**Exhibit C-7**)).

⁵⁰² ANR Inspection Report dated 8 May 2009 (**Exhibit R-14**).

⁵⁰³ See ANR Inspection Report dated 8 May 2009 (**Exhibit R-14**).

⁵⁰⁴ Statement of Rejoinder, §64.

⁵⁰⁵ Letter dated 7 October 2008 from ANR to Pol Farm (**Exhibit C-7**).

⁵⁰⁶ Hearing Tr. (Day 2), p. 29.

⁵⁰⁷ ILC Commentary to art. 8, §7.

been given ‘in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violation.’⁵⁰⁸

269. The tribunal in *Jan de Nul v. Egypt*⁵⁰⁹ emphasised that ‘[i]nternational jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the “effective control” test.’⁵¹⁰ In a similar way, the tribunal in *White Industries v. India*⁵¹¹ held with regard to Article 8 that ‘for the allegedly wrongful conduct of Coal India to give rise to the responsibility of India, White has to show that India had both general control over Coal India as well as specific control over the particular acts in question.’⁵¹²
270. There is no evidence in the present case of any instruction on the part of the Polish government or of any other Polish State organ. The only State organ to comment in the period leading to the termination was the Świdwin Gmina, the local governing body, whose head wrote to ANR in May 2008 supporting Pol Farm’s continued presence.⁵¹³ Its support was also manifested in the Gmina’s acquiescence to late payment of taxes in May 2009.⁵¹⁴
271. The former director of ANR’s Regional Office denied in evidence that he had been instructed by anyone in authority to terminate the Lease:

Q: Mr Gil, did anyone, whether in Szczecin or Warsaw, who was in authority over you, tell you to terminate the lease agreement?

A: No. Never such an order was issued to me.

Q: Did anyone in authority over you, whether in Szczecin or Warsaw, tell you to redistribute land to Polish farmers?

⁵⁰⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] ICJ Rep 43, §400.

⁵⁰⁹ *Jan de Nul NV and Dredging International NV v. Egypt*, ICSID Case No. ARB/04/13, Award dated 6 November 2008.

⁵¹⁰ *Ibid.*, §173.

⁵¹¹ *White Industries Australia Limited v. India*, UNCITRAL, Final Award dated 30 November 2011.

⁵¹² *Ibid.*, §8.1.18.

⁵¹³ Letter dated 30 May 2008 from the Mayor of Świdwin to ANR (**Exhibit C-6**).

⁵¹⁴ Letter dated 21 May 2009 from the Świdwin Municipality to Pol Farm (**Exhibit C-29**).

A: I understand that the lands that were at the free disposal of agency, not those under the lease agreements, at a certain point in time there was a procedure of allocating freely available land to be sold in tendering -- limited tendering procedures, closed tendering procedures. But as for any kind of instruction of non-renewing agreements or terminating agreements in order to announce tenders for the farmers, there was no such instruction made.⁵¹⁵

272. To conclude, in the present case there is no evidence that ANR acted under Poland's instructions, direction or control when terminating the Lease, and correspondingly no basis for attribution under Article 8.

D. OTHER ISSUES

273. In the light of this conclusion, the Tribunal has no need to consider the various other issues argued before it. Unless ANR's conduct complained of was attributable to Poland, there can have been no breach of the BIT, whether with respect to fair and equitable treatment or (by incorporation through the MFN Clause) under an umbrella clause.⁵¹⁶

274. But the Tribunal would add that the negative conclusion it has reached on attribution is consistent with a line of arbitral awards distinguishing between contractual acts and sovereign acts when considering the breach of contractual obligations owed to an investor.⁵¹⁷ In *Siemens v. Argentina*, the tribunal, reviewing prior awards, distinguished between 'being disappointed in the performance of the State in the execution of a contract' on the one hand and 'outright interference with contract execution through governmental action' on the other hand.⁵¹⁸ The *Siemens* tribunal went on to hold that Argentina exercised *puissance publique* to interfere with the contract by, first, using a decree to terminate the contract,⁵¹⁹ exercising a State right to alter the terms of the contract,⁵²⁰ State interference in the performance of the contract,⁵²¹ and a reliance on extra-contractual justifications for failure to pay compensation promised in the decree.⁵²² The tribunal

⁵¹⁵ Hearing Tr. (Day 3), pp. 127-128.

⁵¹⁶ It is therefore unnecessary to consider whether (which the Respondent denies) controlling shareholders can invoke an umbrella clause by reference to a contract of the company to which they are not parties. See paragraph 114.

⁵¹⁷ Statement of Defence, §§68-69; Statement of Rejoinder, §§175-176.

⁵¹⁸ *Siemens A.G. v Argentine Republic*, Award, ICSID Case No. ARB/02/8, Award dated 6 February 2007, §253 (RLA-12).

⁵¹⁹ *Ibid.*, §§254-255.

⁵²⁰ *Ibid.*, §256.

⁵²¹ *Ibid.*, §§257-258.

⁵²² *Ibid.*, §259.

contrasted these with delays and procedures that ‘could be construed as the acts of a contractual party.’⁵²³

275. In *Waste Management v. Mexico*, the tribunal similarly considered that:

[t]he mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalisation and expropriation are inherently governmental acts.⁵²⁴

The tribunal concluded that the acts challenged did not amount to an expropriatory taking of contractual rights, contrasting the situation from a ‘final refusal to pay (combined with effective obstruction and denial of legal remedies)’.⁵²⁵

276. In *Parkerings v. Lithuania*, the tribunal considered similarly that ‘a breach of an agreement will amount to an expropriation only if the State acted not only in its capacity of party to the agreement, but also in its capacity of sovereign authority, that is to say using its *sovereign power*. The breach should be the result of this action’.⁵²⁶ Because the respondent acted there only as a contracting party would have done, the tribunal considered that the condition was not met and that no expropriation had occurred.⁵²⁷

277. *Bayindir v. Pakistan* is again similar. There, the tribunal determined that the expulsion of the investor from the project site did not constitute an expropriation because the acts in question were not shown to be ‘sovereign acts’.⁵²⁸ Instead the tribunal considered that ‘Pakistan can reasonably justify the expulsion by Bayindir’s poor performance . . . with the consequence that the expulsion must be seen in the framework of the contractual relationship.’⁵²⁹

⁵²³ Ibid., §260.

⁵²⁴ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004, §174 (RLA-13).

⁵²⁵ Ibid., §176.

⁵²⁶ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award dated 11 September 2007, §443 (RLA-34).

⁵²⁷ Ibid., §445

⁵²⁸ *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 August 2009, §461 (RLA-19).

⁵²⁹ Ibid.

278. *Biwater Gauff v. Tanzania*⁵³⁰ turned this analysis to a case concerning the termination of a contract. The claimant asserted that Tanzania expropriated its investment by the repudiation of a lease contract⁵³¹ between its subsidiary and the Dar es Salaam Water and Sewage Authority.⁵³² Additionally, the claimant argued that political means chosen to implement the repudiation amounted to expropriation.⁵³³ Ultimately, the tribunal did not find an expropriation based on the termination as it concluded that the termination was done solely on contractual grounds.⁵³⁴
279. The tribunal in *Biwater Gauff* began its analysis by noting the agreement of the parties that the breach or termination of a contract does not *per se* constitute an expropriation.⁵³⁵ Instead, the tribunal said that ‘the critical distinction is between situations in which a State acts merely as a contractual partner, and cases in which it acts “*iure imperii*”, exercising elements of its government authority.’⁵³⁶ In doing so, the tribunal relied on the holdings in *Impregilo v. Pakistan*⁵³⁷ and *Joy Mining v. Egypt*,⁵³⁸ in both of which tribunals made the distinction between acts of public entities as contractual counterparties and sovereign acts of the respondent State.⁵³⁹ The *Biwater Gauff* tribunal stressed that even when Tanzania acted as a shareholder of the Authority, if its acts were ‘in the same manner as a private shareholder might have done’, they did not involve the exercise of *puissance publique*.⁵⁴⁰ Only ‘acts which exceed the normal course of conduct of a State shareholder’ could, in the tribunal’s view, be characterised as acts of *puissance publique*.⁵⁴¹ The termination of the contract did not amount to expropriation because it was done by the Authority rather than Tanzania, in the ‘ordinary behaviour of a contractual

⁵³⁰ *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008 (RLA-14) (hereinafter ‘*Biwater Gauff*’).

⁵³¹ *Biwater Gauff*, §393.

⁵³² *Ibid.*, §§6, 123-124.

⁵³³ *Ibid.*, §393.

⁵³⁴ *Ibid.*, §492.

⁵³⁵ *Ibid.*, §457.

⁵³⁶ *Ibid.*, §458.

⁵³⁷ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005 (hereinafter ‘*Impregilo*’).

⁵³⁸ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB 03/11, Award dated 6 August 2004 (hereinafter ‘*Joy Mining*’).

⁵³⁹ *Impregilo*, §§260-61; *Joy Mining*, §72.

⁵⁴⁰ *Biwater Gauff*, §460.

⁵⁴¹ *Ibid.*, §460.

counterparty’.⁵⁴² ‘In other words, this was not the exercise of *puissance publique*’.⁵⁴³ In support of this conclusion, the tribunal cited the claimant’s record of alleged contractual failures,⁵⁴⁴ listing the poor preparation of the claimant’s contractual bid, failure to take advantage of an available programme to recalibrate base figures, failure to generate expected income, and a failed renegotiation of the contract.⁵⁴⁵ In light of these, the tribunal concluded that, at the moment of contractual termination, ‘the normal contractual termination process was underway.’⁵⁴⁶ The question of the validity of the Authority’s action was a contractual question subject in that case to a separate contractual dispute resolution mechanism.⁵⁴⁷ However, the tribunal did conclude that political acts subsequent to the termination of the contract amounted to an expropriation.⁵⁴⁸ Such acts included a subsequent public announcement of the termination by the Prime Minister in a political speech, withdrawal of the claimant’s VAT exemption certificate, seizure of the claimant’s assets and the deportation of the claimant’s management.⁵⁴⁹

280. The principle that, where a justified ground for termination of a contract exists such termination cannot be regarded as expropriatory, was also confirmed in *Malicorp v. Egypt*.⁵⁵⁰ In this case, an ICSID tribunal rejected the claim that Egypt had expropriated the investor’s contractual rights to build and operate an airport at Ras Sudr. Egypt had terminated the contract for lack of progress on the investor’s side. The tribunal considered these grounds as justifications for the termination and thus rejected the allegation that they were merely a ‘pretext designed to conceal a purely expropriatory measure.’⁵⁵¹ The *Malicorp* tribunal concluded that:

the reasons on which the Respondent relied in order to bring the Contract to an end appear serious and adequate; the termination, justified in fact and in law, could not be interpreted as an expropriatory measure.⁵⁵²

⁵⁴² Ibid., §492.

⁵⁴³ Ibid., §492.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid., §486.

⁵⁴⁶ Ibid., §487.

⁵⁴⁷ Ibid., §493.

⁵⁴⁸ Ibid., §519.

⁵⁴⁹ Ibid.

⁵⁵⁰ *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award dated 7 February 2011.

⁵⁵¹ Ibid., §142.

⁵⁵² Ibid., §143.

281. *Convia Callao v. Peru* provides a similar example. In that case, the tribunal emphasised the contractual autonomy of the parties when determining that the respondent's exercise of its right to declare the expiration of a contract did not amount to an expropriation.⁵⁵³ The tribunal reasoned that:

the prerogative to declare the expiration stems from the will of the contracting parties who, exercising contractual autonomy, negotiated and agreed what the grounds would be to declare the expiration of the Contract. From the above, it follows that the MPC had the prerogative to declare the expiration for the sole reason that the parties had so agreed. Consequently, the power of the MPC to declare the expiration came from the concurrence of wills of the parties, that is, the Contract, not the sovereign will of the State.⁵⁵⁴

The tribunal stressed that, in purporting to terminate the contract, the respondent relied on its terms.⁵⁵⁵ The claimant had argued that this exercise of contractual rights was actuated by public interest motives.⁵⁵⁶ The tribunal considered that even so, the exercise of the termination rights for a public purpose 'did not imply that it was not exercising a power whose only source is the Contract'.⁵⁵⁷ *Convia Callao* was distinctive in that in the contract in question, the government maintained the right to cancel at any time for reasons of public interest,⁵⁵⁸ making a public interest termination explicitly part of the parties' negotiated bargain.

282. Investment tribunals have also made clear that the termination of a contract need not be actually justified in accordance with the applicable law governing the contract in order to exclude it being qualified as expropriatory or performed in the exercise of public powers/*puissance publique*. In the absence of an applicable umbrella clause, the question is not whether contract termination was lawful—that is a matter for the local courts or, as here, for the chosen contractual forum. The

⁵⁵³ *Convia Callao S.A. y CCI – Compañía de concesiones de Infraestructura S.A. c. República del Perú*, ICSID Case No. ARB/10/2, Laudo Final (Final Award) dated 21 May 2013, §501.

⁵⁵⁴ *Ibid.*, §527 ('la prerogativa de declarar la caducidad nació de la voluntad de las partes contratantes quienes, en ejercicio de la autonomía de la voluntad, negociaron y acordaron cuáles serían las causales §deklarar la caducidad del Contrato. De lo anterior se deriva que la MPC contaba con la prerogativa de declarar la caducidad por la única razón de que las partes así lo habían acordado. En consecuencia, la facultad de la MPC de declarar la caducidad provino del concurso de voluntades de los contratantes, esto es, del Contrato, y no de la voluntad soberana del Estado.').

⁵⁵⁵ *Ibid.*, §534-535.

⁵⁵⁶ *Ibid.*, §536.

⁵⁵⁷ *Ibid.*, §537 ('no implica que no estuviera ejerciendo una potestad cuya única fuente es el Contrato').

⁵⁵⁸ *Ibid.*, §§518, 537.

question is whether action purportedly taken under a contract is properly referable to it or is a disguised abuse of public authority.⁵⁵⁹

283. For instance, the tribunal in *Impregilo v. Argentina*⁵⁶⁰ considered, with regard to the question whether the termination of the concession of the investor's subsidiary AGBA constituted an expropriation, that 'it is not decisive whether or not the Province had a correct understanding of AGBA's obligations under the Concession Contract. What is relevant is rather that the Province, with some justification, considered that AGBA had grossly failed in fulfilling its contractual obligations and terminated the Concession Contract on this basis. This is sufficient, in the Arbitral Tribunal's opinion, to exclude that the termination could be regarded as an act of – direct or indirect – expropriation or other appropriation of AGBA's property or Impregilo's investment.'⁵⁶¹ Thus the Tribunal's conclusions in the present case are consistent both with the jurisprudence of attribution and that of alleged taking of contractual rights.
284. To conclude, even if the termination of the Lease Agreement had been attributable to Poland, the claims based on the BIT would have failed on their merits. There is therefore no need to address questions of quantum.⁵⁶²

VII. COSTS AND EXPENSES

A. COSTS CLAIMED BY THE PARTIES

1. The Claimants' Arguments

285. The Claimants submit that costs should follow the event in the event that they are the successful party. On that basis, they request that the Tribunal order the Respondent to pay all 'fees and expenditures of the Arbitral Tribunal and of the Permanent Court of Arbitration' as well as the Claimants' costs of legal representation and of 'experts and advisers'.⁵⁶³ They claim EUR 150,000 for Tribunal costs (based on their deposit payment to the PCA). They further claim NOK 5,972,996.00 and EUR 15,000 as their party costs (comprising costs of legal representation

⁵⁵⁹ Cf. *Vigotop*, §331: 'If the Tribunal were ultimately to conclude that it was indeed legitimate for Respondent to invoke its contractual grounds for terminating the Concession Contract, this would exclude a finding of an expropriation, despite the parallel existence of public policy reasons.'

⁵⁶⁰ *Impreglio S.p.A. v Argentine Republic*, ICSID Case No. ARB/07/17, Award dated 21 June 2011.

⁵⁶¹ *Ibid.*, §283.

⁵⁶² As to quantum, see Statement of Claim, §§7.1-7.2; Statement of Reply, §83; Statement of Defence, §§73-77; Statement of Rejoinder, §§229-232.

⁵⁶³ Letter dated 22 April 2016 from the Claimants, pp. 1-2.

of NOK 5,145,681; and expert and adviser expenses of NOK 827,315 and EUR 15,000).⁵⁶⁴ In the event, the Claimants submit that the Respondent should bear its own legal costs.

286. The Claimants further submit that, even if the Respondent succeeds on the merits, it should, ‘taking into account the circumstances of the case and the Respondent’s conduct in the proceedings,’ nevertheless bear the costs of the arbitration and the Claimants’ legal costs.⁵⁶⁵ In this regard, the Claimants highlight the Respondent’s conduct during the document production stage and its submission of post-hearing materials on 8 April 2016.⁵⁶⁶
287. With regard to the production of documents, the Claimants consider the Respondent to have failed to comply with Procedural Order No. 2 on two counts, namely with respect to disclosure of documents relating to ANR meetings held with Pol Farm and documents recording ‘what happened with Polfarm’s land.’⁵⁶⁷ These categories correspond to the Requests Nos. 5 and 7 in Procedural Order No. 2, both of which were granted.⁵⁶⁸
288. The Claimants submit that the Respondent has not complied with these requests. First, they consider the testimony of Mr Marek Gil to have ‘confirmed’ the existence of additional documents relating to meetings held between ANR and Pol Farm over the course of 2008.⁵⁶⁹ Such documents ‘clearly fall within’ the scope of the aforementioned requests; in the Claimants’ view, Mr Gil’s reference undermines the Respondent’s claim that ‘no further documents’ had been drawn up by ANR in this respect.⁵⁷⁰ The Claimants also point to Mr Gil’s observation that documents had been drafted in connection with a committee constituted in December 2008 to

⁵⁶⁴ Claimants’ Statement of Costs dated 22 April 2016, p. 2 (attached to Letter dated 22 April 2016 from the Claimants).

⁵⁶⁵ Ibid., p. 2.

⁵⁶⁶ Ibid., pp. 2-3.

⁵⁶⁷ Ibid., p. 2.

⁵⁶⁸ Request No. 5 was for Documents (minutes, memorandums, notes and internal documentation prepared by the ANR) in respect of Top Farm’s proposed acquisition of Pol Farm and/or the Lease Agreement (whether under existing or new lease) in the period 1 Jan. 2008 – 31 Dec. 2009. Request No. 7 was for Documents regarding what happened to the Farm following the termination of the Lease Agreement in July 2009 and until it was first transferred or sold by the ANR to one or more third parties. ‘The Claimants request that the Respondent produces documents that: (i) shows who the land was transferred to after the termination; (ii) how the land was sold, transferred or leased; and (ii[i]) shows how much the land was sold for and/ or the value of any lease agreements, and similar documentation.’ See Procedural Order No. 2 dated 6 November 2015, pp. 4, 8.

⁵⁶⁹ Ibid., p. 2 (citing Hearing Tr. (Day 3), pp. 59 *et seq.*).

⁵⁷⁰ Ibid., p. 2.

make recommendations concerning the Lease Agreement—including a ‘form [in] which the committee stated its reason for the recommendation to terminate.’⁵⁷¹

289. The Claimants additionally consider the Respondent to have ‘failed’ to provide documentation in respect of ‘what happened with Polfarm’s land under the Lease Agreement,’ leading to ‘great difficulties (and increased costs)’ in the Claimants’ pleadings on quantum.⁵⁷² In this regard, the Claimants highlight the Respondent’s oral statement that it could ‘produce such documentation *if ordered by the Tribunal.*’⁵⁷³
290. Finally, the Claimants submit that the Respondent should bear the costs of the arbitration on account of its conduct relating to the submission of unsolicited post-hearing materials. The Claimants refer specifically to the Respondent’s 8 April 2016 letter, including a ‘request for reconsideration’ of the Tribunal’s earlier decision not to allow further briefing on an additional ground for termination of the Lease, that had been raised on the final day of oral arguments.⁵⁷⁴
291. Accordingly, and in light of the Respondent’s ‘improper conduct and uncooperative behaviour,’ the Claimants submit that the Respondent should bear all costs of the arbitration, including the Tribunal’s fees and expenditures and the Claimants’ legal costs, ‘regardless of the Tribunal’s decision’ on any issue of liability under the Treaty.⁵⁷⁵

2. The Respondent’s Arguments

292. The Respondent does not address the Claimants’ assertions in its simultaneous pleading on costs. It requests that the Tribunal ‘order Claimants to pay all the costs, disbursements and expenses incurred by Respondent in the defence against this claim including, but not restricted to, legal, expert and witness fees and expenses, and travel and administrative expenses, as well as the costs of the Tribunal.’⁵⁷⁶
293. The Respondent claims a total of EUR 341,546.17⁵⁷⁷ That claim includes its deposit payment to the PCA of EUR 150,000 to cover the arbitration costs. It further includes as legal and other costs

⁵⁷¹ Ibid., p. 2 (citing Hearing Tr. (Day 3), p. 95).

⁵⁷² Ibid., pp. 2-3.

⁵⁷³ Ibid., p. 3 (citing Hearing Tr. (Day 4), pp. 91-93) (emphasis added by the Claimants).

⁵⁷⁴ Ibid., p. 3 (citing Letter dated 8 April 2016 from the Respondent; Hearing Tr. (Day 4)).

⁵⁷⁵ Ibid.

⁵⁷⁶ Statement of Defence, §80. *See also* Letter dated 22 April 2016 from the Respondent.

⁵⁷⁷ Letter dated 22 April 2016 from the Respondent, p. 3.

the amount of EUR 187,255.87 (for which it provides a breakdown by invoice), and expert fees for Professor Brzozowski in the amount of EUR 4,290.30.⁵⁷⁸

B. THE TRIBUNAL'S RULING ON COSTS

1. Relevant Rules on Costs

294. Article X(3) of the Treaty, relating to 'disputes between a Contracting Party and an investor,' provides:

Each party shall bear the costs of participation of its member in the arbitration procedure.

The costs of participation of the chairman shall be borne in equal parts by both parties. The Tribunal may, however, in its award decide on a different proportion of costs to be borne by the parties and this award shall be binding on both parties.

295. Neither Party invoked Article X(3) in their submissions on costs or their other pleadings. The Claimants noted the provision but drew attention to the fact that it leaves discretion to the Tribunal to 'decide on a different proportion of costs to be borne by the parties' and argued instead that the Tribunal should follow the provisions in the UNCITRAL Rules.⁵⁷⁹ The Respondent similarly opted to seek an order that the Claimants pay 'all costs' including 'the arbitration costs' without reference to the provision in Article X(3) of the Treaty.

296. The Parties chose Brussels as the legal seat of the arbitration. The Belgian Arbitration Act leaves it to the Tribunal to decide in its discretion 'which of the parties shall bear the [costs] or in what proportion they shall be borne by the parties.'⁵⁸⁰

297. In light of the Parties' own preference to apply the UNCITRAL Rules and the express discretion left to the Tribunal in Article X(3) of the Treaty to decide on a 'different proportion of costs to be borne by the parties,' the Tribunal decides to dispense with the particular allocation of costs set out in Article X(3) of the Treaty and to follow the provisions in the UNCITRAL Rules for the fixing and allocating of costs.

⁵⁷⁸ Letter dated 22 April 2016 from the Respondent to the Tribunal, p. 2.

⁵⁷⁹ Letter dated 22 April 2016 from the Claimants to the Tribunal.

⁵⁸⁰ Belgian Judicial Code, Title VI: Arbitration (adopted 4 July 1972, last amended 24 June 2013), art. 1713.6.

298. In the UNCITRAL Rules, provisions relevant to costs are found in Articles 38 to 40. Article 38 of the UNCITRAL Arbitration Rules defines the ‘costs of arbitration’ as follows:

The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

299. Paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules set out the following with respect to the allocation of costs, differentiating between Tribunal costs on the one hand (paragraphs (a) to (d), and (f) of Article 38) and the parties’ own costs of representation and assistance on the other hand (paragraph (e) of Article 38)

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.

2. Fixing the Costs of the Arbitration

300. The Parties deposited with the PCA a total of EUR 300,000 (EUR 150,000 by the Claimants; EUR 150,000 by the Respondent) to cover the costs of arbitration.

301. The fees of Professor Ola Mestad, the arbitrator appointed by the Claimants, amount to EUR 48,800. His expenses amount to EUR 2,059.91. The fees of Professor August Reinisch, the

arbitrator appointed by the Respondent, amount to EUR 41,400. His expenses amount to EUR 2,055.51. The fees of Judge James R. Crawford, AC, the presiding arbitrator, amount to EUR 59,200. His expenses amount to EUR 208.86.

302. Pursuant to the Terms of Appointment and the agreement of the Parties, the International Bureau of the PCA was designated to act as Registry in this arbitration. The PCA's fees for registry services amount to EUR 33,857.50. Other tribunal costs, including court reporters, hearing rooms, meeting facilities, travel, bank charges, and all other expenses relating to the arbitration proceedings, amount to EUR 55,261.60.
303. Based on the above figures, the combined Tribunal costs, comprising the items covered in Article 38 (a), (b) and (c) of the UNCITRAL Arbitration Rules, as enumerated above, are fixed at a total EUR 242,843.38. These costs are deducted from the deposit, and any unexpended balance shall be returned to the Parties in accordance with Article 41(5) of the UNCITRAL Rules.
304. Finally, under Article 38(e), the Tribunal finds the costs claimed by the successful party, the Respondent, to be reasonable in amount and proportionate to the nature and complexity of the matter. For the purposes of Article 38(e), the Tribunal therefore fixes Respondent's legal and other costs of representation at EUR 191,546.17 (comprised of EUR 187,255.87 for its legal fees and EUR 4,290.30 for its expert's fees).

3. Allocating the Costs of Arbitration

305. With respect to the tribunal costs, the Tribunal applies the general principle of 'costs follow the event.' That approach is the more compelling here given that the UNCITRAL Arbitration Rules expressly contemplate the rule of 'costs follow the event' in Article 40(1) by its emphasis on 'success' or its opposite. This conclusion is bolstered by both Parties' choice to argue that the unsuccessful side in this arbitration bear the full amount of tribunal costs as well as the successful Party's costs of legal representation.
306. While the Tribunal retains discretion to apportion the tribunal costs between the Parties if it determines that such apportionment is 'reasonable, taking into account the circumstances of the case', it is not persuaded that such circumstances exist in the present case. The Tribunal considers the Respondent's conduct during the course of these proceedings to have been reasonable overall, and in this respect declines the Claimants' request to shift certain costs of the arbitration onto the Respondent, the prevailing side, as a result of its behaviour during the document production phase or with respect to its post-hearing letter. Accordingly, the Tribunal determines, pursuant to Article

40(2) of the UNCITRAL Rules, that it is reasonable to apportion the costs of the arbitration between the Parties such that the Claimants shall bear the full costs of the tribunal.

307. With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the Tribunal notes that there is no equivalent presumption in Article 40(2) of the UNCITRAL Rules that the unsuccessful party shall bear such costs. The Tribunal is ‘free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.’

308. The Tribunal decides that each party shall bear their own costs for legal representation, as defined under Article 38(e) of the UNCITRAL Rules. The Tribunal considers that both Parties’ conduct during the course of proceedings was reasonable, efficient and professional. Further, while the Claimants were unsuccessful in their claim in this arbitration against the Republic of Poland for breach of the BIT, their treatment in the context of the Lease termination raised arguable issues with regard to a long-standing investment in a difficult sector of former state farms. The Tribunal further notes that neither the Treaty nor Belgian arbitration law provides that the successful party to have its legal costs reimbursed. Accordingly, it decides that each Party shall bear its own legal costs.

C. REIMBURSEMENT OF DEPOSIT

309. The Tribunal notes that the Parties have cumulatively paid EUR 300,000 in deposits requested by the Registry at the outset of the proceedings. As noted above, the total figure for tribunal costs of the arbitration is EUR 242,843.38, leaving an unused balance of EUR 57,156.62.

310. The Tribunal directs the PCA to reimburse to the Respondent the remaining balance of the deposit.

311. Taking into account the Tribunal’s determination that the Claimants shall bear the arbitration costs in the amount of EUR 242,843.38, and that the Claimants have already advanced EUR 150,000 of that amount, the Claimants remain responsible for payment of EUR 92,843.38. The Claimants shall pay over to the Respondent within 60 days of this Award, an amount of EUR 92,843.38, which together with the remaining deposit of EUR 57,156.62, will ensure the Respondent is fully reimbursed for its advance on costs.

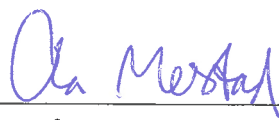
AWARD

312. For the foregoing reasons, the Tribunal, unanimously:

- A. REJECTS the Claimants' claim for breach of the BIT; and
- B. ORDERS the Claimants to pay the Respondent's share of the costs and expenses of the arbitration, as set out in paragraph 311 above.

Place of Arbitration: Brussels, Belgium

Date: 27 June 2016



Professor Ola Mestad



Professor August Reinisch



Judge James R. Crawford, AC