



# ARBITRATION INSTITUTE

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## FINAL AWARD

Made on 10 March 2017

Seat of arbitration: Stockholm, Sweden

ARBITRATION CASE V 2014/181

**CLAIMANT:**

**ANGLIA AUTO ACCESSORIES LIMITED**

*Claimant's counsel:*

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Czech Republic*

**RESPONDENT:**

**THE CZECH REPUBLIC**

*Respondent's counsel:*

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**ARBITRAL TRIBUNAL:**

Dr. Yas Banifatemi, Chairperson  
Prof. August Reinisch, Co-arbitrator  
Prof. Philippe Sands QC, Co-arbitrator

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## **I. INTRODUCTION**

1. This matter arises under an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic dated 10 July 1990 (the “*BIT*”).
2. The Claimant, Anglia Auto Accessories Ltd., is a company incorporated in the United Kingdom. The Respondent is the Czech Republic.
3. The Claimant’s claims concern its efforts to enforce an arbitral award that it obtained in December 1997 in the sum of CZK 4.8 million against its business partner in the Czech Republic, VDI Kyjovan. Although the Claimant was granted several of the enforcement orders it sought, it argues that the courts unduly delayed in issuing these and that during this time VDI Kyjovan became bankrupt. Accordingly, the Claimant argues that it has been deprived of the value of the arbitral award by the courts.
4. The Claimant argues that the courts’ conduct amounts to expropriation in breach of Article 5 of the BIT, and breach of the fair and equitable and full protection and security standards found in Article 2(2) of the BIT
5. The Respondent objects to the jurisdiction of the Arbitral Tribunal to hear the Claimant’s claims. The Respondent also denies any breach of the BIT and seeks a dismissal of the Claimant’s claims on the merits. In particular, the Respondent denies that there were any delays on the part of the Czech courts and argues that any delay to the enforcement proceedings was caused by the Claimant itself and its debtor, VDI Kyjovan.

## **II. PROCEDURAL HISTORY**

### **A. Commencement of the Arbitration and Constitution of the Arbitral Tribunal**

6. On 6 May 2014, the Claimant and two other claimants filed a Request for Arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce (the “*SCC*”). They nominated Professor August Reinisch as arbitrator.
7. On 10 June 2014, the Respondent filed its Answer to the Request for Arbitration. The Respondent nominated Professor Philippe Sands as arbitrator.
8. The SCC divided the proceedings into two matters due to the different nature of the claims and the fact that the claims were presented by different claimants. After the claimants failed to pay the advance on costs requested by the SCC, the SCC decided to dismiss the claims.
9. On 6 January 2015, the claimants wrote to the SCC advising that they wished to pursue the claims and re-submitted the Request for Arbitration without amendment. At that point, the claimants agreed that the proceedings should be divided into two matters and that the seat of the arbitration should be Stockholm. The claimants nominated Professor Reinisch as arbitrator in both proceedings and advised that they had no

objections to the appointment of Professor Sands as arbitrator by the Respondent in both proceedings.

10. On 12 January 2015, Professor Reinisch confirmed his acceptance to sit as arbitrator in the arbitration.
11. On 13 January 2015, the SCC transmitted the Request for Arbitration in this proceeding to the Respondent.
12. On 2 February 2015, the Respondent filed its Answer to the Request for Arbitration in this proceeding. The Respondent again nominated Professor Sands as an arbitrator, and agreed that the proceedings be divided into two and that the seat of the arbitration be Stockholm.
13. On 9 February 2015, Professor Sands confirmed his acceptance to sit as arbitrator in the arbitration.
14. On 17 March 2015, the SCC wrote to Dr. Yas Banifatemi advising that it wished to appoint her as chairperson in the arbitration.
15. On 24 March 2015, Dr. Banifatemi confirmed her acceptance to sit as chairperson in the arbitration.
16. On 26 March 2015, the SCC referred the case to the Tribunal.

#### **B. The Procedural Timetable and Conduct of the Arbitration**

17. On 29 April 2015, the Tribunal invited the Parties to seek to agree a procedural timetable for the conduct of the arbitration, in accordance with Article 23 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("*SCC Rules*").
18. On 11 May 2015, the Claimant advised the Tribunal that the Parties had been unable to reach agreement on the procedural timetable and requested the Tribunal to set a schedule to guarantee the issuance of the final award by 25 September 2015, in accordance with the six-month time period prescribed in Article 37 of the SCC Rules. The Claimant also proposed that the Tribunal hold a hearing and that this arbitration and the related arbitration, 2015/014, be heard together.
19. On 15 May 2015, the Respondent replied to the Claimant's proposals of 11 May 2015. The Respondent indicated that it might request bifurcation of the proceeding and proposed alternate timetables accounting for this possibility. The Respondent submitted that this arbitration and the related arbitration, 2015/014, should be heard separately.
20. On 1 June 2015, the Tribunal issued Procedural Order No. 1 by which it appointed, with the Parties' consent, Ms. Zoe Brentnall as the administrative secretary to the Tribunal.
21. On the same day, the Tribunal issued Procedural Order No. 2, by which it confirmed that the cases should be heard separately, as determined by the SCC. However, it decided that the two cases should be conducted following the same procedural

timetable, with the hearings occurring sequentially. The Tribunal also invited the Respondent to file a request for bifurcation of the proceedings by 22 June 2015 or to notify the Tribunal and the Claimant that it would not seek bifurcation. The Tribunal further advised that it would request the SCC to grant an extension of the time limit for making a final award under Article 37 of the SCC Rules.

22. On 20 June 2015, the Respondent advised that it would not seek bifurcation of the proceedings although reserved its right to raise jurisdictional objections to the Claimant's claims.
23. The Tribunal fixed the procedural timetable by way of Procedural Order No. 3 dated 28 July 2015.
24. On 18 August 2015, the Tribunal asked the Parties to reserve the period from 1 to 7 September 2016 for an oral hearing.
25. On 25 August 2015, the Tribunal asked the SCC for an extension of the time limit for making a final award to 31 December 2016.
26. On 3 September 2015, the SCC granted the Tribunal an extension for making a final award to 2 January 2017.
27. On 18 December 2015, the Tribunal advised the Parties that the commitments of one of the Members of the Tribunal would require long-haul travel on the days immediately prior to and on the morning of 1 September 2016. As a result, the Tribunal verified with the Parties the possibility of hearing the matter on alternative dates in September 2016, including the period from 19 to 23 September 2016.
28. On 23 December 2015, the Claimant advised that it would be available during the period from 19 to 23 September 2016.
29. On the same day, the Respondent advised that it would not be available during the period from 19 to 23 September 2016, but that it could be available during the period from 3 to 7 October 2016.
30. On 15 January 2016, the Tribunal requested the Claimant to advise whether it would be available for a hearing from 3 to 7 October 2016, which the Claimant confirmed on 22 February 2016.
31. On 26 February 2016, the Tribunal confirmed that the matter would be heard from 3 to 7 October 2016.

### **C. Further Developments Prior to the Hearing**

32. On 16 September 2015, the Claimant submitted its Statement of Claim with exhibits. The Claimant did not file any witness statements or expert reports.
33. On 29 October 2015, the Claimant requested the exclusion of counsel for the Respondent, Zeiler.partners, on the basis that the relationship between a lawyer at that firm and the arbitrator appointed by the Claimant, Professor Reinisch, could give rise to reasonable doubts regarding the impartiality and independence of Professor Reinisch.

34. After hearing the Respondent on the issue, and receiving confirmation by Zeiler.partners that the designated lawyer at the firm would not participate in the present proceedings in any capacity, the Tribunal denied the Claimant's application to exclude Zeiler.partners in Procedural Order No. 4.
35. On 11 December 2015, the Respondent submitted its Statement of Defence and Memorial on Jurisdiction with exhibits. The Respondent did not file any witness statements or expert reports.
36. On 8 January 2016, the Respondent made requests for the production of documents by the Claimant. The Claimant did not make any requests for the production of documents by the Respondent.
37. The Claimant filed objections to the Respondent's requests on 15 January 2016. The Respondent filed responses to the Claimant's objections on 22 January 2016.
38. The Tribunal directed the Claimant to produce documents by Procedural Order No. 5 dated 5 February 2016. The Claimant was ordered to produce documents by 19 February 2016.
39. On 15 February 2016, the Claimant requested an extension of the deadline for the production of documents ordered to be produced.
40. On 17 February 2016, the Respondent advised that it did not object to the requested extension.
41. On 18 February 2016, the Tribunal granted the extension.
42. On 18 March 2016, the Claimant wrote to the Tribunal advising of the status of its production and that it had not located documents responsive to certain of the requests.
43. On that date, the Claimant also submitted its Statement of Reply and Counter-memorial on Jurisdiction with exhibits. The Claimant did not file any witness statements or expert reports.
44. On 23 March 2016, the Respondent wrote to the Tribunal with respect to the status of the Claimant's document production. The Claimant, at the Tribunal's invitation, addressed the Respondent's allegation by letter dated 25 March 2016.
45. On 13 May 2016, the Respondent requested a two-week extension of the deadline for filing its Statement of Rejoinder and Reply on Jurisdiction, to 10 June 2016.
46. The Claimant objected to the extension sought by the Respondent on 17 May 2016.
47. On 18 May 2016, the Tribunal granted the extension requested by the Respondent and pushed back, at the same time, the deadline for filing of the Claimant's Statement of Surrejoinder on Jurisdiction by two weeks, to 24 June 2016.
48. On 1 June 2016, the Claimant requested an extension of the deadline for the filing of its Statement of Surrejoinder on Jurisdiction by one month, to 25 July 2016.

49. The Respondent advised that it did not object to the requested extension and this was granted by the Tribunal on 8 June 2016.
50. On 10 June 2016, the Respondent submitted its Statement of Rejoinder and Reply on Jurisdiction with exhibits. The Respondent did not file any witness statements or expert reports.
51. On 25 July 2016, the Claimant submitted its Statement of Surrejoinder on Jurisdiction with exhibits. The Respondent objected to part of the content of the Claimant's Statement of Surrejoinder on Jurisdiction on the basis that it addressed the merits of the dispute.
52. After hearing the Claimant, by Procedural Order No. 6 dated 11 August 2016, the Tribunal directed the Claimant to re-submit its Statement of Surrejoinder on Jurisdiction, addressing issues of jurisdiction only.
53. On 11 August 2016, the Claimant re-submitted its Statement of Surrejoinder on Jurisdiction. By letter of the same date, the Claimant set out the basis on which it had included arguments on the merits in its initial Statement of Surrejoinder and requested the Tribunal to advise when and how the Claimant could amend or supplement its claim pursuant to Article 25 of the SCC Rules.
54. On 12 August 2016, the Respondent replied to the Claimant's letter of 11 August 2016.
55. On 25 August 2016, the Tribunal reiterated to the Parties that the procedural timetable had set a specific sequence of submissions such that the Claimant's final submission on the merits was its Statement of Reply. Further, the Tribunal noted that the Claimant had not sought to amend or supplement its claim within the meaning of Article 25 of the SCC Rules, such that further submissions on the merits were not justified at that time. Finally, the Tribunal emphasised that the Claimant would have the opportunity to further address evidentiary questions at the hearing if it so wished.
56. On 23 August 2016, the Tribunal invited the Parties to agree upon a protocol for the hearing providing for the order of the appearance of the witnesses, the manner in which the hearing should be structured given that this case and case 2015/014 were to be heard in parallel, and the time set aside for opening and closing presentations.
57. The Parties set out their respective positions on these matters by correspondence dated 6, 8, 9 and 12 September 2016.
58. The Tribunal held a pre-hearing telephone conference on 26 September 2016 to hear the Parties further on these matters.
59. On 27 September 2016, the Tribunal issued Procedural Order No. 7 by which it made directions for the organisation of the hearing. Among other things, the Tribunal directed the Claimant to submit a brief statement not exceeding 10 pages of the evidence that Mr. Ivan Busta would give at the hearing by close of business on 28 September 2016.
60. The next day, the Claimant submitted a statement of the evidence that Mr. Busta would give at the Hearing. In this statement, the Claimant requested that two new documents be admitted to the record.



## **D. The Hearing**

61. Following the Parties' agreement contained in their respective emails of 1 March 2016, the hearing took place at the offices of the Respondent's counsel, Zeiler.partners, in Vienna, between 3 and 6 October 2016.
62. In addition to the Members of the Tribunal and the Tribunal's administrative secretary, Ms. Zoe Brentnall, the following persons were present at the hearing.

### *For the Claimant:*

Jaroslav Broz Jr.  
JUDr. Jaroslav Broz Snr.  
Ivan Busta  
James Busta

### *For the Respondent:*

Dr. Alfred Siwy  
Alexander Zojer  
Tomas Muzar  
Anna Bilanova

63. Mr. Busta was examined on behalf of the Claimant.
64. The hearing was transcribed by Mr. Trevor McGowan of The Court Reporter Ltd. Consecutive interpretation services were provided by Ina Maertens and Mojmir Kallus.
65. During the hearing, and after having heard the Parties, the Tribunal decided to admit the two documents tendered by the Claimant through Mr. Busta's statement of evidence to the record (**Exhibit C-58** and **C-59**). These documents had been obtained from the court file of the District Court of Hodonin. The Tribunal gave each Party two weeks, until 13 October 2016, to consult the file further and, if either Party wished to file further documents, to make a reasoned request for leave to do so.

## **E. Developments Following the Hearing**

### **1. Developments concerning the file of the District Court of Hodonin**

66. On 20 October 2016, the Claimant made submissions on the significance of the two documents admitted to the record during the hearing, Exhibits C-58 and C-59. The Claimant also enclosed photographs of further documents from the court file but did not seek leave to admit these to the record.
67. On 21 October 2016, the Respondent objected that the Claimant had not requested leave to file further documents and took the position that the documents did not in any event support the Claimant's position.
68. On 31 October 2016, the Claimant replied to the Respondent's letter, stating that it had misunderstood the Tribunal's direction and did not insist on its submission of 20 October 2016 being accepted. The Claimant requested that if the Tribunal was to

disregard its submission then the Tribunal disregard the Respondent's submission of 21 October 2016 also.

69. On 31 October 2016, the Tribunal recalled its directions at the hearing, indicated that it would revert to the Parties on the matter, and asked the Parties to refrain from making further submissions unless and until they were specifically directed to do so by the Tribunal.
70. On 19 December 2016, the Tribunal advised the Parties of its decision to admit to the record the evidence filed with the Claimant's letter of 20 October 2016, and the Respondent's further submissions on the matter contained in its letter of 21 October 2016. The Tribunal invited the Claimant to resubmit the evidence filed with its letter of 20 October 2016 with exhibit numbers.
71. On 2 January 2017, the Claimant re-submitted that evidence as Exhibit C-61.

## **2. Developments concerning the BIT's *travaux préparatoires***

72. On 19 October 2016, the Tribunal issued Procedural Order No. 8 whereby, referring to the positions taken by the Parties at the hearing regarding the interpretation of the BIT, it invited the Parties to search for the *travaux préparatoires* regarding Article 2(2) of the BIT and, to the extent they could be located, to make them available to the Tribunal by 11 November 2016.
73. On 8 November 2016, the Respondent advised that it had obtained relevant *travaux préparatoires* in Czech, and requested until 22 November 2016 to have the documents translated into English.
74. On 11 November 2016, the Respondent provided copies of the relevant *travaux préparatoires* in Czech, and, on 22 November, provided English translations of those documents.
75. On 28 November 2016, the Claimant advised that it had searched for *travaux préparatoires* but had been unable to locate any. The Claimant argued that the Respondent had submitted only *travaux préparatoires* that were advantageous to its position and requested the Tribunal to request the United Kingdom to submit *travaux préparatoires* and a statement of how the United Kingdom understands Article 2(2) of the BIT.
76. On 5 December 2016, the Respondent asked the Tribunal to disregard the Claimant's request on the bases that there was no reason why the Claimant could not obtain the *travaux préparatoires*, the Tribunal is not empowered to obtain a statement from the United Kingdom and, in any event, such a statement would be irrelevant.
77. On 19 December 2016, the Tribunal advised that it had noted both Parties' submissions concerning the *travaux préparatoires*, and that it would consider the weight and relevance to be given to the material submitted by the Respondent.

### 3. Costs Submissions

78. On 6 January 2017, the Tribunal invited the Parties to file submissions on how costs should be allocated in this matter, and the actual costs incurred.
79. On 20 January 2017, the Parties made their respective submissions.
80. On 24 January 2017, the Respondent requested leave to respond to the Claimant's submission on costs.
81. On 25 January 2017, the Tribunal granted the Respondent leave to respond by 27 January 2017, and granted the Claimant a right of reply to the response made by the Respondent by 1 February 2017. The Tribunal also invited the Claimant to file the invoices supporting the costs referred to in its submissions by 27 January 2017.
82. On 27 January 2017, the Respondent made submissions in response to the Claimant's submission on costs, in particular concerning the Claimant's entitlement to recover a contingency fee paid to its counsel for legal services.
83. The Claimant submitted the invoices in support of the costs referred to in its cost submissions on the same day.
84. On 1 February 2017, the Claimant made submissions in reply to the Respondent's submissions of 27 January 2017.
85. The Parties' respective costs submissions are discussed further in Part V.

### 4. Extension of the Time Limit for Making a Final Award and Closure of the Proceedings

86. On 19 December 2016, the Tribunal wrote to the SCC explaining the developments that had occurred since the Hearing and requesting an extension to the time for making a Final Award to 17 February 2017.
87. On 20 December 2016, the SCC referred the Tribunal's request to the Parties and invited them to submit any comments by 23 December 2016.
88. On 28 December 2016, the SCC granted the Tribunal the requested extension of time for making the Final Award to 17 February 2017.
89. On 9 February 2017, the Tribunal closed the arbitral proceedings.
90. On 10 February 2017, the Respondent advised the Tribunal that it had on that day received a copy of an Award on Jurisdiction in the matter of *A11Y Ltd v. Czech Republic* relating to the interpretation and scope of Article 2(3) of the BIT. The Respondent requested the Tribunal to re-open the proceedings and grant the Respondent leave to submit the decision as a legal exhibit in support of its case on the basis that Article 2(3) of the BIT is one of the provisions relied upon by the Claimant in this proceeding.
91. At the Tribunal's invitation, on 13 February 2017, the Claimant provided comments on the Respondent's request. The Claimant argued that there were no grounds for re-opening the proceedings, referring, among other things, to the fact that the matter had

been thoroughly addressed by both Parties in their submissions and that the Tribunal remained obliged to reach a correct and just interpretation of the BIT irrespective of the interpretation reached by the tribunal in *A11Y Ltd v. Czech Republic*.

92. On 13 February 2017, the Tribunal wrote to the SCC requesting a further extension of the time limit for making a Final Award, to 10 March 2017, on the basis that the Tribunal had been seized of additional requests by the Parties concerning costs and the re-opening of the proceedings, and that the work schedules of its members had compelled travel and thus timing difficulties.
93. The same day the SCC referred the Tribunal's request to the Parties and invited any comments by 15 February 2017.
94. On 15 February 2017, both Parties having agreed to the requested extension, the SCC determined 10 March 2017 to be the time limit for rendering the Final Award.
95. On 16 February 2017, the Tribunal, having considered the Parties' respective submissions, declined to re-open the proceedings. As a result, it confirmed that the Award of 9 February 2017, which was attached to the Respondent's letter of the same date, would not be considered by the Tribunal.

### III. JURISDICTION OF THE ARBITRAL TRIBUNAL

96. The Respondent submits that the Tribunal does not have jurisdiction to determine the Claimant's claims for breach of the BIT. Specifically, the Respondent submits that:
  - (a) the BIT was terminated upon the Respondent's accession to the European Union in May 2004;
  - (b) in any event, the Claimant has made no investment under the BIT; and
  - (c) in any event, Article 8(1) of the BIT (the dispute resolution provision) only provides jurisdiction to determine the Claimant's claim for breach of Article 5 and not Article 2(2).
97. The Tribunal addresses each of these arguments in turn.

#### A. Whether the BIT Was Terminated Upon the Respondent's Accession to the European Union

98. The Respondent argues that the BIT was terminated when it became a member State of the European Union ("*EU*") on 1 May 2004 by virtue of Article 59 of the Vienna Convention on the Law of Treaties ("*VCLT*").<sup>1</sup>
99. In the alternative, the Respondent argues that, even if the BIT was not terminated, Article 8(1) is no longer valid by virtue of Article 30(3) of the VCLT.<sup>2</sup>

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<sup>1</sup> Statement of Defence and Memorial on Jurisdiction, Section 2.4.

<sup>2</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.4.3.

1. **Whether the BIT Was Terminated *In Toto* Pursuant to Article 59 of the VCLT**

(a) **The Parties' Positions**

100. Article 59 of the VCLT provides:

*“A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.”*

101. The Respondent argues that the BIT and the EU Treaties relate to the same subject-matter, in that they protect investments made by the nationals of one Member State in the territory of another Member State.<sup>3</sup> In particular, the Respondent points to:

- (a) Article 49 of the Treaties on the Functioning of the European Union (“*TFEU*”) *et seq* which provide the right of establishment and prohibit restrictions on the rights of nationals of a Member State in the territory of another member State, and Article 16(2) of the Charter of Fundamental Rights which recognises the freedom to conduct business in accordance with EU law and national laws and practices. The Respondent argues that these provisions are the equivalent of Article 2(1) of the BIT in that they create favourable conditions for investors of other EU Member States;<sup>4</sup>
- (b) Article 18 of the TFEU which prohibits discrimination between nationals of Member States based on their nationality. The Respondent argues that this provision is equivalent to Articles 2(2) and 3 of the BIT;<sup>5</sup>
- (c) Article 17 of the Charter of Fundamental Rights which provides that no one shall be deprived of his or her possessions. The Respondent argues that this provision is equivalent to Article 5 of the BIT;<sup>6</sup> and
- (d) Article 63 of the TFEU *et seq* which grants the freedom of movement of capital between Member States. The Respondent argues that this provision is equivalent to Article 6 of the BIT, which guarantees the unrestricted transfer of investments and returns.<sup>7</sup>

102. Accordingly, the Respondent argues, the protection offered by the EU treaties is equivalent to that offered by the BIT and therefore the latter is no longer in force by virtue of Article 59 of the VCLT.

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<sup>3</sup> Statement of Defence and Memorial on Jurisdiction, Section 2.4; Statement of Rejoinder and Reply on Jurisdiction, Section 2.3.2.

<sup>4</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 133.

<sup>5</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 134.

<sup>6</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 135.

<sup>7</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 119; Statement of Rejoinder and Reply on Jurisdiction, ¶ 136.

103. The Claimant submits that the BIT remains in force despite the Respondent's accession to the EU.<sup>8</sup>
104. First, the Claimant points out that the process prescribed for termination of the BIT in Article 14 – notably written notice from one party to the other – has not been followed.<sup>9</sup> The Claimant notes that Article 65(1) of the VCLT contains the same notice requirement for termination.<sup>10</sup> Therefore, the Claimant says, the BIT must still be effective.
105. Second, the Claimant submits that the TFEU does not regulate the “*same subject-matter*” as the BIT, as required by Article 59 of the VCLT.<sup>11</sup> The Claimant submits that “*same subject-matter*” must be read strictly such that “*same*” should be treated as meaning “*identical*”.<sup>12</sup> The Claimant submits that the objects of the BIT and the TFEU are not the same: specifically, it cannot be said that the object of TFEU is the protection of foreign investment. In addition, the Claimant says that investor rights under the BIT are wider and more specific than under the TFEU. In particular, the Claimant denies that the TFEU protects against expropriation, and notes that it does not provide an equivalent of Article 8(1) of the BIT, the dispute resolution clause.<sup>13</sup>
106. Third, the Claimant says that even if the BIT has been terminated, it would still be in force pursuant to Article 14 which provides that its provisions will remain in effect for fifteen years from the date of termination.<sup>14</sup>
107. Fourth, the Claimant invokes Article 65(4) of the VCLT which provides that “*nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.*” It argues that this means that, even if the BIT has been terminated, the Tribunal's jurisdiction to determine claims for breaches of the BIT would remain intact.<sup>15</sup>
108. Fifth, the Claimant says that the question of whether accession to the EU terminates bilateral investment treaties entered into by Member States has already been considered

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<sup>8</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 101-138; Statement of Surrejoinder, ¶¶ 45-84. The Claimant argues that the Czech-Cyprus bilateral investment treaty also remains in force for the same reasons. The Claimant relies upon the Czech-Cyprus bilateral investment treaty in arguing the Tribunal has jurisdiction to determine their claims for breach of Article 2(2) of the BIT.

<sup>9</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 105-107.

<sup>10</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 108. Article 65(1) of the VCLT provides: “*A Party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it, or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.*”

<sup>11</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 112.

<sup>12</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 113-115; Statement of Surrejoinder, ¶¶ 61, 63.

<sup>13</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 119-120, 137; Statement of Surrejoinder, ¶¶ 66-68.

<sup>14</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 109, 138; Statement of Surrejoinder, Section 3.4.

<sup>15</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 109.

and answered in the negative. The Claimant refers to *Eastern Sugar* and *EUREKO v. Slovakia* in this regard.<sup>16</sup>

109. By way of reply, the Respondent submits that neither Article 14 of the BIT nor Article 65 of the VCLT apply in these circumstances.<sup>17</sup> The Respondent argues that Article 14 only applies in the circumstances of ordinary termination following the procedure in the BIT, which is not the case here.<sup>18</sup> The Respondent says that Article 65(1) of the VCLT only applies to disputes under Part V of the VCLT (which is not the case here), and Article 65(4) does not apply in circumstances where the dispute settlement clause itself is invalid.
110. The Respondent submits that the requirement that the two treaties relate to the “*same subject-matter*” does not mean that the two treaties must be co-extensive in all respects.<sup>19</sup> The Respondent concedes that the scope of the TFEU is substantially wider than that of the BIT, but maintains that it nevertheless has the purpose and effect of promoting and protecting investments of one Member State’s investors in other Member States.
111. The Respondent further concedes that EU law does not provide for an investor-State arbitration mechanism, but argues that it nevertheless grants access to effective dispute settlement before domestic courts of Member States and the EU courts.<sup>20</sup>
112. Finally, in its Statement of Surrejoinder on Jurisdiction, and at the hearing, the Claimant referred to a further provision of the TFEU which it says supports its position. That is Article 351, which provides:

*“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.”<sup>21</sup>*

### **(b) The Tribunal’s Decision**

113. The Tribunal was not convinced by the Respondent’s interpretation, which was barely pursued at the Final Hearing.
114. First, as a treaty law matter, assuming there is no incompatibility between the provisions of subsequent treaties, there are two conditions under Article 59 of the VCLT for a treaty to be terminated by the effect of the conclusion of a later treaty: the two treaties under consideration – here, the BIT concluded in 1990 and the TFEU which was acceded by the Czech Republic in 2004 – must “*relat[e] to the same subject matter*” and it must “*appear[] from the later treaty or [be] otherwise established that the parties intended that the matter should be governed by that treaty*”.

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<sup>16</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 111.

<sup>17</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.4.1.

<sup>18</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 118.

<sup>19</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.4.2.

<sup>20</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 137.

<sup>21</sup> Statement of Surrejoinder, ¶ 77; Tr. 3 October 2016, 9:2-5.

115. The Tribunal does not find that the BIT and the TFEU have the same subject matter. The object and purpose of the BIT is the “*promotion and protection of investments*”, whereas the TFEU is concerned with the “*functioning of the European Union*”. Article 1(1) of the TFEU further makes clear that it is designed to “*organise[] the functioning of the Union and determine[] the areas of, delimitation of, and arrangements for exercising its competences.*”
116. Even assuming, as argued by the Respondent, a substantive overlap between certain provisions of the TFEU and those of the BIT – the right of establishment under Article 49 TFEU as the substantive equivalent of the promotion of investments under Article 2(1) of the BIT; the prohibition of discrimination under Article 18 TFEU as the substantive equivalent of Articles 2(2) and 3 of the BIT on fair and equitable treatment, national treatment and most-favored-nation treatment; the prohibition of deprivation of possession under Article 17 of the Charter of Fundamental Rights as the substantive equivalent of prohibition of expropriation under Article 5 of the BIT; and Article 63 TFEU on the freedom of movement and capital as the substantive equivalent of the repatriation of investment and returns under Article 6 of the BIT – the Tribunal does not find that it appears from the TFEU itself, or that it is otherwise established that the parties to the TFEU intended the promotion and protection of investments to be governed by that instrument. In fact, the TFEU does not address the subject of the promotion and protection of investments at all. In any event, the Tribunal is not convinced that the above TFEU provisions are substantive equivalents of the provisions of the BIT, in particular in light of the absence of an important substantive protection in the TFEU, that of investors’ access to an international and neutral dispute resolution forum in the form of international arbitration.
117. Second, in the absence of an automatic termination resulting from the operation of Article 59 of the VCLT, the Tribunal notes that the parties to the BIT, the Czech Republic and the United Kingdom, never sought to terminate the BIT following the procedures set out by that instrument. In this respect, the Tribunal notes that provisions such as the survival clause contained at Article 14 of the BIT show the significance, for the parties to the BIT, of a lasting protection, over a period of fifteen years, of investments made in reliance on the BIT’s regime. Against this background, the notion that the provisions of the BIT would vanish by the effect of the mere existence of the TFEU, without any of the treaty law safeguards and mechanisms being triggered, can hardly be reconciled with the requirements of legal certainty and transparency, or with the actual requirements of the VCLT.
118. The Tribunal concludes, on these bases, that the BIT was not terminated in toto pursuant to Article 59 of the VCLT and the Respondent’s jurisdictional objection on this basis is dismissed.

## **2. Whether Article 8(1) is No Longer Valid Pursuant to Article 30(3) of the VCLT**

### **(a) The Parties’ Positions**

119. The Respondent argues that, even if the BIT was not terminated by its accession to the EU, Article 8(1) is incompatible with the TFEU and is therefore no longer valid pursuant to Article 30(3) of the VCLT.
120. Article 30(3) of the VCLT provides in relevant part:



*“(1) [...] the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs [...] (3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.”*

121. The Respondent argues that the dispute resolution provision in Article 8(1) of the BIT is not compatible with Articles 344 and 267 of the TFEU.<sup>22</sup>

122. Article 344 of the TFEU provides that *“Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”* The Respondent says that Article 8(1) of the BIT is incompatible with this provision because it stipulates an agreement of Member States to submit disputes to arbitration and therefore provides a method of settlement other than those provided by the EU treaties.<sup>23</sup>

123. Article 267 of the TFEU provides in relevant part:

*“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*

*(a) the interpretation of the Treaties;*

*(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*

*Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*

*Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. [...]*”

124. The Respondent argues that the survival of Article 8(1) of the BIT would mean that Member States could erode the application of Article 267 of the TFEU by transferring disputes from national courts to arbitral tribunals. To the extent the BIT would give the Tribunal the discretion to decide on matters concerning EU treaties, this would be incompatible with Article 267 of the TFEU.<sup>24</sup>

125. The Claimant responds that Article 344 of the TFEU only covers disputes among Member States, and not individuals and Member States as is the case under Article 8(1) of the BIT.<sup>25</sup> Therefore, the Claimant says, Article 344 does not apply to the case at

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<sup>22</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.4.3.

<sup>23</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 145.

<sup>24</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 146.

<sup>25</sup> Statement of Surrejoinder, ¶ 56.

hand. The Claimant also argues that the EU has never had any competence, whether exclusive or shared, in the field of arbitration as a dispute settlement method.<sup>26</sup>

### (b) The Tribunal's Decision

126. Given its earlier finding that the BIT and the TFEU do not have the same subject matter (*see supra*, paragraphs 113-116), the Tribunal does not find that there is an incompatibility between the dispute resolution mechanisms under Article 8(1) of the BIT and Articles 344 and 267 of the TFEU.
127. The Tribunal further notes that Article 344 of the TFEU concerns EU Members States' undertaking to submit to the dispute resolution mechanism of the TFEU for the "*interpretation or application of the Treaties* [namely, the TFEU and the Treaty on European Union, as per Article 1(2) of the TFEU]"; likewise, Article 267 of the TFEU concerns the exclusive jurisdiction of the EU Court of Justice for "*the interpretation of the Treaties*". The Tribunal notes, in this respect, that it is called to interpret and apply the BIT, not the TFEU or the Treaty on European Union. Conversely, and subject to its determination of the Respondent's remaining jurisdictional objections, this Tribunal has jurisdiction only to determine matters of interpretation and application of the BIT between the disputing Parties and in relation to the present dispute.
128. As a result, this Tribunal having and exercising jurisdiction under the BIT does not create an incompatibility with Article 267 of the TFEU and the EU Court of Justice's jurisdiction to interpret and apply the TFEU. The Respondent's jurisdictional objection on this basis is therefore dismissed.

## B. Whether the Claimant Made an Investment under the BIT

### (a) The Parties' Positions

129. The Claimant's claims arise out of its attempts to enforce an arbitral award obtained on 16 December 1997 against its former business partner, VDI Kyjovan ("*Kyjovan*") in the Czech Republic. After obtaining the award, the Claimant commenced various enforcement proceedings in the Czech Republic, which it says were largely unsuccessful as a result of undue delay or inactivity on the part of the Czech courts.
130. The Claimant submits that the Respondent, through the inactivity of its judiciary, has unlawfully expropriated the Claimant of the value of the arbitral award, and breached the fair and equitable treatment and full protection and security standards in Article 2(2) of the BIT.
131. The Parties dispute whether the Claimant has made an investment under the BIT.
132. The Claimant argues that the relevant investments for the purposes of the BIT are a "*contractual claim to damages confirmed by the arbitration award*" and a "*right to arbitrate*".<sup>27</sup>
133. Article 1 of the BIT defines "*investment*":

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<sup>26</sup> Statement of Surrejoinder, ¶ 57.

<sup>27</sup> Statement of Claim, ¶ 103.

*“For the purposes of this Agreement:*

*the term “investment” means every kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity and in particular, though not exclusively, includes:*

*movable and immovable property and any other related property rights including mortgages, liens or pledges;*

*shares in and stock and debentures of a company and any other form of participation in a company;*

*claims to money or to any performance under contract having a financial value;*

*intellectual property rights, goodwill, know-how and technical processes;*

*business concessions conferred by law or, where appropriate under the law of the Contracting Party concerned, under contract, including concessions to search for, cultivate, extract or exploit natural resources.”*

134. The Claimant argues that a contractual claim to damages constitutes an investment pursuant to Article 1(a)(iii) of the BIT, which defines as an investment “*claims to money or to any performance under contract having financial value.*”<sup>28</sup> The Claimant refers in this respect to the decision in *Saipem v. Bangladesh*. The Claimant also invokes the Preamble of the BIT, which states that one of its purposes is the “*stimulation of business initiative*”. The Claimant argues that failure to accord protection to a claim recognised in a final, enforceable arbitral award would conflict with this purpose.
135. In the alternative, the Claimant submits that an arbitral award may be considered a right *in rem*.<sup>29</sup> In this regard, the Claimant argues that arbitral awards are considered property under international law and cites the *Stran Greek* case which was decided before the European Court of Human Rights. In that case, the Court held that the applicants’ right to the sums in an arbitration award constituted a “*possession*” within the meaning of Article 1 of Protocol 1 of the European Convention on Human Rights. The Claimant submits that it is entitled to rely on that Article by way of both the VCLT and Article 11 of the BIT.
136. The Claimant argues that the right to arbitrate also constitutes an investment pursuant to Article 1(a)(iii) of the BIT.<sup>30</sup> The Claimant refers to the Preamble of the BIT which provides that the contracting parties act “*in the spirit of the principles of the Final Act of the Conference on Security and Cooperation in Europe signed at Helsinki on 1 August 1975.*” The Claimant submits that the Helsinki Act referred to in the Preamble contains important principles for the interpretation of the BIT and that it underscores the role of arbitration as a method of settlement of international disputes.
137. In this regard, the Claimant refers to *ATA v. Jordan* in which the tribunal found that the right to arbitration constituted a distinct “*investment*” pursuant to the BIT under consideration in that case. The Claimant argues that it has been deprived of not only

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<sup>28</sup> Statement of Claim, Section VI.5.2.1.

<sup>29</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 198-199.

<sup>30</sup> Statement of Claim, Section VI.5.2.2.

the monetary value of the arbitral award, but its right to arbitrate has also been frustrated.

138. In addition, the Claimant argues that its right to damages arising out of Kyjovan's breach of its agreement with the Claimant represents a continuation of the Claimant's original monetary investment. The Claimant relies upon *White Industries v. India* in this regard, in which the tribunal stated that "*awards made by tribunals arising out of disputes concerning "investments" made by "investors" under BITs represent a continuation or transformation of the original investment.*"
139. The Respondent denies that an arbitral award may constitute an investment as defined in the BIT.<sup>31</sup> The Respondent refers to *Gea Group Aktiengesellschaft v. Ukraine* which it says has decided this issue.<sup>32</sup> In that case, the tribunal distinguished between a contract (which may or may not be considered an investment) and an award for damages in favour of one party arising from breach of that contract by the other party. The Respondent submits that the tribunal held that even if the contract could be considered an investment, an award deriving from it cannot be considered an investment simply by reason of the fact that it rules on rights in the contract. The tribunal held that "*the Award itself involves no contribution to, or relevant economic activity within Ukraine [the host state in that case].*" The Respondent argues that *Gea Group* is directly analogous to the case at hand.
140. The Respondent also submits that several tribunals have refused to consider claims from one-off commercial transactions as an investment even where the applicable BIT included "*claims for money*" as a form of investment.<sup>33</sup> The Respondent cites *Joy Mining v. Egypt* and *Romak v. Uzbekistan* in this regard.
141. In addition, the Respondent argues that even if the Claimant made an investment, no investment existed when the proceedings were initiated.<sup>34</sup> The Respondent submits that under international law, a claimant must meet the jurisdictional requirements for its claim at the point in time when the proceedings regarding the dispute are initiated. The Respondent cites the *Arrest Warrant* case, *Vivendi II v. Argentina*, *Goetz v. Burundi* and *LETCO v. Liberia* in this regard.
142. The Respondent submits that even taking the earliest possible date for the commencement of these proceedings – the date of filing of the Notice of Dispute, being 1 March 2013 – the Claimant fails to meet this requirement as it no longer had any claim against Kyjovan at that time. The Respondent notes that the insolvency proceedings against Kyjovan were terminated on 6 May 2011 and Kyjovan was de-registered from the commercial registry on 18 September 2012.<sup>35</sup> The Respondent submits that the Claimant's investment ceased to exist on that day.

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<sup>31</sup> Statement of Defence and Memorial on Jurisdiction, Section 2.3; Statement of Rejoinder and Reply on Jurisdiction, Section 2.3.1.

<sup>32</sup> *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011 (**Exhibit RL-21**).

<sup>33</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.3.1.

<sup>34</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.3.2.

<sup>35</sup> Extract from the Commercial Register showing Kyjovan (**Exhibit C-3**); Section 68(1) of Act No. 513/1991, the Commercial Code (**Exhibit RL-90**).

143. The Respondent has taken no position on whether the right to arbitrate may constitute an investment under the BIT, as advanced by the Claimant.
144. By way of reply, the Claimant concedes that there is no unanimity in the case law and among commentators as to whether an arbitral award itself may be considered an investment.<sup>36</sup> However, it submits that the *Gea Group* decision should not be followed and notes that it has been criticized by the tribunal in *White v. India* as an “*incorrect departure from the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning “investment” made by “investors” under BITs represent a continuation or transformation of the original investment.*”<sup>37</sup> The Claimant re-emphasises that the award is a continuation of its original investment, notes that the purposes of the BIT is to promote and protect investment, and submits that there is an “*ever closer link*” between arbitration and investments in host states.
145. The Claimant argues that its contract with Kyjovan was not a “*one-off commercial transaction*” but was intended to be the basis for long-term cooperation between the two.<sup>38</sup>
146. The Claimant rejects the Respondent’s argument that it had no investment when these proceedings were initiated.<sup>39</sup> The Claimant argues that the jurisdiction of the Tribunal is established by Article 1 of the BIT (in that it defines “*investment*” to include “*all investments, whether made before or after the date of the entry into force of this Agreement*”) and the rule of “*intertemporality*” as stated in *Las Palmas* and codified in Article 28 of the VCLT. In any event, the Claimant submits that the insolvency or liquidation of Kyjovan did not extinguish its claim against Kyjovan, which it says had already been transformed into the arbitral award.
147. Further, in its Statement of Surrejoinder on Jurisdiction, the Claimant has advanced an alternative argument, namely that the Tribunal has jurisdiction to determine breaches of Article 1 of Protocol 1 of the ECHR based on Article 8(1) of the BIT in connection with Articles 5(1) and 11.<sup>40</sup> The Claimant submits that breach of Article 1 of Protocol 1 may be considered as a measure having effect equivalent to expropriation, and therefore the Tribunal has jurisdiction over the issue pursuant to Article 8(1).
148. The Claimant, however, “*abstains from making any arguments on the substance of this claim, noting that it has from the very beginning of the present dispute referred, besides the breaches of the BIT, to the breaches of the ECHR by District Court in Hodonin.*”<sup>41</sup>

### (b) The Tribunal’s Decision

149. The Tribunal’s task is to interpret Article 1(a) of the BIT, which defines the term “*investment*”.

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<sup>36</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 195.

<sup>37</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 200.

<sup>38</sup> Statement of Surrejoinder on Jurisdiction, ¶ 89.

<sup>39</sup> Statement of Surrejoinder on Jurisdiction, Section 5.2.

<sup>40</sup> Statement of Surrejoinder on Jurisdiction, Section 5.1.

<sup>41</sup> Statement of Surrejoinder on Jurisdiction, ¶ 101.

150. As a preliminary matter, the Tribunal does not deem it necessary to inquire into the question whether the requirements of a contribution, certain duration and an element of risk are met in this instance, given that this arbitration was brought under the SCC Arbitration Rules, not the ICSID Arbitration Rules under which the so-called *Salini* test has been developed in arbitral case law in relation to Article 25 of the 1965 ICSID Convention.
151. The Tribunal notes that “*investment*” under the BIT is defined broadly, covering “*every kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity*”. Under this definition, a final and binding arbitral award granting damages qualifies as an “*asset belonging to an investor*”. This is further confirmed by the non-exhaustive list provided at Article 1(a), which refers, under point (iii), to “*claims to money or to any performance under contract having a financial value*”. In their ordinary meaning, the words “*claims to money*” encompass a party’s right under an award to be paid a sum of money, a right that can be pursued in enforcement proceedings. It follows that the Claimant, who prevailed in the arbitration and who has an entitlement to the damages granted to it by the 1997 Award, has a “*claim to money*” which it was entitled to pursue before the Czech courts. Likewise, the Claimant may be said to have a “*claim to ... performance under contract having a financial value*”, by the effect of the 1997 Award which recognized its contractual rights.
152. The Tribunal notes that the Claimant’s debtor, Kyjovan, was put in insolvency and ultimately de-registered from the commercial registry in September 2012 in the period between 1997, when the award was rendered, and the initiation of this arbitration in 2015 (or, at the earliest, in 2013 with the filing of the Notice of Dispute). However, the Claimant’s claim to money under the 1997 Award cannot be said to have disappeared *ipso facto* by the effect of Kyjovan’s liquidation. That claim survived through the 1997 Award, which is still in force. The Claimant’s entitlement under the 1997 Award is a question distinct from the question whether the Claimant would have been able to enforce it against the assets of an entity other than Kyjovan following the latter’s liquidation.
153. It follows from the above that the 1997 Award qualifies as a claim to money or to performance under contract having financial value within the meaning of Article 1(a) of the BIT, and that this Tribunal has jurisdiction over the present dispute. This finding is distinct from the merits question of whether the Claimant was effectively prevented from enforcing its title under the 1997 Award and whether its claim to money, but for the Respondent’s actions or inactions, would have been satisfied.
154. Having found that the Claimant’s entitlement under the Award constitutes a claim to money and, thus, an investment protected under Article 1(a) of the BIT, the Tribunal does not find it necessary to address the Claimant’s additional argument relating to its right to arbitrate.

**C. Whether the Tribunal Has Jurisdiction to Determine Alleged Breaches of Article 2(2) of the BIT**

155. Article 8(1) of the BIT provides:

*“Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four months from written notification of a claim, be submitted to arbitration under paragraph (2) below if either party to the dispute so wishes.”*

156. The Respondent argues that the Tribunal does not have jurisdiction to determine claims for breach of Article 2(2) of the BIT. According to the Respondent, pursuant to Article 8(1) the Tribunal may hear claims for breaches of Articles 2(3), 4, 5, and 7 of the BIT only.<sup>42</sup>
157. Although implicitly admitting that Article 8(1), on its face, does not provide jurisdiction to hear claims for breaches of Article 2(2), the Claimant argues that the Tribunal has jurisdiction to determine alleged breaches of Article 2(2) through two avenues.<sup>43</sup>
158. First, the Claimant observes that the bilateral investment treaty between the Respondent and Cyprus contains a more favourable dispute resolution clause which it, as a company incorporated in the United Kingdom, may invoke by virtue of Article 3 of the BIT (the “most-favoured-nation” provision).<sup>44</sup>
159. Second, and in the alternative, the Claimant argues that Articles 2(3) and 8(1) of the BIT, when read together, provide jurisdiction to hear claims for breaches of Article 2(2).<sup>45</sup>
160. The Tribunal considers below each of the arguments put forward by the Claimant.

**1. Whether the Tribunal Has Jurisdiction Pursuant to Article 3 of the BIT and the Czech-Cyprus BIT**

**(a) The Parties’ Positions**

161. The Claimant argues that Article 3 of the BIT (the most-favoured-nation provision) allows it to rely on the more favourable dispute resolution clause contained in the Czech-Cypriot BIT.<sup>46</sup>
162. Article 3 of the BIT provides:

*“(1) Each Contracting Party shall ensure that under its law investments or returns of investors of the other Contracting Party are granted treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.*

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<sup>42</sup> Statement of Defence and Memorial on Jurisdiction, Section 2.1; Tr. 3 October 2016, 52:18-69:19.

<sup>43</sup> Statement of Claim, Section IV.4.1; Statement of Reply and Counter-memorial on Jurisdiction, Part 1; Statement of Surrejoinder, ¶¶ 39-43.

<sup>44</sup> Statement of Claim, Section IV.4; Statement of Reply and Counter-memorial on Jurisdiction, Part 1; Tr. 3 October 2016, 6:21-8:23; Tr. 6 October 2016, 51:5-56:15.

<sup>45</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 92-100.

<sup>46</sup> Statement of Claim, Section IV.4; Statement of Reply and Counter-memorial on Jurisdiction, Section 1.

*(2) Each Contracting Party shall ensure that under its law investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, are granted treatment not less favourable than that which it accords to its own investors or to investors of any third State.”*

163. The Claimant observes that Article 8(2)(d) of the Czech-Cypriot BIT confers more favourable dispute resolution rights. In particular, it notes that this provision covers, broadly, “*any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment*”. The Claimant also observes that, contrary to the BIT in this case, Article 8(3) of the Czech-Cypriot BIT provides that “*arbitral awards shall be final and binding on both parties to the dispute and shall be enforceable in accordance with the domestic legislation*”.<sup>47</sup> Accordingly, according to the Claimant, Article 3 of the BIT should operate to broaden the types of disputes that can be arbitrated under Article 8(1) of the BIT to include those that can be arbitrated under the Czech-Cypriot BIT.<sup>48</sup>
164. The Claimant makes several textual and contextual arguments in support of this interpretation.
165. First, the Claimant argues that the words “*enjoyment*” and “*treatment*” in Article 3 must entail enforcement of an investor’s rights, and therefore must cover dispute resolution.<sup>49</sup> It further states that the term “*most-favoured*” must be given full effect such that every rule which is more favourable to nationals of a third State must be able to be relied upon by the Claimant.<sup>50</sup>
166. Second, the Claimant invokes the principle of *expressio unius* in support of its position.<sup>51</sup> The Claimant notes that Article 7 of the BIT expressly excludes customs unions and tax treaties from the scope of application of Article 3(2). The Claimant argues that if the parties to the BIT had likewise intended to exclude the dispute resolution clause from Article 3(2), they would have done so expressly. The Claimant notes that this was the reasoning of the tribunal in *RosinvestCo v. Russia* in relation to similar clauses in the UK-USSR bilateral investment treaty.
167. Third, the Claimant argues that the UK model BIT which was published shortly after the BIT was concluded suggests that the UK had always understood the most-favoured-nation provision in the bilateral investment treaties it concluded as including dispute resolution.<sup>52</sup> Article 3(3) of the UK model BIT of 1991 provided: “*For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provision of Article 1 to 11 of this Agreement.*”

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<sup>47</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 6-9.

<sup>48</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 5.

<sup>49</sup> Statement of Claim, ¶ 89.

<sup>50</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 1.4.1.

<sup>51</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 1.4.2; Statement of Surrejoinder on Jurisdiction, Sections 1.1 and 1.2.

<sup>52</sup> Statement of Claim, ¶ 79.



168. Fourth, the Claimant emphasises the “*inextricable link*” between access to arbitration and their substantive rights as investors.<sup>53</sup> It says that neither diplomatic protection nor the domestic courts are viable means of resolving this dispute, and notes that it has been litigating this matter for 20 years before the Respondent’s courts. It submits that without access to arbitration, its substantive rights as an investor are not real or effective.
169. Fifth, the Claimant invokes Article 18 of the TFEU which imposes a duty on the Respondent not to discriminate against nationals of EU Member States on the basis of nationality.<sup>54</sup> The Claimant argues that this must entail incorporation of the dispute resolution clause from the Czech-Cypriot BIT into this BIT, since any other interpretation would discriminate against UK citizens compared to Cypriots.
170. The Claimant affirms that its position is supported by the *National Grid v. Argentina* decision, which was based on the UK-Argentina BIT. The Claimant states that the most-favoured-nation clause in that BIT was identical to the Article 3 of this BIT, and that the tribunal allowed extension of the clause to dispute resolution on the basis that the investors’ substantive rights would not be enforceable.<sup>55</sup> The Claimant also refers to *Gas Natural, RosinvestCo v. Russia, Maffezini, Impregilo* and *Siemens v. Argentina* which it says support the inclusion of dispute resolution in the most-favoured-nation clause.<sup>56</sup>
171. The Respondent argues that Article 3 of the BIT does not apply to the dispute resolution provision in Article 8(1) for four reasons.<sup>57</sup>
172. First, the Respondent argues that the wording of Article 3 makes clear that it does not apply to dispute resolution.<sup>58</sup> In particular, the Respondent makes the following points.
- (a) Article 3 only applies to rights granted under the domestic law of the host State (“*under its law*”). The Respondent says that this means that all an investor can ask for is for the host State to not apply its domestic law less favourably to an investor than it does to investors of third States, or grant the latter rights under its domestic law that it does not grant to the former. Article 3 therefore does not permit the Claimant to invoke a right under an international treaty.
  - (b) The term “*treatment*” in Article 3 refers only to substantive rights and does not include the right to arbitration. The Respondent refers to *Daimler v. Argentina* in this regard.
  - (c) Article 3(2) refers to “*management, maintenance, use, enjoyment or disposal of their investments*” and therefore not to dispute resolution. This contrasts to other “most-favoured-nation” provisions which refer to treatment “*in all matters*” and which have, in limited circumstances, been found to apply to dispute

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<sup>53</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 1.3.

<sup>54</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 1.4.3.

<sup>55</sup> Statement of Claim, ¶ 81.

<sup>56</sup> Statement of Claim, ¶¶ 81-83.

<sup>57</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.

<sup>58</sup> Statement of Defence and Memorial on Jurisdiction, Section 2.2.1.2.1; Statement of Rejoinder and Reply on Jurisdiction, Sections 2.2.1-2.2.3.

resolution. The Respondent refers to *Plama v. Bulgaria* and *Wintershall v. Argentina* in this regard.

173. Second, the Respondent takes the view that the BIT's *travaux préparatoires* and the treaty practice of the parties to the BIT show that they did not intend for Article 3 in this BIT to apply to the dispute resolution clause.<sup>59</sup>
174. As regards the BIT's *travaux*, the Respondent argues that they show that Czechoslovakia (as it was at the time) was hesitant to conclude BITs with broad dispute resolution clauses at the time this BIT was negotiated. In addition, continues the Respondent, the BIT's *travaux* show that Czechoslovakia insisted on limiting the wording of the broad most-favoured-nation clause of the UK model BIT to treatment granted under domestic law.<sup>60</sup>
175. As regards the treaty practice of the parties to the BIT, the Respondent's view is that it confirms its position.<sup>61</sup> The Respondent points out that after the publication of the UK model BIT in 1991, the UK deleted Article 3(3) in subsequent treaties when it agreed on a narrow dispute resolution clause.<sup>62</sup> The Respondent also notes that both parties had commonly used broad dispute resolution clauses and argues that they must therefore be taken to have deliberately limited the dispute resolution clause in this BIT.<sup>63</sup>
176. In this relation, the Respondent referred, during the Hearing, to the award in *Venezuela US SRL*, in which the tribunal found that even if the most-favoured-nation clause does refer to dispute resolution, that is not sufficient to substitute consent to arbitrate.<sup>64</sup>
177. Third, the Respondent argues that the context of Article 3 within the BIT shows that it does not apply to dispute resolution.<sup>65</sup> The Respondent points out that adopting the interpretation advocated by the Claimant would mean that the limitation in Article 8(1) would have no meaning or effect, which would be contrary to basic principles of treaty interpretation.
178. The Respondent argues that, in light of the specific wording of Article 3, the *expressio unius* principle should not apply to broaden the scope of the Article. In this regard, the Respondent submits that the reasoning of the tribunal in *RosinvestCo v. Russia* is flawed and should not be followed. The Respondent refers to *Austrian Airlines v. Slovakia* and *EURAM v. Slovakia* in which it says that tribunals deciding very similar provisions held that the narrowing of the dispute resolution provisions indicated that the parties to the

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<sup>59</sup> Statement of Defence and Memorial on Jurisdiction, Section 2.2.1.2.2; Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.5.

<sup>60</sup> Tr. 3 October 2016, 59:1-17.

<sup>61</sup> Statement of Defence and Memorial on Jurisdiction, Section 2.2.1.2.2; Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.6; Tr. 6 October 2016, 35:6-19.

<sup>62</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 91; Tr. 6 October 2016, 44:14-45:9.

<sup>63</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.6; Tr. 3 October 2016, 57:7-15.

<sup>64</sup> Tr. 6 October 2016, 45:10-46:5.

<sup>65</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.4.

relevant BIT did not intend the most-favoured-nation clause to apply to it, and that the application of *expressio unius* makes no sense.<sup>66</sup>

179. Fourth, the Respondent maintains that international arbitration practice underlines that Article 3 cannot be used to import dispute resolution clauses.<sup>67</sup> The Respondent refers to *Hochtief v. Argentina*, *Wintershall v. Argentina*, *Telenor Mobile v. Hungary* and *Plama v. Bulgaria* which it says established that, in the absence of a very clear indication in the most-favoured-nation clause, it cannot be assumed that the clause was intended to apply to substitute consent to arbitration when such consent was lacking in the basic treaty.
180. According to the Respondent, the case law referred to by the Claimant does not assist it. In particular, the Respondent argues that in none of these cases was the jurisdiction of the tribunal based on the dispute resolution clause of a third treaty, and that the tribunals merely found that procedural obstacles could be overcome by reliance on the most-favoured-nation clause.<sup>68</sup>
181. The Respondent denies that the exclusion in Article 8(1) means that investors are left without any means of enforcing the substantive rights not referred to in that Article. In response to the Tribunal's questions at the Hearing, the Respondent suggested that investors could invoke diplomatic protection, or seek protection in another forum such as the national courts.<sup>69</sup> In any event, the Respondent argues that the enforceability of certain substantive rights in the BIT is beside the point and cannot undo the plain wording of Article 8(1).<sup>70</sup>
182. By way of reply, the Claimant makes the following points.<sup>71</sup>
183. First, it rejects the Respondent's contention that the term "*treatment*" in Article 3 refers only to substantive rights and not to procedural rights, including the right to arbitrate. The Claimant argues that the term should be interpreted in accordance with the purpose of the BIT to encompass the protection of investors and investments, and thus also the procedural rights granted in the arbitration clause. It says that the purpose of Article 3 is non-discrimination among the nationals of third States, and that this calls for an extensive interpretation rather than a restrictive one.
184. Second, the Claimant argues that the application of the *expressio unius* principle is required by the VCLT. Referring to *Austrian Airlines* and *EURAM v. Slovakia* decisions, which have been relied upon by the Respondent, the Claimant maintains that they did not follow the method of treaty interpretation mandated by Article 31 and 32 of the VCLT, and therefore do not represent good precedent.

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<sup>66</sup> Statement of Defence and Memorial on Jurisdiction, Section 2.2.1.2.3; Tr. 3 October 2016, 63:9-64:14.

<sup>67</sup> Statement of Defence and Memorial on Jurisdiction, Section 2.2.1; Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.8.

<sup>68</sup> Statement of Defence and Memorial on Jurisdiction, Section 2.2.2.1.

<sup>69</sup> Tr. 3 October 2016, 54:10-18; Tr. 5 October 2016, 177:12-17; Tr. 6 October 2016, 49:16-50:12.

<sup>70</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.7.

<sup>71</sup> Statement of Surrejoinder on Jurisdiction, Section 1.

185. Third, the Claimant submits that the *travaux préparatoires* of the BIT are of no or minimal assistance in this case as they were not prepared by the Respondent but by its predecessor, the Czech and Slovak Federal Republic.<sup>72</sup> As far as the Respondent is concerned, it maintains that, although the *travaux* were prepared in 1988 and 1989 by the predecessor communist Government, it is unlikely that the BIT was negotiated by the new non-communist Government that came into power at the end of December 1989 alone, with the BIT being signed in July 1990.<sup>73</sup> The *travaux* can therefore serve as an aid to interpretation of the BIT, continues the Respondent.
186. Fourth, the Claimant concedes that Article 3 is limited to rights granted by Czech law, but submits that international treaties form part of Czech law pursuant to Article 10 of the Czech Constitution which provides: “*Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.*”<sup>74</sup> Thus, the Claimant says, Article 3(2) of the BIT applies to the provisions of the Czech-Cypriot BIT, and as a result the right to arbitrate is part of Czech domestic law.
187. The Claimant also emphasises that Article 38 of the Czech Bill of Rights guarantees the right to a “*lawful*” judge.<sup>75</sup> It says that case law has established that a “judge” under Article 38 includes an international judge. By analogy, the Claimant says, this must extend to international arbitrators. The Claimant submits in this regard that the Tribunal is the sole body which may provide legal protection to the Claimant’s investment.

### (b) The Tribunal’s Decision

188. Although it was impressed by the extensive and sophisticated character of the Parties’ arguments relating to the scope of Article 8(1) of the BIT, the Tribunal has found the answer to this question to be straightforward, given the language used in the BIT.
189. Article 8(1) of the BIT sets out the types of disputes that can be submitted to arbitration. These are “[d]isputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former”. Thus, Article 8(1) expressly provides that only certain types of breaches can be submitted to arbitration: those concerning Article 2(3) (the effect of specific agreements entered into by investors); Article 4 (compensation for losses, in situations of armed conflict, national emergency or civil disturbances); Article 5 (expropriation); and Article 6 (repatriation of investment and returns).

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<sup>72</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 1.4.4. The Claimant initially disputed that, under Article 32 of the VCLT, recourse could be had to *travaux* where a meaning had already been derived by interpretation in accordance with Article 31 of the VCLT. The Claimant subsequently accepted that *travaux* “*may serve as confirmation of the interpretation result under the general rule of interpretation.*” See Statement of Surrejoinder, ¶ 18.

<sup>73</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.5.

<sup>74</sup> Statement of Surrejoinder, Section 1.4 (translation provided by the Claimant); Tr. 6 October 2016, 43:10-21.

<sup>75</sup> Statement of Surrejoinder, ¶ 32.

190. The Tribunal finds, in light of the express language of, and comprehensive enumeration under, Article 8(1), that the standards of fair and equitable protection and full protection and security, which are contained in Article 2(2) of the BIT, are excluded from the scope of the Respondent's consent to arbitration and cannot, accordingly, provide a basis for a claim under the BIT.
191. Likewise, the majority of the Tribunal has found it determinative that the most-favoured-nation provisions at Article 3 of the BIT are excluded from the scope of Article 8(1), which defines the jurisdiction of this Tribunal. In the majority's view, it follows from this specific exclusion that an investor, such as the Claimant in this case, cannot rely on Article 3 of the BIT to import more favourable dispute resolution provisions found in another investment treaty.
192. Given that the BIT expressly excludes Article 3 from the scope of investor-State arbitration, the majority of the Tribunal has found that the questions of the scope of Article 3 (the meaning of "*treatment*", "*under its laws*", or "*management, maintenance, use, enjoyment or disposal*"), the impact of the UK model BIT on the interpretation of this BIT, or whether access to arbitration is a procedural or substantive right become moot. The majority recognises, in the latter respect, that the exclusion of Article 2(2) from the scope of investor-State arbitration results in situations where an investor is not able to enforce the standards under that provision. On this issue, the Respondent pointed to the avenues of diplomatic protection or recourse to national courts during the Hearing. However, the text of Article 8(1) of the BIT does not set forth any such recourse, with the consequence that breaches of Article 2(2) cannot be remedied through judicial or arbitral proceedings. That said, the Tribunal is bound by the express language of the BIT, which reflects a choice made by its drafters, and cannot rewrite Article 8(1) or substitute provisions taken from other investment treaties for those that have expressly been included by the drafters of the BIT. In the majority's view, this ends this Tribunal's inquiry.
193. Professor Reinisch took the view that the fact that Article 8(1) does not encompass the BIT's most-favoured-nation clause does not, *per se*, exclude this Tribunal's jurisdiction (to the extent the most-favoured-nation clause were to be read to include access to dispute settlement). Because the effect of a most-favoured-nation clause is a question of how it is formulated, he noted that, in the present case, Article 3 of the BIT expressly relates the most-favoured-nation treatment to treatment "*under* [a Contracting Party's] *laws*", which implies that such treatment only concerns treatment under the domestic law of the Contracting Parties. Thus, investors are entitled to claim that under the host State's law they should receive the same treatment as investors from third countries; however, this provision cannot be understood as permitting an investor to demand treatment which the host State has promised to third party investors in any international agreement like a BIT with a third country.
194. It follows from the above that the Tribunal does not have jurisdiction to hear claims based on Article 2(2) of the BIT through the operation of Article 3 of the BIT.

## 2. Whether Articles 8(1) and 2(3) May be Interpreted to Confer Jurisdiction to Hear Claims for Breach of Article 2(2)

### (a) The Parties' Positions

195. The Claimant also argues that Articles 8(1) and 2(3) may be read together to confer jurisdiction to hear claims for breach of Article 2(2).<sup>76</sup>

196. Article 2(3) provides:

*“Investors of one Contracting Party may conclude with the other Contracting Party specific agreements, the provisions and effect of which, unless more beneficial to the investor, shall not be at variance with this Agreement. Each Contracting Party shall, with regard to investments of investors of the other Contracting Party, observe the provisions of these specific agreements, as well as the provisions of this Agreement.”*

197. The Claimant relies on the second sentence of the provision, and submits that “*the provisions of this Agreement*” must include Article 2(2) of the BIT. It submits that this provision, therefore, provides an alternative ground on which the Tribunal can hear claims for breach of Article 2(2).

198. The Respondent argues that the Claimant’s interpretation of Article 2(3) is based on an improper reading of the second sentence of the Article.<sup>77</sup> The Respondent notes that all the first sentence does is to provide that investment contracts between an investor and the host State cannot contain terms that are less beneficial for the investor than the BIT itself. The Respondent submits that the second sentence is the necessary corollary of the first, and provides that the host State shall observe the provisions of those investment contracts that it concludes and the provisions of the BIT where they are more favourable. Thus, the Respondent argues that Article 2(3) only applies to situations where there is a specific investment agreement.

199. The Respondent further argues that the adoption of the Claimant’s interpretation would lead to strange results. First, it would mean that the express limitation in Article 8(1) would have no meaning or effect. Second, Article 2(3) itself would be redundant since all of the provisions of the BIT are already binding on the host State.<sup>78</sup>

### (b) The Tribunal’s Decision

200. The Tribunal was not convinced by the Claimant’s interpretation of Article 2(3).

201. *First*, Article 2(3) of the BIT cannot provide an alternative basis for jurisdiction under Article 2(2) where none otherwise exists. To the extent Article 8(1) of the BIT has expressly excluded Article 2(2) from its scope, the Tribunal cannot, through Article 2(3), reintroduce into the scope of investor-State arbitration the provisions of Article 2(2).

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<sup>76</sup> Statement of Surrejoinder, ¶¶ 39-43.

<sup>77</sup> Tr. 3 October 2016, 64:15-65.

<sup>78</sup> Tr. 3 October 2016, 68:13-69:19.

202. *Second*, and in any event, the Tribunal does not find that Article 2(3) has the scope which the Claimant suggests. The object of this provision appears to be to impose upon the parties to the BIT an obligation to recognise the existence of specific agreements benefiting investors and establish the principle according to which the provisions of such specific agreements or the BIT apply, whichever are more favourable. Any other interpretation would render meaningless Article 2(3) or the exclusions under Article 8(1) of the BIT.
203. It follows that the Tribunal cannot have jurisdiction over breaches of Article 2(2) through the operation of Article 2(3) of the BIT.

\* \* \*

204. Having found that it has jurisdiction to hear this dispute, but only insofar as alleged breaches of Article 5 of the BIT are concerned, the Tribunal will proceed to the merits of the Claimant's case on this basis.

#### **IV. MERITS**

##### **A. Summary of the Parties' Positions**

205. In 1997, the Claimant obtained an arbitral award in the sum of approximately CZK 4.8 million against its business partner, Kyjovan (the "**1997 Award**"). The Claimant then commenced various enforcement proceedings before the Czech courts, seeking to enforce the 1997 Award against Kyjovan's bank accounts, movable goods and subdebtors. Although the Claimant was granted several of the enforcement orders it sought, it argues that the courts unduly delayed in issuing these and that during this time Kyjovan became bankrupt. Accordingly, the Claimant argues that it has been deprived of the value of the 1997 Award by the courts. The Claimant argues that the Czech courts' conduct amounts to indirect, creeping expropriation, in breach of Article 5 of the BIT.
206. The Respondent denies that there were any delays on the part of the courts and argues that any delay to the enforcement proceedings was caused by the Claimant and by the intervention of Kyjovan. The Respondent argues that the conduct complained of by the Claimant would not, in any event, amount to expropriation.

##### **B. Facts**

207. The Claimant is a company incorporated in the United Kingdom.
208. Following the collapse of the Soviet Union, the Claimant saw an opportunity in the Czech Republic in the automobile accessories industries. For this purpose, it went into business with a manufacturing cooperative in the Czech Republic, Kyjovan. In 1990, the Claimant and Kyjovan entered into a joint venture agreement, pursuant to which

they incorporated a further company, Sprint a.s., registered in the Czech Republic.<sup>79</sup> Sprint a.s. was in the business of the manufacturing of automobile accessories.<sup>80</sup>

209. A dispute arose subsequently between the Claimant and Kyjovan regarding Kyjovan's performance of its obligations under the joint venture agreement, in particular its obligation to provide gas and electricity to the premises occupied by Sprint a.s.<sup>81</sup>
210. On 16 December 1997, the Claimant obtained an arbitral award against Kyjovan at the Court of Arbitration of the Chamber of Commerce. The 1997 Award ordered Kyjovan to pay damages of CZK 4,812,170 with six percent interest per annum from 16 July 1993.<sup>82</sup>
211. The Claimant subsequently commenced proceedings seeking to enforce the 1997 Award. Each of the enforcement proceedings is described in the following subsections.

**1. Enforcement Proceedings No. 347/98 (*Kyjovan's bank account*)**

212. On 24 February 1998, the Claimant commenced proceedings at the District Court of Hodonin seeking enforcement of the 1997 Award by levy on Kyjovan's bank account.<sup>83</sup>
213. Following a complaint by the Claimant, on 2 September 1998 the Chairman of the District Court wrote to the Claimant apologising for the delays to the proceedings.<sup>84</sup> The Chairman stated that the Claimant's complaint was justified and that it was evident that there had been delays since the initiation of the proceedings. The Chairman personally apologised to the Claimant for the delays and stated that he had taken steps to ensure the immediate continuance of the proceedings.
214. The Claimant subsequently requested the Minister of Justice to intervene to accelerate the proceedings. The Claimant received a reply on 1 December 1999, stating that the District Court had "*adopted corresponding organizational and staff measures and actions to improve conditions of labour in the execution department which should contribute to quicker settlement of the execution cases.*"<sup>85</sup>
215. The Respondent says that on 23 November 1999 and 4 February 2000 the Claimant supplemented its application by adding bank account numbers.<sup>86</sup> The Claimant did not respond to this assertion.

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<sup>79</sup> Extract from the Commercial Register showing Sprint a.s. (**Exhibit C-1**).

<sup>80</sup> Statement of Claim, ¶ 13.

<sup>81</sup> Arbitral Award dated 16 December 1997, Rsp. 94/93 (**Exhibit C-7**).

<sup>82</sup> *Ibid.*

<sup>83</sup> Petition commencing proceedings no. E 347/98 (**Exhibit C-9**).

<sup>84</sup> Letter from Head of District Court of Hodonin dated 2 September 1998 (**Exhibit C-51**).

<sup>85</sup> Letter from Minister of Justice, dated 1 December 1999 (**Exhibit C-32**).

<sup>86</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 174.



216. At this time, the Claimant and Kyjovan were engaged in a related dispute about the right of Sprint a.s. to use a warehouse on land owned by Kyjovan. On 2 February 2000, Kyjovan, in the context of this dispute, issued an invoice to the Claimant for the use of the warehouse.<sup>87</sup> Kyjovan then alleged to have set-off its invoiced claim against the claim deriving from the Claimant's 1997 Award.
217. On 25 February 2000, Kyjovan applied for termination of the enforcement proceedings based on this alleged set-off.<sup>88</sup>
218. On 30 March 2000, the Hodonin District Court stayed the proceedings pending the outcome of Kyjovan's application.<sup>89</sup> The Claimant successfully appealed this decision, however, and the same court reversed the stay and decided to continue the proceedings on 14 April 2000.<sup>90</sup> Kyjovan's application was ultimately not granted.<sup>91</sup>
219. On 12 May 2000, the Claimant filed a further complaint regarding delays by the Court.<sup>92</sup>
220. The Hodonin District Court subsequently granted the enforcement order on 14 August 2000.<sup>93</sup> Kyjovan appealed this to the Brno Regional Court on 19 September 2000.<sup>94</sup> The Respondent says that Kyjovan was then requested to file further evidence for its alleged set-off, which it failed to do.<sup>95</sup>
221. On 18 August 2000, Mr. Ivan Peter Busta, a director and shareholder of the Claimant, published an article in a Czech newspaper describing his negative experiences doing business in the Czech Republic and seeking protection through the judicial system.<sup>96</sup>
222. In response to the article, on 21 September 2000, the judges of the Hodonin District Court, including the judge appointed to the enforcement proceedings, signed a collective declaration of bias against Mr. Busta and requested that his claims be heard in another court.<sup>97</sup> This was later found to have been a violation of Mr. Busta's constitutional rights by the Czech Constitutional Court, in July 2001.<sup>98</sup> The Claimant

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<sup>87</sup> Invoice of 2 February 2000 (**Exhibit R-19**).

<sup>88</sup> Submission of Kyjovan dated 25 February 2000 (**Exhibit R-38**).

<sup>89</sup> Decision District Court Hodonín of 30 March 2000 (**Exhibit C-10; Exhibit R-39**).

<sup>90</sup> Claimant's appeal against decision of District Court of Hodonin of 30 March 2000 (**Exhibit C-11**)  
Decision District Court Hodonín of 14 April 2000 (**Exhibit R-40; Exhibit C-12**).

<sup>91</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 176.

<sup>92</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 177.

<sup>93</sup> Enforcement order, dated 14 August 2000 (**Exhibit C-13; Exhibit R-41**).

<sup>94</sup> Kyjovan's appeal against enforcement order dated 18 September 2000 (**Exhibit R-42**).

<sup>95</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 179.

<sup>96</sup> Article dated 18 August 2000 (**Exhibit C-36**).

<sup>97</sup> Letter from judges of the District Court of Hodonín dated 21 September 2000 (**Exhibit C-37**).

<sup>98</sup> Decision of the Constitutional Court dated 3 July 2001 (**Exhibit C-38**).

says that due to this declaration of bias, it was unable to recover anything against the enforcement order.<sup>99</sup>

223. The Respondent states that the enforcement order became “*final and effective*” on 22 September 2000.<sup>100</sup> The entry into force, however, was not recorded on the order until 15 March 2013, as shown by a stamp of that date.<sup>101</sup> The Claimant maintains that this stamp is significant, pursuant to section 307 of the Code of Civil Procedure:

*“(1) Regarding the fact that the decision ordering the enforcement by the court became enforceable the court shall inform the financial institution; this information shall be delivered to the financial institution into own hands.*

*(2) After this the financial institution shall pay the claim from the account of the obliged party.”<sup>102</sup>*

224. The Claimant submits that because the order was not recorded as entering into legal force until 2013, it could not have been sent to Kyjovan’s bank, and therefore the bank could not pay the Claimant.<sup>103</sup> The Claimant has submitted the photographs of the delivery notes attached to the order showing that they were sent to Kyjovan’s bank, and other debtors, on 5 September 2000, before the stamp of legal force was applied.<sup>104</sup>

225. The Respondent points out that section 307 only requires the court to “*inform*” the financial institution that the enforcement order has become enforceable, and does not require the court to send a copy of the order itself, or to make any other record of the notification.<sup>105</sup>

226. Further, the Respondent notes that the Claimant received payments of approximately CZK 1.5 million from CSOB Bank.<sup>106</sup> The Claimant does not deny this, but argues that these were made by the bank voluntarily and not pursuant to the enforcement order.<sup>107</sup> The Respondent argues that the suggestion that the bank would make payments voluntarily is absurd.<sup>108</sup> The Respondent points out that it requested correspondence between CSOB Bank and the Claimant, and that this request was granted by the Tribunal, but that no documents were produced.<sup>109</sup> The Respondent

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<sup>99</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 160 (“*The reason why not a single Czech crown was not [sic] enforced from these accounts was that all judges of OS Hodonin court have declared themselves biased and requested to be dismissed from hearing the cases on 21.9.2000.*”).

<sup>100</sup> Enforcement order, stamped as at 15 March 2013 (**Exhibit C-58**).

<sup>101</sup> *Ibid.*

<sup>102</sup> Section 307 of the Czech Code of Civil Procedure (**Exhibit C-59**).

<sup>103</sup> Tr. 5 October 2016, 98:25-99:6.

<sup>104</sup> Enforcement order showing delivery notes (**Exhibit C-61**).

<sup>105</sup> Tr. 5 October 2016, 132:3-134:1; Letter from the Respondent to the Tribunal dated 21 October 2016.

<sup>106</sup> Statement of Claim, ¶ 191; Statement of Reply and Counter-memorial on Jurisdiction, ¶ 162.

<sup>107</sup> *Ibid.*

<sup>108</sup> Tr. 5 October 2016, 133:5-134:2; Statement of Rejoinder and Reply on Jurisdiction, ¶ 201.

<sup>109</sup> Tr. 5 October 2016, 133:20-134:2; Letter from the Respondent to the Tribunal dated 21 October 2016.

argues that the inference to be drawn from this is that these documents would confirm that the bank made the payments as a result of the court order.<sup>110</sup>

227. On 31 March 2001, Kyjovan was declared bankrupt.<sup>111</sup> The payments received from CSOB Bank were received after this date, in June 2001 and December 2004.<sup>112</sup>

228. The Claimant argues that these enforcement proceedings were delayed by the Hodonin District Court for 25 months between the time when they were initiated in February 1998 and the time when they were suspended in March 2000. The Claimant refers to the Hodonin District Court's apology of September 1998 as an acknowledgment of the undue delays caused by it.<sup>113</sup> The Claimant states that the Hodonin District Court then wrongly suspended the proceedings, as it recognised by its reversal of that decision. The Claimant also states that the Hodonin District Court delayed the entry into legal force of the enforcement order for 13 years.

229. The Respondent argues that the Hodonin District Court was not inactive in these proceedings and points out that it granted the enforcement order sought by the Claimant, who was then able to recover "*very significant*" sums from CSOB bank.<sup>114</sup>

## 2. Enforcement Proceedings no. 2029/98 (*Kyjovan's movable goods*)

230. On 14 October 1998, the Claimant sought to enforce the 1997 Award against Kyjovan's movable goods.<sup>115</sup> In particular, the Claimant sought an order in the Hodonin District Court for the sale of goods and prohibiting their disposal.

231. A court fee was requested on 9 November 1998 and paid by the Claimant on 19 November 1998.<sup>116</sup>

232. The order was granted on 1 December 1998.<sup>117</sup> The Claimant was requested in the order to pay a further fee: "*Note to counsel Dr. Brož on payment of cost of proceedings securing the assets in the amount of 19 500 CZK.*"<sup>118</sup>

233. The Claimant requested an explanation for this requested fee on 21 December 1998.<sup>119</sup> The Claimant explained that there was genuine lack of clarity as to why the fee was

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<sup>110</sup> Letter from the Respondent to the Tribunal dated 21 October 2016.

<sup>111</sup> Decision of the Regional Court in Brno declaring the bankruptcy of Kyjovan dated 30 March 2001 (**Exhibit C-14**).

<sup>112</sup> Statement of Claim, ¶ 191; Statement of Reply and Counter-memorial on Jurisdiction, ¶ 162.

<sup>113</sup> Tr. 5 October 2016, 102:3-103:17.

<sup>114</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 181.

<sup>115</sup> Petition commencing proceedings E 2029/98, dated 14 October 1998 (**Exhibit C-15**).

<sup>116</sup> Request for payment of court fee dated 9 November 1998 (**Exhibit R-43**); Payment receipt dated 19 November 1998 (**Exhibit R-44**).

<sup>117</sup> Enforcement order, dated 1 December 1998 (**Exhibit C-16**).

<sup>118</sup> This is visible on the translation of the enforcement order of 1 December 1998 submitted by the Respondent as **Exhibit R-45**). The Claimant accepts that the order requested payment of CZK 19,500: Statement of Reply and Counter-memorial on Jurisdiction, ¶ 164.

<sup>119</sup> Letter from the Claimant to the District Court dated 21 December 1998 (**Exhibit C-54**).

payable.<sup>120</sup> The Respondent argues that this fee was a deposit for the costs arising from securing Kyjovan's assets, and was clearly payable pursuant to section 327(2) of the Czech Code of Civil Procedure which provides that "*the court shall only secure the property if the beneficiary makes an advance payment to such costs*".<sup>121</sup>

234. On 11 July 2000, the Claimant wrote to the Hodonin District Court, taking note that the Court had clarified the reason for the requested fee in March 2000, namely an "*advance for the settlement of the costs connected with seizure of the things*",<sup>122</sup> and paid the court fee.<sup>123</sup> The Respondent emphasises that the Claimant was completely inactive from 21 December 1998, when it requested clarification of the court fee, until 11 July 2000.<sup>124</sup>
235. In March 2000, Kyjovan had applied to have the 1997 Award set aside.<sup>125</sup> In July 2000, the District Court held a hearing to determine whether or not to stay the enforcement proceedings, given the risk that they would have to be terminated depending on the outcome of Kyjovan's application to set-aside the 1997 Award. On 13 July 2000, the District Court decided to stay the proceedings.<sup>126</sup>
236. The Claimant appealed this decision to the Brno Regional Court on 4 August 2000.<sup>127</sup> Kyjovan was declared bankrupt on 31 March 2001, before the appeal was heard.<sup>128</sup> In view of Kyjovan's bankruptcy, the Brno Regional Court held that the proceedings were automatically stayed, and did not proceed to determine the merits of the Claimant's appeal.<sup>129</sup>
237. The Claimant argues that the enforcement proceedings were delayed by the Hodonin District Court's failure to respond to the Claimant's request for clarification of the court fee for 15 months, and the Hodonin District Court's subsequent decision to stay the proceedings which the Claimant says was unlawful. The Claimant also notes that Kyjovan's application to set-aside the 1997 Award was later found by the District Court in Prague 7 to be "*entirely unreasonable*."<sup>130</sup>
238. The Respondent argues that it was clear under the Court Fee Act precisely what fee the Claimant was required to pay and why.<sup>131</sup> Had the Claimant paid the deposit earlier, the Respondent says that the Hodonin District Court would have made a decision whether

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<sup>120</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 164.

<sup>121</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 206.

<sup>122</sup> Letter from the Claimant to the District Court dated 11 July 2000 (**Exhibit C-55**).

<sup>123</sup> Payment Receipt of 13 July 2000 (**Exhibit R-47**).

<sup>124</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 209.

<sup>125</sup> Submission of Kyjovan of 11 March 1998, (**Exhibit R-8**).

<sup>126</sup> Protocol of the Hearing of 13 July 2000 (**Exhibit R-48**); Decision District Court Hodonín of 13 July 2000 (**Exhibit R-49**).

<sup>127</sup> Claimant's appeal dated 4 August 2000 (**Exhibit C-18**).

<sup>128</sup> Decision of the Regional Court in Brno declaring the bankruptcy of Kyjovan dated 30 March 2001 (**Exhibit C-14**).

<sup>129</sup> Decision Regional Court Brno of 9 August 2001 (**Exhibit R-50**).

<sup>130</sup> Decision District Court of Prague 7 of 19 March 2001 (**Exhibit R-10**).

<sup>131</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 3.2.1.4.

to stay the proceedings one and a half years earlier. By the time the Claimant took the required steps, the Respondent says it was too late for the Brno Regional Court to decide on whether the District Court's decision to stay the enforcement proceedings in view of Kyjovan's setting aside application was legitimate or not.<sup>132</sup> In any event, the Respondent says that the Hodonin District Court's decision to stay the proceedings pending resolution of Kyjovan's setting aside application was within its discretion as afforded to the Court by Section 266 of the Code of Civil Procedure.<sup>133</sup>

### 3. Enforcement Proceedings no. 2576/98 (*Kyjovan's subdebtors*)

239. On 30 November 1998, the Claimant commenced proceedings in the Hodonin District Court seeking to enforce the 1997 Award against Kyjovan's subdebtors, being the tenants of a property Kyjovan owned.<sup>134</sup>
240. The Hodonin District Court requested payment of the court fee on 7 January 1999,<sup>135</sup> and the enforcement order was granted on 5 March 1999.<sup>136</sup>
241. Kyjovan appealed against the order to the Brno Regional Court on 22 March 1999.<sup>137</sup> The Brno Regional Court rejected Kyjovan's appeal on 3 September 1999.<sup>138</sup>
242. On 29 September 1999, the Claimant applied to the Hodonin District Court to amend the account number on the enforcement order.<sup>139</sup> The Claimant says that this was a "*technical and easily solvable problem*", and had no effect on the enforcement given that the subdebtors had been prohibited in the order from paying rent to Kyjovan.<sup>140</sup>
243. The Hodonin District Court amended the enforcement order on 20 December 1999 to reflect the corrected bank account number.<sup>141</sup>
244. On 8 February 2000, Kyjovan applied to have enforcement proceedings discontinued on the basis of its alleged claim for set-off in relation to the warehouse.<sup>142</sup> This was not granted by the Court, however.
245. On 14 March 2000, the Claimant again applied to amend the bank account number on the enforcement order.<sup>143</sup> The Hodonin District Court amended the enforcement order on 19 April 2000 to reflect this<sup>144</sup>

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<sup>132</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 214.

<sup>133</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 212

<sup>134</sup> Petition for writ of execution on judgment, E2576/98 (**Exhibit C-21**).

<sup>135</sup> Request for Court Fee of 7 January 1999 (**Exhibit R-13**).

<sup>136</sup> Decision of the District Court Hodonín of 5 March 1999 (**Exhibit R-14**).

<sup>137</sup> Appeal of 22 March 1999 (**Exhibit R-15**).

<sup>138</sup> Decision of the Regional Court Brno of 3 September 1999 (**Exhibit R-16**).

<sup>139</sup> Decision of the District Court of Hodonín of 20 December 1999 (**Exhibit R-17**).

<sup>140</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 169; Tr. 5 October 2016, 114:17-115:1, 156:17-157:22 (Mr. Busta).

<sup>141</sup> Decision of the District Court of Hodonín of 20 December 1999 (**Exhibit R-17**).

<sup>142</sup> Kyjovan's motion to discontinue the enforcement dated 8 February 2000 (**Exhibit R-20**).

246. A few months later, on 27 June 2000, the Claimant informed the Hodonin District Court that Kyjovan's subdebtors were not paying the Claimant as ordered.<sup>145</sup>
247. According to the Respondent, on 4 July 2000 Kyjovan advised the Hodonin District Court that it had assigned its contracts with the relevant subdebtors to a wholly-owned subsidiary.<sup>146</sup> The Respondent has produced a letter from Kyjovan addressed to its tenant subdebtors advising of the assignment of the contracts,<sup>147</sup> though no proof of receipt of this letter by the District Court is on the record.
248. On 12 July 2000, the Hodonin District Court contacted the subdebtors.<sup>148</sup> The subdebtors advised the Court that they had been informed by Kyjovan about the alleged set-off and therefore they did not consider themselves obliged to comply with the enforcement order.<sup>149</sup>
249. The Claimant filed a criminal complaint against Kyjovan's board on 21 August 2000 in respect of the assignment of its contracts with its subdebtors,<sup>150</sup> which was later extended to the subdebtors.<sup>151</sup> The investigation into this complaint was suspended on 9 January 2004.<sup>152</sup>
250. On 25 August 2000, the Hodonin District Court advised the Claimant that it could seek a motion imposing fines on the subdebtors pursuant to section 315 of the Code of Civil Procedure.<sup>153</sup>
251. The Claimant filed an application for the imposition of fines on 15 September 2000, but it made its application pursuant to a different section, section 351 of the Code of Civil Procedure.<sup>154</sup> The Respondent points out that this section concerns unsubstitutable obligations, and says that this was not applicable to the Claimant's situation.<sup>155</sup>
252. The judge assigned to determine the Claimant's application for the imposition of fines was among those who had issued a declaration of bias on 21 September 2000.<sup>156</sup> Due

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<sup>143</sup> Claimant's application to amend account number of enforcement order dated 14 March 2000 (**Exhibit R-21**).

<sup>144</sup> Decision of the District Court of Hodonín of 19 April 2000 (**Exhibit R-22**).

<sup>145</sup> Claimant's notice to the Court dated 27 June 2000 (**Exhibit R-23**).

<sup>146</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 161.

<sup>147</sup> Letter from Kyjovan to the Court dated 4 July 2000 (**Exhibit R-26**).

<sup>148</sup> Court enquiry to subdebtors, dated 12 July 2000 (**Exhibit R-24**).

<sup>149</sup> Subdebtor replies (**Exhibit R-25**).

<sup>150</sup> Claimant's criminal complaint against Kyjovan dated 21 August 2000 (**Exhibit C-28**).

<sup>151</sup> Criminal complaint against subdebtors dated 15 September 2000 (**Exhibit C-29**).

<sup>152</sup> Letter from the Police to the Claimant dated 9 January 2004 (**Exhibit C-31**).

<sup>153</sup> Internal order by the District Court of Hodonín including delivery receipt, dated 25 August 2000 (**Exhibit R-27**).

<sup>154</sup> Claimant's submission dated 15 September 2000 (**Exhibit R-29**).

<sup>155</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 3.2.1.1.

<sup>156</sup> Letter from judges of the District Court of Hodonín dated 21 September 2000 (**Exhibit C-37**).

to this collective declaration of bias, the Claimant's application for the fines was not decided until after the bankruptcy proceedings were commenced against Kyjovan on 30 March 2001.<sup>157</sup> No further steps towards enforcement of the Claimant's claim were made while insolvency proceedings were on foot.

253. In December 2008, once the insolvency proceedings were concluded, the Court finally determined the Claimant's application for the imposition of fines on the subdebtors.<sup>158</sup> This was rejected on the basis that the provision of the Code of Civil Procedure on which the application was based, section 351, was not applicable to subdebtors.
254. The Respondent argues that the Court took the steps requested by the Claimant within a short time, and that the only reason why the Claimant was unable to recover its claim was its own inability to provide the correct account number and Kyjovan's interference with the enforcement proceedings.<sup>159</sup> The Respondent notes that one subdebtor had tried to pay the Claimant but was unable to as the account number was wrong.<sup>160</sup>

#### 4. Enforcement Proceedings no. 525/99 (*additional Kyjovan's subdebtors*)

255. On 17 March 1999, the Claimant initiated enforcement proceedings against several additional subdebtors of Kyjovan in the Hodonin District Court.<sup>161</sup> The Claimant did not pay the court fee upon commencement of the proceeding, which the Respondent argues it was obliged to pay pursuant to the Czech Court Fee Act.<sup>162</sup>
256. On 29 September 1999, the Claimant requested clarification of the court fee.<sup>163</sup> The Claimant says that it was not clear which proceeding the fee was requested for or why.<sup>164</sup> In particular, the Claimant said that these proceedings had been initiated to extend the proceedings 2567/98 already on foot to other subdebtors, and on that basis did not consider that an additional court fee should be payable.<sup>165</sup> The Claimant received no response from the Court to its request for clarification.
257. On 15 May 2000, the Court requested the Claimant to pay the court fee.<sup>166</sup> The Claimant says that this was incomprehensible and that it therefore again requested an

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<sup>157</sup> Decision of the Regional Court in Brno declaring the bankruptcy of Kyjovan dated 30 March 2001 (**Exhibit C-14**); Statement of Defence and Memorial on Jurisdiction, ¶ 164.

<sup>158</sup> Decision of the District Court of Hodonin dated 15 December 2008 (**Exhibit C-27**).

<sup>159</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 166.

<sup>160</sup> Decision of the District Court of Hodonin of 20 December 1999 (**Exhibit R-17**); Tr. 5 October 2016, 125:5-10.

<sup>161</sup> Petition commencing proceedings 525/99, dated 16 March 1999 (**Exhibit C-23**).

<sup>162</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 182; Statement of Rejoinder and Reply on Jurisdiction, ¶ 190.

<sup>163</sup> Claimant's letter dated 19 June 2000 (**Exhibit R-32**).

<sup>164</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 171.

<sup>165</sup> Claimant's letter dated 19 June 2000 (**Exhibit R-32**); Tr. 5 October 2016, 152:23-153:13.

<sup>166</sup> Request for Court fees (**Exhibit R-31**); Statement of Defence and Memorial on Jurisdiction, ¶ 169.

explanation of why the court fee was payable.<sup>167</sup> The Claimant says that it first requested clarification of the court fee by phone, but that the court refused to supply this information, and it therefore made the request for a second time in writing.<sup>168</sup> Mr. Busta confirmed at the Hearing that he resisted paying the fee for this period out of principle, because he thought that the fee was not justified, rather than because he could not afford it.<sup>169</sup>

258. The Claimant ultimately paid the court fee on 4 July 2000.<sup>170</sup>
259. The Court granted the enforcement order on 31 August 2000.<sup>171</sup> However, Kyjovan again informed its subdebtors that it had a claim for set-off and that they therefore did not need to comply with the court order.<sup>172</sup>
260. In addition, on 18 September 2000, Kyjovan filed a motion against the enforcement order based on its alleged set-off.<sup>173</sup> On 1 March 2001, the Court asked Kyjovan for further evidence in support of its motion.<sup>174</sup> The motion was never granted and on 30 March 2001 Kyjovan was declared bankrupt.<sup>175</sup>
261. The Claimant argues that the delay to payment of the court fee was caused by the Court itself in ignoring the Claimant's requests for clarification of what proceeding the fee was payable for, and why.<sup>176</sup> The delays that resulted to the enforcement proceedings are therefore attributable to the Court, according to the Claimant.
262. The Respondent argues that there was no delay on behalf of the Court in these proceedings.<sup>177</sup> The Respondent notes that it took the Claimant more than one year to pay the required court fee for the proceedings to commence, and that once the fee was paid the enforcement order was issued within a few weeks. The Respondent says that court fees are set out clearly in the Czech Court Fee Act, and that the Claimant should not have required clarification.<sup>178</sup>
263. The subsequent delays, the Respondent says, were attributable to intervention by Kyjovan in persuading its subdebtors not to comply with the court order. The

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<sup>167</sup> Claimant's letter dated 19 June 2000 (**Exhibit R-32**); Statement of Reply and Counter-memorial on Jurisdiction, ¶ 171.

<sup>168</sup> Claimant's letter dated 19 June 2000 (**Exhibit R-32**).

<sup>169</sup> Tr. 5 October 2016, 171:4-173:10.

<sup>170</sup> Record of payment of court fee dated 4 July 2000 (**Exhibit R-33**).

<sup>171</sup> Enforcement order dated 31 August 2000 (**Exhibit R-34**).

<sup>172</sup> Debtor replies (**Exhibit R-35**).

<sup>173</sup> Kyjovan's appeal against enforcement order, dated 18 September 2000 (**Exhibit R-36**).

<sup>174</sup> Court request to Kyjovan dated 1 March 2001 (**Exhibit R-37**).

<sup>175</sup> Decision of the Regional Court in Brno declaring the bankruptcy of Kyjovan dated 30 March 2001 (**Exhibit C-14**).

<sup>176</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 172.

<sup>177</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 173; Statement of Rejoinder and Reply on Jurisdiction, ¶¶ 191-192.

<sup>178</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 194.



Respondent says that the Claimant chose not to initiate third-party proceedings against these subdebtors directly, but “*remained passive*” until the bankruptcy proceedings were initiated.<sup>179</sup>

264. The Claimant argues that it subsequently filed a civil suit against 40 of Kyjovan’s subdebtors claiming damages, two of which it recovered against in the sum of CZK 542,944.50.<sup>180</sup>

## C. Analysis

### (a) The Claimant’s Position

265. The Claimant contends that the Respondent expropriated its right to contractual damages – as provided for in the 1997 Award – in a manner that breached Article 5(1) of the BIT.

266. Article 5(1) provides in relevant part:

*“Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. [...]”*

267. Specifically, the Claimant argues that the Respondent has expropriated its investment through the inactivity of its courts.<sup>181</sup> The Claimant submits that this took the form of indirect “*creeping expropriation*”, *i.e.* expropriation through a series of discrete steps by the Czech courts.<sup>182</sup>
268. In the Claimant’s submission, the Czech courts “*placed excessive obstacles in the way of enforcement of rights in the investment, with the final consequence that the investment was substantially deprived of any economic value.*”<sup>183</sup> The Claimant refers to *Loewen v. the United States*, on the basis of which, the Claimant submits, it can be inferred that the manifest denial of justice by courts may lead to situations with consequences analogous to expropriation.
269. The Claimant argues that the expropriatory measure in the present case was “*the failure to enforce an arbitral award by OS Hodonin, in an arbitrary, discriminatory and unreasonable fashion.*”<sup>184</sup> In particular, the Claimant points to the collective declaration of bias made by the judges of the Hodonin District Court, and the Czech Constitutional Court’s finding that this was a violation of the Claimant’s constitutional rights.

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<sup>179</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 193.

<sup>180</sup> Statement of Claim, ¶¶ 35(8), 191; Statement of Reply and Counter-memorial on Jurisdiction, ¶ 178.

<sup>181</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 4.2.1.

<sup>182</sup> Tr. 5 October 2016, 100:18-101:5.

<sup>183</sup> Statement of Claim, ¶ 145.

<sup>184</sup> Statement of Claim, ¶ 146.

270. In short, the Claimant submits that the District Court “*by its unconstitutional, abusive, arbitrary and unprecedented manner of proceeding, carried out in bad faith, attained such a level of intensity of interference with the investment of the Claimant*” that it constitutes a measure having the effect equivalent to expropriation under Article 5 of the BIT.<sup>185</sup> The Claimant urges the Tribunal to consider the conduct of the Respondent as a whole, including that complained of in the proceedings brought by Mr. Busta relating to the goods of Sprint CR.<sup>186</sup>
271. The Claimant argues that indirect expropriation may take the form of omission.<sup>187</sup> In support of this, the Claimant cites the statement of the tribunal in *EUREKO v. Poland* that “*it is obvious that the rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions. Many international arbitral tribunals have held so.*”<sup>188</sup> The Claimant submits that *Olguin v. Paraguay*, which is cited by the Respondent as authority that omissions cannot constitute expropriation, is a “*fact-specific case*” and an exception to the “*general rule in international law*” that an omission can constitute expropriation. The Claimant submits that the other authorities referred to by the Respondent are of limited application.
272. In addition, the Claimant submits that the reference in Article 5 of the BIT to “*measures having effect equivalent to nationalisation or expropriation*” would include omissions in protecting the property, given that the effect of them is equal to taking of the property. The Claimant urges the Tribunal to focus on the effect of non-enforcement of the award by the courts, which was that the Claimant was deprived of the entire value of it.<sup>189</sup>
273. The Claimant submits that expropriation may occur as a result of the lack of legal protection on the part of the national courts, and cites *Amco v. Indonesia* in which the tribunal stated that “*expropriation in international law also exists merely by the state withdrawing the protection of the courts from the owner expropriated*”. The Claimant says that this has been confirmed by *Rumeli v. Kazakhstan*, in which the tribunal stated that “*a taking by the judicial arm of the State may also amount to expropriation.*”<sup>190</sup>
274. The Claimant argues that it is not necessary for it to show that the deprivation was “*irreversible*”, only that it was “*not merely ephemeral*”.<sup>191</sup> The Claimant cites *Middle East Cement* and *Wena Hotels* in support of this. In any event, the Claimant says that due to Kyjovan’s bankruptcy, the effect of the measures was the irreversible deprivation of its rights.
275. The Claimant submits that there is no requirement to establish denial of justice or exhaustion of local remedies in cases of judicial expropriation under this BIT. The

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<sup>185</sup> Statement of Claim, ¶ 150.

<sup>186</sup> Tr. 5 October 2016, 120:24-121:21.

<sup>187</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 4.2.2.

<sup>188</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 230.

<sup>189</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 4.2.3.

<sup>190</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 4.2.2.1.

<sup>191</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 4.2.4.

Claimant cites *Jan de Nul v. Egypt* and *Saipem v. Bangladesh*, and the commentaries by Paulsson, Greenwood and McLachlan, Shore and Weiniger in this regard.<sup>192</sup>

276. Nevertheless, the Claimant argues that it has exhausted its local remedies, and been denied justice in this instance.<sup>193</sup> The Claimant argues that the only way it could enforce the arbitration award was via the courts and that there was no other remedy when the courts refused to act.<sup>194</sup> It notes that it turned to the Constitutional Court in respect of the collective declaration of bias and obtained a ruling in its favour. It also says that it has negotiated in good faith with the Czech Ministry of Finance, to no avail.
277. Nor, the Claimant submits, is it necessary to establish abuse of rights in cases of judicial expropriation.<sup>195</sup> Nevertheless, the Claimant argues that the behaviour of the courts in this case was abusive and unconstitutional.<sup>196</sup> In particular, it points to: (i) the courts' postponement of the enforcement against Kyjovan's movable goods;<sup>197</sup> (ii) the courts' general inactivity, for example its 15-month delay in the sale of Kyjovan's movable goods due to an issue of a court fee;<sup>198</sup> (iii) the collective declaration of bias by the judges, which the Claimant describes as the "*crowning abusive conduct*."<sup>199</sup> The Claimant argues that the courts acted not only illegally, but in contravention of the Constitution, as recognised by the Constitutional Court.
278. The Claimant submits that, as a result of the Respondent's conduct, it has been deprived of the entire value of the arbitral award.<sup>200</sup> The Claimant states, however, that it has recovered CZK 1,959,444.50 from Kyjovan's subdebtors and CZK 1,774,765.30 during the insolvency proceedings.<sup>201</sup> It has therefore excluded these sums from its damages claim.

### (b) The Respondent's Position

279. The Respondent argues that the Claimant's claim for expropriation must fail for the following reasons.
280. First, the Respondent argues that the effect of the alleged omissions by the courts was not expropriatory.<sup>202</sup> The Respondent argues that expropriation requires that an investor be deprived of the value of its investment in whole or at least significant part,

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<sup>192</sup> Statement of Claim, Section IV.5.1; Statement of Reply and Counter-memorial on Jurisdiction, Section 4.2.5.

<sup>193</sup> Statement of Claim, Section IV.5.1; Statement of Reply and Counter-memorial on Jurisdiction, Section 4.2.5.

<sup>194</sup> Tr. 5 October 2016, 101:14-21.

<sup>195</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 306-310.

<sup>196</sup> Statement of Reply and Counter-memorial on Jurisdiction, Section 4.2.6.

<sup>197</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 298

<sup>198</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 301.

<sup>199</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 303.

<sup>200</sup> Statement of Reply and Counter-memorial on Jurisdiction, ¶ 251.

<sup>201</sup> Statement of Claim, ¶ 191.

<sup>202</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 4.1.2.

and that the Claimant has failed to establish that this is the case here. In particular, the Respondent notes that the Claimant says that it has recovered approximately 77 percent of the principal amount of the award.<sup>203</sup>

281. Further, the Respondent argues that it was Kyjovan's bankruptcy that was the reason the Claimant was unable to satisfy its claim.<sup>204</sup> The Respondent says that for its claim to succeed, the Claimant would have to demonstrate that the alleged omissions of the courts rendered the award a "nullity". The Respondent submits that case law has established that an award has to be set-aside for a taking to have occurred, and that delays in enforcement of even as long as ten years are not sufficient to establish expropriation. Since the award remained in legal force, the Respondent argues that no expropriation has occurred.
282. Second, the Respondent argues that expropriation by courts requires the abusive application of the law by the courts and that the Claimant has failed to establish this.<sup>205</sup> The Respondent cites *Saipem v. Bangladesh* in which the tribunal found that for an act of the judiciary to be considered expropriatory, the courts have had to have acted illegally. The Respondent says that the mere misapplication of the law is not sufficient.
283. The Respondent submits that none of the instances of allegedly abusive conduct by the courts meets this threshold.<sup>206</sup> In response to the examples of abusive conduct alleged by the Claimant, the Respondent argues that:
- (a) The Court's decision to postpone the enforcement proceedings against Kyjovan's movables was justified under the Code of Civil Procedure;
  - (b) The Court's alleged "*inactivity*" with respect to the enforcement against Kyjovan's movables was due to the Claimant's failure to pay the deposit, rather than any failure of the Court;
  - (c) The Court's suspension of the enforcement proceedings against Kyjovan's subdebtors between 30 March and 14 April 2000 was inconsequential given that it was only suspended for two weeks. Since the Court quickly reversed its initial decision, this cannot be considered to have been abusive;
  - (d) The Constitutional Court's decision regarding the collective declaration of bias by the judges of the District Court shows that the declaration did not constitute abusive conduct. The Respondent submits that the Constitutional Court had merely exercised the discretion afforded to it under the Code of Civil Procedure in a direction different to that of the Regional Court of Brno, which had confirmed the judges' request to have the proceedings transferred to another forum.<sup>207</sup> At the most, the Respondent submits, the Constitutional Court's judgment showed merely that the judges had not been in line with Czech law, which in the Respondent's view is not sufficient to establish expropriation.

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<sup>203</sup> Tr. 5 October 2016, 140:3-24.

<sup>204</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 4.1.2.2; Tr. 5 October 2016, 140:25-141:19.

<sup>205</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 4.1.3; Tr. 5 October 2016, 142:5-24.

<sup>206</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 4.1.3.2.

<sup>207</sup> Tr. 5 October 2016, 139:14-24, 144:7-25.

284. Third, the Respondent submits that the Claimant must establish that it has exhausted its local remedies, in addition to having been denied justice.<sup>208</sup> The Respondent cites *ATA v. Jordan*, *AFT v. Slovakia*, *Pantehniki v. Albania* and *Toto Costruzioni v. Lebanon* in support of this. The Respondent argues that there was no denial of justice, and, in any event, the Claimant has failed to show that it exhausted its local remedies.
285. Fourth, the Respondent submits that expropriation requires an “*irreversible and permanent deprivation of the economic use of the investment*”.<sup>209</sup> The Respondent argues that the alleged delay in the proceedings does not meet this requirement as this would only ever have been temporary. Further, the Respondent argues that the fact of delay on a claim does not impact the existence of the claim itself.
286. The Respondent argues that the cases cited by the Claimant in support of a more lenient application of this requirement either concerned very significant measures taken against the investors which had effects also after they had been revoked, or were lasting at the time the award was rendered. The Respondent submits that the rationale in those cases does not apply here.
287. Finally, the Respondent argues that the Claimant’s case is one of omission and that omissions of a State are not sufficient to constitute expropriation.<sup>210</sup> The Respondent cites *Olguin v. Paraguay* which stated:

*“For an expropriation to occur, there must be actions that can be considered reasonably appropriate for producing the effect of depriving the affected part of the property it owns, in such a way that whoever performs those actions will acquire, directly or indirectly, control, or at least the fruits of the expropriated property. Expropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place.”*<sup>211</sup>

288. The Respondent also cites *Sea-Land Service Inc. v. Iran*, in which it says that the Iran US Claims Tribunal held that the inaction of a State even if it was aware of the circumstances having a severe impact on the investor’s investment “*can hardly justify a finding of expropriation.*”<sup>212</sup>
289. According to the Respondent, this position is supported by scholarly commentary, notably by *McLachlan, Shore & Weininger* who write that:

*“[...] the Olguin ‘teleologically driven’ test is to be preferred: the Olguin test is more closely connected to the historical origins of expropriation claims; [...] it further recognizes that for most tribunals an assessment of indirect expropriation*

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<sup>208</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 4.1.4.

<sup>209</sup> Statement of Rejoinder and Reply on Jurisdiction, Section 4.1.5.

<sup>210</sup> Statement of Defence and Memorial on Jurisdiction, Section 4.1.3.

<sup>211</sup> *Olguin v. Paraguay* ICISD Case No. ARB/98/5, Award, 26 July 2001 (unofficial English translation) (RL-31), ¶ 84.

<sup>212</sup> Statement of Rejoinder and Reply on Jurisdiction, ¶ 411.

*in any of its forms has not somehow been disconnected from a requirement of State conduct of some sort.”*<sup>213</sup>

### (c) The Tribunal’s Decision

290. For the following reasons, the Tribunal finds that there has been no expropriation of the Claimant’s investment through the inaction of the Czech Courts.
291. The Claimant’s expropriation case is premised on the deprivation of its contractual right to damages through the Czech Courts’ alleged inactivity resulting in the non-enforcement of the 1997 Award.
292. For an expropriation to occur, in the form of direct or creeping expropriation, there must be a permanent and irreversible deprivation. The Tribunal refers in this respect to consistent arbitral case law which establishes that an expropriation takes place where an investor has been permanently deprived of the value of its investment in whole or in significant part.<sup>214</sup> This is reflected in the *Plama v. Bulgaria* decision, which has set out the decisive elements in the evaluation of allegations of expropriation: “(i) *substantially complete deprivation of the economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof (i.e., approaching total impairment); (ii) the irreversibility and permanence of the contested measures (i.e., not ephemeral or temporary); and (iii) the extent of the loss of economic value experienced by the investor.*”<sup>215</sup>
293. On this question, the Tribunal notes that the Claimant has, over the years 2001-2004, managed to recover a substantial portion of the sums due to it under the 1997 Award, either through civil court proceedings against Kyjovan’s subdebtors (CZK 542,944.0) or through successful enforcement proceedings against Kyjovan’s bank accounts (CZK 1.5 million).<sup>216</sup> The Respondent referred in this regard to the recovery of 77 percent of the principal amount under the Award (*see supra*, paragraph 280). The Claimant did not challenge this statement.
294. In the circumstances, it cannot be said that the Claimant was deprived of its claim to money as recognised by the 1997 Award. To the contrary, the 1997 Award was the very premise for the payments received by the Claimant in the civil suit and enforcement proceedings:

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<sup>213</sup> Statement of Defence and Memorial on Jurisdiction, ¶ 233; McLachlan, Shore, Weininger, *International Investment Arbitration – Substantive Principles*, OUP 2007, p. 291 (**Exhibit RL-33**).

<sup>214</sup> For example: *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, (**Exhibit RL-39**), ¶ 116; *Wena Hotels Ltd v Egypt* 41 ILM 896 (2002) (**Exhibit RL-128**), ¶ 99; *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, (**Exhibit RL-40**), ¶ 20.32.

<sup>215</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 193.

<sup>216</sup> The Tribunal notes the Respondent’s request for adverse inferences to be drawn from the Claimant’s failure to produce correspondence between CSOB bank and the Claimant showing that the bank made payments as a result of the Court’s enforcement order, not voluntarily. The Tribunal notes that it would have been helped by such correspondence in its inquiry of the basis on which payments had been made under the 1997 Award. While it does not draw adverse inferences from the absence of such correspondence on the record, the Tribunal does note that the contrary proof was not presented by the Claimant, namely proof that CSOB’s payments were made voluntarily.

- The enforcement order granted by the Hodonin District Court in the Enforcement proceedings E347/98 in respect of Kyjovan’s bank accounts was expressly made “*pursuant to the decision issued by the Arbitration Court at the Chamber of Commerce of the Czech Republic and the Agrarian Chamber of the Czech Republic in Prague, with reference Rsp 94/93, dated 16 December 1997*”, i.e. the 1997 Award.<sup>217</sup>
  - The enforcement order granted by the Hodonin District Court in the Enforcement proceedings E525/99 (in respect of Kyjovan’s subdebtors) was also expressly made “*in accordance with the arbitral award of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic in Prague, file no. Rsp 94/93 dated 16 December 1997.*” It was the subdebtors’ failure to pay pursuant to this enforcement order that formed the basis the Claimant’s civil suit against those subdebtors, through which it recovered CZK 542,944.
295. Nor was the 1997 Award set aside by the Czech Courts. As noted by the Claimant, Kyjovan’s application to set aside the Award was found, in a decision rendered on 19 March 2001 by the District Court for Prague 7, to be “*entirely unreasonable*”.<sup>218</sup>
296. This is not to say that the Claimant did not have difficulty enforcing the 1997 Award, or that such enforcement did not involve a lengthy period. However, on the facts of the case, the Tribunal is not convinced that the deficiencies in the enforcement process could be said to be systematically attributable to the Czech Courts.
297. The history of enforcement court proceedings shows that the Claimant itself made procedural decisions that did not assist in the timely advancement of its position in the court proceedings. Thus, the Claimant:
- failed to pay court fees for a period of 19 months, between 1 December 1998 and 11 July 2000, instead requiring the Court to provide an explanation as to reason underlying the fee before a payment was made (Enforcement proceedings No. 2029/98);
  - failed twice to provide accurate account numbers, with the result that the Claimant had to apply to amend its account number on 29 September 1999 and 14 March 2000; this resulted in unnecessary delays in the enforcement proceedings, and one subdebtor indicating not being able to proceed with a payment (Enforcement proceedings No. 2576/98);
  - failed, when prompted by the Hodonin District Court to seek a motion imposing fines on the recalcitrant subdebtors, to file an application on the basis of the accurate section of the Code of Civil Procedure (invoking section 315 instead of section 351 of the Code) (Enforcement proceedings No. 2576/98); this ultimately resulted in the application being rejected;
  - failed to pay court fees, between 17 March 1999 and 4 July 2000, instead requiring the Court to provide an explanation for the reason underlying the

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<sup>217</sup> Enforcement order, dated 14 August 2000 (**Exhibit C-13; Exhibit R-41**).

<sup>218</sup> Decision District Court of Prague 7 of 19 March 2001 (**Exhibit R-10**).

fee (Enforcement proceedings No. 525/99). At the Hearing, counsel for the Respondent clarified that the “*Claimant was required, in accordance with Czech law, to pay a court fee, exactly as it was in the first proceedings, where it paid this court fee. The court fee amounted to CZK 37,500. Just to give you perspective, at today's conversion rate that's about €1,400.*”<sup>219</sup> This was not disputed by the Claimant. During the Hearing, Mr. Busta, a director of the Claimant, conceded that the court fee “*wasn't a significant amount of money*”, that “[n]othing was preventing [him] from paying that amount”, and that he had the means to pay it.<sup>220</sup>

298. The delays resulting from the above conduct cannot be said to have been caused by the inaction of the Czech Courts. As noted by the Hodonin District Court in its Corrected Resolution of 20 December 1999, when amending the Claimant’s account number for purposes of enforcement, “*it is not the court's fault that [the account] is incorrect, but the entitled entity's fault when originally it stated an incorrect account number*”.<sup>221</sup>
299. Further, in Enforcement proceedings No. 2576/98 and No. 525/99, the reason why certain of Kyjovan’s subdebtors did not comply with court enforcement orders appears to be the obstruction caused by Kyjovan, the Claimant’s debtor who alleged a right to set-off to avoid payment to the Claimant. When asked by the Chairperson about Kyjovan at the Hearing, Mr. Busta referred to it as the “*Manufacturing Union of Invalids*”, a profit-making company receiving “*heavy subsidies*” from the State, but there was no suggestion by the Claimant that Kyjovan was a company owned or controlled by the Respondent, or that Kyjovan would have collided with the Czech Courts or Czech authorities to prevent the Claimant from receiving payment under the 1997 Award.<sup>222</sup> The actions of Kyjovan – including its resistance to the enforcement of the 1997 Award through the initiation of setting aside and its defense of enforcement proceedings – remain those of a private entity acting as such.
300. Finally, the Tribunal notes that, throughout the years, the Claimant enjoyed a number of successes in enforcement proceedings before the Czech Courts. The Tribunal refers in particular to:
- The 2 September 1998 letter from the Head of the Hodonin District Court, apologising for the 6-month delay in the enforcement proceedings;<sup>223</sup>
  - The enforcement order issued on 1 December 1998 by the Hodonin District Court (Enforcement proceedings No. 2029/98);<sup>224</sup>
  - The enforcement order issued on 5 March 1999 by the Hodonin District Court (Enforcement proceedings No. 2576/98);<sup>225</sup>

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<sup>219</sup> Tr. 5 October 2016, 129 :7-12.

<sup>220</sup> Tr. 5 October 2016, 170 :24-173 :10.

<sup>221</sup> **Exhibit R-17**, Decision of the District Court Hodonín of 20 December 1999.

<sup>222</sup> Tr. 5 October 2016, 89:9-12 and 90:15-19.

<sup>223</sup> Letter from Head of District Court of Hodonin dated 2 September 1998 (**Exhibit C-51**).

<sup>224</sup> Enforcement order, dated 1 December 1998 (**Exhibit C-16**).

<sup>225</sup> Decision of the District Court Hodonín of 5 March 1999 (**Exhibit R-14**).



- The Brno Regional Court’s dismissal of Kyjovan’s appeal on 3 September 1999 (Enforcement proceedings No. 2576/98);<sup>226</sup>
- The Hodonin District Court’s dismissal of Kyjovan’s application of 8 February 2000 to have enforcement proceedings discontinued on the basis of its alleged claim for set-off in relation to the warehouse (Enforcement proceedings No. 2576/98);<sup>227</sup>
- The Hodonin District Court’s amendments of the enforcement order on 20 December 1999 and 19 April 2000 (Enforcement proceeding No. 2576/98);<sup>228</sup>
- The Hodonin District Court contacting subdebtors in July 2000 to inquire as to the reason for their non-compliance with its enforcement order (Enforcement proceeding No. 2576/98);<sup>229</sup>
- The enforcement order issued on 14 August 2000 by the Hodonin District Court (Enforcement proceedings No. 347/98).<sup>230</sup> This order was sent to CSOB bank on 5 September 2000,<sup>231</sup> and the Claimant subsequently recovered approximately CZK 1.5 million. In light of this, the Tribunal is not persuaded that the fact that the stamp of entry into force was not applied to the order until March 2013 adversely affected the Claimant’s ability to recover monies pursuant to the order;
- The Hodonin District Court advising the Claimant on 25 August 2000 that it could seek a motion imposing fines on the recalcitrant subdebtors (Enforcement proceeding No. 2576/98);<sup>232</sup>
- The enforcement order issued on 31 August 2000 (Enforcement proceeding No. 525/99);<sup>233</sup>
- The Czech Constitutional Court’s decision of 3 July 2001, finding that Mr. Busta’s constitutional rights had been violated by the decision of 21 September 2000 rendered by the judges of the Hodonin District Court signing a collective “*declaration of bias*” (Enforcement proceedings No. 347/98).<sup>234</sup>

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<sup>226</sup> Decision of the Regional Court Brno of 3 September 1999 (**Exhibit R-16**).

<sup>227</sup> **Exhibit R-20**; Statement of Defence and Memorial on Jurisdiction, ¶ 158.

<sup>228</sup> Decision of the District Court Hodonín of 20 December 1999 (**Exhibit R-17**); Amended Decision District Court Hodonín of 19 April 2000 (**Exhibit R-22**).

<sup>229</sup> Court Enquiry 12 July 2000 (**Exhibit R-24**).

<sup>230</sup> Enforcement order, dated 14 August 2000 (**Exhibit C-13**; **Exhibit R-41**).

<sup>231</sup> Enforcement order showing delivery notes (**Exhibit C-61**).

<sup>232</sup> Internal order by the District Court of Hodonín including delivery receipt, dated 25 August 2000 (**Exhibit R-27**).

<sup>233</sup> Enforcement order dated 31 August 2000 (**Exhibit R-34**).

<sup>234</sup> Decision of the Constitutional Court dated 3 July 2001 (**Exhibit C-38**).

In this respect, the Tribunal noted, with serious concern, the unprecedented step taken by the Hodonin judges in issuing a declaration of bias. At the Hearing, the Respondent justified this action by Mr. Busta's declarations in the press and his accusations of corruption brought against the Hodonin judges; the Respondent further expressed surprise at the Claimant's dissatisfaction with the fact that, as a result of this declaration, the case was transferred to another court.<sup>235</sup> However, and notwithstanding the unique nature of such a step, the Claimant did not provide adequate explanations as to why a transfer of the case file to another court was not an appropriate remedy to address the Claimant's perception of bias in the circumstances.

At the same time, the Czech Constitutional Court found the declaration of bias to constitute a violation of the Claimant's constitutional rights, thereby ensuring that the Claimant's rights would be protected within the Czech judicial system.

Regardless of the foregoing, the Tribunal is not persuaded that the declaration of bias prevented the Claimant from recovering sums that it otherwise would have. Enforcements orders in the E347/98, E2567/98, and E525/99 proceedings were granted before the declaration of bias was made. The Claimant argues that its application to impose fines on Kyjovan's subdebtors for failure to comply with the enforcement order granted in the E2567/98 proceedings was delayed by the judge assigned to the matter declaring himself biased, and was not finally determined until December 2008 due to Kyjovan's intervening bankruptcy. However, the Claimant's application was ultimately rejected on the basis that it had been brought under the wrong provision of the civil code. It therefore appears, on the evidence before the Tribunal, that the application would have failed for that reason, even if the judge had not declared himself biased.

301. In light of this procedural history, which shows not only that the Czech Courts did not sit inactive in this matter, but also advanced the Claimant's case and provided remedies for deficiencies in the proceedings, the Claimant cannot complain of "*excessive obstacles*" in its enforcement attempts, or "*arbitrary, discriminatory and unreasonable*" conduct by the Respondent's courts, or a sweeping refusal to act.
302. Having so found on the facts of the case, the Tribunal does not deem it necessary to make a determination on the specific legal standards that apply to creeping expropriation or to the actions or inactions of State organs for purposes of the international responsibility of States for an expropriation that might be said to be "creeping". It is plain on the evidence before the Tribunal that no creeping expropriation occurred, by reference to any of the standards invoked by the Claimant.
303. The Tribunal thus finds that the Respondent did not expropriate, through its courts, the Claimant's right to contractual damages under the 1997 Award.

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<sup>235</sup> Tr. 5 October 2016, 138:18-25.

## V. COSTS

304. Article 44 of the SCC Rules provides as follows in relation to the costs incurred by a party:

*“Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.”*

305. As regards the costs of the arbitration, Article 43(5) of the SCC Rules further provides:

*“Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances.”*

306. Pursuant to Article 43(4) of the SCC Rules, the Tribunal hereby includes the Costs of the Arbitration as finally determined by the Board:

***Dr. Yas Banifatemi:***

- *Fee:* EUR 51 563
- *Expenses* EUR 650
- *Per diem allowance* EUR 1 000

***Prof. August Reinisch:***

- *Fee* EUR 30 938

***Prof. Philippe Sands:***

- *Fee* EUR 30 938
- *Expenses* £ 384,91
- *Per diem allowance* EUR 1 000

***Stockholm Chamber of Commerce Administrative fee:*** EUR 16 313

307. On 6 January 2017, the Tribunal invited the Parties to file submissions on how costs should be allocated in this matter, and the actual costs incurred.

308. On 20 January 2017, the Parties made their respective submissions.

### **(a) The Claimant’s Costs Submissions**

309. The Claimant submits that the principle that the party against whom the award is made should bear the costs of the other party should not apply to the Respondent given that it is a sovereign State and *“hence has sufficient staff as well as material background to defend itself especially when it has specialized department for dealing with international arbitrations.”* The Claimant did not explain what standard of allocation of costs should apply more generally in this case.

310. The Claimant claims the following costs and expenses:

- (a) 10 percent plus VAT of the amount awarded to the Claimant as its legal fees;
- (b) costs of external consultations regarding international law, amounting to CZK 235,500 or EUR 8,715;
- (c) Advance on costs paid by the Claimant in the amount of EUR 73,925 and EUR 14,536;
- (d) 50 percent of the cost incurred by the Claimant in travelling from Brno to Vienna and back, in the amount of 2,827 CZK or EUR 104 (the other 50 percent being claimed in the 2015/014 proceeding);
- (e) 50 percent of the cost incurred by the Claimant for accommodation, in the amount of EUR 420 (the other 50 percent being claimed in the 2015/014 proceeding);
- (f) 50 percent of the cost incurred by the Claimant for the court report, being EUR 4,581.36 (the other 50 percent being claimed in the 2015/014 proceeding); and
- (g) 50 percent of the cost incurred by the Claimant for interpreters, being 6,750 CZK or EUR 2,498 (the other 50 percent being claimed in the 2015/014 proceeding).

311. The Claimant provided invoices for the claimed expenses on 27 January 2017.
312. On 24 January 2017, the Respondent requested leave to respond to the Claimant's submission on costs. The Tribunal granted this leave on 25 January 2017, and granted the Claimant a right of reply to the response made by the Respondent.
313. On 27 January 2017, the Respondent submitted that the Claimant's counsel had rendered legal services on the basis of a contingency fee arrangement that is prohibited by Article 3.3 of the Code of Conduct of Lawyers of the EU, which is incorporated into the Czech Code of Professional Conduct by Article 2(2). The Respondent thus submitted that the Claimant cannot recover any contingency fee paid to its counsel for legal services as costs in the arbitration.
314. The Claimant replied on 1 February 2017, and made the following points.
- (a) The Claimant referred to the 10 percent fee arrangement in its Statement of Claim. This, however, is the first time the Respondent has argued it is not recoverable. The Respondent should be taken to have waived its right to file this objection by Article 31 of the SCC Rules, which provides that: *"A party, who during the arbitration fails to object without delay to any failure to comply with the arbitration agreement, these Rules or other rules applicable to the proceedings, shall be deemed to have waived the right to object to such failure."*
  - (b) The fee arrangement is permitted under Article 10(5) of the Czech Code of Professional Conduct, which it says provides: *"The lawyer shall be entitled to negotiate a contractual fee determined by a share of the value of the case or result of the case if the level of such a negotiated fee is adequate under the provision of paragraphs 2 and 3. However, a contractual fee determined by a share of the result of the case may not be usually considered appropriate if this share is higher than 25%."*

- (c) The Code of Conduct of Lawyers of the EU only applies where a lawyer of one member State is providing professional services in a member State other than his or her own, and therefore does not apply in this case.
- (d) The fee arrangement was the only way that the Claimant could have afforded to proceed with the arbitration.

**(b) The Respondent's Cost Submissions**

315. The Respondent claims reimbursement of its full costs and expenses in the sum of EUR 93,231.63 or CZK 4,557,430.73. Like the Claimant, the Respondent has not set out the standard applying to allocation of costs.

- (a) The Respondent's costs and expenses comprise the following:
- (b) The advance on costs paid to the SCC in the sum of EUR 90,336;
- (c) Costs and disbursements incurred for legal representation in the amount of CZK 4,329,800.60 (fees excluding VAT);
- (d) Costs of co-counsel who provided advice on matters of Czech national law, in the amount of CZK 120,852.85;
- (e) Internal costs incurred in translating Czech documents into English, in the amount of CZK 99, 861.85;
- (f) Additional costs incurred through an external translation agency, in the sum of CZK 6,915.61;
- (g) One quarter of the total costs incurred by the Respondent for the court reporter in both this case and the 2015/014 case, being EUR 2,290.68; and
- (h) 50 percent of the travel and accommodation expenses for the oral Hearing incurred in relation to both this case and the 2015/014 case, being EUR 604.95.

316. The Respondent's statement of costs was accompanied by the relevant invoices.

**(c) The Tribunal's Decision**

317. The Tribunal notes that both Parties have sought the full reimbursement of their costs and expenses, without setting out the applicable standard in light of the circumstances of the case.

318. The Tribunal has considered all of the circumstances to determine the most appropriate allocation of costs in this arbitration. The Tribunal has in particular been mindful of the following factors: the complexity of the legal and factual issues which the Tribunal was called to determine; the reasonableness of the positions taken by both Parties in relation to the legal issues at stake; the fact that the Parties have had to investigate and present underlying facts that go back 20 years; and the highly professional, graceful and helpful manner in which counsel on both sides acted throughout the arbitration proceedings.

319. The Tribunal also notes that each Party has partly prevailed and partly failed on its contentions: the Claimant has prevailed on two out of three of the Respondent's

jurisdictional objections, whereas the Respondent has prevailed partly on jurisdiction and fully on the merits.

320. In the circumstances, the Tribunal finds that the rule according to which the losing party should bear the entire costs of an arbitration, which is not the only accepted rule on allocation of costs, should not apply in this matter.
321. Accordingly, given the balance in the Parties' conduct, positions and outcome, the Tribunal decides that each Party should bear its own costs, including the costs of legal representation, and half of the costs of the Arbitral Tribunal and of the Arbitration Institute of the Stockholm Chamber of Commerce.
322. To the extent it has decided that each Party should bear its own costs, the Tribunal does not need to determine the question whether the Claimant may recover any contingency fee paid to its counsel under the Code of Conduct of Lawyers of the EU.

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## VI. TRIBUNAL'S DECISION

323. For the reasons set out above, the Arbitral Tribunal:

- (1.) Rejects the Respondent's objections to jurisdiction based on the termination of the BIT upon the Respondent's accession to the EU in May 2004 and on the existence of an investment made by the Claimant, and decides that it has jurisdiction to determine the present dispute;
- (2.) Decides that its jurisdiction extends solely to alleged breaches of Article 5 of the BIT;
- (3.) Dismisses the Claimant's claims on the merits;
- (4.) Decides that each Party shall bear its own costs;
- (5.) Decides that the Parties are jointly and severally liable to pay the costs of the Arbitration, namely the costs of the Arbitral Tribunal and the Arbitration Institute of the Stockholm Chamber of Commerce, which have been set as follows:
  - The Fee of Dr. Banifatemi amounts to EUR 51,563 and compensation for expenses of EUR 650 as well as per diem allowance of EUR 1,000, in total EUR 53,213.
  - The Fee of Prof. Reinisch amounts to EUR 30,938.
  - The Fee of Prof. Sands amounts to EUR 30,938 and compensation for expenses of £ 384.91, as well as a per diem allowance of EUR 1,000, in total EUR 31,938 and £ 384.91.
  - The Administrative Fee of the SCC amounts to EUR 16,313.

These amounts are to be borne by the Parties in equal shares.

324. Pursuant to Section 41 of the Swedish Arbitration Act, a party may bring an action against the award regarding the decision on the fees of the arbitrators within three months from the date when the party received the award. This action should be brought before the Stockholm District Court.

**Done in: Stockholm**

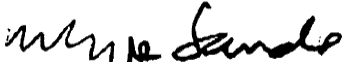
**Date: 10 March 2017**

**Prof. August Reinisch (arbitrator)**



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**Prof. Philippe Sands QC (arbitrator)**



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**Dr. Yas Banifatemi (Chairperson)**



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