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AWARD

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ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 16509/JHN

THE EAST CEMENT FOR INVESTMENT COMPANY

(Jordan)

vs/

THE REPUBLIC OF POLAND

(Poland)

This document is an original of the Partial Award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.

PARTIAL AWARD

Given in Paris, France, on 26 August 2011

ICC Arbitration 16509/JHN

IN THE ARBITRATION

BETWEEN

THE EAST CEMENT FOR INVESTMENT COMPANY (Jordan)
Claimant

and

THE REPUBLIC OF POLAND
Respondent

BEFORE

Mr. Ulf Franke, Chairman
Prof. Avv. Piero Bernardini, Arbitrator
Prof. Brigitte Stern, Arbitrator

For Claimant:

Mr. [redacted]
The EAST CEMENT FOR INVESTMENT COMPANY
[redacted]

For Respondent:

SOŁTYSIŃSKI KAWECKI & SZLĘZAK
KANCELARIA RADCOW PRAWNY
ADWOKATOW SP.K.
Prof. Dr. [redacted]
Dr. [redacted]
Mr. [redacted]
Mr. [redacted]
Ms. [redacted]
ul. Wawelska 15B
02-034 Warsaw
Poland

PROKURATORIA GENERALNA SKARBU
PANSTWA
Ms. [redacted]
ul. Hoża 76/78
00-682 Warsaw
Poland

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1. INTRODUCTION

1.1 The Parties

(1) The Claimant:

The Claimant, The East Cement for Investment Company ("Claimant" or "The East Cement" or "ECIC"), is established under the laws of the Hashemite Kingdom of Jordan. The East Cement is registered as a private shareholding company under the registration number 42/2004/05/06.

The registered address of The East Cement is:

THE EAST CEMENT FOR INVESTMENT COMPANY
Wasfi Al Tal St.
Maram Center – Appt No 416
Amman
Jordan

(2) The Respondent:

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

The address of Poland is:

Minister of Justice
Al. Ujazdowskie 11
00-950 Warszaw
Poland

1.2 The Arbitral Tribunal

The Tribunal has been constituted as follows:

Chairman

Mr. Ulf Franke

Chapmansgatan 2
11236 Stockholm
Sweden

jointly nominated by the co-arbitrators and confirmed by the Secretary General of the ICC on 25 November 2009. The joint nomination of the Chairman was made pursuant to the Parties' agreement that the co-arbitrators nominate jointly a Chairman within 45 days upon notification of their confirmation.

Co-arbitrator

Prof. Avv. Piero Bernardini

STUDIO LEGALE UGHI & NUNZIANTE
Via Venti Settembre 1
00187. Rome
Italy

nominated by Claimant and confirmed by the ICC Court at its session of 8 October 2009.

Co-arbitrator

Prof. Brigitte Stern

7, rue Pierre Nicole
75005 Paris
France

nominated by Respondent and confirmed by the ICC Court at its session of 8 October 2009.

1.3 **The Arbitration Agreement**

The basis for this arbitration is a Bilateral Investment Treaty ("BIT" or "Treaty") between the Republic of Poland and the Hashemite Kingdom of

Jordan on the Reciprocal Promotion and Protection of Investments dated 4 October 1997. It provides in Article 7 (Disputes between one Contracting Party and an investor of the other Contracting Party) as follows:

"(1) Disputes between one of the Parties and an investor of the other Party shall be notified in writing, including a detailed information, by the investor to the host Contracting Party of the investment. As far as possible the Parties shall endeavour to settle these differences by means of a friendly agreement.

(2) If these disputes cannot be settled in this way within six months from the date of the written notification mentioned in paragraph (1) the dispute shall be submitted, at choice of the investor to:

- a court of arbitration in accordance with the Rules of Procedure of the Arbitration Institute of the Stockholm Chamber of Commerce;
- the court of arbitration of the Paris International Chamber of Commerce;
- the ad-hoc court of arbitration established under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law;
- the International Centre for the Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes between States and Nationals of other States ", in case both Contracting Parties have become signatories of this Convention.

(3) (see under 1.4 below)

(4) The arbitration decisions shall be final and binding for the Parties to the disputes. Each Contracting Party undertakes to execute the decisions in accordance with its national law.

(5) The Contracting Party which is a party to the dispute shall at no time whatsoever during the procedures involving investments disputes, asserts (sic)

as a defence its immunity or the fact that the investor has received compensation under an insurance contract covering the whole or part of the incurred damage or loss."

1.4 **The applicable substantive law**

Article 7(3) of the BIT provides as follows:

"The arbitration award shall be based on:

- the provisions of this Agreement;
- the national law of the Contracting Party in whose territory the investment was made, including the rules relative to conflicts of laws;
- the rules and the universally accepted principles of international law."

1.5 **The place of arbitration**

The place of arbitration is Paris, France, in accordance with an agreement among of the Parties.

1.6 **The language of the arbitration**

The language of the arbitration is English in accordance with an agreement among the Parties. It was agreed that if documents are submitted in another language than English, the relevant passages on which the Party submitting the documents relies shall be translated into English. It was also agreed that fact and expert witnesses may testify in another language than English but their testimony shall be interpreted into English.

1.7 **The issue to be determined**

The issue to be decided by the Tribunal in this Partial Award relates only to the Parties' legal and other costs, including the allocation of such, until that stage of the proceedings.

2. PROCEDURAL HISTORY

1. On 31 July 2009, Claimant filed a Request for Arbitration with enclosures with the ICC International Court of Arbitration (the "Court").

2. On 16 October 2009, Respondent filed an Answer to the Request for Arbitration with enclosures with the Court.

3. On 26 November 2009, the Arbitral Tribunal received the file.

4. On 27 January 2010, a hearing was held in Paris. The main issues that were dealt with at the hearing were the Terms of Reference and the First Procedural Order, including the Provisional Procedural Timetable. Both Parties were present by counsel. The Tribunal and the Parties agreed on the documents and by the end of the hearing the Terms of Reference were signed by the Parties and the Arbitrators. On the same day, the First Procedural Order and the Provisional Procedural Timetable, attached to the First Procedural Order, were issued.

5. By letter dated 28 January 2010, the Secretariat informed the Tribunal that in compliance with Article 24(1) of the ICC Rules of Arbitration in force as from 1998 (the "ICC Rules" or the "Rules"), the time limit of six months within which the Arbitral Tribunal must render the Final Award started to run on the date of signature of the Terms of Reference , i.e. on 27 January 2010.

6. By letter dated 19 March 2010, Mr. [redacted] and Ms [redacted] informed the Tribunal "that the law firm [redacted] has formally resigned from acting as the legal counsel of the East Cement for Investment Company in the present proceedings."

7. By letter dated 25 March 2010, the Claimant informed the Tribunal "that we have started immediately the process to search and select new legal firm." Noting that it must complete "a comprehensive agreement with the potential law firm so as not to face the same issues this time", the Claimant requested the Tribunal "to shift the time table by a minimum of 90 days."

8. By letter dated 1 April 2010, the Respondent, noting that Claimant's counsel had resigned "[e]leven days before the agreed deadline for the filing of the First Submission", expressed "substantial reservations about the timing and nature of the extension request." "To the extent that the Tribunal deems any extension to be warranted or necessary, Respondent may accept a limited prolongation of no more than 30 days."

9. On 6 April 2010, the Tribunal issued Procedural Order No. 2, which dealt with Claimant's request for extension of time and Respondent's comments to such request. The Tribunal noted that the retention of new counsel is a valid reason for an extension. Having already been aware of the resignation of the law firm [redacted] for some time, the Tribunal, however, requested Claimant to finalize the retention of new counsel as soon as possible. The Tribunal also requested Claimant to complete its submission scheduled for 5 April 2010 without delay after new counsel has been retained, particularly since Claimant already has had the opportunity to devote considerable time on such submission. The Tribunal granted Claimant an extension of time for filing its First Submission until 4 June 2010, adding that it would adapt the Timetable to such extension in detail at a later occasion after consultation with the Parties. In the meantime, the Tribunal extended all time limits in the Timetable for 60 days.

10. By letter dated 7 May 2010, Mr [redacted] informed the Tribunal that the Claimant had requested [redacted] to succeed [redacted] in this arbitration and that [redacted] had "accepted such a legal representation and assistance." In the letter, Mr. [redacted] requested an extension for "an additional 3 months" for Claimant to submit its First Submission.

11. By letter dated 17 May 2010, Respondent, noting that the extension already granted for the Claimant's First Submission, i.e. until 4 June 2010, meant that Claimant would be afforded more than four months from the organizational hearing for its First Submission, objected "to a further extension of three months." The Respondent was "able to accept an extension until no later than July 15, 2010 provided that the Tribunal deems such an extension to be warranted."

12. On 19 May 2010, the Tribunal issued a revised Provisional Procedural Timetable, elaborated in consultation with the Parties.

13. By letter dated 23 July 2010, the Secretariat informed the Tribunal that, at its session of 1 July 2010, pursuant to Article 24(2) and in view of the timetable that had been established with the Parties, the Court had extended the time limit for rendering the Final Award until 31 August 2011.

14. On 26 July 2010, Claimant filed its First Submission, with enclosures.

15. On 30 July 2010, Claimant filed a Request for Document Production.

16. By letter dated 12 August 2010, the Secretariat informed the Parties that, at its session the same day, the Court had reconsidered the advance on costs and, on the basis of an amount in dispute partially quantified at US$ 150,537,300, decided to increase it from US$ 160,000 to US$ 770,000, subject to later readjustments. The Parties were invited to pay within 30 days from the day following the date of receipt of the letter US$ 305,000 each.

17. On 10 September 2010, the Secretariat extended the time for payments of the advance on costs until 19 November 2010.

18. On 20 September 2010, the Respondent filed objections to Claimant's Request for Document Production.

19. On 20 September 2010, Respondent filed a Request for Document Production.

20. On 14 October 2010, the Tribunal ruled on Respondent's objections to Claimant's Request for Document Production. The Tribunal considered that some of the documents requested by Claimant may be relevant and material to the outcome of the case. No explanation of any specificity was, however, offered by Claimant. The Tribunal also expressed the opinion that the production of the requested documents was overly broad and unduly burdensome insofar as the Request concerned "all" documents relating to the subject matter of the request and covered a period of three years. The Tribunal also noted that most, if not all, documents were publicly available and although the Claimant complained of problems to retrieve documents from public sources, it had already retrieved a number of such documents. The Claimant's Request for Document Production, as formulated, was dismissed. The Tribunal added that if the Claimant could not retrieve documents which it considered relevant and material to the outcome of the case from any public sources it should submit the matter to the Tribunal for final determination. Such submission, which should be with the Tribunal on 5 November 2010 at the latest, should be accompanied by a more detailed explanation of the reasons why the requested document(s) are relevant and material to the outcome of the case. Further, the Claimant should explain why it had not been possible to retrieve any of the requested document(s) from public and other sources and why it assumed that such documents were in the possession or custody or under control of the Respondent. The Claimant never submitted any matter to the Tribunal for final determination.

21. On 14 October 2010, the Claimant filed objections to Respondent's Request for Document Production.

22. On 26 October 2010, the Tribunal ruled on Claimant's objections to Respondent's Request for Document Production. All requests were granted. Regarding Claimant's objections to the production of certain documents requested by the Respondent because they may not exist, the Tribunal added that while it had no reason to doubt that some of the requested documents may not exist and therefore cannot be produced, it ordered the Claimant to make a thorough research for the existence of any documentation falling within the

limits of the requests and (a) to confirm that such search has been undertaken and (b) to produce such documentation to the extent that it is found.

23. On 2 November 2010, the Secretariat acknowledged receipt of US$ 305,000 from Respondent in payment of its share of the advance on costs.

24. By letter dated 8 November 2010, Claimant, referring to the Secretariat's letters of 12 August 2011, 10 September 2010 and 2 November 2010, requested an extension of time to pay its share on the advance on costs until mid of January 2011. Claimant pointed out that "the Claimant's shareholders immediately upon receipt of the letters decided to proceed with a raising of funds and a Claimant's share capital increase in order to secure the payment of the Claimant share of the advance of costs."

25. On 10 November 2010, Respondent filed its First Submission with enclosures.

26. On 10 November 2010, the Secretariat, referring to previous extensions, granted Claimant a further extension to pay its share of the advance on costs until 10 December 2010.

27. By letter dated 23 November 2010, Mr. [redacted] informed the Tribunal that [redacted] will no longer assist and represent Claimant in this arbitration, adding that per the provisions of the representation agreement, the termination will have effect within fifteen (15) days from 23 November 2010.

28. By letter dated 2 December 2010, Claimant, with reference to the resignation of [redacted], requested a suspension of the proceedings or an extension of the time limit for two months to enable it to appoint new legal counsel or reach an agreement with [redacted] office to continue representing Claimant.

29. By letter dated 9 December 2010, the Claimant requested a further extension to pay its share of the advance on costs.

30. By letter dated 10 December 2010, the Secretariat, referring to previous extensions granted, advised Claimant that the Secretariat was not in a position to grant Claimant a further extension to pay its share of the advance on costs (i.e. US$ 305 000). Should Claimant fail to make this payment within 10 days upon receipt of the letter, the Secretariat would invite Respondent to substitute for Claimant in paying the balance of the advance on costs.

31. By letter 20 December 2010, Respondent objected to any suspension or any extension of the timetable as unwarranted under the circumstances noting that Claimant already had obtained an 8-week extension of the time for filing its First Submission following the withdrawal of Claimant's previous counsel only eleven days before the agreed deadline for Claimant's First Submission. In this regard, Respondent further noted that Mr. [redacted] had failed to respond in any way to the Tribunal's deadline of November 16, 2010 to submit a power of attorney, and the last letter in the file from Mr. [redacted] before that was dated 8 November, 2010. Thus, as of the date of this letter, Claimant has been on notice of the likely need for new counsel for about five weeks at least. Claimant has not, however, offered any information about the steps that have been taken to retain new counsel, or why that process would require more than five weeks, let alone an indefinite suspension.

32. On 21 December 2010, the Tribunal decided on Claimant's request of 2 December 2010 on a suspension of the proceedings or an extension of the time limit for two months. The Tribunal expressed reluctance to grant any further extensions of the proceedings or any suspension. The Tribunal noted that the Request of Arbitration in this case was filed on 31 July 2009 and in order to finalize the case within a reasonable time it was essential that the oral hearing could be held as scheduled, i.e. 23 – 27 May 2011. Therefore, only a short extension could be granted. The Tribunal also noted that the Claimant already for a considerable time had been aware of that it may have to appoint new legal counsel. The time for the Claimant to file the submission scheduled for 17 January 2011 was extended until 31 January 2011 at the latest. The Claimant was instructed to appoint new counsel within such time that the time limit could be kept.

33. On 28 January 2011, Claimant should have produced documents to Respondent in accordance with the Tribunal's decision of 26 October 2010. Claimant never delivered any documents, however, nor did it explain why it did not comply with the Tribunal's decision.

34. On 31 January 2011, the Claimant requested a staged and staggered payment of the advance on costs of at least 4 instalments and/or, as an alternative interim solution, that the Claimant reduces the amount of the claims to 50 Million US$.

35. On 31 January 2011, Claimant should have filed its Second Submission but did not. Nor did Claimant explain why it did not comply with the Procedural Timetable.

36. By letter dated 4 February 2011, the Secretariat noted that the Parties had first been invited to pay the balance of the advance on costs, reconsidered and fixed by the Court at US$ 770,000, subject to later readjustment, on 12 August 2010. Until today, no payment was received from Claimant in payment of the balance of its share of the reconsidered advance on costs (i.e. US$ 305,000). It was therefore not possible to grant Claimant a further extension and the Secretariat was also unable to grant Claimant's request to pay the balance of its share of the advance on costs in instalments. However, the Secretariat informed Claimant that it was free to adjust its claims. The Secretariat noted that the amount in dispute was currently partially quantified at US$ 150,537,300 (i.e. PLN 447,014,935 for the partially quantified principal claims). If Claimant intended to reduce its claim, it was invited to inform the Secretariat accordingly within 7 days upon receipt of the letter.

37. By letter dated 15 February 2011, the Secretariat, referring to its letter dated 4 February 2011, noted that no indication was received from Claimant regarding a potential adjustment of its claims. Consequently, further to its letter dated 4 January 2011 and in light of Claimant's payment failure, the Secretariat invited Respondent to substitute for Claimant in paying the balance of its share of the advance on costs (i.e. US$ 305 000) within 10 days from the date of receipt of

the letter. Unless payment of the amount was received within the time limit granted, the Secretariat informed the Parties that the Secretary General may, pursuant to Article 30(4) of the Rules, grant the Parties a further and final time limit of not less than 15 days to make payment, failing which the claims would be considered withdrawn, without prejudice to their reintroduction at a later date in another proceeding.

38. By letter dated 18 February 2011, Respondent, referring to Claimant's request on 31 January 2011, asked the Tribunal to (i) reject this and any further extension requests from Claimant, and (ii) issue an order finding Claimant in default for failure to prosecute its case, and cancelling the Procedural Timetable as no longer valid or necessary.

39. By letter dated 25 February 2011, Respondent declined the Secretariat's invitation of 15 February 2011 to cover the Claimant's share of the advance on costs, and requested that the Secretary General and the Tribunal, in view of Article 30(4) of the ICC Rules, allow Respondent to be heard on a motion for an award on costs prior to the termination of this arbitration.

40. By letter dated 4 March 2011, Claimant, acknowledging that it so far had been unable to comply with the deadlines stated in the Procedural Order, requested "a final extension of 45 days ... to fund and finance this case", stating that it presently was in a process of selling a real estate property that would enable it within 45 days to immediately make the payment of its share of the costs.

41. By letter dated 10 March 2011, Respondent requested that "(i) the Tribunal issue an order finding Claimant in default of its obligations under the Procedural Timetable, and cancelling the same as no longer extant; (ii) the ICC and the Tribunal confer and confirm that, despite the inevitable deemed withdrawal of claims, the Tribunal shall adjudicate Respondent's request for costs; and (iii) the ICC refund to Respondent the portion of the advance payment that has not been consumed as promptly as possible."

42. By letter dated 16 March 2011, the Secretariat, acknowledging receipt of Respondent's letter dated 25 February 2011, Claimant's letter dated 4 March 2011 and Respondent's letter dated 10 March 2011, advised that, after consultation with the Arbitral Tribunal, the Secretariat will presently refrain from inviting the Secretary General to apply Article 30(4) of the Rules until the Arbitral Tribunal has reverted to the Parties regarding the further conduct of the proceedings. Notwithstanding this, the Secretariat reminded the Parties that the outstanding balance of the advance on costs, i.e. US$ 305 000, should be paid without further delay. In this respect, the Secretariat reserved its right to apply Article 30(4) of the Rules in due course.

43. By letter dated 17 March 2011, the Tribunal, stating Claimant's failure to comply with the Procedural Timetable and other orders of the Tribunal, informed the Parties of its decision to discontinue the current Procedural Timetable and to invite Claimant to respond, by 31 March 2011 at the latest, to the Respondent's requests, included in its letters dated 18 and 25 February and 10 March 2011, that the proceedings be terminated and that costs be awarded in Respondent's favour.

44. By letter dated 31 March 2011, Claimant rejected Respondent's request that the proceedings be terminated and that costs be awarded in Respondent's favour.

45. By letter dated 29 April 2011, the Tribunal, again stating Claimant's failure to comply with the Procedural Timetable and other orders of the Tribunal, the result of which was that the case after close to two years was far from ready for final resolution, as well as Respondent's request of an award on the costs, informed the Parties that it had decided to render a Partial Award on the Parties' costs incurred so far in the proceedings. The Parties were invited to submit, by 13 May 2011 at the latest, cost statements, which may include the costs requested as well as views on which of the Parties shall bear the costs or in what proportions they shall be borne by the Parties.

46. By letters dated 13 May 2011, both Parties submitted submissions on costs. The contents of the submissions appear below.

47. By letter dated 16 May 2011, the Tribunal invited each Party to comment, by 27 May 2011 at the latest, on the other Party's submission.

48. By letter dated 26 May 2011, Claimant requested an extension to comment on the other Party's submission until 3 June 2011.

49. By letter dated 27 May 2011, the Tribunal extended the time limit to comment on the other Party's cost submission until 3 June 2011.

50. By letters dated 3 June 2011, each Party commented on the other Party's cost submission.

51. By letter dated 21 July the Tribunal declared the proceedings closed under Article 22 (1) of the ICC Rules with respect to the Parties' costs in relation for this part of the proceedings.

3. RELIEF SOUGHT

3.1 Claimant

52. Claimant's demands full compensation for the costs it "has incurred ..... in the preparation, follow up and registration of its claim ...." Such costs amount to US$ 280,000.00, € 318,494.10 and JOD 65,000.00.

3.2 Respondent

53. Respondent requests that the Tribunal render an award pursuant to Article 31 of the ICC Rules, ordering that Claimant bear all costs of this arbitration in the amount of € 668,141.47, plus compound interest at the Polish statutory rate of 13%, or, alternatively, the EURIBOR rates for three months plus 5%, compounded quarterly, in the case the amount is unpaid after 30 days from the date of notification, as well as any additional relief that the Tribunal may deem just and appropriate under the circumstances of this case.

4. FACTUAL AND LEGAL GROUNDS INVOKED BY THE CLAIMANT; SUMMARY OF THE CLAIMANT'S CONTENTIONS

54. Claimant's position is that it "has incurred substantial expenses in the preparation, follow up and registration of its claim and thus demands full compensation of said costs."

55. Claimant "reiterates its previous statements that failure to respond to its request for extension of Procedural Order was unfounded, unjustified and has disabled Claimant from submitting further evidences in substantiation of its case."

56. "Further, Claimant would like to reiterate the fact that it is the Respondent who has continuously frustrated the ability of Claimant to make payments, by depriving the Claimant of funds and payments due to it from the proceeds of its actions."

4.1. Costs incurred by Claimant:

Item no	Expense explanation	Amount $	Amount in Euro	Amount in JOD
1	ICC court Fee	37,500.00		
2	Lawyer fees		229,494.10	
3	Case document translation		25,000.00	
4	Jordan Consultancy & Various Advice			65,000.00

In addition to the above, the Claimant had incurred indirect costs associated with the follow up and collection of documents for the case. Those costs are:

Item no	Expense explanation	Amount $	Amount in Euro
1	Travels		64,000.00
2	Case Management cost	192,000.00	
3	Administration cost	36,000.00	
4	Miscellaneous cost	15,000.00	

57. "Claimant rejects to be considered as defaulting party to meet the Procedural Order and thus to be responsible for losing its actual costs incurred so far. More importantly, the Claimant rejects to bear any cost claimed by the Respondent as the later had constantly refused and hindered [Claimant]'s attempts to extend the time lines of the Procedural Order. Therefore, Respondent should not benefit from its actions that had adversely affected Claimant."

58. "Respondent should bear in full all costs of arbitration as cessation of proceedings had been caused by it without lawful justification."

4.2. Claimant's comments on Respondent's claims

59. "On the Respondent's request to recover the costs of this arbitration – without submission to the accuracy of costs presented by the Respondent, Claimant rejects this request categorically on the basis that legality negates liability for damages. Claimant should not bear any share of said costs arising from Claimant's entitlement to recover its rights from Respondent."

60. "It is the Respondent that should bear in full all costs of arbitration attributed to it as cessation of proceedings had been requested by it not the Claimant. Respondent should not benefit from such request."

5. FACTUAL AND LEGAL GROUNDS INVOKED BY THE RESPONDENT; SUMMARY OF THE RESPONDENT'S CONTENTIONS

61. Respondent is seeking a Tribunal award ordering Claimant to reimburse Respondent for the entirety of the costs of this arbitration, including Respondent's full costs of legal representation, plus compound interest on the amounts awarded.

5.1 Rules and practices

5.1.1 *ICC case law*

62. Under Articles 31(1) and (3) of the ICC Rules, the Tribunal has broad discretion to decide in what proportions the costs shall be borne by the Parties, including the administrative expenses fixed by the ICC Court, and the costs of legal representation.

63. Applying the general rule that the costs should follow the event, one ICC tribunal emphasized that

> "[s]ince it is the **defendant who is winning this arbitration because the claim of Claimant was either withdrawn during the oral hearing** or is dismissed by this final award, **it is the Claimant who is to carry its costs.**"[1]

64. A party's behaviour in the conduct of the arbitration is also an important factor in the allocation of costs. For example, another ICC tribunal underscored that,

> "[a]ccording to **the general principles of international arbitration law, the arbitral tribunal must take into account for its decision on costs** not only the result of the proceedings but also **the behaviour of the parties during the proceedings . . . . According to good faith, the parties to an international arbitration must in particular facilitate the proceedings and abstain from all delaying tactics . . . .**"[2]

65. Specifying the nature of the delaying tactics motivating the ICC tribunal's costs award in that case, the tribunal continued,

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[1] Final award in ICC case no. 8547 of 1999 (emphasis added by Respondent).
[2] Final award in ICC case no. 8486 of 1996 (emphasis added by Respondent).

> "The behaviour of the defendant during the entire proceedings did not comply with these requirements in any way. The defendant **made none of the advance payments on costs which are required for the proceedings**. . . . Further, it also contributed to **unnecessary delay and confusion** in the proceedings by appointing counsel at the last moment, (...) compounded by **counsel's renunciation to the mandate** only a few days afterwards. . . . For the above reasons, the defendant shall also reimburse to the claimant the advance payment on costs, which the latter paid for these proceedings."[3]

66. In addition to the support found in the ICC Rules and practices, the Respondent has also referred to decisions by investment treaty tribunals operating under various arbitration regimes, which have confirmed that the failure to prosecute its case and a party's behaviour during the arbitration are crucial factors in assessing the allocation of costs. Among such references are the following.

5.1.2 *Other international arbitration's case law*

67. The decision on costs of the NAFTA UNCITRAL tribunal in *Melvin J. Howard & others v. Canada* is illustrative. There, the tribunal was faced with a situation almost identical to that presented by ECIC in the present case. The NAFTA claimants failed to advance their claims, including failing to cover the required advance on costs. In ordering claimants to reimburse Canada for the costs of the proceedings, the tribunal observed that

> "in light of the Claimants' failure to meet their basic obligations and to orderly prosecute their claims, the Tribunal is of the view that the Claimants are to be perceived as the unsuccessful Party. . . [The costs of proceeding] were incurred as a result of the Claimants' decision to commence this arbitration and their

[3] *Ibid.* The tribunal in this case awarded costs to the party that failed on much of its claims based on the conduct of the parties.

> subsequent refusal to pursue their claims in an efficient manner in accordance with the applicable arbitration rules. It would not be fair or reasonable, in the Tribunal's view, if these costs were to be borne or partially shared by the Respondent, the Government of Canada."[4]

68. Accordingly, the Melvin J. Howard UNCITRAL tribunal awarded Canada the fees and expenses of the tribunal and the costs of assistance required by the tribunal.

69. The ICSID tribunal in *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, reached a similar conclusion in the context of the claimant's failure to prosecute that case.[5] There, the tribunal did not deem it necessary to determine the relative success or failure of either side. Rather, "the Tribunal may proceed to a decision on the allocation of costs on the basis of other factors, such as in a case where a party's bad faith, lack of cooperation, dilatory or otherwise improper conduct justifies that the costs of the proceedings be assessed against such party." Citing that "[a]fter almost two years of adjudication . . . Claimants suddenly decided to abandon their claims," and Claimant's "crisply stated" withdrawal of counsel, the tribunal determined that

> "Claimants cannot expect Respondent to carry the burden of the costs of defending claims that Claimants decided to abandon. Accordingly, equity and fairness mandate that Claimants should bear the expenses and costs incurred by the Respondent in this arbitration."

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[4] *Melvin J. Howard, Centurion Health Corp. & Howard Family Trust v. The Government of Canada*, UNCITRAL, PCA Case No. 2009-21 (NAFTA), Order for the Termination of the Proceedings and Award on Costs, Aug. 2, 2010 (Judge Peter Tomka, Pres.; M. Florestal; H. Alvarez), *available at* http://ita.law.uvic.ca/documents/HowardvCanadaOrder.pdf.

[5] *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1 (Canada/Costa Rica BIT), Order of the Tribunal Taking Note of the Discontinuance of the Proceedings and Allocation of Costs, Oct. 27, 2010 (A. Garro, Pres.; A. Lowenfeld; B. Cremades), *available at* http://ita.law.uvic.ca/documents/QuadrantPacificGrowthFundVCostaRicaOrderEng.pdf.

70. Similarly, in *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, the respondent's request for a default award, not with respect to the merits, but with respect to fees and costs resulted in the ICSID tribunal's determination that it was "fair and reasonable" to order claimants to contribute € 400,000 to respondent's legal costs and associated expenses.[6] Respondent explained that the tribunal could entertain its request to "render a default award in favour of the Respondent on the ground of Claimants' failure to prosecute their claims." Furthermore,

> "Respondent argued that it was entitled to an award of fees and costs because the Claimants had wasted the time, energy, and money of ICSID, the Tribunal, and the Republic by bringing a claim that (i) they never intended to pursue as pleaded, but rather had brought as a mere tactical device, (ii) could have been adequately handled under the Respondent's own laws and procedures . . . ."

71. In line with the respondent's requests, the tribunal granted a substantial sum for respondent's costs given, inter alia, "the fact that the Claimants ultimately abandoned some of their claims." In doing so, the tribunal underscored that its approach "reinforces the view that, [ ] **claimants in investment arbitrations . . . cannot expect to leave respondent States to carry the costs of defending claims that are abandoned** . . . ." (emphasis added by Respondent)

5. 2. Application to the case

72. There are several independent reasons supporting Respondent's request for an award on costs.

5.2.1 *Claimant has failed to prosecute its case*

[6] *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01 (Italy/South Africa and BLEU/South Africa BIT), Award, Aug. 4, 2010 (V. Lowe, Pres.; C.N. Brower; J.M. Matthews) ¶¶ 132-133 available at http://ita.law.uvic.ca/documents/PieroForesti_v_SouthAfrica_Award.pdf.

73. Claimant has effectively abandoned its case, having failed to meet several deadlines and orders set by the Tribunal, and to cover the required advance on costs.

74. Claimant has disregarded the timetable and several extensions exceptionally granted by the Tribunal. For example, Claimant failed to respond in any way on 28 January 2011 to the Tribunal's 26 October 2010 order requiring the production of documents. Claimant also did not submit its Second Submission, due 31 January 2011, initially failing even to acknowledge the Tribunal's deadline. Instead, on the very due date for Claimant's submission, Claimant sent the ICC Secretariat a letter, which was not copied to Respondent but subsequently forwarded to Respondent by the Secretariat, requesting "a staged and staggered payment for . . . at least 4 instalments" and proposing "an alternative interim solution that the Claimant reduces the amount of the Claim to 50 Million USD." Claimant, however, then failed to embrace an opening from the ICC to reduce the amount of the claim. In any case, Claimant has defaulted in that it failed even to file its Second Submission, and otherwise failed to prosecute its case.

75. Furthermore, rather than affirmatively withdrawing its claim to avoid Respondent's incurring further costs, Claimant engaged in dilatory tactics, asserting its intention to proceed, but failing to act. Claimant presented no fewer than five excuses for its failure to prosecute its claim, including (i) the resignation of two counsel teams; (ii) the inability to retain new counsel; (iii) a pending – since at least November 8, 2010 – purported capital increase; (iv) a planned sale of real estate; and (v) even political turmoil in the Maghreb and Middle East. None of Claimant's excuses provided sufficient basis to defer Claimant's obligations under the Parties' procedural agreement.

76. Claimant has repeatedly presented excuses to protract these proceedings, both with respect to (i) the time limits for payment of the advance on costs, and (ii)

the Procedural Timetable. In all, Claimant already has been granted six extensions by the Secretariat, and three extensions by the Tribunal.

77. During the course of this arbitration, two counsels for Claimant have resigned. The first resignation was announced eleven days before the agreed deadline for the filing of the First Submission, seriously disrupting Respondent's planning and schedule for its responsive pleading. The second resignation, in November 2010, was not initially communicated either to the Tribunal, or to Respondent. After each counsel resignation, Claimant has sought extension of the deadlines. First, Claimant sought three months, then another three months, and finally two months. Already after the first resignation, the Tribunal "express[ed] concern on the duration of the proceedings." Nonetheless, as recently as March 4, 2011, Claimant persisted with its request for delay, seeking "[a] final Extension of 45 days."

78. Not only has Claimant failed to meet the exceptionally granted deadline, it failed as well to offer any explanation as to the steps taken, or progress made, long after the dates when Claimant announced that Mr. Vatier would no longer act for Claimant in this arbitration, and after the dates when Claimant committed to have new counsel in place.

5.2.2 *Therefore, Claimant has to pay for Respondent's legal and other costs*

79. The costs relevant in this arbitration include two principal categories: (1) the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the ICC Court; and (2) the reasonable legal and other costs incurred by Respondent in the arbitration. In addition, the Respondent has requested that Claimant shall be ordered to pay (3) compound interest on the amount awarded.

(1) Fees and expenses of the arbitrators and the ICC administrative expenses fixed by the ICC Court

80. In accordance with the agreed upon procedure and relevant rules, Respondent has paid its portion of the advance on costs in its entirety. Respondent has in good faith timely paid the advance on costs fixed by the ICC Court in the amount of US$ 80,000 on 17 December 2009, and the further adjustment of US$ 305,000 on 26 October 2010 for an aggregate advance payment by Respondent of US$ 385,000 (€ 275,011.53).

81. Given Respondent's good faith and unvarying compliance with the rules, the award on costs should direct that Claimant reimburse Respondent in full for the advance on costs that has already been paid (alternatively, Claimant should be ordered to reimburse whatever amount the Court of Arbitration fixes and retains from Respondent's advance at the close of the arbitration).

(2) The reasonable legal and other costs incurred by Respondent in this arbitration

Legal representation

82. Costs for legal representation of € 367,638.18, are not only reasonable, they are substantially conservative. This amount also encompasses additional costs incurred by counsel, such as attorney travel costs to Paris for the January 2010 hearing, and to the Bankruptcy Court in Cracow, as well as all other costs not evidenced elsewhere, including, for example, courier costs.

Expert opinion

83. Respondent retained an expert to provide an opinion regarding Polish bankruptcy law. The total costs to Respondent for expert services in this case are € 5,029.17

Translations

84. To produce the written submissions in this case, Respondent contracted with outside vendors for translation services required. The total outside costs to Respondent for translation services in this case are € 18,490.90.

85. Virtually all documents relevant and material in this arbitration are in the Polish language. Respondent was not only burdened with costs of translating its own supporting documents, but also was forced to translate documents submitted by Claimant only in the Polish language, or that Claimant has translated improperly. Such practices have been employed by Claimant from the outset of these proceedings, and have continued through Claimant's recent submission dated 4 March 2011. Claimant's practices, in turn, generate unnecessary, additional costs to Respondent.

86. Given the specificity of this case and Claimant's approach, the above costs are reasonable and should be granted in full by the Tribunal.

Travel expenses of Respondent's representative

87. Travel costs of Respondent's representative, Mr. [redacted], to the 27 January 2010 hearing in Paris are included under the category of other costs. These travel expenses were necessary and are eminently reasonable. As in the case of Professor [redacted], Dr. [redacted], and Mr. [redacted] Respondent's representative, Mr. [redacted] traveled in economy class. Similarly, Mr. [redacted] stayed at a hotel under a discounted rate for the minimum period possible (1 night). Accordingly, the amount of these travel expenses, € 617.17, is reasonable and should be borne by Claimant.

Other expenses incurred by Counsel for Respondent

88. The cost of renting the ICC venue for the January 2010 hearing in Paris is also included under the category of other costs in this arbitration. This cost amounts to € 1,354.52.

(3) Compound interest

89. Respondent is entitled to compound interest on any award of its costs of arbitration and legal representation. International tribunals routinely grant interest on the principal monetary award for compensation. Indeed, counsel for Claimant has asserted entitlement to interest on any award in its favor at the rates applicable under EURIBOR, so surely there can be no objection from Claimant upon an award of interest to Respondent.

90. Furthermore, an interest charge on Respondent's costs is the only assurance that Respondent will be made whole.

91. As for the rate of interest that is appropriate in this case, Article 7(3) of the Treaty applicable here provides as follows:

> "The arbitration award shall be based on: [i] the provisions of this Agreement; [ii] **the national law of the Contracting Party in whose territory the investment was made**, including the rules relative to conflicts of laws; [iii] the rules and the universally accepted principles of international law." (emphasis added by Respondent)

92. Under Polish law, the rate of statutory interest is 13%. Thus, in view of Article 7(3) of the Treaty, item [ii], it is amply within the Tribunal's authority to award the statutory rate of interest required under Polish law of 13% per annum.

93. Given the above, in addition to any pre-award interest, Respondent respectfully requests that, in case of non-payment of any award on costs in favour of Respondent after 30 days from the date of its notification, the Tribunal apply the Polish statutory rate of interest of 13% per annum to the aggregate amount awarded.

94. In the alternative, Respondent respectfully asks the Tribunal to grant, at a minimum, the rate of interest akin to that Claimant deemed appropriate for itself, i.e., the EURIBOR rates for 3 months plus 5% to its award on costs in favour of Respondent in the case it is unpaid after 30 days from the date of notification. Although the Polish statutory rate is entirely justified in this case, this alternative mode of calculation, as proposed by Claimant itself, is consistent with the practices of other tribunals, both with respect to the level of,[7] and the compound character of interest.[8]

95. In addition, and regardless of the choice among the alternative rates of interest proposed above, interest should be compounded quarterly, or at another interval deemed appropriate by this Tribunal. The relevance of granting compound interest has been underscored by an ICSID tribunal:

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[7] *See, e.g., PSEG v. Turkey*, ¶ 348 (employing "the 6 month average ***LIBOR plus 2 per cent*** per year for each year during which amounts are owing. The interest shall start running on the date specified below until payment of the Award. Interest shall be ***compounded semi-annually***.") (emphasis added by Respondent); *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ¶ 9.2.8 (underscoring that "the Tribunal concludes that a **6%** interest rate represents a reasonable proxy for the return Claimants could otherwise have earned on the amounts invested and lost in the Tucumán concession.") (emphasis added); *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC (Russia/Moldova BIT), Award, Sept. 22, 2005 (G.C. Moss, sole arbit.) ¶ 7.5 ("***In case payment is not made or only partially made*** by that date the Respondent shall pay ***default interests*** at the rate of **23%** for payments in lei and **2.5%** for payments in Euro, compounded quarterly.") (emphasis added by Respondent) *available at* http://ita.law.uvic.ca/documents/Bogdanov-Moldova-22September2005.pdf.

[8] *See Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ¶ 9.2.4 ("To the extent there has been a tendency of international tribunals to award only simple interest, this is changing, and the award of compound interest is no longer the exception to the rule.").

Subtotal for costs of arbitration	**€ 275,011.53**
Attorney time	€ 367,638.18
Subtotal for legal representation	**€ 367,638.18**
Expert opinion	€ 5,029.17
Translations	€ 18,490.90
Travel expenses of Prokuratoria Generalna representative	€ 617.17
Cost of renting the ICC venue for the January 2010 hearing	€ 1,354.52
Subtotal for other costs	**€ 25,491.76**
Subtotal for legal and other costs	**€ 393,129.94**
TOTAL	**€ 668,141.47**

5.3 **Respondent's comments on Claimant's claims**

98. As Claimant's submission itself establishes, Claimant has no genuine legal or factual basis for its claim for costs. Rather, consistent with ECIC's practices from the outset of this arbitration, its costs request further confirms the groundlessness of ECIC's positions, as well as Respondent's entitlement to a full award of its costs.

99. A review of each of the components of the overall costs reflects that Claimant seeks reimbursement of € 552,942.01 for costs of legal representation and other expenses, while for the same purpose Respondent has shown it incurred € 393,129.94 in costs. The comparison of the Parties' respective requests confirms the reasonableness of Respondent's request for a full award of all its costs.

100. Respondent requests that the Tribunal rejects in its entirety Claimant's request for costs, and renders an award pursuant to Article 31 of the ICC Rules, ordering that Claimant bear all costs of this arbitration in the amount of € 668,141.47, plus compound interest at the Polish statutory rate of 13%, or another appropriate rate.

6. THE TRIBUNAL'S REASONING AND CONCLUSIONS

6.1 Introduction

101. The key provisions in this arbitration appear in Article 31 of the ICC Rules, which reads:

> "1. The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.
>
> 2. The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case. Decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings.
>
> 3. The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."

102. The Tribunal notes that under this Article it can take decisions on costs at any time during the proceedings, except, however, on the costs fixed by the Court. The reason for this exception is obvious. The Court does not fix the costs of arbitration (i.e. fees and expenses of the Arbitral Tribunal and ICC administrative expenses) until the final award stage, so the costs are not known to the Tribunal at the time for this Partial Award. From this also follows that the Tribunal at this stage of the proceedings cannot decide that one Party shall

reimburse the other Party for the advance on costs since such decision is dependent on the Court's fixing of the costs of arbitration at the final award stage.

103. Other costs, and how such costs shall be allocated among the Parties, can be dealt with by the Tribunal in a partial award. In this context, it shall be noted that neither of the Parties has contested that a decision on costs is made by the Tribunal.

104. The Tribunal finds it appropriate that a decision on costs is taken at this stage. The proceedings have been pending for two years – Claimant filed the Request for Arbitration on 31 July 2009 – and are presently not progressing.

105. Considerable costs have been incurred by the Parties and they are entitled to a decision from the Tribunal.

106. Having concluded that a partial award of costs is not only in line with the applicable rules but also appropriate in this case, the Tribunal turns to considering the reasonableness and allocation of the costs.

107. Both Parties have submitted cost statements and also commented on each other's statements. Extensive summaries of such statements and comments appear above. The fact that not all arguments and evidence are expressly mentioned in the Partial Award shall not be construed as if they have not been taken into account.

108. The Tribunal starts by considering the allocation of the costs and will then, if the conclusion is that one party shall reimburse the other, turn to consider whether the amount claimed is reasonable. Finally, the Tribunal will also deal with interest.

6.2 Allocation of costs

109. As noted earlier, this case was initiated by Claimant on 31 July 2009. On 27 January 2010, the Parties and the Tribunal agreed on a provisional procedural timetable. It provided for a final hearing on 17 – 21 January 2011.

110. On 19 May 2010, the Parties and the Tribunal agreed on a revised timetable. It provided for a final hearing on 23 - 27 May 2011.

111. On 17 March 2011, the Tribunal, noting Claimant's failure to comply with the timetable and other orders of the Tribunal, decided to discontinue the current timetable. No new timetable has been adopted.

112. The blame for the delay of the proceedings, and eventually, for all practical purposes, the effective stay of same, falls entirely upon Claimant. It has failed to comply with both time limits, laid down in agreed timetables or otherwise, and other orders of the Tribunal. The Tribunal particularly notes that despite repeated extensions, Claimant has not filed its second written submission, which, after extensions, should have been submitted on 31 January 2011 at the latest. Nor has it complied with the Tribunal's order to produce documents, due on 28 January 2011.

113. During the course of the arbitration, two counsels for Claimant have resigned, the last one on 23 November 2010. Despite extensions of the time to enable Claimant to appoint new counsel, no such has been retained.

114. The Tribunal further notes that Claimant has failed to pay its share of the advance of costs despite repeated requests by the Secretariat.

115. Although Claimant objects to a termination of the proceedings, it is the Tribunal's opinion that Claimant has since long failed to prosecute its case in such a way that Claimant must be considered to have abandoned the case. By so behaving, Claimant must also assume responsibility for the costs it has occurred both for itself and the Respondent by first initiating the case and then, after both Parties had devoted considerable time and efforts on the case, abandon it.

116. The Tribunal agrees with *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, that [ ] "claimants in investment arbitrations . . . cannot expect to leave respondent States to carry the costs of defending claims that are abandoned . . . ."[10]

117. Other tribunals faced with similar situations have concluded in the same direction, e.g. *Melvin J. Howard & others v. Canada* and *Quadrant Pacific Growth Fund LP and Canasco Holdings Inc v Republic of Costa Rica*.[11]

118. Under the ICC Rules, the Tribunal has wide discretion to determine how to allocate the costs among the Parties. Having already concluded that the Tribunal cannot take a decision on the allocation of the costs fixed by the Court, it remains for it to decide on the legal and other costs incurred by the Parties. According to the conclusion above, the Tribunal finds that the Claimant shall bear both its own legal and other costs and the reasonable costs claimed by Respondent in relation to the period of the proceedings up until this Partial Award.

6.3 Reasonable costs

119. As to the reasonableness of the legal and other costs claimed by Respondent, the Tribunal notes that Respondent has provided details of its costs in appendices. None of the costs appear unnecessary or excessive. The Tribunal also notes that the costs claimed by Respondent are lower than the corresponding costs claimed by the Claimant. In the Tribunal's opinion, the Respondent's costs, in total € 393,129.94, are reasonable.

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[10] *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award Aug. 4, 2010, available at http://ita.law.uvic.ca/documents/PieroForesti_v_SouthAfrica_Award.pdf.

[11] *Melvin J. Howard, Centurion Health Corp. & Howard Family Trust v. The Government of Canada*, UNCITRAL, PCA Case No. 2009-21 (NAFTA), Order for the Termination of the Proceedings and Award on Costs Aug. 2, 2010, available at http://ita.law.uvic.ca/documents/HowardvCanadaOrder.pdf.
Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceedings and Allocation of Costs Oct. 27, 2010 available at
http://ita.law.uvic.ca/documents/QuadrantPacificGrowthFundVCostaRicaOrderEng.pdf.

6.4 Interest

120. Respondent's position is, as noted earlier, that, in case of non-payment of any award on costs in favour of Respondent after 30 days from the date of its notification, the Tribunal shall apply the Polish statutory rate of interest of 13% per annum to the aggregate amount awarded, and has in such connection referred to the applicable law provision in Article 7(3) of the BIT, which, inter alia, provides that "the national law of the Contracting Party in whose territory the investment was made, including the rules relative to conflicts of laws" shall be applicable by the Tribunal, among other rules.

121. In the alternative, Respondent has asked the Tribunal to grant, at a minimum, EURIBOR rate for 3 months plus 5% to its award on costs in favour of Respondent in the case it is unpaid after 30 days from the date of notification.

122. In addition, and regardless of the choice among the alternative rates of interest proposed above, Respondent requests that the interest be compounded quarterly, or at another interval deemed appropriate by this Tribunal.

123. Claimant has not requested interest on the amounts claimed as compensation for its costs, nor has it, although it has denied Respondent's right to be compensated, offered any comments regarding Respondent's interest claims. It may be noted in this connection, however, that Claimant in its main claims has requested interest on amounts awarded it "at the rate of EURIBOR 3 months as at the date of performance of the award by the Respondent."

124. The Tribunal's opinion is that the interest shall serve the purpose of compensating the aggrieved party for the loss of the use of its money. The purpose shall not be to over compensate such party or to punish the other party. In the Tribunal's view, the Polish statutory rate of interest of 13% may result in an overcompensation of the Respondent. This is not because it is something wrong with Polish statutory rate of interest but is a consequence of the fact that

statutory interest rates usually change infrequently and will therefore not at all times reflect the economic conditions. In the Tribunal's opinion a more market oriented rate should be applied.

125. The Tribunal recalls that the applicable law provision, apart from referring to "the national law of the Contracting Party", also includes a reference to the "rules and the universally accepted principles of international law."

126. The Tribunal notes that the UNIDROIT Principles of International Commercial Contracts (the "UNIDROIT Principles") include in Article 7.4.9 (2) a provision specifically dealing with interest for failure to pay money. It provides that:

> "The rate of interest shall be the average bank short term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment."

127. This provision appears in the UNIDROIT Principles 2010 as well as in the preceding versions 1994 and 2004.

128. The official comment by UNIDROIT to this provision in the 1994 and 2004 versions states, inter alia, that:

> "This solution seems to be that best suited to the needs of international trade and most appropriate to ensure an adequate compensation of the harm sustained. The rate in question is the rate at which the aggrieved party will normally borrow the money which it has not received from the nonperforming party."

129. Although the UNIDROIT Principles, under their title, deal with international commercial contracts, the Tribunal finds that guidance could be sought in these principles also in the present matter, particularly in finding "an adequate

compensation of the harm sustained" by Respondent, should the amount awarded not be provided.

130. As noted above the rate of interest under the UNIDROIT Principles shall, in the first place, "be the average bank short term lending rate to prime borrowers prevailing for the currency of payment at the place for payment."

131. In the present case, however, the Parties, as an alternative to Polish statuary rate, have adopted a more international approach by referring, albeit in different connections in these proceedings, to EURIBOR as an acceptable rate of reference. This is also consistent with the currency of payment. The Tribunal, therefore, concludes that EURIBOR shall serve as reference rate in the present case. Both Parties have also indicated that the rate be adjusted every three months. The Tribunal agrees.

132. Even if the conclusion is that EURIBOR shall be used as a reference rate, further matters remain to be decided. (1) One is whether the EURIBOR rate should be increased and, in such case, by which margin. (2) A second is whether the interest rate should be simple or compounded, and if the latter, in what intervals. (3) Finally, also the starting point for the application of the interest shall be determined.

(1) Margin

133. The EURIBOR rate should be increased as such rate only reflects the interest at which banks lend money to each other, not loans to customers. Respondent has requested a margin of 5 per cent. The Tribunal finds such margin excessive taking into account the purpose of the interest outlined above, an approach also underlying the UNIDROIT Principles. 2% is a more reasonable margin, and this margin is also frequently applied in international practice. A number of recent investment awards have applied LIBOR plus a 2 per cent margin, e.g. *PSEG Global, Inc., et al. v. Turkey*[12] and *Lemire v. Ukraine*.[13] EURIBOR is

[12] *PSEG Global, Inc., et al. v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007, available at http://ita.law.uvic.ca/documents/PSEGGlobal-Turkey-Award.pdf.

comparable to LIBOR and there is no reason why the same margin should not be used when the reference rate is EURIBOR, and in *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*[14] a 2 per cent margin was used in connection with EURIBOR.

(2) Simple or compound interest

134. Respondent has requested that the interest should be compounded quarterly, or at another interval deemed appropriate by this Tribunal. Claimant has not expressed any view on this matter.

135. The Tribunal is of the opinion that compound interest better than simple interest would compensate the Respondent in case of non-payment of the award on costs in favour of Respondent. This view is supported by recent case law in investment arbitration. See in particular *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic.*[15] Respondent has suggested that the interest should be compounded quarterly. However, also in line with recent practice, the Tribunal decides that the interest should be compounded semi-annually, see e.g. *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*[16] and *PSEG Global, Inc., et al. v. Turkey*[17].

(3) *Dies a quo*

136. While Claimant has indicated interest "as at the date of performance of the award", Respondent has requested interest "after 30 days from the date of notification of the award." Respondent has thus accepted a 30 day grace period. The Tribunal finds such period appropriate, in view also of the formalities required for payments.

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[13] *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, Mar. 28, 2011, available at http://ita.law.uvic.ca/documents/LemireVUkraine_Award_28March2011.pdf.
[14] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2 (ECT), Award Sept. 17, 2009, available at http://ita.law.uvic.ca/documents/CementowniaAward.pdf.
[15] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award Aug. 20, 2007, available at http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf.
[16] See footnote 14.
[17] See footnote 12.

137. Interest shall continue to accrue, until all amounts owed in accordance with this Award have been finally paid.

7. AWARD

For the reasons set out above, the Tribunal determines as follows:

(1) The Claimant, The East Cement for Investment Company, shall bear its own legal and other cost in this arbitration up and until this Partial Award.

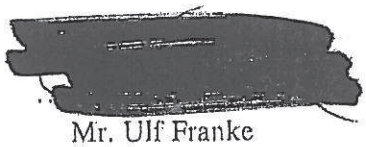
(2) The Claimant, The East Cement for Investment Company, is ordered to pay to the Respondent, The Republic of Poland, € 393,129.94, which represents the legal and other costs incurred by Respondent in this arbitration up and until this Partial Award. It should be noted that the legal and other costs awarded do not include the costs of arbitration to be fixed by the Court or any advance on costs payments.

(3) In the event of non-payment of the amount owing under (2) above within 30 days of notification of the Award, compound interest shall be paid at the successive EURIBOR 3 months rate plus 2% for each year, or portion thereof, beginning 30 days from the date of receipt of this Partial Award by Claimant. Interest shall be compounded semi-annually.

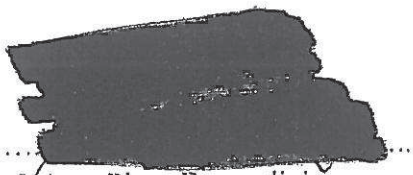
(4) All other decisions are reserved for one or more further awards.

Place of arbitration: Paris, France

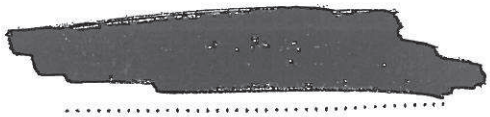
Date: 26/8/2011



Mr. Ulf Franke
Chairman



Prof. Avv. Piero Bernardini
Arbitrator



Prof. Brigitte Stern
Arbitrator