INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

JCDECAUX SE

v.

CZECH REPUBLIC

(ICSID CASE NO. ARB/20/33)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated 5 June 2026.

Martina Polasek
Secretary-General

Washington, D.C., 5 June 2026

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

JCDECAUX SE

Claimant

and

CZECH REPUBLIC

Respondent

ICSID Case No. ARB/20/33

AWARD

Members of the Tribunal
Rt Hon Lord Jonathan Mance, President
Prof Kaj Hobér, Arbitrator
Prof Raúl Emilio Vinuesa, Arbitrator

Secretary of the Tribunal
Ms Alicia Martín Blanco

Assistant to the Tribunal
Mr Joseph Rich

Date of dispatch to the Parties: 5 June 2026

REPRESENTATION OF THE PARTIES

Representing JCDecaux SE:

c/o Mr. Leon Kopecký
Mr. Christoph Lindinger
Mr. Sebastian Lukic
Mr. Djordje Todorovic
Schönherr Rechtsanwälte GmbH
Schottenring 19
1010 Vienna
Austria

Representing the Czech Republic:

c/o Dr. Martina Matejová
Dr. Jaroslav Kudrna
Ms. Tereza Ševčíková
Ms. Magdaléna Kůrová
Ms. Lenka Psárska
Ms. Alžběta Bělova
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International Arbitration and Investment Protection Unit
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Czech Republic

Dr. Sabine Konrad
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Germany

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT	The Agreement between the French Republic and the Czech and Slovak Federal Republic on the reciprocal promotion and protection of investments. Entry into force: 14 October 1966
C-[#]	Claimant's Exhibit
CL-[#]	Claimant's Legal Authority
Gewista Holding	Gewista Holding GmbH
Gewista	Gewista-Werbegesellschaft mgH
Hearing	Hearing held on 19 May 2025 to 27 May 2025
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Tr. Day [#] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 12 March 2021.

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the French Republic and the Czech and Slovak Federal Republic on the reciprocal promotion and protection of investments, which entered into force on 27 September 1991 (the "**BIT**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**").

2. The Claimant is JCDecaux SE (the "**Claimant**"), a company incorporated under the laws of the French Republic.

3. The Respondent is the Czech Republic (the "**Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to alleged breaches by the State in the period 2016 to 2019 of standards of protection guaranteed by the BIT and international law in relation to the Claimant's alleged investment in the Czech Republic, such breaches causing the Claimant damage and/or ultimately involving expropriation of such investment in or by November 2019.

A. PROCEDURAL HISTORY

6. On 26 August 2020, ICSID received a request for arbitration from the Claimant against the Respondent (the "**Request**").

7. On 16 September 2020, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d)

of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. By correspondence of 26 and 29 October 2020, the Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, the presiding arbitrator, to be appointed by agreement of the co-arbitrators.

9. By letter of 19 November 2020, Claimant appointed Prof. Kaj Hobér, a national of Sweden, as an arbitrator in this case. Prof. Hobér accepted his appointment on 20 November 2020. By correspondence of 4 January 2021, Respondent appointed Prof. Raúl Emilio Vinuesa, a national of Argentina and Spain, as an arbitrator in this case. Prof. Vinuesa accepted his appointment on 5 January 2021. On 10 March 2021, the Claimant informed the Secretary-General of the Parties' agreement to appoint The Rt. Hon. Lord Jonathan Mance, a national of the United Kingdom, as President of the Tribunal. Respondent confirmed the agreement on the same day. Lord Mance accepted his appointment on 12 March 2021.

10. On 12 March 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms Aurélia Antonietti, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal.[1]

11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 4 May 2021 by videoconference.

12. On 14 May 2021, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France, although the Tribunal may hold in-person hearings at any other place in

[1] Ms Antonietti was replaced as Secretary by Ms Alicia Martín Blanco on 3 March 2022. On 6 March 2024, Mr Joseph Rich was appointed as Assistant to the Tribunal.

geographical Europe that it considers appropriate having consulted the Parties. In the event the Tribunal, having consulted the Parties, determined that the hearing on jurisdiction would be held at the International Dispute Resolution Centre (IDRC) in London, United Kingdom, and that the main substantive hearing should take place in The Peace Palace, in The Hague, in the Kingdom of The Netherlands.

13. On 19 October 2021, the Claimant filed its Memorial on the Merits. This was accompanied by:

    a. The First Witness Statement of [redacted] dated 13 October 2021 (the "**First [redacted] Statement**");

    b. The First Witness Statement of [redacted], dated 24 September 2021 (the "**First [redacted] Statement**");

    c. The First Witness Statement of [redacted] dated 12 October 2021 (the "**First [redacted] Statement**"); and

    d. The expert report of [redacted] dated 12 October 2021 (the "**First [redacted] Expert Report**").

14. On 30 November 2021, the Respondent filed its Request for Bifurcation and Memorial of Preliminary Objections (the "**Request for Bifurcation**"). A Response, Reply and Rejoinder followed on 11 January 2022, 25 January 2022 and 8 February 2022 respectively. On 24 February 2022, the Tribunal issued Procedural Order No. 2 granting the bifurcation of the preliminary objections and the merits. Further to the Parties' comments, on 3 March 2022, the Tribunal issued Procedural Order No. 3, containing the timetable on the preliminary objections.

15. Further preliminary objections pleadings were then exchanged: a Counter-Memorial was filed on 7 June 2022, a Reply on 26 July 2022 and a Rejoinder on 6 September 2022. On 22 September 2022, the Tribunal issued procedural order No. 4 on the organization of the hearing. On 12 October 2022, the hearing on preliminary objections was held at the

International Dispute Resolution Centre in London. The Parties filed their respective submissions on costs pertaining to the bifurcated phase on 9 January 2023.

16. On 28 July 2023, the Tribunal issued its Decision on Preliminary Objections. The preliminary objections raised by the Respondent at that stage were rejected by the Tribunal. The reasons for that decision are not repeated here. The Decision on Preliminary Objections forms part of this Award and is attached as Annex A.

17. The exchange of pleadings on the merits was resumed thereafter. On 10 November 2023, the Respondent filed its Counter-Memorial on the merits. This was accompanied by:

    a. The First Witness Statement of [redacted] dated 10 November 2023 (the "**First [redacted] Statement**");

    b. The First Expert Report of [redacted] dated 10 November 2023 (the "**First [redacted] Expert Report**").

18. Further to the Parties' respective requests for document production, on 31 January 2024, the Tribunal issued Procedural Order No. 5 on document production. Following further communications from the Parties, on 26 February 2024, the Tribunal issued Procedural Order No. 6 on document production.

19. On 8 May 2024, the Claimant filed its Statement of Reply. This was accompanied by:

    a. The Second Witness Statement of [redacted] dated 3 May 2024 (the "**Second [redacted] Statement**");

    b. The Second Witness Statement of [redacted], dated 7 May 2024 (the "**Second [redacted] Statement**");

    c. The Second Witness Statement of [redacted] dated 15 April 2024 (the "**Second [redacted] Statement**"); and

    d. The Second Expert Report of [redacted], dated 8 May 2024 (the "**Second [redacted] Expert Report**").

20. On 31 July 2024, the Respondent filed its Rejoinder. This was accompanied by:

a. The Second Witness Statement of [redacted] dated 22 July 2024 (the "**Second [redacted] Statement**");

b. The First Witness Statement of [redacted] dated 22 July 2024 (the "**First [redacted] Statement**");

c. The First Witness Statement of [redacted] dated 24 July 2024 (the "**First [redacted] Statement**");

d. The First Witness Statement of [redacted] dated 30 July 2024 (the "**First [redacted] Statement**");

e. The Second Expert Report of [redacted] dated 31 July 2024 (the "**Second [redacted] Expert Report**");

f. The First Expert Report of [redacted], dated 26 July 2024 (the "**First [redacted] Expert Report**"); and

g. The First Expert Report of [redacted], dated 31 July 2024 (the "**First [redacted] Expert Report**").

21. On 7 August 2024, the Claimant wrote to the Tribunal with reference to the Rejoinder and accompanying evidence. The Claimant contended that:

a. The evidence filed with the Rejoinder was not responsive to the Reply and was filed too late. The Claimant accordingly requested that the First [redacted] Expert Report, the First [redacted] Expert Report, the First [redacted] Statement, the First [redacted] Statement and the First [redacted] Statement be excluded from the record.

b. The Claimant also argued that the jurisdictional objection at Section III.A of the Rejoinder to the effect that the Claimant had no standing as an investor should be rejected as untimely on the basis that it could have been brought sooner.

22. The Respondent submitted a response to the Claimant's application on 21 August 2024. The parties' submissions on these issues are not repeated here. On 4 October 2024, the Tribunal issued Procedural Order No. 7 addressing them. The Tribunal ruled that the relevant factual witness be allowed and invited further submissions from both Parties on the admissibility of the expert evidence on 9 and 14 October 2024. The Tribunal further ruled that the Claimant should be permitted to submit any evidence material to the new procedural objection (viz. that the Claimant had no standing as an investor) by 14 October 2024 (which the Claimant duly did).

23. On 11 September 2024, the European Commission filed a request for leave to intervene as a non-disputing party. On 13 September 2024, the Respondent filed observations on the European Commission's request. On 26 September 2024, the Claimant filed observations on the European Commission's request. At the Tribunal's invitation, the European Commission responded to the Parties' observations on 10 October 2024. The Tribunal rejected the European Commission's request in Procedural Order No. 9, issued on 3 March 2025.

24. The final hearing in this matter had originally been scheduled for 1 November 2024 to 8 November 2024. On 16 October 2024, in light of the matters set out above, *inter alia*, the Parties agreed that the hearing be adjourned. The Parties further agreed that the First [redacted] Expert Report and the First [redacted] Expert Report stay on the record in full, and that the Claimant should have leave to file expert evidence in rebuttal to those reports.

25. On 29 November 2024, the Respondent requested leave to submit the following decisions into the record: (i) Decision by the District Court for Prague 9 of 30 August 2024 (File No. 7C371-2021); (ii) Decision of the Supreme Court of 31 May 2022 (File No. 24 2749/2020); and Decision of the Constitutional Court of 4 July 2013 (File No. III. ÚS 1594/2013). The Claimant did not object to this request subject to an extension of the deadline to file its rebuttal expert evidence.

26. Pursuant to a timetable then agreed between the Parties:

    a. On 6 February 2025, the Claimant submitted:

i. The First Expert Report of Josef Šilhán, dated 6 February 2025 (the "**First [redacted] Expert Report**");

ii. The First Expert Report of Petr Novotný, dated 6 February 2025 (the "**First [redacted] Expert Report**");

b. On 6 March 2025, the parties submitted a joint record of [redacted] and [redacted] listing their points of agreement.

c. On the same day, the Respondent filed an expert record written by [redacted] stating that [redacted] had failed to provide any comments. The Claimant objected to the submission of the expert record.

d. On 27 March 2025, the parties simultaneously filed rebuttal reports of the same date by [redacted] and [redacted] (the "**Second [redacted] Expert Report**" and the "**Second [redacted] Expert Report**" respectively).

e. On 31 March 2025, the parties submitted a short joint record of the positions of [redacted] and [redacted]

f. On 14 April 2025, the Respondent submitted the Second Expert Report of [redacted] ("**the Second [redacted] Expert Report**"). The Claimant did not submit a further report but referred back to the First [redacted] Expert Report.

27. On 20 February 2025, the Respondent applied to strike the First [redacted] Expert Report from the record on the basis of a non-disclosure regarding the relationship between [redacted] and his law firm and the City of Prague. The Claimant responded to this application on 6 March 2025, and the Respondent replied on 17 March 2025. On 19 March 2025, the Tribunal issued Procedural Order No. 10 holding that, even assuming that any non-disclosure of prior assignments, undertaken by [redacted] for the City of Prague, DPP and/or Prague Municipal Districts, involved any breach of the IBA Guidelines or any disclosure duty, the same should not disqualify [redacted] from acting as expert, and that submissions could be made at the final hearing as to the weight to be attributed to his evidence.

28. On 2 April 2025, the Respondent requested leave to submit to the record the Award in *ELA USA, Inc. v. Republic of Estonia*[2], published by the PCA five days earlier; on 8 May 2025 the Claimant indicated that it did not oppose this, and it was so admitted by the Tribunal as recorded by ICSID's message to the parties on 13 May 2025.

29. On 9 May 2025, the Tribunal held a pre-hearing organizational meeting with the Parties by videoconference. On 13 May 2025, the Tribunal issued Procedural Order No. 8 on the organization of the hearing on the merits. The hearing on the merits was held at the Peace Palace in the Hague from 19 May 2025 to 27 May 2025 (the "**Hearing**"). Shortly prior to the Hearing on 14 May 2025, the Claimant informed the Tribunal that one of its witnesses, [redacted] was prevented from testifying on health grounds.

30. The Respondent then filed an urgent application requesting that oral examinations of all fact witnesses be rescheduled to a date at the Tribunal's earliest convenience. Representations were made on the subject by both parties in writing prior to the Hearing. In their light, the parties were invited by the Tribunal to make further submissions on the position regarding [redacted] at the beginning of the Hearing.

31. In its oral submissions at the beginning of the Hearing, Respondent sought an order under paragraph 18.4 of Procedural Order No. 1, which provides in relevant part that "*If a witness or expert called does not appear without a valid reason at the hearing, the Tribunal may disregard that witness's or expert's statement or opinion.*"

32. The Tribunal ruled after hearing both parties' representations that the arbitration should proceed. The Tribunal ruled that it had to consider the possibility that [redacted] might appear and accordingly that he should not be shown any material from the arbitration. The Tribunal stated that if [redacted] did become ready and able to give evidence, the Tribunal would at that stage determine whether he should be allowed to do so. If [redacted] did not appear ready and able to give evidence, the Tribunal would have to decide at that stage with reference to paragraph 18.4 what course to take. The Tribunal held (by a majority)

[2] RL-0333, *ELA U.S.A., Inc. v. The Republic of Estonia*, PCA Case No. 2018-42, Award, 21 February 2025.

that it was not at that time able to conclude that there was no valid reason for [redacted]'s non-attendance.

33. The issue arose again on the second day of the hearing, when counsel for the Claimant informed the Tribunal that they were instructed that a message had been received from [redacted] providing an update on his health. Representations were heard from both parties as to whether the message should be read into the record. Ultimately, the Tribunal was provided with both the Whatsapp message sent to [redacted] and his response.

34. In its Post-Hearing Brief the Respondent maintained its objection to [redacted]'s witness statements remaining on the record, but, against the event that the Tribunal allowed them to remain on the record, made submissions about such statements, in particular: that [redacted] did not state in them that DPP's Board terminated the Rencar Contract because of alleged instructions from [redacted] that his statements were unclear; that threats referred to as having been made by [redacted] of JCDecaux to [redacted] at the meeting of 6 April 2016[3] meant that the Tribunal should draw an adverse inference against the Claimant; and, finally, that circumstances, documents and witnesses called by the Respondent showed that the Rencar Contract was cancelled as a matter of managerial duty, not because of any "conspiracy". The Tribunal's final rulings and approach regarding [redacted]'s evidence appear in paragraphs 317 and 321 et seq below.

35. The following persons were present at the Hearing:

Tribunal:
Rt Hon Lord Jonathan Mance, President
Prof Kaj Hobér, Arbitrator
Prof Raúl Emilio Vinuesa, Arbitrator

ICSID Secretariat:
Ms Jara Minguez Almeida, ICSID

Assistant to the Tribunal:
Mr Joseph Rich, Assistant to the Tribunal

For the Claimant:

[3] C-0066, Minutes from the meeting of JCDecaux's representatives and DPP, 6 April 2016.

[redacted] Schoenherr Rechtsanwaelte GmbH
[redacted], Schoenherr Rechtsanwaelte GmbH
Mr Leon Kopecký, Schoenherr Rechtsanwaelte GmbH
Mr Christoph Lindinger, Schoenherr Rechtsanwaelte GmbH
Mr Sebastian Lukic, Schoenherr Rechtsanwaelte GmbH
[redacted], Schoenherr Rechtsanwaelte GmbH
Mr Djordje Todorovic, Schoenherr Rechtsanwaelte GmbH
[redacted] JCDecaux SE
[redacted] JCDecaux SE

For the Respondent:
Dr Jaroslav Kudrna, Ministry of Finance of the Czech Republic
Ms Tereza Ševčíková, Ministry of Finance of the Czech Republic
Ms Magdaléna Kůrová, Ministry of Finance of the Czech Republic
Ms Lenka Psárska, Ministry of Finance of the Czech Republic
Dr Sabine Konrad, Aurelius Cotta
Dr Maximilian Pika, Aurelius Cotta
Mr Pierre Trippel, Aurelius Cotta
Ms Marie Hervol, Aurelius Cotta
Mr Tilman Koops, Aurelius Cotta
Ms Martina Matejová, Aurelius Cotta

36. During the Hearing, the following persons were examined:

On behalf of the Claimant:
Factual Witnesses:
[redacted]
Expert Witnesses:
[redacted]

On behalf of the Respondent:
Factual Witnesses:
[redacted]
Expert Witnesses:
[redacted]

37. The Parties filed simultaneous post-hearing briefs on 29 July 2025, and simultaneous Reply post-hearing briefs on 26 August 2025.

38. On 12 August 2025, the Respondent sought leave to introduce the Decision by the District Court for Prague 9 of 7 May 2025 (File No. C 394/2016 – 2149) in the proceedings between Rencar and DPP to the record and to submit comments on the Decision, to which the Claimant did not object provided it be permitted to respond to the Respondent's comments. In accordance with the Tribunal's directions, on 5 September 2025, the Respondent submitted the Decision as well as its comments on the Decision, to which the Claimant replied on 16 September 2025.

39. The Parties filed their submissions on costs for the merits phase on 21 October 2025.

40. On 5 December 2025, the Respondent sought leave to add to the record the Judgment of the Municipal Court Prague of 27 November 2025 (File No. 17 CO 326/2025) in the proceedings between Rencar and DPP, once published. The Claimant did not object to the request provided that it be permitted to file comments on any comments that may be filed by the Respondent. In accordance with the Tribunal's directions, on 23 January 2026, the Respondent submitted the Judgment and on 6 February 2026, the Respondent submitted comments on the Judgment, to which the Claimant replied on 20 February 2026.

41. Further to the Tribunal's invitation, the Parties on 28 April 2026 submitted updates of their costs submissions for the merits phase.

42. The proceeding was closed on 20 April 2026.

II. FACTUAL BACKGROUND

(1) The establishment of DPP and of Rencar

43. In 1948, the Czech and Slovak Federal Republic or Czechslovakia was taken over by a totalitarian communist regime. Nationalisation of private property ensued.

44. In 1989, the communist regime fell in the Velvet Revolution. The transformation from a communist, state-controlled economy to a capitalist democratic state began. Democratic elections were held in June 1990.

45. On 21 December 1990, the Government of the Czech Republic adopted Resolution No. 366, which approved the proposal of the City of Prague to dissolve the state enterprise Dopravní podnik hl. m. Prahy – kombinát and transfer its assets to a new company to be named Dopravní podnik hl. m. Prahy, a.s. ("**DPP**"). The assets were transferred and DPP was established on 11 July 1991. Since the establishment of DPP, the City of Prague has been the sole shareholder in DPP.

46. DPP is said to be the largest provider of public transportation services in the Czech Republic. It employs over 11,000 people and operates around 775 trams, 1,200 buses and three metro lines. It has a long-term contract with the City of Prague for the provision of public services.

47. The key components of DPP's corporate structure are: (i) the General Meeting; (ii) the Supervisory Board; and (iii) the Board of Directors. As to these:

    a. The General Meeting represents the interests of the shareholder (i.e. the City of Prague). By DPP's Articles of Association of 4 November 1997, the powers of the General Meeting are entrusted to Prague City Council.

    b. The Supervisory Board elects and removes the members of the Board of Directors and oversees the performance of the Board's powers and the company's activities. It consists of fifteen members, two-thirds of whom are typically elected by the General Meeting and one-third of whom are elected by DPP's employees.

    c. The Board of Directors represents the company. The Board's main responsibility is managing the business. Articles 9(1)(s) and Article 12.1 to 12.4 of DPP's Articles of Association[4] provide:

[4] R-0048, Articles of Association of 1 July 2014; R-0060, Articles of Association of 19 December 2014; and R-0161, Articles of Association of 21 November 2017.

"***Article 9 Competence of the General Meeting***

9.1. The exclusive competence of the General Meeting includes, inter alia*:*

…

(s) giving instructions to the Board of Directors and setting the principles of the Board's activities unless such an instruction or principle interferes with the Company's business management and unless such an instruction or principle is at variance with the legal regulations; ….

…."

Article 12 Position and competence of the Board of Directors

12.1. The Board of Directors is the governing body of the Company. ….

12.2. The Board of Directors makes decisions on all Company matters unless they are reserved for the competence of another body of the Company by the law or by these Articles of Association.

12.3. The Board of Directors follows the instructions of the General Meeting under the conditions specified by the legal regulations.

12.4. The Board of Directors is responsible for business management of the Company. …."

d. [redacted] explained that as a matter of Czech law: (i) the board members' managerial duty of care was, subject to specified exceptions, not something on which instructions could be taken from third parties; and (ii) shareholders could not give unsolicited instructions to board members on how to conduct business, with the result that the Prague City Council could not give instructions to the board on such matters. That appears to be the position which Articles 9.1(s) and 12.1 to 12.3 of DPP's Articles also reflect.

48. The City of Prague is the founder and sole shareholder of DPP. DPP receives funding from the City of Prague; according to DPP's 2022 Annual Report, 28.5% of the funds spent on acquisitions in 2021 were subsidies from the City of Prague.

49. RENCAR PRAHA a.s. ("**Rencar**") was founded in 1990 as a subsidiary of DPP or its predecessor, in order to operate and bring in income as an advertising agency. Rencar

initially operated under three distinct contracts regulating the installation of advertising on (i) buses, (ii) trams and (iii) the metro.

(2) The Claimant's investment in the Czech Republic

50. According to the Request for Arbitration dated 26 August 2020, the Claimant is "*the regional and global market leader in, among others, transport advertising, billboards, and outdoor advertising*".

51. The Claimant originally invested in the Czech Republic in 1994, following the award of a contract from the City of Prague for the installation, operation and advertising use of "street furniture" ("**the Street Furniture Contract**"). Street furniture refers to public urban street equipment such as bus shelters, city information panels, public toilets and bike stands. The construction of these objects is funded through their use for advertising purposes. The Claimant states that it built 2,556 advertising spaces under the Street Furniture Contract, which expired in 2021.

(3) The Claimant's acquisition of a controlling shareholding in Rencar

52. In 2000, the City of Prague resolved to privatise Rencar. On 12 December 2000, DPP initiated a public tender for the acquisition of a 72% share in Rencar ("**the Tender**").

53. The Tender provided *inter alia* that:

a. The shares would be sold to the bidder who "*submits the highest financial offer and at the same time proposes the most advantageous plan for further development and future of RENCAR*".

b. DPP "*undertakes to extend the existing contract with RENCAR … for the lease of areas usable for advertising on movable and immovable property owned by [DPP] … until at least 31 December 2015*".

54. The Claimant tendered and was successful in the tender process through a subsidiary company, Europlakat Spol s.r.o.m ("**Europlakat S**") which on 29 June 2001 signed the Share Purchase Agreement ("**the SPA**") to purchase a 72% shareholding in the shares of

Rencar shares for the price of CZK 90,000,000. Following the SPA, DPP retained 28% of the shares in Rencar.

55. The Claimant's case at the hearing was that, as at 29 June 2001, it held a controlling interest in Europlakat S through a 58.5% interest in JCDecaux Central Eastern Europe Holding GmbH ("**JCD CEE**"), which in turn held a 67% interest in Gewista-Werbegesellschaft mbH ("**Gewista**"), an Austrian company, which in turn held a 51% interest in Europlakat International Werbegesellschaft mbH ("**Europlakat Int**"), which in turn held a 51% interest in Aussenwerbung Tschechien – Slowakei Beteiligungs-Gesellschaft mbH ("**ATSBG**"), which in turn held a 100% interest in Europlakat S which acquired the 52% shareholding in Rencar.

56. By Article 1.8 of the SPA, DPP undertook *inter alia* not to engage in any unilateral activities leading to the limitation of Rencar's rights arising from the Rencar Contract. Article 5.2 provided that the contents and validity of the Rencar Contract would not be violated by DPP in any unilateral manner "*at least until 31 December 2015*".

57. On the date of the SPA, Amendment No. 3 to the Rencar Contract entered into force. The Claimant contends that this amendment was prepared for the purposes of the public tender in order to increase the value of Rencar and attract investors. The amendment provided *inter alia* for:

    a. An extension of the duration of the Rencar Contract to 30 June 2016, with the addition of a provision for the contracting parties to negotiate for the extension of the contract prior to expiry, and the proviso that Rencar should have a right of preference over other bidders if it submitted a bid equivalent to the most advantageous bid;

    b. A change in the calculation of rent under the Rencar Contract, with the introduction of pricing categories dependent on revenues from advertising. These were as follows.

Sales revenues	Rent (p.a.)
≤ CZK 70 million	CZK 50 million
> CZK 70 million, ≤ CZK 80 million	CZK 50 million + 10% of amount by which revenues exceed CZK 70 million
> CZK 80 million, ≤ CZK 90 million	CZK 57 million + 60% of amount by which revenues exceed CZK 80 million
> CZK 90 million	CZK 63 million + 50% of amount by which revenues exceed CZK 90 million

c. A restriction on the circumstances in which the Rencar Contract could be terminated.

d. An undertaking by DPP not to extend its cooperation with euro AWK, s.r.o, ("**euroAWK**"), another advertising company providing services on Prague public transport, beyond the scope of DPP's existing contract with euroAWK.

(4) Post-acquisition performance and changes to pricing mechanism

58. The Claimant contends that Rencar excelled in the years following the acquisition. The Claimant cites the fact that the DPP's income increased significantly between 2001 and 2008. The Claimant attributes Rencar's alleged success to the provision of the Claimant's know-how and experience.

59. Over this period, various amendments were made to the Rencar Contract. The following table summarises the amendments to the Rencar Contract, on which the Claimant relies. The Respondent's case is that each of Amendment No. 7, the Consolidated Contract and Amendment No. 9 was and is invalid under Czech law and/or international law, and further that it is to be inferred from all the circumstances that the Claimant engaged in fraud in obtaining some or all of them.

No.	Date	Summary
1	22 July 1997	Rencar to install information equipment in metro stations and to use equipment to promote and advertise information about public transport in the City of Prague.
2	30 Oct 1997	Rencar to put up new information and advertising panels in the metro.
3	29 June 2001	Extended areas available for installation of advertising; revised definitions; required DPP to install and operate an electronic information system; required DPP to end cooperation with certain third parties in respect of CLV advertising; extended duration of the contract to 30 June 2016; deleted certain termination grounds; incorporated a new revenue sharing scheme. See also paragraph 57 above.
4	30 Dec 2002	CZK 10 million rent reduction for 2002 to compensate for flood in Prague.
5	31 July 2003	Regulated advertising opportunities on DPP's new electronic information systems in the metro (MetroVision) and provided for management and installation of the same.
6	13 June 2008	Parties agreed to build new, renovate or replace shelters at public transport stops; DPP authorised use of the new shelters for advertising purposes, committed to assist with construction and agreed to provide assistance in obtaining private and public consents and permits.
7	1 April 2009	Rencar agreed to maintain, repair, replace and clean parts of advertisement space and keep records of installation, maintenance, repairs, replacement and cleaning. Yearly rental payment reduced. See further paragraph 62 below.
n/a	19 Oct 2009	The 2009 Consolidated Contract. This extended the contract to 30 June 2031 and made other changes: *see below*.
8	29 Mar 2011	Agreed technical conditions for placing advertisements and operational advertisements in buses and trams.

9	30 Oct 2013	Digitalisation of advertising and expansion of digital advertising; redefinition of mutual rights and obligations to ensure future expansion of digital advertising. See paragraph 66 below.

60. On 13 June 2008, Rencar's then CEO Pavel Slabý and DPP's then CEO Martin Dvořák signed a Memorandum of Future Co-Operation ("**the June 2008 Memorandum**"). This provided (in respect of Amendment No. 6) that:

> "*The Parties are aware that the Public Transport Company is a sectoral contracting entity within the meaning of Act No. 137/2006 Coll., on public procurement, and must proceed in accordance with the Act in the performance of this Memorandum. The Parties state that they do not anticipate the Public Transit Company's own investment in the construction of the Foundation Structures in an amount exceeding the existing threshold for above-the-threshold public contracts applicable to a sectoral contracting entity.*"

61. The June 2008 Memorandum is relied upon by the Respondent as demonstrating that the Claimant knew that DPP was a contracting authority under Czech procurement law and that the Rencar Contract was also subject to procurement law regulations.

62. By Amendment No. 7, Rencar agreed to maintain, repair, replace and clean parts of the advertisement space (responsibility for which had previously been with DPP). The Amendment reduced the sum Rencar had to pay as rent in circumstances where revenues were CZK 80 million or less. The new pricing mechanism was:

Sales revenues	Rent (p.a.)
≤ CZK 80 million	CZK 30 million
> CZK 80 million, ≤ CZK 90 million	CZK 57 million + 60% of amount by which revenues exceed CZK 80 million
> CZK 90 million	CZK 63 million + 50% of amount by which revenues exceed CZK 90 million

63. The Claimant contends that this rent reduction reflected Rencar's expanded obligations in respect of the maintenance, repair and cleaning of advertising space.

64. On 10 December 2008, the Prague Municipal Court issued a decision in an action submitted by Rencar against euroAWK.[5] In it, the court expressed the view that the Rencar Contract was invalid within the meaning of Section 37(1) of the Czech Civil Code due to indefinite specification of the subject of the lease. On 14 May 2009, the High Court of Prague concurred with this view.[6]

65. In October 2009, a "Consolidated Version" of the Rencar contract was signed (the "**2009 Consolidation**", the "**2009 Consolidated Contract**"). This incorporated all the previous amendments into one document, as well as further changes. *Inter alia*:

a. Article III(1) stated that "*The contract is concluded for a fixed term, namely until 30 June 2031*."

b. Under Article IV(1), the pricing mechanism was again altered, with a reduction in the amount Rencar had to pay in circumstances where revenues were over CZK 80 million. The new pricing mechanism was:

Sales revenues	Rent (p.a.)
≤ CZK 80 million	CZK 30 million
> CZK 80 million, ≤ CZK 90 million	CZK 30 million + 60% of amount by which revenues exceed CZK 80 million
> CZK 90 million	CZK 36 million + 50% of amount by which revenues exceed CZK 90 million

c. Article IV(2) provided that either Party might, by notice delivered not later than 120 days before the end of any calendar year, propose an amendment to Article

[5] As referred to in R-0027, Decision of the Prague High Court in the dispute between Rencar and euroAWK, 14 May 2009.

[6] R-0027, Decision of the Prague High Court in the dispute between Rencar and euroAWK, 14 May 2009, stated as delivered on 16 June 2009.

IV(1) to take effect on 1 January in the next calendar year, and, if the proposal or an amendment based on it was not accepted, might withdraw from the contract to the extent that it had been amended by Amendment No. 7 of 20 April 2009,

d. Under Articles II(2), II(7) and IV(6), Rencar agreed to construct and operate 200 new bus shelters on foundations the construction of which it agreed to finance on behalf of DPP until after the end of the relevant calendar year; and in return the advertising revenue from these new structures was excluded from the general provisions regarding rent, and Rencar undertook to make a separate payment of "*20% of the net revenues realised*" from the placement of advertising on these shelters.

e. Article I(7) stipulated that all advertising space acquired by DPP following conclusion of the 2009 Consolidated Contract would become subject to lease or use for advertising purposes by Rencar at the date of DPP's acquisition; Article IX(1) contained a declaration by both Parties that Rencar's rights under the Contract were exclusive, unless otherwise required by law; and Article IV(3) also contained an undertaking by DPP not to enter into contracts or allow third parties to use advertising spaces or install advertising mediums on DPP's property.

f. Article III(7) provided that, before the expiry of the contract term, the Parties should, at the request of either, enter into negotiations for the extension of the contract or conclusion of a new contract "*with the proviso that Rencar shall have a right of preference over other bidders if it submits a bid equivalent to the most advantageous bid objectively demonstrated by [DPP]*"

66. On 30 October 2013, DPP and Rencar concluded Amendment No. 9. This recorded the parties' intention to digitalise advertising in Prague and to agree on a long-term strategy for the same. Among other things, the amendment (i) provided for a trial digitalization as part of the renovation of the Národní třída metro station and (ii) stipulated that advertising revenue from the use of digital mediums was excluded from the general provisions regarding rent and that Rencar would instead pay DPP 20% of all revenues from use of such mediums.

67. The mistreatment and/or expropriation relied upon under the BIT and/or international law in this case occurred during a period between 2015 and November 2019. The way in which the Claimant's interest in Rencar was held had by then altered. Between 2014 and 26 August 2020, the Claimant's case is that the Claimant was the sole shareholder of JCDecaux Europe Holding SAS ("**JCDecaux Europe**"), a French company, which was the sole shareholder of JCD CEE (as defined above), which held the 67% shareholding in Gewista, which was the sole shareholder of Europlakat, a Czech company which owned 70% of Rencar.

68. By way of qualification of this picture, it appears that the shares in Europlakat were, prior to 2 November 2015, held not by Gewista, but rather by Aussenwerbung Tschechien – Slowakei Beteiligungs-Gesellschaft mbH ("**ATSBG**"), which on or by that date merged with Europlakat. It further appears that in 2022 or 2023 Gewista was replaced as sole shareholder of Europlakat by ATSBG Holding GmbH, a new company in which Gewista held 45% of the shares and JCD CEE held the remaining 55%.

(5) The euroAWK dispute

69. Under the contract on the installation and operation of adverts in the vitrine windows of the Prague metro concluded between DPP and euroAWK s.r.o. on 18 May 1999, euroAWK was authorised to install and operate CLV panels in the spaces of the Prague metro. This contract was concluded for a specific period from 20 April 2013 with automatic extension for a further 5 years, unless DPP were to inform euroAWK by registered letter at least 6 months prior to the expiry of the contract that it was no longer interested in extending this contract (the **"notice provision"**).

70. On 17 October 2012, DPP purported, pursuant to the said notice provision, to terminate its contract with euroAWK for the installation and operation of advertising in the Prague metro (the **"euroAWK Contract**"). The Respondent contends that DPP was obliged to send this notice of termination under Amendment No. 3 of the Rencar Contract, according to clause VIII(3) of which DPP undertook not to extend its cooperation with euroAWK beyond the scope of the euroAWK Contract.

71. The efficacy of this purported termination was contested by euroAWK, apparently on the ground that a gas explosion at its offices meant that it did not receive the relevant registered letter in time. On 18 June 2014, the Prague District Court made a preliminary injunction prohibiting DPP from removing euroAWK's advertising from the Prague metro.

72. The minutes from a meeting of DPP's Board of Directors on 28 July 2014 record that "*A litigation is currently pending concerning termination of the agreement between the Public Transit Company and EuroAWK. The Public Transit Company assumes that the agreement will be declared terminated*."

73. A dispute between DPP and Rencar developed following the purported termination and euroAWK's continued use of the advertising surfaces of the vitrine windows of the metro.

74. On 23 July 2014, Rencar requested DPP to deliver a notice to euroAWK to terminate the euroAWK Contract as of 20 April 2018. Rencar also requested DPP to conclude a settlement agreement with Rencar in respect of damages allegedly suffered by Rencar. Rencar sought to set off CZK 11,178,084 against an invoice issued by DPP for 2013 rent. This claimed set-off was in respect of DPP's failure to terminate the euroAWK Contract. At its Board Meeting on 28 July 2014 DPP resolved to resist this claim to set off, and to claim default interest.

75. On 2 December 2014, Rencar sent a letter to DPP offering two alternatives as regards the euroAWK claims. Either, set-off be permitted under the Rencar Contract or negotiations be conducted with DPP to find a business solution.

76. On 5 February 2015, Rencar claimed a set-off of CZK 21,449,309 against rent payable for 2014 (CZK 29,971,553.59). The set-off claimed was in respect of the euroAWK dispute.

77. On 11 May 2015, DPP insisted on payment of the full amount of rent for 2014. DPP said that it would not authorize Rencar's set-off request.

78. On 1 June 2015, Rencar provided a draft "*Agreement on Arrangement of the Rights and Obligations of the Parties*" based on the parties' negotiations for settlement of the dispute.

This proposed that DPP make a payment of CZK 16 million in settlement of the dispute, with rent payments under the Rencar Contract to be unaffected.

79. DPP sought legal advice in respect of this proposal. An opinion provided on 10 June 2015 by [redacted] law firm advised DPP *inter alia*: (i) not to enter into the draft agreement, *inter alia* because it could if adopted involve DPP's governing body in breach of its managerial duty of care; (ii) to request revenue accounts for the whole period of the Rencar Contract; (iii) to issue supplementary invoices where there was a discrepancy between what was paid by Rencar and what should have been paid; (iv) to issue a supplementary invoice for 2013; (v) if Rencar was in default with payments, to inform Rencar of the same pursuant to the relevant provisions of the Rencar Contract; and (vi) to terminate the Rencar Contract if Rencar did not pay the sums due.

80. On 25 June 2015, DPP informed Rencar that the due date to pay the 2014 invoice was extended due to the ongoing negotiations.

81. In September 2015, Rencar proposed by way of a draft amendment to the Rencar Contract that the euroAWK dispute be submitted to arbitration.

82. On 23 October 2015, Rencar sent the DPP Board of Directors a letter which stated *inter alia*:

> "*Rencar maintains its position that DP Praha is not legally entitled to payment of the disputed amount. Since DP Praha has notified Rencar in writing that it is prepared to terminate the Rencar Contract in the event of non-payment of the disputed amount, and since Rencar is interested in ensuring that the Rencar Contract (which is vital to the Company) is not affected by any disputes as to its validity and effectiveness or the invalidity of any termination by DP Praha, Rencar will pay the disputed amount to DP Praha. This will preclude any possibility of termination for alleged default alleged by DP Praha in the payment of the 2014 payments under the Rencar Agreement.*"

83. On 11 December 2015, Rencar issued proceedings against DPP in the District Court for Prague 9. Rencar claimed that DPP had breached its obligations under the Rencar Contract not to extend the euroAWK Contract beyond 20 April 2013 and to ensure removal of all euroAWK advertising by no later than 20 October 2013.

(6) Rise of the ANO

84. The rise in Czechia of a political party, Action of Dissatisfied Citizens (Akce Nespokojených Občanů) ("**ANO**") plays an important role in the Claimant's case. ANO was founded by Mr Andrej Babiš in 2012. Mr Babis is a businessperson. He is said to control Agrofert, a conglomerate of agriculture, foods and chemical companies. He also reportedly has interests in the Czech media; the Claimant contends that a year after founding ANO, Mr Babiš purchased a media group (Mafra) which publishes Mladá Fronta Dnes and Lidové Noviny. The Claimant says that these are two of the most read daily newspapers in the Czech Republic.

85. In 2013, ANO competed in the Czech national elections for the first time, winning 19% of the vote. ANO entered into a coalition with the Czech Social Democratic Party ("**ČSSD**") and the Christian and Democratic Union ("**KDU–ČSL**"). Mr Babiš was appointed finance minister and first deputy prime minister.

86. ANO's success on a national level was accompanied by success in the City of Prague. In 2014, ANO won the highest share of the vote with over 22%. ANO entered into a coalition with CSSD and Trojkoalice. [redacted] an ANO politician, was put forward and duly elected as Mayor of Prague from 16 November 2014.

87. [redacted] was a leading figure in ANO, described as chair of its group of Parliamentary MPs, and author of an evidently fairly contemporary diary or notes, which, by some undisclosed route, came into the hands of journalists and attracted extensive commentary in 2021 by journalists from Seznam Zprávy.

(7) Questions are raised about the Rencar Contract

88. By early 2013 DPP's internal audit was reporting concerns about the Rencar Contract, described as being of "high materality". In particular, revenue from spaces rented out exclusively to Rencar by the Contract had decreased significantly from CZK 84.9 million in 2006 to CZK 50.5 million in 2011. A cause of increase was the obligation to provide maintenance, repairs and cleaning of advertisements undertaken by Rencar since 2009

under Amendment No. 7 dated 1 April 2009; but it was estimated that such maintenance, etc. had only cost DPP some CZK 18 million a year until 2009.

89. On 30 September 2013, DPP was advised by counsel that the subject-matter of DPP's agreements with both Rencar and euroAWK was defined vaguely in a manner which might involve their "[absolute/direct] invalidity".

90. On 28 July 2014 [redacted] as chairman presented to the Board a report which the Board of Directors of DPP had requested on Amendment No 7. The report concluded that it was unclear what the costs of maintenance undertaken by Rencar by this Amendment were and why Rencar had taken them over from DPP, but that, if they were less than the CZK 27 million reduction in rental effected by the Amendment, DPP should negotiate to revise the Amendment. At the meeting [redacted] commented that the results of the analysis were disappointing and that DPP had to address the issue.

91. Following further discussion of the revenue decrease at a DPP Board meeting on 18 August 2014, DPP on 22 August 2014 wrote a letter to Rencar invoking Article IV(2) of the 2009 Consolidated Contract for re-negotiation of the pricing arrangements thereunder, and on 25 August 2014 send a draft proposed amendment to the Rencar Contract.

92. In June 2015 (and as mentioned in paragraph 79 above) DPP's legal department forwarded to [redacted] outside counsel's advice on a draft settlement proposal which had been submitted to DPP by Rencar relating to euroAWK's occupation of advertising spaces, and which outside counsel advised could if adopted involve DPP's governing body in breach of its managerial duty of care.

93. In September 2015, DPP's internal audit department conducted an analysis of the revenues from the lease of advertising spaces. The report was stated to have been "*drawn up at the CEO's request*". The report opined *inter alia* that the extension of the Rencar Contract to 2031 in the 2009 Consolidation Contract was unjustified, was disadvantageous for DPP and might constitute an attempt to circumvent the Public Procurement Act, which the parties should have followed.

94. In October 2015 [redacted] Mayor of Prague, was reported as expressing dissatisfaction with the Rencar Contract and stating her view that the management of DPP, and in particular its CEO [redacted] should be replaced in order to implement a strategy of internal savings and of reconsideration of unfavourable contracts such as those with Rencar and another company (Erika).[7] She was also reported as saying that, "*after discussions with our coalition partners and within ANO*", their present view was that it would be ideal to identify a replacement for [redacted] by "*a tender for an agency with an international reputation*".[8]

95. In the event, the removal of [redacted] met some opposition (even within ANO) at this stage, and the matter was not pushed to a vote in the Supervisory Board. [redacted] is recorded as telling reporters that this was on the basis that DPP would "*accommodate the city's wishes*" (i.e. presumably, regarding review of existing contracts), while [redacted] is reported as saying that "*either the CEO will leave with a thank you or will leave by himself*".

96. In early December 2015, the City launched an architectural competition for the design of new street furniture, and [redacted] is reported as telling the press that the City would either agree on a Street Furniture Contract more favourable to the City or the City would terminate. Asked about a reported threat by JCDecaux to remove existing street furniture, if its Street Furniture Contract was terminated, [redacted] is further reported as saying that

> "*If they do that, this will be in fact the end of their business activities in Czechia*".

and as adding that

> "*in the event of obstructions, the city will also interrupt cooperation between the company and the Transport company of the capital*."

[7] C-0052, [redacted] *Company has to save internally*, Mladá fronta dnes, 3 October 2015.

[8] C-0052, [redacted] *Company has to save internally*, Mladá fronta dnes, 3 October 2015.

97. On 14 December 2015, the DPP Board of Directors adopted a resolution in which it ordered an analysis of DPP's rights and obligations as a shareholder of Rencar and an inspection of the factual situation regarding the placing of advertisements by Rencar.

98. On 11 January 2016, following a report by [redacted] to the National Unit for Combating Organised Crime, Criminal Police and Investigation Service ("**Organised Crime Unit**"), a police investigation was instigated [redacted]

[redacted]

99. The investigation was carried out between December 2015 and November 2018, with a report being ultimately issued on 30 November 2018 (the "**Investigation Report**").

100. At a meeting on 19 January 2016 between [redacted] of DPP and [redacted] of Rencar, the former summarised basic problematic areas as being: the unsatisfactory legal aspect of the contractual relationship, which was described as very confusing and unclear due to various amendments; the risk of potential disputes; the provisions governing the amount of DPP's revenue share; DPP's dissatisfaction with the current economic benefit from the relationship; and the absolutely unsatisfactory contractual provisions regarding effective and efficient control of Rencar's proper performance. On 22 January 2016 [redacted] followed this up with a letter reiterating that "*the problem had criminal and economic*

dimensions", referring to the issues arising regarding euroAWK and saying that he "*did not rule out the possibility of a drastic solution to the situation*".

101. On 1 February 2016 DPP's Board resolved to obtain a legal opinion on the contractual relationship with Rencar, "*focusing on the prerequisites for amending or terminating this contractual relationship, taking into account the new private-law regulation in the new Civil Code and the Corporations Act and the current legislative changes in the area of public procurement*".

102. By Protocol addressed to the DPP Board dated 22 February 2016, Mgr. and Ing. Petr Prchal, DPP's legal counsel, advised DPP against any further negotiations with Rencar, while Rencar's stance in correspondence was being verified.

103. At a meeting of DPP's Board on 14 March 2016, the Board, chaired by [redacted], was presented with a legal opinion dated 9 March 2016 obtained from the law office [redacted] pursuant to the Board's resolution of 1 February 2026. The opinion concluded that the original Rencar Contract and the related amendments and the 2009 Consolidated Contract were all null and void, in particular because there had been no proper concession procedure and no approval by DPP's Board; but that, nevertheless a business relationship existed which "*can be regarded as a lease agreement concluded implicitly*", although it was "*not possible to determine exactly whether it was concluded for a fixed term (until 30 June 2016) or for an indefinite term (possibility of termination with a three-month notice period)*". The contractual position was described by [redacted] at the meeting as "*complex and [open to] several legal interpretations*".

104. During the meeting, [redacted] as chairman and Bc. Češkoá as Vice-Chairperson expressed the view that notice to terminate the Rencar Contrct should be sent, though only after discussion at a Supervisory Board meeting due to take place on 23 March 2016, following which the Board of Directors could decide on its sending *per rollam*, i.e. without a formal in personam meeting. The meeting concluded with a Resolution No. 4/2016/2, which *inter alia*: (1) referred to the legal opinion received from [redacted] (2) instructed [redacted] as CEO to negotiate a general settlement of DPP's relationship with Rencar, including a date of termination no later than 30 June 2016; (3) decided, as requested by the

Supervisory Board, to commission [redacted] to draw up a legal opinion for DPP's Supervisory Board on the validity of the Rencar Contract and whether it constituted a concession contract, on the possibility of termination and on overall strategy and risks, on the possibility of a settlement and on the impacts of termination on DPP as a shareholder in Rencar; (4) instructed DPP's legal department to engage CCS, as a precautionary measure to prepare a notice of termination of "*the lease agreement potentially implicitly concluded for an indefinite term*" with Rencar as well as an application to the Competition Office for an opinion "*as to the legal regime of the Contract and the obligation to proceed further pursuant to the Competition Act*"; and (5) granted a power of attorney to CCS Law Office DPP in the negotiation with Rencar resolved upon by point (2) above.

105. The Tribunal does not have before it full or fully documented information about the course of subsequent events. The planned Supervisory Board meeting presumably took place on 23 March 2016. The inference is that it must have endorsed the sending of the proposed notice of termination, following which the Board did the same on a *per rollam* basis. The Board's approval to that effect was the subject of Bord Resolution PR/2016/2 dated 30 March 2016 signed by [redacted] chairman and Bc. Češkoá as Vice-Chairperson.[9] It asserted the absolute nullity and invalidity of the Rencar Contract on grounds ranging from its want of expression of the parties' intention "*in a proper and attributable manner*" to the "*vaguely defined subject matter of the lease*" and to breach of the Act governing concession contracts. It went on to say that, in view of the parties' de facto behaviour, and as a precaution against the possibility that this gave rise to "*the existence of a valid lease agreement concluded by implication*", DPP also terminated any such implied contract by a statutory three-month notice under section 677(2) of Act No. 40/1964, Civil Code.

106. On 31 March 2016 an electronically-signed letter was sent by [redacted] Mayor to [redacted] Chief Executive Officer and Chairman of the Board of Directors of DPP, referring to the media spotlight on the Rencar Contract and the financial significance of that Contract for the City's budget, and saying that she therefore assumed that the Board of DPP "*has already carefully inquired into the above-mentioned doubts as to the alleged*

[9] R-0118, Letter re termination of a contract for the rental of advertising space, 30 March 2016.

economic disadvantages ensuing from the agreement with Rencar, including the possibility of terminating the contractual relationship earlier than 2031" and that "*This is even more so if the Agreement is indeed invalid*". The letter went on to ask for the management of DPP to send to the members of Prague City Council the basic details and economic data on the contractual relationship with Rencar, and the opinion of DPP's Board "*on the alleged disadvantages from this contractual relationship, information on the possible termination of the agreement and the possibility of announcing a new transparent tender procedure*". This letter was in due course deployed by [redacted] at a meeting with Rencar on 6 April 2016 to show that the Mayor was "*urging him to correct the problem with the unfavourable contractual relationship*".

107. The Mayor's letter also received a detailed answer dated 19 April 2016 from [redacted] still at this point the CEO of DPP[10], in which [redacted] offered the possibility that a DPP representative might speak at the Prague City Assembly to explain the position, and concluded by saying that:

> "*The DPP's Board of Directors is convinced that the termination of the contractual relationship with Rencar and the subsequent announcement of an open tender is clearly in line with the interests of the shareholder and is ready to defend the chosen procedure before the shareholder (or Prague City Assembly or Prague City Council).*"

108. On 16 April 2016 the Supervisory Board removed [redacted] from the Board of Directors of DPP, replacing him with Mr Gillar; and left it to that Board to decide whether [redacted] should also be dismissed as CEO of DPP. Commenting on this decision, when asked by ČTK [Czech Press Agency], [redacted] is reported as recalling that she had criticised the way the company was run for a long time, and as saying that: "*The change is appropriate and I think it is the right step from the supervisory board*"[11]

[10] See the next paragraph.

[11] C-0054, *A coup in the transport company: CEO [redacted] fell, he bothered ANO*, echo.cz, 18 May 2016.

109. On or about 18 May 2016, [redacted] was removed from his office as CEO of DPP, and his deputy Ms Ceskova was likewise removed from her office.

(8) Subsequent events

a. Czech competition authority's investigation of DPP

110. The Czech competition authority is Úřad pro ochranu hospodářské ("**UOHS**").

111. Prior to terminating the Rencar Contract on 30 March 2016, DPP on 22 March 2016 asked UOHS whether it considered that the Concession Act (Act No. 139/2006 Coll., on Concession Contracts and Concession Procedure) was applicable to the Rencar Contract and whether, if DPP entered into an identical contract with a third party in the future, it would be necessary to proceed pursuant to the Concession Act.

112. By its response of 6 April 2016, UOHS explained that its powers did not extend to providing legally binding interpretative opinions on legislation, and that its role was to evaluate the acts of contracting parties that had already taken place. The UOHS stated that, if DPP intended to file an application requesting the UOHS to investigate the Rencar Contract, it could do so.

113. On 28 April 2016, the Board of Directors resolved to do that. The request was submitted the following day.

114. The UOHS issued its decision on 9 September 2016 (the "**UOHS Decision**"). The UOHS found that DPP had failed to respect procurement rules in relation to Amendment No. 9 to the Rencar contract. The UOHS imposed a fine of CZK 1,000,000 on DPP.

115. On 19 September 2016, DPP appealed, but only against the amount of the fine. This appeal was rejected on 25 November 2016.

b. Czech court proceedings

116. Rencar's advertising activity of the nature covered by the Rencar Contract did not come immediately to an end after the purported termination of the contract. The relevant surfaces were the subject of tenders over a period of years under which others obtained advertising

rights (see below). But by late 2019 Rencar had lost access to most of the relevant surfaces, although some appear to have remained available to it, at least to some limited extent, even until 2021, when Rencar was fully excluded. Hence, the Claimant's selection of November 2019 as an appropriate date at which to assess its loss.

117. In order to uphold what it maintained to be its rights and to clarify the situation, Rencar issued proceedings against DPP in the District Court for Prague 9 on 27 September 2016. The primary relief sought was a declaration that the Rencar Contract was valid. Europlakat was an intervenor in the proceedings.

118. On 9 September 2019, the District Court decided that the Rencar Contract and/or amendments were void *ab initio*. It found, first, that the subject-matter of the Rencar Contract was not "*clear*" as required by Section 37(1) of the Civil Code, and that it and all subsequent Amendments, including the Consolidated Contract, were incapable of giving rise to any lease accordingly (paragraph 32). Second, it held that the Rencar Contract was only signed by one representative per party and was therefore inconsistent with Rencar's Articles of Association (paragraph 35). Third, it held that it was "*bound*" in the light of the Czech Competition Authority's decision regarding Amendment No. 9, to hold that the Consolidated Contract was a concession contract and, as such, being a material modification of the Rencar Contract and being concluded without prior consent of the Ministry of Finance, that it was invalid under section 30 of the Czech Concession Act. In conclusion the District Court dismissed both the claim for a declaration that (a) the Rencar Contract for a Lease was valid and (b) the claim that there was a valid contractual relationship, holding that the parties' relations were only "*de facto*", not legal.

119. Rencar appealed against the District Court's decision. On 3 September 2020, the Prague Municipal Court acting as the appellate court issued its decision. It held that the declaratory relief sought required the Claimant under Section 80 of the Civil Procedure Code to show some urgent legal interest, that this could be inferred in relation to the claim that the Rencar Contract on a Lease was valid, but was not clear as regards the claim that there was a valid contractual relationship. The Municipal Court thus remitted the case to the District Court

with the instruction that Rencar should be requested to supplement its action for declaratory relief and substantiate the urgent legal interest.

120. Rencar filed an appeal to the Supreme Court, but on 11 May 2021 this appeal was held to be inadmissible.

121. The District Court's decision on the case as remitted was issued on 17 August 2021. The District Court rejected Rencar's claim. The District Court held that Rencar had not supplemented its action in such a way as to ensure that it was not incomprehensible and vague.

122. Rencar appealed against the District Court's decision. The Municipal Court upheld the District Court's decision on 25 January 2022.

123. Rencar then appealed again to the Supreme Court, this time against the decision of the Municipal Court. By a resolution dated 19 July 2022, the Supreme Court quashed both the District Court's decision of 17 August 2021 and the Municipal Court's decision of 25 January 2022. The Supreme Court held that the action for declaratory relief was not vitiated by indefinite specification of the legal relationship with regard to which Rencar was seeking the declaration.

124. On 15 February 2023, the District Court ruled that Rencar had no urgent legal interest in the requested declaration. On 14 September 2023, the Municipal Court quashed that decision, disagreeing that there was no urgent legal interest, and referred the case back to the District Court. On 7 May 2025 the Prague District Court concluded that the Rencar Contract was invalid. The same conclusion was reached in proceedings involving another party (ERFLEX) decided by the Municipal Court of Prague 9 on 30 August 2024 and 14 February 2025.

125. Rencar's appeal against the 7 May 2025 decision of the Prague District Court was rejected on 27 November 2025 by the Municipal Court. The Municipal Court agreed with the conclusion of the District Court that the Rencar Contract was absolutely invalid for uncertainty under Section 37(1) of the (old) Civil Code. Subsequent conduct did not permit an inference that areas on Rencar's property that were suitable for advertising were known

to the parties at the time of contracting; they had accordingly cooperated on the basis of a "*supposed contractual relationship that turned out to be non-existent.*"[12] An absolutely invalid contract could not be subsequently remedied by amendments. The Consolidated Rencar Contract was an amendment and in any event did not sufficiently define the subject matter.

126. Rencar also filed a complaint to the Constitutional Court on 21 December 2022 in respect of the resolution of the District Court for Prague 9 at a hearing of 11 November 2022, which refused modification of the relief sought by Rencar to add a declaration that there was a legal relationship between DPP and Rencar as a result of the 2009 Consolidated Contract (as amended) and /or implicit agreement. The Constitutional Court rejected the complaint as inadmissible on the basis that it was directed against a procedural decision issued in a pending proceeding.

(9) Replacement of Rencar

127. Between December 2016 and January 2022, advertising space on the Prague public transport network was sold off by tender. The table below shows the tenders and their outcomes.

Date	Subject of tender	Winner
December 2016	6-month rental of advertising space on 300 buses (SOR NB 12 and SOR NB 18)	BigBoard Praha, a.s. ("**Bigboard**")[13]
November 2017	12-month rental of advertising space on 300 buses (SOR NB12 and SOR NB18)	Bigboard
November 2017	12-month rental of advertising space on 60 trams (Trams15T FORCITY)	Bigboard
March 2018	10-year rental of advertising space on City Light Vitrines	Bigboard

[12] R-0391, Judgment of the Municipal Court Prague 9, Ref. No. 17 Co 326/2025 - 2284, 27 November 2025.

[13] Bigboard did not ultimately take up the contract.

June 2018	6-year rental of advertising space on the metro	Railreklam, spol. s.r.o. ("**Railreklam**")
September 2018	3-year rental of advertising space on 50 trams (Trams15T FORCITY)	Bigboard
September 2018	12-month rental of advertising space on 300 buses (SOR NB12 and SOR NB18)	Bigboard
May 2019	10-year rental of advertising space on 300 buses (SOR NB12 and SOR NB18)	European Digital Industries, a.s.
July 2019	Lease of spaces for CLV installation	Railreklam
November 2019	~3-year rental of advertising space on 300 buses (SOR NB12 and SOR NB18)	Bigboard
January 2022	~3-year rental of advertising space on 150 trams (Trams15T FORCITY)	Bigboard
January 2022	3-year rental of advertising space on 150 trams (Trams15T FORCITY)	Bigboard

128. Bigboard did not submit a bid in the June 2018 tender. Bigboard thus won all but two of the tenders in which it submitted a bid. With the possible exception of the March 2018 tender,[14] Bigboard was the highest bidder in each of those tenders.

129. The Respondent contends that DPP's revenues increased significantly as a result of the contracts concluded following these tenders.

[14] The Respondent has adduced evidence from [redacted] to the effect that Bigboard was ultimately the highest bidder in the March 2018 tender, even if it did not initially submit the highest offer.

III. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

130. As further set out below, the Claimant alleges that the Respondent's conduct breached the Expropriation Standard and the FET Standard (as defined). By the Statement of Reply, the Claimant seeks the following relief:

a. A declaration that the Respondent breached its obligations towards the Claimant under the BIT and international law;

b. An order that the Respondent pay the Claimant EUR 21,640,832 or such other amount as the Tribunal deems appropriate;

c. An order that the Respondent pay pre-award and post-award interest at a rate of interest that is equivalent to EURIBOR plus 2%, compounded annually, for the period beginning on 1 November 2019 and ending on the date that the compensation has been paid, or at such other rate and period as the Tribunal deems appropriate;

d. An order that the Respondent pay the costs and expenses of this arbitration, including the Claimant's legal and expert fees and expenses, the Claimant's expenses, the costs of the Claimant's departments dealing with the present arbitration, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's other costs;

e. Such other relief as the Tribunal considers appropriate.

131. In response, the Respondent requests that the Tribunal render an Award:

a. Dismissing the Claimant's claims in their entirety for lack of jurisdiction or admissibility;

b. In the event that the Tribunal rejects the Respondent's preliminary objections, dismissing the Claimant's claims in their entirety;

c. Ordering the Claimant to bear all fees and costs borne by the Respondent in relation to the proceedings, the arbitrators' fees and expenses, and ICSID administrative costs, with interest from the date of the Award until the date of payment.

IV. THE TRIBUNAL'S APPROACH TO THE ISSUES

132. The Tribunal will start by considering the various jurisdictional objections raised by the Respondent State under ICSID Arbitration Rule 41(1), and will then address the issue of attribution which the State also raises, if the jurisdictional hurdles are overcome.

V. RESPONDENT'S JURISDICTIONAL OBJECTIONS

133. As regards the jurisdictional objections, the Respondent submits that:

a. The predominant Investment that the Claimant invokes is the Rencar Contract and this is invalid under the Czech Civil Code and cannot constitute an Investment under Article 1 of the BIT;

b. The Claimant's alleged Investment was not made in accordance with Czech law as required by Article 1 of the BIT, but was made in violation of Czech procurement law;

c. The Claimant's alleged Investment violates international public policy on public procurement;

d. The facts relied upon show fraudulent practice sufficient to warrant the declining of jurisdiction.

e. The Claimant is not an investor.[15]

134. The first two of these jurisdictional objections travel much over-lapping ground. They are also related to the third and fifth objections.

[15] This objection was added at the Rejoinder stage of the proceedings.

(1) Objection 1: The Rencar Contract is the "predominant" investment, but is invalid under Czech law and cannot constitute an investment under Article 1 of the BIT

a. Parties' Positions

i. Respondent's Position

135. Article 1 of the Bilateral Investment Treaty between France and Czechia provides *inter alia* that:

> "*Article 1*
>
> *For the purposes of this Agreement:*
>
> *1. The term 'investment' means every kind of asset such as property and rights of all kinds and, in particular, includes:*
>
> *a/ movable and immovable property as well as all property rights, in particular mortgages, priority rights, guarantees and the right to use assets;*
>
> *b/ shares and all other forms of participation in companies constituted in the territory of one of the Contracting Parties as well as all rights deriving therefrom;*
>
> *c/ obligations, claims and rights to any performance having economic value;*
>
> *d/ copyrights, industrial rights (such as patents, trademarks, industrial designs and models), technological processes, licenses, registered names and goodwill;*
>
> *e/ concessions conferred by law or under contract, in particular concessions concerning the prospecting, cultivation, extraction or exploitation of natural resources, including those located in the maritime area of the Contracting Parties,*
>
> *provided that such assets are deemed to be or have been invested in accordance with the law in force of the Contracting Party in the territory or maritime area in which the investment is made.*

The term 'investment' shall also include indirect investments made by investors of one Contracting Party in the territory or maritime area of the other Contracting Party via an investor of a third State.

Any change in the form of the investment shall not affect their qualification as an investment within the meaning of this Agreement, provided that such change is not contrary to the law of the Contracting Party governing the territory or maritime area where such investment has been made."

136. The Respondent submits that the claims do not fall within the BIT's scope of application on the basis that a void contract under domestic law cannot be an investment under the BIT or under Article 25 of the ICSID Convention.[16] There are three limbs to this submission.

137. First, the Respondent submits that the investment at issue before the Tribunal is not the shares in Rencar but rather is or is predominantly the Rencar Contract in its consolidated form from 2009.[17] The Respondent relies on the following matters:

a. The Claimant does not allege any measures directed against the Claimant's legal title to the Rencar shares.[18]

b. The 2009 Consolidated Contract is "*conditional for Claimant's entire case*" because the case is concerned with Rencar's alleged right to provide services until 2031, which was provided by the 2009 Consolidation.[19]

c. Where there are two alleged investments at stake, an investment tribunal must assess its jurisdiction with reference to the investment at issue. This is the Rencar Contract.[20]

[16] Counter-Memorial, ¶356.
[17] Counter-Memorial, ¶¶368 et seq.
[18] Counter-Memorial, ¶369.
[19] Counter-Memorial, ¶370.
[20] Counter-Memorial, ¶371.

138. Second, the Respondent submits that the Rencar Contract was concluded in violation of and/or was invalid under the Czech Civil Code in the following respects:[21]

a. Contrary to section 37(1) of the Civil Code, the object of the Rencar Contract made on 31 January 1997 was not sufficiently defined. The Respondent refers to the 2008 decision of the Prague Municipal Court as confirmed by the High Court in Prague in 2009 and the 2019 decision of the District Court for Prague 9 in support of this. The same submission is made in relation to the 2009 Consolidated Contract made on 19 October 2009; and none of the Amendments or any events subsequent to such Contracts can, it is submitted, remedy the resulting invalidity. The Respondent also submits that the absolute invalidity of the Rencar Contract was confirmed by the District Court for Prague 9's decision of 7 May 2025 (upheld by the Municipal Court's decision of 27 November 2025), as well as by the ERFLEX decisions of 30 August 2024 and 14 February 2025[22]; it relies upon the District Court for Prague 9's and the Municipal Court's judgments as holding held that the Rencar and Consolidated Rencar Contracts were invalid both for failure to comply with mandatory written form requirements and for want of clarity of content, and that the Consolidated Rencar Contrary was also invalid under the Concession Act for want of any Concession Act procedure. It held that the Parties were in a de facto not a legal relationship, that their invalidity could not be remedied by implying any form of contract, but that, even if the circumstances had given rise to any implied contract, it would have been subject to termination without reason.

b. Contrary to the Articles of Association of Rencar and DPP, the Rencar Contract made on 31 January 1997 was not signed by two representatives of each company. Again, the Respondent refers to the 2008 decision of the Prague Municipal Court.

c. Amendment No. 7, the 2009 Consolidated Contract and Amendment No. 9 were concluded in violation of the mandatory procedures for the awarding of concession

[21] Counter-Memorial, ¶¶358-359; Rejoinder, ¶¶368-372.

[22] See paragraph 124 above; Respondent's submission dated 5 September 2025; Respondent's comments on the 27 November 2025 Decision dated 6 February 2026.

contracts under the Concession Act. The Concession Act and the Public Procurement Act both governed matters of public procurement and both were applicable to DPP's contracts because DPP was a "*contracting authority*" under those Acts. Contracts that qualify under those Acts may only be awarded following required tender procedures. For concession contracts, the procedure under the Concession Act must be followed. The required procedure for significant concessions (i.e. those exceeding CZK 250 million) is strict and non-compliance results in the invalidity and lack of legal effect of a contract concluded in violation of the procedure. The Concession Act requires (*inter alia*) that significant concessions are approved by the municipal council and that an opinion be obtained from the Ministry of Finance prior to execution. In both cases, failure to comply results in the contract not having legal effect. In the present case:

i. Amendment No. 7 qualified as a public contract or as a concession contract and therefore compliance with the Public Procurement Act and the Concession Act was required. Neither procedure was followed, with the result that DPP could have been sanctioned in an administrative offence procedure.

ii. As regards the 2009 Consolidated Contract, the contract qualified as a significant concession (with reference to revenues for the full contract term) such that the strict procedures referenced above were required. The Respondent relies in this respect on *inter alia* the opinions expressed by [redacted] Such procedures were not complied with, meaning that the 2009 Consolidated Contract was void. This invalidity is not affected by any time bar.

iii. Finally, as regards Amendment No. 9, the Concession Act applies. Again the Respondent relies on *inter alia* opinions expressed by [redacted] As the required procedure was not complied with, Amendment No. 9 is also void for violation of Section 30 of the Concession Act.

d. The Respondent further submits that the violation of the Concession Act was confirmed in respect of both Amendment No. 9 and the 2009 Consolidated Contract by the UOHS Decision in 2016.

139. By the Rejoinder, the Respondent adduced the First [redacted] Expert Report in support of the first and second propositions, and the First [redacted] Expert Report in respect of the third proposition as a matter of Czech law.

140. The Respondent submits that, as a result of these matters, the Rencar Contract was void *ab initio* as a matter of Czech law.[23] The amendments could not cure these deficiencies because they were intended to amend, not to re-write the contract.

141. Third, the Respondent submits that if an alleged right did not come into effect under the domestic legal order, there is no basis to treat that alleged right as an investment under a treaty.[24] The Respondent refers in this regard to the following authorities (among others):

a. *Libananco v. Turkey*.[25] The Respondent relies on the fact that the tribunal applied Turkish law to determine whether there had been a valid transfer of the shares in question to the claimant.

b. *Saba Fakes v. Turkey*.[26] The Respondent relies on the fact that a transfer of shares was not valid for the purposes of the BIT because the claimant did not hold legal title over the investment as a matter of domestic law.

c. *Vestey v. Venezuela*.[27] The Respondent refers to the statement at ¶194 that "*While the term "investment" itself is to be defined under the applicable rules of international law, the question whether or not the Claimant holds title over the assets constituting an investment is a matter of municipal law*."

d. *Cortec Mining v. Kenya*.[28] The Respondent relies on the tribunal's conclusion that the claimants' failure to comply with the legislature's regulatory regime constituted

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[23] Rejoinder, ¶601.

[24] Counter-Memorial, ¶¶360-367; Rejoinder, ¶¶339-348.

[25] RL-0181, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011.

[26] CL-0172, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010.

[27] RL-0224, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016.

[28] RL-0244, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018.

a violation of Kenyan law that, in terms of international law, warranted the proportionate response of a denial of treaty protection under the BIT and ICSID Convention.

e. *ELA v. Estonia,* where the tribunal held that:

> *"... it is equally well established that where an alleged taking occurs by operation of a municipal court decision on an issue of municipal law, an international arbitration is required to show deference to the municipal courts. As articulated by the tribunal in Azinian, a governmental authority 'cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level.' To establish unlawfulness at the international level, it would not suffice for an international tribunal simply to disagree with the determination of the municipal courts. There must be an irregularity of sufficient gravity […], such as clear incompatibility with a rule of international law, undue influence from other State organs, an abuse of rights, a serious and fundamental impropriety in the legal process, a denial of justice or a pretence of form, or, in certain exceptional circumstances, a judicial decision contrary to municipal law. The mere fact that a judicial decision is incorrect as a matter of municipal law does not suffice. The possibility of holding the state liable for judicial decisions does not entitle an investor 'to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction.'*
>
> *[…]*
>
> *In sum, a seizure of property by a court as the result of normal domestic legal process does not amount to an expropriation under international law*

unless there was a fundamental and serious element of impropriety about the legal process."[29]

f. Douglas, The International Law of Investment Claims, Rule 4 states that the "*law applicable to an issue relating to the existence or scope of property rights comprising the investment is the municipal law of the host state, including its rules of private international law*."[30]

142. In response to submissions by the Claimant, the Respondent rejects any suggestion that it is precluded by estoppel or similar doctrines from relying on domestic law to deny the validity of the investment. The Respondent makes the following points:[31]

a. The doctrines of estoppel or waiver under international law cannot apply to the issue of whether an investment was validly created because this results in absurdity. The Respondent refers to the tribunal's finding in *Vestey v. Venezuela* that "*The principle of estoppel cannot create otherwise inexistent property rights*."[32]

b. In *ADC v. Hungary*,[33] the tribunal found that the respondent State was prevented from relying on the invalidity of the contract *as a matter of the applicable domestic law*.

c. A high threshold has to be met before a State is prevented from relying on the invalidity or illegality of an investment. This is demonstrated by *Kardassopolous v. Georgia* (a case relied upon by the Claimant),[34] where the following factors were present (i) the contracts were concluded between the US-registered company of the

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[29] RL-0333, *ELA U.S.A. Inc. v. The Republic of Estonia*, PCA Case No. 2018-42, Award, 21 February 2025, ¶¶1078-1080.

[30] RL-0164, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, Cambridge 2009.

[31] Rejoinder, ¶¶349-365.

[32] RL-0224, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶257.

[33] CL-0038, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.

[34] CL-0034, *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007.

investor and a State-owned oil company which the tribunal considered to be an organ of the Georgian state; (ii) the contracts were ratified by the Georgian Cabinet of Ministers and the Minister of Fuel and Energy; (iii) the contracts included express representations, declarations and warranties that they were in compliance with Georgian law; and (iv) the invalidity of the agreements was raised for the first time in the arbitration. The Respondent contends that none of those factors applies in the present case, and that similar distinguishing considerations apply in respect of the decisions in *Arif v. Moldova*,[35] *Karkey v. Pakistan*,[36] *CME v. Czech Republic*[37] and *Macbo v. Kosovo.*[38]

d. Estoppel is not available where a party has unclean hands. The Claimant was said to have unclean hands by reason of the alleged violations of procurement law.

ii. Claimant's Position

143. The Claimant makes the following points in response.

144. First, it is not correct that the disputed investment is the Rencar Contract.[39] The Memorial identifies the Rencar shares as being in issue.[40] Pursuant to Article 1(1) of the BIT, which refers *inter alia* to "*claims and rights to any performance having economic value*", an "*investment*" includes both shareholdings and contracts. Professor Scheurer's Commentary on the ICSID Convention confirms this. The Claimant's case is based on both its shareholding in Rencar and the Rencar Contract. The jurisdictional requirements under the BIT and the ICSID Convention are accordingly met.

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35 CL-0037, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013.

36 RL-0232, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017.

37 CL-0197, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003.

38 CL-0195, *Mabco Constructions SA v. Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction, 30 October 2020.

39 Reply, ¶¶225-226.

40 Memorial, ¶¶181-184.

145. Second, as to the argument that an invalid contract cannot be an investment under a Treaty, the Claimant submits that the applicable law is international law, not domestic law.[41] This is confirmed by Professor Christoff Schreuer's *Jurisdiction and Applicable Law in Investment Treaty Arbitration* (2014), which states at p.3 that "*[q]uestions of jurisdiction are governed by their own system which is defined by the instruments containing the parties' consent to jurisdiction.*"

146. Third, the Respondent is estopped from relying on breaches of its own law as a defence.[42] As a matter of law:

a. Customary international law as codified in International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (the "**ILC Articles**"), Article 3, and the Vienna Convention on the Law of Treaties ("**VCLT**"), Article 27, prohibits States from relying on their domestic laws to evade obligations under international law.

b. Tribunals routinely dismiss illegality arguments anchored in domestic law in similar circumstances.[43] A State is precluded from relying on a breach of its domestic law in circumstances where the State was silent "*for years*" or "*many months*" following the alleged breach. The Claimant refers to:

i. *Kardassopoulos v. Georgia*, where the tribunal dismissed Georgia's objection that two State-owned entities did not have authority to enter into the agreements in question, finding that the State "*never protested nor claimed that these agreements were illegal under Georgian law*" but was instead silent in the years following their execution;[44]

ii. *Arif v. Moldova*, where the State's reliance on the invalidity of a contract as declared by the Supreme Court was held to be overly "*formalistic in that it*

41 Reply, ¶228.

42 Reply, ¶¶229-237.

43 Reply, ¶221.

44 CL-0034, *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, ¶¶158-159, 192, 262.

relies on a judicially declared invalidity", the reality being that at the time the investment was made and "*for many months thereafter*" both parties believed and were allowed to trust that the contract was valid;[45]

iii. *Karkey v. Pakistan*, where the State's rejection based on alleged invalidity was rejected because the State had "*consistently maintained that Karkey's investment was established in accordance with Pakistani laws*";[46]

iv. *Stati v. Kazakhstan*, where "*for years, Respondent failed to allege that anything was illegal or improper*";[47] and

v. *Mabco v. Kosovo*, where the privatization authority had "*voiced no concern over the legality of the manner in which the Claimant was proceeding*", the tribunal found that the case law showed that "*an illegality in an investment that might otherwise disqualify the investment from protection cannot be raised as a jurisdictional defense if the State was aware of the illegality and expressed no objection on that basis*."[48]

c. This approach is consistent with the doctrine of estoppel, citing I.C. MacGibbon, *Estoppel in International Law* (1958), p.512 (referring to the "*requirement that a State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions*"), as applied in cases such as *ADC v. Hungary* ("*Almost all systems of law prevent parties from blowing hot and cold. If any of the suit of Agreements in this case were illegal or unenforceable under Hungarian law one might have expected the Hungarian Government or its entities to have declined*

[45] CL-0037, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶¶371-374.

[46] RL-0232, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶¶598, 621, 628.

[47] CL-0194, *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Case No. 116/2010, Award, 19 December 2013, ¶¶800, 812.

[48] CL-0195, *Mabco Constructions SA v. Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction, 30 October 2020, ¶¶142, 396, 409.

to enter into such an agreement")[49] and *CME v. Czechia* ("*change of the legal position of the hos State towards the foreign investor … cannot be easily reconciled with the principle that a party cannot be heard to deny that which it has previously affirmed and on which the other party has acted in reliance*").[50]

147. Applying this doctrine to the facts:

a. The Rencar Contract was concluded between Rencar and DPP (two companies held by the City of Prague) in 1997 and was not put in doubt either during the tender process or nearly 15 years of implementation. On the contrary, the parties introduced numerous amendments to the Rencar Contract to extend and refine their relationship. The Claimant also refers to comments made by DPP in 2012, 2013 and 2014 praising the services provided by the Claimant and/or Rencar.

b. The alleged invalidity of the Rencar Contract was raised much later. As at the date of the hearing, Court proceedings as to the alleged invalidity of the Rencar Contract were still pending. DP's complaints were raised immediately prior to the destruction of the Claimant's investments as a pretext for the taking of the Rencar Contract.

148. Fourth, the Claimant submits that, to the extent that the Respondent's domestic law arguments are relevant:[51]

a. The Rencar Contract *did* define the subject matter of the agreement with sufficient clarity. Section 266(3) of the Czech Commercial Code refers to (1) subsequent behaviour and (2) the practice between the parties as decisive for the interpretation of a contract. In this case, the Rencar Contract was applied for close to 15 years and its subject matter was thus continuously clarified. The Claimant also refers to Articles I and IV of the Rencar Contract as originally agreed, and to the preamble to and Article I of the 2009 Consolidated Contract. The District Court for Prague 9

[49] CL-0038, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶475.

[50] CL-0197, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, ¶488.

[51] Reply, ¶¶234-236.

was able in its judgment to give a clear description of the content of both the Original and the Consolidated Rencar Contract, but erred in suggesting that it was unclear, and in particular by focusing on the Contract's suggested lack of clarity to third parties, rather than on its actual clarity to the Parties.[52] It also ignored the effect of the Commercial Code, by treating the text of the Contract as decisive, when the Commercial Code enables recourse to be had to Parties' subsequent conduct.[53] Prior to the 27 November 2025 Decision, the Claimant submitted that the judgement(s) of the Czech Courts on which the Respondent relies were non-final, lower court rulings, liable to appeal, in legal proceedings which had been on-foot for almost ten years. In relation to the 27 November 2025 Decision, the Claimant contends that the judgment is unpersuasive because it is lacking in analysis.[54] The Claimant further submits that the Czech decisions do not bear on or preclude the bringing of proceedings under the BIT and that the Respondent would in any event be estopped, by its conduct in giving effect to the Rencar Contract over years, from denying its validity and enforceability.

b. The notion that the Rencar Contract was signed by unauthorised signatories is also wrong. The relevant Articles of Association for determining authority to sign the Rencar Contract are Rencar's Articles of Association in force in 1997, i.e. Rencar's 1993 Articles of Association. Sections 1 and 4 of the same permitted the "Executive Director" to sign documents on the company's behalf. Signature by Rencar's then CEO, Mr Jiří Křížek, was accordingly sufficient. In any event, any alleged irregularity was remedied once the parties entered into the 2009 Consolidated Contract.

c. Further, there was no breach of Czech concession law. There was no substantial transfer of risk to Rencar by Amendment No. 7, the 2009 Consolidated Contract or Amendment No. 9 and Czech concession law does not apply.

[52] Claimant's Post-Hearing Brief I ¶20.

[53] Claimant's Post-Hearing Brief I, ¶20.

[54] Claimant's comments on the 27 November 2025 Decision dated 20 February 2026.

149. The Respondent relies in respect of this fourth point on the expert evidence of Mr Šilhán.

b. The Tribunal's Analysis

150. The Tribunal is concerned with a situation in which the Claimant bases its claim on an indirect interest in Rencar in the form of shares in Rencar. It allegedly acquired this interest on 29 June 2001, by virtue of Europlakat spol. s r.o's purchase of shares in Rencar from DPP under the SPA bearing that date. At the time when the Claimant alleges that its claim under the BIT arose, that is from or after March 2016 to the filing on 20 August 2020 of its Request for Arbitration under the BIT, the Claimant alleges that its indirect interest amounted to 46.9%. The Tribunal readily accepts that Rencar's Contract with DPP dated 31 January 1997 must have been an important – indeed probably the most important – element and attraction in the decision to acquire an interest in Rencar's shares. But neither Europlakat nor the Claimant acquired any interest in that Contract other than the indirect financial interest arising from the fact that it was one of the assets of Rencar in which they held shares.

151. Rencar's business flourished and the Rencar Contract was amended a number of times and in 2009 was incorporated into the 2009 Consolidated Contract. The present case arises from challenges made by DPP to the validity under Czech law of the Rencar Contract in its original and/or amended and/or consolidated form. The most significant of these challenges in the context of this case is, almost certainly, that made to the 2009 Consolidated Contract, since it was only by this that the Rencar Contract was extended to 30 June 2031, instead of lapsing at the previous expiry date of 30 June 2016.

152. The issue raised by the present jurisdictional objection is therefore whether the challenges under Czech law to, in particular, the original and 2009 Consolidated Contract, as amended, would, if made good, have the effect either that there was no investment capable of being invoked under the ICSID Convention or that the Claimant's assets were not invested in accordance with the laws of Czechia, as required by the Article 1 of the BIT.

153. The Tribunal does not consider that either effect would follow. The indirect interest in the Rencar shares that the Claimant acquired and thereafter held[55] was unquestionably an investment. No one has suggested that there was anything contrary to Czech law or invalid about that acquisition or shareholding. The present case differs in that basic respect from both *Libananco v. Turkey*[56], where the initial acquisition of shares, and *Cortec Mining v. Kenya*[57], where the initial obtaining of licences, was held to have been contrary to and invalid under domestic law.

154. The Respondent submits that the Claimant's claim depends essentially or in large measure on the making and validity of the original and 2009 Consolidated Contract as amended (particularly by Amendments Nos 7 and 9). It submits that the investment, or the "*predominant*" investment, in respect of which the Claimant claims must be regarded as being that Contract and/or those Amendments. In other words, as the Tribunal understands the submission, because the claim relates to the treatment of core assets allegedly belonging to Rencar, those assets must be the relevant investment. Further, the Respondent submits that, taking the original and 2009 Consolidated Contract as the investment, the Claimant must show that it made substantial investment under or in reliance on that Contract, whereas the most the Claimant could actually show is that some 73,000 Euros was invested in a trial digitalisation of advertising installations at the Národní třída station.[58]

155. The Tribunal does not accept the Respondent's analysis or submissions in this area. Any initial investment in shares in a company will normally be and be intended to be followed by activity and contracts undertaken by that company in the ordinary course of business. If the business prospers, the original investment will increase in value and be protected accordingly by any relevant BIT, without any need to show any additional investment by the original investor. There is also no basis for describing each subsequent activity or outlay by the business (such as the internal funding of the Národní třída digitalisation) as

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[55] See paragraphs 222 to 228 below for closer analysis of the position.

[56] RL-0181, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶113.

[57] RL-0244, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/19, Award, 22 October 2018, ¶365.

[58] See the Respondent's submissions in answer to Tribunal enquiry at Tr. Day 6, p. 997, l. 23 to p. 999, l. 6.

involving a further separate investment. Nor is there any basis for ignoring the shares, the primary legal interest acquired by the Claimant in Czechia, when identifying whether there existed or exists an investment which was, allegedly, damaged by the Respondent for the purposes of a claim under a relevant BIT and the ICSID Convention. The effect of any mistreatment of Rencar or its assets will be felt on the Claimant through and by virtue of its shareholding, which will fall in value accordingly. If a claim based on the diminution in value of the Rencar shares is otherwise open to the Claimant, there is no way in which the invalidity of any particular contract held by Rencar can or should be treated as rendering the original investment in shares invalid or in conflict with Czech law.

156. That is not to suggest that the invalidity of a particular contract made by a company (here, Rencar) in which an investor has invested by taking a shareholding may not be relevant to the nature or quantum of any claim which a claimant may have in respect of its valid investment in (here) Rencar. But that is a different matter. An international law claim under a BIT may have to take account of the effect of national law on a particular asset when considering what, if any, recoverable loss has been sustained in respect of a valid investment. That is not, however, a jurisdictional point, but a point arising from the inter-relationship of international and domestic law.

157. A similar conclusion was reached by the tribunal in *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela.*[59] The tribunal there held that the Claimant's acquisition of a shareholding was valid and effective under Venezuelan law, so as to constitute an investment protected by the relevant BIT, whereas the question whether, in the light of Venezuelan procurement law, the acquisition also had the legal effect of transferring to the Claimant an interest capable of protection in two companies was for later consideration, when the tribunal came to consider the admissibility and merits of the claim.

158. The extent to which the assets of a company in which an investor acquires shares should be regarded as an investment made by the investor was also considered in *Vestey Group*

[59] RL-0324, *Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6. Award, 16 January 2013, ¶160.

Ltd v. Bolivarian Republic of Venezuela.[60] The Vestey Group had acquired shares in a company which conducted a cattle farming enterprise, and it claimed under a BIT in respect of measures affecting that interest in its entirety. The State alleged that, in order to hold an investment, the Vestey Group needed to show, but could not show, that it had title to individual assets (land, livestock, equipment, vehicles, etc) making up the enterprise. The tribunal rejected the submission, holding that all that was necessary was for the Vestey Group to have validly acquired its shares in the company. Issues about title to individual assets were for the merits, and not jurisdictional. There is no suggestion that it was or could have been relevant to consider which of the shareholding or the cattle farming enterprise was the "*predominant*" investment, in order to go on to consider, if it was the latter, whether the latter was validly owned under Venezuelan law.

159. The way in which the tribunal expressed itself in the *Vestey Group* case is also generally instructive, and the present Tribunal will set it out in extenso:

> "*193. The consent to arbitrate expressed in Article 8 of the BIT covers disputes about the Respondent's obligations 'in relation to an investment of the national or company' of the other Contracting State. It is common ground that Vestey qualifies as such a 'national or company' of the UK. The Respondent, however, maintains that the investment is not an investment, as Vestey failed to acquire the necessary title over the land.*
>
> *194. The Parties do not dispute that Venezuelan law governs the issue of ownership of the asset constituting the purported investment. While the term 'investment' itself is to be defined under the applicable rules of international law, the question whether or not the Claimant holds title over the assets constituting an investment is a matter of municipal law.*
>
> *195. In the present case, the investment out of which the dispute arose is Vestey's interest in the cattle farming enterprise, Agroflora, a company incorporated under*

[60] RL-0224, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case. No. ARB/06/4, Award, 15 April 2016 ¶

Venezuelan law. The relevant inquiry is thus whether the Claimant held title to the shares in Agroflora under Venezuelan law.

196. The question remains whether Vestey also needs to show title to the individual assets (land, livestock, equipment, vehicles, etc.) to hold an investment and, hence, for jurisdiction to be established over this dispute. In the Tribunal's opinion, this question must be answered in the negative. This dispute arises out of measures affecting Vestey's interest in the cattle farming enterprise in its entirety. The measures were not directed exclusively at individual assets, such as the land plots. They targeted the enterprise as a whole. It is thus the cattle farming enterprise as a whole that must qualify as an investment of an investor.

197. The reasoning of the Holiday Inns tribunal is instructive in this regard:

> *'It is well known […] that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others.'*

198. Therefore, to conclude that the present dispute arises directly out of an investment of an investor, it is sufficient to find that Vestey held title to the shares in Agroflora. Title to the individual assets will certainly be relevant to determine the value of the allegedly expropriated investment. This is, however, a question for the merits.

199. The case law relied upon by the Respondent confirms this approach limiting the jurisdictional enquiry to the ownership of the shares. In Libananco v. Turkey, the tribunal indeed held that:

> *'Turkish law applies to the issue of whether (and when) Libananco acquired the shares in question and thus had an "Investment" under Article 26(1) of the ECT and Article 25(1) of the ICSID Convention.'*

200. Nowhere did the Libananco tribunal analyze whether the local subsidiary held each and every asset in accordance with the applicable rules of ownership. Venezuela shares such understanding, when it notes that the Libananco tribunal declined jurisdiction because of the claimant's failure to prove title to the shares 'over which the measures in question applied'. The reasoning in Saba Fakes was similar, when the Tribunal enquired into the claimant's ownership of the shares in the local company.

201. It is undisputed that Vestey owned Agroflora's shares and Vestey presented registered corporate documents to this effect. Nothing in the record suggests nor is it alleged that Vestey did not follow Venezuelan law when it acquired the shares. Therefore, the Tribunal cannot but conclude that the present dispute arises out of the investment 'of' the Claimant."

160. The Tribunal has no doubt that the approach to jurisdiction taken in the *Vestey Group* can and should be applied in the present case. What matters for jurisdictional purposes is that the Claimant's basic investment was and is in the shares in Rencar. The value of the shares will, necessarily, depend on examination of the fortunes and state of Rencar's assets, including (if and when challenged) their validity. But those are matters for enquiry as part of the merits. To insist on each asset held by Rencar being regarded as a separate investment, into the validity of which separate enquiry is necessary at the jurisdictional stage, in preference to allowing a claim to proceed based on the primary investment in the shares, appears to the Tribunal wrong in principle. This head of jurisdictional objection is therefore rejected.

(2) Objection 2: The Claimant's alleged Investment was not made in accordance with Czech law as required by Article 1 of the BIT, but in violation of Czech procurement law

a. The Parties' Positions

161. This objection turns on Article 1(1) of the BIT, set out above, and most particularly upon the following words:

> "*1. The term 'investment' means every kind of asset such as property and rights of all kinds …*
>
> *… provided that such assets are deemed to be or have been invested in accordance with the law in force of the Contracting Party in the territory or maritime area in which the investment is made.*"

162. The Tribunal has already noted the considerable overlap between this and the first jurisdictional objection, addressed above.

i. Respondent's Position

163. The Respondent submits that the investment is outside the jurisdiction of the Tribunal *rationae materiae* because the Claimant's investment was not made in accordance with Czech law, violating the legality requirement of Article 1(1) of the BIT.[61] There are two limbs to the Respondent's submission on this point:

a. Investments made in violation of Czech law are not protected by the BIT;

b. The Rencar Contract violates Czech law.

164. As to the first limb, the Respondent relies on the following authorities:[62]

a. *Phoenix v. Czech Republic*,[63] where the tribunal stated that "*[t]he purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State*." The tribunal gave the example of where a state restricts foreign investment in a sector of its economy and an investor disregards that restriction.

[61] Counter-Memorial, ¶¶373-374.

[62] Counter-Memorial, ¶¶375-380.

[63] RL-0109, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶100-101.

b. *Fraport v. Philippines II*,[64] where the tribunal is said to have made clear that investments needed to be legal in order to found the tribunal's jurisdiction *rationae materiae*.

c. *Saba Fakes v. Turkey*,[65] where the BIT in question applied to investments "*...established in accordance with the laws and regulations in force [in the state] at the time the investment was made*". The tribunal held at ¶115 that this meant BIT protection would "*not apply to investments which have not been established in conformity with the Respondent's laws and regulations*" – in such circumstances, the contracting state could not be deemed to have given its consent to arbitrate under the BIT.

d. *Anderson et al. v. Costa Rica*,[66] where the tribunal emphasised at ¶53 that where a BIT requires that investments be made in accordance with the laws of the host country, this requirement must be strictly followed.

e. *Cortec Mining v. Kenya*,[67] where the tribunal stated at ¶321 that "*for an investment to be protected on the international level, it has to be in substantial compliance with the significant legal requirement of the host state*."

f. *Vanessa Ventures v. Bolivia*,[68] where the tribunal found at ¶134 that reference to a host State's "laws" in Article 1 of the relevant BIT was a "*reference to the laws and regulations made by, or under the authority of, the public authorities of the State, and does not extend to purely contractual obligations*."

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[64] RL-0212, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014.

[65] CL-0172, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010.

[66] RL-0172, *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010.

[67] RL-0244, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018.

[68] RL-0324, *Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013.

165. In response to submissions made by the Claimant, the Respondent rejects the notion that a legality clause only applies to rules of a fundamental nature within the State's legal order.[69] The Respondent refers to *Quiborax v. Bolivia*,[70] where it contends that the tribunal rejected a suggestion that the domestic laws in question would have to be of a fundamental nature and found that only trivial violations of the host State's legal order were excluded. The Respondent also contends that the cases of *Rumeli v. Kazakhstan* and *ECE v. Czech Republic* (on which the Claimant relies in support of this point, as detailed below) did not decide whether the rules must be of a fundamental nature and that any comments in *Saba Fakes* were *obiter* because the tribunal concluded that the claimant did not hold an investment.

166. The Respondent gives *Teinver v. Argentina*[71] and *Saluka v. Czech Republic*[72] as further examples of cases in which tribunals have assessed compliance with domestic laws beyond those regulating the admission of foreign investment.

167. The Respondent says that, even if the Claimant is correct in contending that the relevant rules must be of a fundamental nature and directed at the regulation of investments, procurement rules meet that requirement.[73] No question of estoppel arises, as set out in respect of Jurisdictional Objection I.

168. As to the second limb (viz. whether the Rencar Contract violates Czech law), the Respondent makes the following points:

    a. The investment which must have been made in compliance with Czech law is the predominant investment. The predominant investment is the 2009 Consolidated Contract and the Claimant's alleged investments made in reliance on this contract.

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69 Rejoinder, ¶¶378-383.

70 RL-0092, *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶¶263-266.

71 CL-0097, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, ¶327.

72 RL-0144, *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶213.

73 Rejoinder, ¶¶391-393.

b. The 2009 Consolidated Contract was not compliant with Czech law as set out in respect of Jurisdictional Objection I above.[74] The Respondent relies in particular upon the decision of the UOHS and the resolution of the Organised Crime Unit as detailed above. The Respondent submits that the UOHS decision should be treated as established fact in this arbitration, referring in support of this proposition to *WCV v. Czech Republic*.[75]

169. The Respondent also contends that Amendment No. 7 and Amendment No. 9 violated mandatory provisions of Czech public procurement law as stated in respect of Jurisdictional Objection I above.[76] Again, the Respondent refers to the UOHS decision, the First [redacted] Expert Report and the findings of the Organised Crime Unit in this regard.

ii. Claimant's Position

170. The Claimant submits that in applying legality clauses such as Article 1 of the BIT, tribunals have applied a fact-sensitive approach considering (1) the nature of the rules violated and (2) the toleration of illegality by the host State.[77] The Claimant cites *Principles of International Investment Law* (2022) in this regard.

171. As regards limb (1), the Claimant contends with reference to the same authority that a legality clause applies only if the rules are "*specifically directed at the regulation of investments*" and have a "*fundamental nature*" within the State's legal order.[78] The Claimant refers to three investment cases in support of this proposition:

a. *Saba Fakes v. Turkey*.[79] Turkey referred to the provisions of its competition law arguing that any breach of its state law would be sufficient to taint the investment and deprive it of the protection of the BIT. The tribunal was "*not convinced*" by

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[74] *See* paragraph 138 above.

[75] RL-0266, *WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. The Czech Republic*, PCA Case No. 2016-12, Final Award, 26 July 2023, ¶182 ("*the Tribunal will, as it must, treat municipal law as a fact, and will follow the prevailing interpretation given to the municipal law by the courts and authorities of the Czech Republic*").

[76] *See* paragraph 138 above.

[77] Reply, ¶239.

[78] Reply, ¶¶241-242.

[79] CL-0172, *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶¶117, 119.

this argument, holding that "*a host State should not be in a position to rely on its domestic legislation beyond the sphere of investment regime to escape its international undertakings vis-à-vis investments made in its territory.*"

b. *Rumeli v. Kazakhstan*.[80] The tribunal analysed the legality clause in the BIT in the following terms: "*investments in [a] State will only be excluded from the protection of the treaty if they have been made in breach of fundamental legal principles of the host country*."

c. *ECE v. Czechia*.[81] The tribunal dismissed the State's objection founded on an alleged violation of Czech administrative law, holding that "*the cases in which tribunals have found that they are without jurisdiction on the basis of illegality, on analysis, have all concerned illegality of a particularly serious nature connected with the initial making of the investment* […]."

172. The Claimant contends that *Fraport v. Philippines II*, *Vanessa Ventures v. Venezuela* and *Quiborax v. Bolivia* as relied upon by the Respondent all demonstrate that the scope of legality clauses in BITs is narrowly limited. The Claimant draws the following principles from the authorities:

a. Legality clauses require a "*clearly evidence[d]*" violation of domestic law (quoting *Fraport*);[82]

b. Legality clauses cover intentional violations committed by investors;

c. Legality clauses do not extend to "*each and every law of the host state*" (quoting *Achmea v. Slovakia*).[83]

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[80] CL-0026, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶¶319, 322.

[81] CL-0200, *ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶¶3.169, 3.170.

[82] RL-0212, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶¶435-436.

[83] CL-0201, *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award, 7 December 2012, ¶172.

173. In the present case, the Claimant contends that (i) there is no violation of Czech law, let alone a clearly evidenced one; (ii) none of the alleged violations were committed by the investor; and (iii) none of the alleged violations could trigger the legality clause. A breach of public procurement law could not deprive the Tribunal of jurisdiction even if established because public procurement rules do not specifically regulate investments but are instead rules of general application (a term used in *Principles of International Investment Law*), and are not fundamental legal principles. Contract law rules are not "*regulatory obligations*" of "*fundamental importance*" in the language of *Cortec v. Kenya*.[84]

174. As regards limb (2), the Claimant contends that where a State ignores the alleged illegality of an investment, it will be precluded or estopped from subsequently raising this issue.[85] The Claimant refers to *Karkey v. Pakistan* as an illustration of this principle.[86]

175. The Claimant relies in this regard on the same matters set out above in respect of the first jurisdictional objection: DPP waited six years before inquiring into, let alone raising, the issue of illegality of the Rencar Contract. Prior to this, the Claimant alleges, DPP praised Rencar's performance.

176. To the extent that public procurement laws are relevant, the Claimant makes the following points in respect of the allegation that the 2009 Consolidated Contract violated public procurement law:[87]

a. The UOHS decision relates to Amendment No. 9, not the Rencar Contract.

b. The police investigation found that neither DPP, nor Rencar's employees committed a criminal offence.

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[84] RL-0244, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018, ¶346.

[85] Reply, ¶244.

[86] RL-0232, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶628.

[87] Reply, ¶250.

b. The Tribunal's Analysis

177. This jurisdictional issue involves a number of considerations already addressed in the context of the first jurisdictional objection. It starts however with the express provision in Article 1 of the BIT, according to which it is [to be] understood that assets constituting an investment "*must be or have been invested in accordance with the laws of [here, the Czech Republic*]". The Respondent repeats its submission that the relevant investment, and (it says) certainly the "*predominant*" investment, is the original and/or consolidated and/or amended Rencar Contract. It further submits that such investment was not made in accordance with Czech law and was invalid or incapable of being the subject of protection under the BIT accordingly.

178. The Tribunal is unable to accept these submissions for reasons similar to those already indicated in relation to the first jurisdictional objection. The Claimant made an indirect investment in Rencar shares, and it was only as a result of that investment that it acquired an even more indirect financial interest in the Rencar Contract. The validity of the shareholding in Rencar and its acquisition in accordance with Czech law are unchallenged. There is no basis on which the shareholding can be ignored or refused recognition as a valid investment, when and if the Claimant invokes the BIT in order to recover compensation for alleged breaches of the BIT. This is so, even though the alleged impairment of the value of the Claimant's shareholding in Rencar, in respect of which the Claimant claims in this arbitration, derives from the allegedly wrongful termination or non-performance of the Rencar Contract.

179. Once again, if the Rencar Contract as originally made in 1997 or as consolidated in 2009, or any relevant Amendment, was invalid or entered into other than in compliance with Czech law, that may be relevant to the question whether there was any wrongful termination or non-performance or any loss recoverable under the BIT. But those are different matters, going not to jurisdiction, but to the merits, into which it is not appropriate to enter at this stage.

180. The Respondent's second jurisdictional objection is therefore also rejected.

(3) Objection 3: The Claimant's alleged Investment violates international public policy on public procurement.

a. Parties' positions

i. Respondent's Position

181. The Respondent objects to the Tribunal's jurisdiction on the basis that alleged failures to follow proper procurement procedures in respect of the Rencar Contract mean that there has been a violation of international public policy which goes to jurisdiction.[88] There are three limbs to the Respondent's submissions on this point.

182. First, the Respondent submits that the violation of international public policy bars jurisdiction.[89] The Respondent relies on the following:

a. The principle that international public policy constitutes "*an international consensus as to universal standards ad accepted norms of conduct that must be applied in all fora*": *World Duty Free Company v. Kenya*.[90]

b. The finding in *Inceysa v. El Salvador* that violation of international public policy goes to jurisdiction because:

> "*[i]t is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy.*"[91]

c. The finding in *Plama v. Bulgaria* that the investor had violated international public policy by committing a fraudulent misrepresentation under Bulgarian law.[92]

183. The Respondent contends that the tribunal need not rely directly on the principle of good faith in this regard, but can instead apply "*the more limited proposition that a violation of*

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88 Counter-Memorial, ¶387.

89 Counter-Memorial, ¶¶388-395.

90 RL-0149, *World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, ¶139.

91 RL-0146, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶249.

92 RL-0160, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶144.

a domestic provision bars jurisdiction where that provision forms part of international public policy."

184. Second, the Respondent submits that public procurement forms part of international public policy for the following reasons:[93]

a. Several international organisations address public procurement, including the Organisation for Economic Co-operation and Development (OECD), the United Nations via the United Nations Commission on International Trade Law (UNCITRAL), the World Trade Organization (WTO) and the World Bank.

b. Public procurement aims at promoting competition and thereby the efficiency of public spending and competition.

c. Objective competition will ensure that all eligible suppliers or contractors, regardless of their origin, are provided an equitable opportunity to engage in the procurement process, thereby reducing discrimination and promoting fairness and impartiality.

d. Public procurement aims at transparency, which ensures acceptance of the public and the rule of law.

e. Public procurement rules are an important tool in reducing other phenomena that violate international public policy, i.e. corruption, bribery, fraud, theft of resources, conflict of interest, collusion, abuse and manipulation of information, discriminatory treatment and waste or abuse of resources.

f. The European Union ("**EU**") regulates procurement in a detailed manner. As a member of the EU, the Czech Republic is bound by EU regulation.

185. In response to a point made by the Claimant, the Respondent argues that there are international conventions regulating public procurement procedures, referring to the 1994

[93] Counter-Memorial, ¶¶396-402.

Agreement on Government Procurement ("**GPA 1994**") and the 2012 Agreement on Government Procurement ("**GPA 2012**").

186. The Respondent also contends that *Inceysa v. El Salvador* is an example of a case where violation of domestic procurement rules resulted in a violation of international public policy and consequently the lack of jurisdiction of the tribunal.

187. Third, the Respondent submits that the failure to undertake concession procedures prior to entry into Amendment No. 7, the 2009 Consolidated Contract or Amendment No. 9 (as confirmed in the Respondent's submission by *inter alia* the UOHS Decision) violated international public policy. [94] The Respondent makes the following points:

a. Failure to undertake a concession procedure violated the objective of competition.

b. In undermining competition, the amendments also violated the principles of non-discrimination and fairness.

c. The 2009 amendments were "*the paradigm of untransparent procedures*". Not even DPP's own Board of Directors was consulted.

d. Violations of concession procedures call into question the integrity of the Rencar Contract in its entirety. DPP's revenue decreased during its relationship with Rencar and increased after termination of the Rencar Contract.

188. The Respondent relies in support of these points on the findings of the Organised Crime Unit.

ii. Claimant's Position

189. The Claimant submits that international public policy and good faith principles only apply in exceptional circumstances such as fraud, bribery, corruption or abusive manipulation of the system:[95]

[94] Counter-Memorial, ¶¶403-408.

[95] Reply, ¶¶254-256,

a. The *Inceysa* tribunal found that the claimant had presented false information, which led to the awarding of a concession in El Salvador. Contrary to the claimant's representations during the bidding process, the evidence showed that the claimant had no "*experience and capacity*" and no "*operations or employees*".

b. In *Plama*, the investment was obtained due to a misrepresentation. The claimant presented itself as a "*consortium*" consisting of "*two major experienced companies*" when in reality it was a sole investor without experience. The investment was held by the tribunal to be "*the result of a deliberate concealment amounting to fraud*".

c. In *Phoenix*, the investment was obtained "*for the sole purpose of bringing international litigation*" and therefore amounted to an "*abusive manipulation of the system*".

d. The *Abaclat* tribunal relied on the good faith principle in the context of an alleged "*abuse of rights*". The Tribunal held that there was no abuse of rights which would justify dismissal of the *claims.*

e. *In World* Duty Free v. Kenya, the tribunal found on the exceptional basis of serious allegations of bribery and corruption that "*claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal*."

190. The Claimant submits that a procurement law breach comes "*nowhere close*" to amount to fraud, bribery, corruption or abusive manipulation of the system.[96] The Claimant further alleges that, even if it did, the Respondent's claim would not succeed because there has been no breach of procurement law procedures in the present case. In addition to the points already set out:

[96] Reply, ¶260.

a. Under the Concession Act, a breach of public procurement law can be raised within five years, but no later than ten years from the date when the breach occurred. The Respondent can accordingly no longer rely on a breach of public procurement law.

b. Neither Amendment No. 7, Amendment No. 9 nor the 2009 Consolidated Contract fall within the scope of the Concession Act. The Concession Act only applies where (i) the contracting authority acts as a "public contractor", (ii) the concessionaire provides services or carries out certain works, (iii) the concessionaire bears a substantial part of the risks associated with the benefits received, and (iv) the concessionaire receives from the contracting authority a remuneration exceeding CZK 20 million. Requirements (ii) to (iv) were not satisfied in respect of Amendment No. 7 and the 2009 Consolidated Contract because the Rencar Contract and its amendments did not relate to the provision of services or the carrying out of certain works; no substantial risks arising out of the rental for advertising spaces were transferred to Rencar; and, Rencar did not receive any remuneration from DPP (rather it owed DPP monthly rents). As regards Amendment No. 9, requirements (iii) and (iv) were not met, contrary to the UOHS's findings.

c. The Respondent's procurement law argument is based on the UOHS decision on Amendment No. 9 and the report of the police investigation.[97] The UOHS wrongly found the Concession Act to be applicable to Amendment No. 9, but even if its findings were correct its decision would relate only to Amendment No. 9, not the whole Rencar Contract. The police investigation yielded no results and found that no criminal offence was committed.

[97] The Claimant contends that the City of Prague instructed DPP to issue UOHS proceedings because ANO had an increasing influence on the decision-makers at the UOHS. The Claimant refers to a newspaper report from April 2021 describing [redacted], allegedly a member of the appeals commission at UOHS, as '[redacted] *s man at UOHS*", and to a passage allegedly excerpted from the [redacted] Diary stating '[redacted] *Decision of UOHS. Rencar – when will it be?*" The Respondent has stated in response to these allegations that [redacted] did not hold any position at UOHS during the relevant time period and that even if he had been a member of the appeals commission, the appeal to the same only concerned the fine imposed by the UOHS.

191. The Claimant also refers to *World Duty Free v. Kenya* for the principle that investment tribunals must "*carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards*." The Claimant submits that public procurement rules do not fulfil these conditions:[98]

a. No international convention regulates public procurement procedures. The Respondent's reference to what international organisations "*consider important*" is unavailing.

b. There is no uniform comparative law on procurement standards. In different states, different procurement rules and procedures apply. This is in stark contrast to truly transnational issues like corruption.

c. There are no awards which apply domestic procurement rules as international public policy rules. What is required are exceptional circumstances as set out above.

b. The Tribunal's Analysis

192. This jurisdictional objection by the Respondent involves, first, the proposition that "*failures to follow proper procurement procedures in respect of the Rencar Contract mean that there has been a violation of international public policy which goes to jurisdiction*". "*Proper procurement procedures*" in this context appears to be intended to refer to some unspecific public international legal standard, rather than necessarily to Czech law. The consequence of any such failures is said to be to deprive the present Tribunal of jurisdiction.

193. Cases cited in support of the jurisdictional objection are the *World Duty Free Company v. Kenya* where an investment was procured by bribery of President Moi, *Inceysa v. El Salvador*, where the award of a contract was obtained by fraud and *Plama v. Bulgaria*, where again an investment was obtained by fraud. These are all cases very far removed from the present. They concern fraud or abuse in relation to the procurement of the very investment in relation to which BIT protection is subsequently sought.

[98] Reply, ¶¶257-258.

194. None of the cases cited by the Respondent suggests that failure to follow "*proper procurement procedures*" is a pre-requisite under public international law to the making of a valid investment. While the cases contain well-known statements about the existence of principles of "*international public policy*", they also stress that tribunals need "*be very cautious in this respect and must carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards*" (*World Duty Free*, ¶141).

195. The proposition that international public policy recognises and should enforce compliance with unspecified general principles of public procurement, as a precondition to recognition of a valid investment, is a far-reaching one. Even among market-economies, it appears likely that there are considerable differences in the regulation of public procurement. How an investment tribunal could or would identify what public policy required could itself lead to much doubt and dispute. The whole exercise of identifying and applying such principles would itself be fraught by the fact that there is nothing to support it in the BIT. On the contrary, the BIT requires investment to have been or to be made in accordance with the law of the Contracting State (here Czechia).

196. Further, even if there were any attraction in the proposition advanced by the Respondent, which the Tribunal at present does not see, it would not affect the Tribunal's jurisdiction over the present dispute relating to the indirect investment in shares in Rencar on which the Claimant relies in this case. There is no suggestion that international public policy required any specific step by the Claimant before acquiring its indirect interest in Rencar shares. Once again, any complaint that the Respondent may have, to the effect that the absence of a proper procurement procedure (whether under Czech law or under some suggested international law standard) renders the 2009 Consolidated Contract and/or its Amendments invalid, is one which the Respondent can seek to raise at the merits stage. It is not a complaint which is relevant to the Tribunal's jurisdiction.

197. The Tribunal again refers in this connection to what has been said in paragraphs 150-156 and 178 above.

(4) Objection 4: The facts relied upon show fraudulent practice sufficient to warrant the declining of jurisdiction

a. Parties' positions

i. Respondent's Position

198. The bases of this jurisdictional objection are that (i) there has been fraudulent practice in respect of the 2009 Consolidated Contract and Amendments Nos. 7 and 9 and that (ii) fraudulent practice by the investor deprives an investment tribunal of jurisdiction.[99]

199. The Respondent submits that there is a consensus that "*serious and fundamental violations, such as fraud or corruption, establish a lack of jurisdiction*".[100] The Respondent refers in support of this proposition to:

a. *Hochtief v. Argentina*,[101] where the tribunal stated that:

> "*Investments that are forbidden, or dependent upon government approvals that were not in fact obtained, or which were effected by fraud or corruption can be caught by a provision such as Article 2(2) of the Argentina-Germany BIT.*"

b. *Inceysa v. El Salvador*,[102] where the tribunal held:

> "*…even thought it might be considered that the analysis the Arbitral Tribunal is obligated to make involves the determination of issues of a substantive nature, such as the conformity of Inceysa's investment with the laws of El Salvador, it is obvious that these issues constitute a premise that must necessarily be examined in order to decide the issue of the competence of the Arbitral Tribunal.*"

c. *Mamidoil v. Albania*,[103] where the tribunal held:

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[99] *See* Counter-Memorial, ¶¶409, 423.

[100] Counter-Memorial, ¶¶409-411.

[101] RL-0213, *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, ¶199.

[102] RL-0146, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶157.

[103] RL-0218, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶378.

> "*The investment may be legal in substance but still tainted by illegality when the investor violates procedural norms and regulations for setting up its investment. Fraud and corruption are prominent examples of such behaviour.*"

200. The Respondent develops this argument by reference to three points.

a. First, corruption and fraud are closely connected.[104] They were mentioned together in the above cases and are the subject of the "*Uniform Framework for Combatting Fraud and Corruption*" as adopted by multiple international organizations. They violate policy objectives and should not enjoy protection through an arbitral tribunal under international law.

b. Second, corruption and fraud do not require a strict violation of a national criminal law.[105] They are international principles that give the tribunal discretion in combatting improper practices. The Respondent cites *Phoenix v. Czech Republic* for the principle that legal concepts can have a dual nature or a "*Janus*" aspect under national and international law,[106] and *Hamester v. Ghana* for the link between the rule that an investment must not be created through fraud or deceit and the international principle of good faith.[107] The Respondent also refers to collusive practice as a category mentioned in the Uniform Framework for Combatting Fraud and Corruption to demonstrate the international nature of prohibitions on fraud.

c. Third, due to the fundamental policy objective in combatting fraud and corruption, the standard of proof for the respondent state is lower.[108] The Respondent contends with reference to *Metal-Tech v. Uzbekistan*,[109] *Libananco v. Turkey*,[110] *Union*

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[104] Counter-Memorial, ¶413.

[105] Counter-Memorial, ¶414.

[106] RL-0109, *Phoenix Action Ltd v. Czech Republic,* ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶109.

[107] RL-0173, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶123 ("*An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct …*").

[108] Counter-Memorial, ¶415.

[109] RL-0169, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶293.

[110] RL-0181, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶125.

Fenosa v. Egypt,[111] *Penwell Business v. Kyrgyz Republic*[112] and *Karkey Karadeniz Elektrik Uretim v. Pakistan*[113] that numerous arbitral tribunals have relied upon indirect or circumstantial evidence of corruption. In particular, the Respondent cites the *Penwell* tribunal's statement that:

> "*This Arbitral Tribunal does not see any convincing reason why, outside the field of criminal law, a heightened standard of proof should apply to allegations of illegality. In the field of criminal law, the standard must be high because what is at stake is the risk of unjustly sanctioning an innocent person. Outside that field,* ***what is at stake is the respective interests of two persons, the claimant and the respondent, and it would be paradoxical to impair the interests of the latter by reason of the seriousness of the alleged misbehaviour of the former****. Facts must be convincingly proven, whether these facts are fraud or not.* ***The Arbitral Tribunal's conviction can be made on the basis of circumstantial evidence or 'red flags'. The absence of direct evidence should not be a bar, where the red flags are such that they convince the Arbitral Tribunal of the reality of the allegations***." (Respondent's emphasis)

The Respondent also references Dr Llamzon and Dr Sinclair, who state that "*red flags*", i.e. indirect or circumstantial evidence of corruption, are "*widely recognized as a general principle of international law for a long time*". They add that:

> "*[R]ed flags and similar indicia of corruption can be conceived as potential forms of circumstantial evidence that, once established, can lead to a shifting of the burden of proof, requiring the rebuttal of allegations by evidence to the contrary, failing which certain inferences and conclusions might be drawn. Indeed, circumstantial evidence, particularly when direct evidence of corruption is unavailable, is increasingly, albeit cautiously, accepted as a tool to evaluate allegations of corruption by arbitral tribunals.*"

[111] RL-0242, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, ¶7.52.

[112] RL-0269, *Penwell Business Limited (by MegaCom) v. Kyrgyz Republic*, PCA Case No. 2017-31, Final Award, 8 October 2021 ¶¶323-324.

[113] RL-0232, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶497

201. In response to a point made by the Claimant, the Respondent denies that this practice of looking for '*red flags'* applies only to corruption:[114]

a. The Fraud and Corruption Awareness Handbook of the World Bank applies the concept of '*red flags'* to both fraud and corruption.

b. Arbitral tribunals in *Karkey v. Pakistan* and *Fynerdale v. Czech Republic* have relied on '*red flags*' in the context of allegations of fraud.[115] The tribunal in *Unión Fenosa v. Egypt* held that "*corruption is rarely proven by direct cogent evidence; but, rather, it usually depends upon an accumulation of circumstantial evidence*".[116] The same holds true for fraud.

c. *Siag v. Egypt* and *Saba Fakes v. Turkey* as relied upon by the Claimant are part of an older body of authority which has been replaced by more recent arbitral practice on the use of '*red flags'*. This change in arbitral practice coincided with a general push by international organizations and individual States for stricter rules against bribery, fraud, corruption and related offences. The Respondent refers in this regard to (i) the OECD's 2009 "*Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*", (ii) the 2010 Cross Debarment Agreement between the World Bank and several other continental development and investment banks; (iii) the introduction of the Bribery Act 2010 in the United Kingdom; and (iv) the OECD's 2021 update to its *Recommendation*, which encouraged member states to take even stricter measures against illegal activity. The Respondent urges the Tribunal to adopt what it contends to be the more recent practice, following the tribunal in *Penwell* (which recorded that "*a majority view appears to have emerged in favour of the 'red flags' approach*").

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[114] Rejoinder, ¶¶438-450.

[115] RL-0232, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶497; RL-0326, *Fynerdale Holdings BV v. The Czech Republic*, PCA Case No. 2018-18, Award, 29 April 2021, ¶¶569-575.

[116] RL-0242, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt,* ICSID Case No. ARB/14/4, Award, 31 August 2018, ¶7.52.

202. The Respondent argues that there is sufficient evidence of fraudulent practice in the facts on record. The Respondent summarises the evidence as follows:[117]

a. Under the 2009 Consolidated Contract, Rencar received a twenty-two year extension to 2031. The First [redacted] Expert Report states that long-term contracts are not usual in the advertisement industry, that the duration for other contracts in the transportation sector was much lower and that a 30-year contract was therefore a significant outlier.

b. Not only did Rencar receive a long extension, it also received a rent reduction under Amendment No. 7. The Claimant has not provided any convincing explanation for this extension and police investigations have shown that there is no plausible documentation to support the suggestion that the reduction of rent was due to Rencar taking care of maintenance. DPP's September 2015 internal audit analysis determined that there was no justifiable reason for extending the Rencar Contract by an additional 22 years. The Internal Audit Department expressed concerns that the extension might "*be classified as an attempt to circumvent the Public Procurement Act*."

c. The Czech Police found that Amendment No. 7, the 2009 Consolidated Contract and Amendment No. 9 were concluded in violation of Czech law. The National Unit for Combating Organised Crime only terminated the proceedings against [redacted] because the police were unable to assess the financial loss with the strict degree of certainty required in a criminal case. The criminal investigation report (i) concluded that [redacted] (ii) found that [redacted], (iii) concluded that [redacted] and (iv) is strong evidence that DPP's personnel involved in the conclusion of Amendment No. 7, the 2009 Consolidated

[117] Counter-Memorial, ¶¶424-430.

Contract and Amendment No. 9 had positive knowledge that DPP was a contracting authority under Czech public procurement law and accordingly that the contractual acts were violating Czech public procurement law.

d. The June 2008 Memorandum between DPP and Rencar concerning Amendment No. 6 shows that Rencar and DPP knew from 13 June 2008 that DPP was a contracting authority for the purposes of Czech public procurement law. The Memorandum expressly stated that "*The Parties aware of that the Public Transit Company is a sectoral contracting entity within the meaning of Act No. 137/2006 Coll., on public procurement, and must proceed in accordance with the Act in the performance of this Memorandum*." Rencar must therefore have known that the 2009 Consolidated Contract violated Czech public procurement law. The Claimant's apparent lack of due diligence raises further concerns in this regard. Moreover, the police investigations confirmed that the individuals involved in the 2009 amendments knew of the violation of public procurement law.

e. The police investigations have shown that [redacted] Rencar's [redacted] misrepresented the advertisement spaces in the contracts.

f. Significant documents regarding the Claimant's acquisition of the Rencar shares, the conclusion of Amendment No. 3, Amendment No. 7 and the 2009 Consolidated Contract have not been produced in response to requests by the Respondent. Contractual documentation including drafts is no longer available within DPP.

g. The Claimant and its subsidiaries have a track record of supporting political parties in the municipal elections. The Respondent has produced tables for the 2014, 2018 and 2022 municipal elections which purport to show a correlation between the discounts provided by the Claimant's subsidiaries to political parties running for election and the success of those political parties; the Respondent contends that such discounts were not given without expecting a return and that this is a significant red flag. The Respondent also points to the fact that, when ordered by the Tribunal to produce the advertisement contracts concluded between the Claimant and its subsidiaries and political parties for the municipal elections

between 2002 and 2022, the Claimant failed to produce a single document for the period from 2002-2010. The Respondent says that this was the decisive time period when Amendment No. 7, the 2009 Consolidated Contract and Amendment No. 9 were concluded.

h. The Rencar Contract and its Amendments were detrimental for DPP: (i) the audit analysis produced by DPP's internal audit department in 2012 shows a significant decrease in DPP's percentage share of Rencar's revenues after the conclusion of Amendment No. 7 and the 2009 Consolidated Contract; (ii) an analysis by [redacted] in an external market value report of 17 February 2017 found that the estimated market value of DPP's advertising spaces for 2013-2016 was significantly higher than the actual remuneration received from Rencar under the Rencar Contract; (iii) a table produced by the Respondent showing DPP's income from advertising for 2013-2023 shows that DPP's revenues increased following the initiation of new public tenders.

i. The Respondent also relies on the conduct of the Claimant's other subsidiaries in Prague, at Prague Airport, in Leipzig and in Brussels. The Respondent alleges that: the Claimant's subsidiary JCDecaux městký mobiliář spol. s.r.o. and its technical director [redacted] were involved in a scandal surrounding the influencing of public tenders in the Municipal District of Prague 1; there are ongoing proceedings in relation to JCDecaux Městský mobiliář spol. s.r.o.'s business at Prague Airport; the street furniture contract entered into by the Claimant's subsidiary in Leipzig was terminated on 31 December 2016 on the basis that an open tender procedure was required under EU public procurement law, and; the Claimant's Belgian subsidiary violated competition law in Brussels by continuing to use advertising spaces after the expiry of the contract period with the City of Brussels. The Respondent contends that their conduct establishes a pattern of violations of public procurement and principles of fair competition.

203. The Respondent contends that the Tribunal should ascertain actively whether or not the 2009 Consolidated Contract and the amendments were "*received ... under further*

fraudulent circumstances" even if it is not satisfied by the existing indications for fraud and assumes jurisdiction.[118] The Respondent makes the following points in this regard:[119]

a. There is a growing body of authority under international law that arbitral tribunals must investigate suspicions of corruption *sua sponte*. The Respondent refers to *Metal-Tech v. Uzbekistan* (where the tribunal declined jurisdiction on grounds of corruption having raised questions on its own motion),[120] *Niko Resources v. Bangladesh* (where the tribunal issued extensive directions and questions regarding corruption issues)[121] and *BSG v. Guinea* (where the tribunal issued a protocol on document inspections and authenticity issues before declining jurisdiction on corruption grounds)[122] in support of this.

b. This body of authority should also apply to issues of fraud under international law as both fraud and corruption are issues of international public policy (as demonstrated by the fact that they are addressed together in the World Bank's "*Uniform Framework for Combatting Fraud and Corruption*").

c. The Tribunal's duty to undertake further investigations is reinforced in the present case because of its restrictive handling of document production, having refused the Respondent access to (i) the due diligences pertaining to acquisition of the Rencar shares; (ii) the due diligences pertaining to the validity of Amendment No, 7; (iii) the legal due diligence commissioned in 2013-2014 with regard to the commencement of the installation of digital advertising in the test station at *Národní třída*; (iv) the internal investigations and/or compliance reports commissioned since the beginning of the police investigations in December 2015 pertaining to Amendment No. 7, the 2009 Consolidated Contract and Amendment

[118] Rejoinder, ¶454.

[119] Rejoinder, ¶¶455-458.

[120] RL-0169, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶¶256, 85 et seq.

[121] RL-0277, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Procedural Order No. 13.

[122] RL-0278, *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022, ¶76.

No. 9; (v) the due diligences on the compliance of the Rencar Contract, including its amendments, with Czech competition law; (vi) the internal investigations and/or compliance reports commissioned by the Claimant or its subsidiary after 2016 pertaining to the acts underlying the May 2021 decision of the District Court for Prague 1.

204. The Respondent contends that if the Tribunal were to award damages after denying the Respondent access to the above evidence and refusing to undertake further investigations, this would constitute a violation of a fundamental rule of procedure.[123]

ii. Claimant's Position

205. As a preliminary point, the Claimant rejects the notions that (i) fraud and corruption do not require a strict violation of national criminal law and (ii) the standard of proof is lower for a respondent State.[124] Specifically:

a. As regards (i), the Claimant contends that the Respondent is unable to point to any violation of domestic law, and that this is at odds with its reliance on domestic law elsewhere in its defence.[125]

b. The Claimant contends that (ii) is contrary to well-established case law, submitting that tribunals consistently emphasise that '*serious allegations'* like that of fraud or corruption are subject to a high standard of proof.[126] The Claimant refers in this regard to the decisions in *Siag v. Egypt* (where it was held that allegations of fraud are "*typically held to a heavy standard of proof*", though the Respondent contends that this was merely a summary by the tribunal of the claimant's position in that case),[127] *Saba Fakes v. Turkey* (where it was said that the burden in respect of "*any allegations of impropriety is particularly heavy*")[128] and *Sastre v. Mexico* (where

[123] Rejoinder, ¶458.

[124] Reply, ¶262.

[125] Reply, ¶263.

[126] Reply, ¶264.

[127] CL-0048, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, ¶325.

[128] CL-0172, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶131.

the tribunal concluded that higher standards of proof have typically applied for "*certain types of serious wrongdoing, such as corruption, fraud and conspiracy*", though the Respondent notes that the tribunal did not actually deal with corruption, fraud or conspiracy in its decision).[129] Against this background, the Claimant submits that showing "*red flags*" is not sufficient.

206. The Claimant contends that the decisions invoked by the Respondent in arguing to the contrary do not in fact support the Respondent's case:[130]

a. In *Libananco*, the tribunal found that an allegation of fraud "*does not necessarily entail a higher standard of proof*"; this does not mean that it permits application of a lower standard, however.

b. In *Karkey*, the tribunal discussed the shifting of the burden. The tribunal emphasised that there would need to be "*unequivocal (or unambiguous) prima facie evidence*" for the burden to shift.

c. *Hamester v. Ghana* centred on concrete breaches of Ghana's Criminal Code.

d. *Inceysa* involved specific findings of violations of Salvadoran law.

207. Turning to the allegations of fraud, the Claimant contends that there is no evidence of fraudulent practice even if the Respondent's allegations are taken at face value:[131]

a. The First [redacted] Expert Report is not evidence of fraudulent practice. It is [redacted]'s assessment of the 2009 Consolidated Contract.

b. The findings of the criminal investigation report were that no criminal offence had been committed by [redacted] or other Rencar employees, thus refuting the Respondent's claims.

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[129] CL-0203, *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 November 2022, ¶148.

[130] Reply, ¶¶265-266.

[131] Reply, ¶¶268-271. The responses set out below were to the matters on which the Respondent relied in the Counter-Memorial; those matters were expanded in the Rejoinder.

c. The UOHS decision does not represent an objective assessment of the amendments to the Rencar Contract for the reasons set out above: the proceedings were initiated on instruction by the City of Prague and the UOHS's decision was influenced by City of Prague and ANO officials. In particular, [redacted] of the UOHS Appellate Committee was effectively acting under UOHS orders.

d. The circumstantial evidence relied upon by the Respondent is unavailing: the alleged convictions for misdemeanour in respect of other Prague street furniture contracts were quashed by the Supreme Court.

208. In the premises, the Claimant contends that the Respondent has failed to discharge its burden of proof in respect of the allegation of fraud.

b. The Tribunal's Analysis

209. The Tribunal has accepted, when considering the previous jurisdictional objections, (i) that principles of international public policy and good faith can operate to invalidate an investment, for example in circumstances where the investment has been induced or obtained by fraud, bribery, corruption or abusive manipulation; and, further, (ii) that the effect of such conduct can in appropriate circumstances be to give rise to a jurisdictional objection to the pursuit of any claim in respect of such investment under a BIT. It has cited *World Duty Free Company v. Kenya,* where an investment was procured by bribery of President Moi, *Inceysa v. El Salvador*, where the award of a contract was obtained by fraud, and *Plama v. Bulgaria*, where again an investment was obtained by fraud. The cases contain in this context well-known statements about the existence of principles of "*international public policy*", while stressing (in a passage already quoted above) that tribunals need "*be very cautious in this respect and must carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards*".[132]

[132] RL-0149, *World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, ¶141.

210. The Claimant does not take issue with the submission that international public policy and good faith principles can apply in circumstances such as fraud, bribery, corruption or abusive manipulation of the system in relation to the making of an investment or with the correctness of the cases of that nature, cited in the previous paragraph.

211. The Respondent invites the Tribunal to examine a substantial number of "*red flags*" which, taken together, should, it submits, lead the Tribunal to decline to go into any claim for breach of the relevant BIT. Once again, however, it is necessary, in the Tribunal's view, to draw a clear distinction between matters going to the Tribunal's jurisdiction in respect of the claim made and matters which, if jurisdiction exists, may require consideration at a later stage.

212. The Tribunal has jurisdiction, as it has already made clear, in relation to the Claimant's indirect investment in shares in Rencar. Nothing in the alleged red flags or other material advanced by the Respondent bears on that investment. The relevance of such material exists, if anywhere, at the merits stage, when the Respondent will be able to advance any grounds of law or international or domestic public policy open to it, as a reason for concluding that the Claimant cannot have any valid claim or cannot recover any relief in respect the matters about which it complains in this arbitration. The Tribunal, having jurisdiction, will be able to consider, evaluate and determine such issues at that stage.

213. In these circumstances, it would not be and is not appropriate for the Tribunal to spend time considering the detail or implications of the many allegations of impropriety which the Respondent has advanced or the suggested "*red flags*". Suffice it to say that they appear to involve a high degree of generality and speculation in an area where the Tribunal would not accept that references to "red flags" can or should dilute the ultimate question which is whether a party alleging fraud, corruption or the like has been able to adduce sufficient evidence to satisfy a tribunal on the balance of probabilities and bearing in mind the seriousness of the charge that there has indeed been fraud, corruption or equivalent.

214. The Tribunal will add only that, had it been appropriate for the Tribunal to go into such allegations now, and had it concluded that they did not on their face give rise to a prima facie case of fraud, corruption or equivalent, the Tribunal would not have accepted the

Respondent's further submission that the Tribunal should then itself undertake some sort of further investigatory role, with a view to seeing whether it could itself carry matters further. That would seem to the Tribunal a wholly inappropriate role for a tribunal to exercise.

215. The fourth head of jurisdictional objection will be rejected accordingly.

(5) Objection 5: The Claimant is not an investor

a. Parties' positions

216. By the Rejoinder, the Respondent added a further jurisdictional objection on the basis that the Claimant is not an investor pursuant to Article 1(1) of the BIT and Article 25(1) of the ICSID Convention.[133] The Respondent contends that this objection is based on new evidence not obtained until after submission of the Counter-Memorial.[134]

i. Respondent's Position

217. The Respondent contends that the Claimant has failed to prove that it is an investor because the shareholder of Europlakat between 26 July 1999 and 2 November 2015 was ATSBG.[135] The Respondent submits that this company is not mentioned either in the Claimant's description of its corporate chain in the Request for Arbitration or in the First [redacted] Expert Report. They further submit that the corporate documentation available does not prove that, as at or from 29 June 2001, either ATSBG or Gewista actually occupied the position shown by Claimant's chart of the alleged chain of subsidiaries through which the Claimant supposedly held its interest in Rencar. The Respondent concludes that it is unclear *whether* the Claimant held shares in Europlakat before the conclusion of the 2001 transfer of the Rencar shares from DPP to Europlakat, and *when* the Claimant became the majority shareholder in Europlakat.[136]

[133] Rejoinder, ¶322.

[134] Rejoinder, ¶323.

[135] Rejoinder, ¶334.

[136] Respondent's Post-Hearing Brief I, ¶24.

218. The Respondent also refers in this regard to the Claimant's statement in its Letter to the State of 3 May 2024 that Amendment No.3 was drafted prior to the Claimant's acquisition of Europlakat. The Respondent says that this shows that at least up until 29 June 2001 (i.e. the signing of the SPA for the acquisition of Rencar shares), the Claimant was not a shareholder in Europlakat.[137]

ii. Claimant's Position

219. The Claimant responds as follows:[138]

a. The Claimant acquired Rencar in 2001;

b. The Claimant owned Rencar at all relevant times;

c. The Claimant still owns Rencar.

220. The Claimant provided in this regard an Annex to its Opening Statement which showed the Claimant's shareholding structure as of 29 June 2001. This has been summarised at paragraphs 54-55 above. As regards JCD CEE and Gewista, the Claimant argues that:

a. Exhibit C-146 shows that JCD CEE owned 67% of the shares in Gewista on 29 June 2001, and states with reference to C-145 that this shareholding was acquired on 26 June 2001.

b. Exhibit C-148 shows that Europlakat Int owned 51% of the ATSBG shares on 29 June 2001, and that the date of the excerpt is irrelevant because the last entry was made prior to the date of the SPA.

221. The Claimant further submits that:

a. It did not sell or otherwise dispose of its shareholding interest after the filing of the claim, but increased it. The Claimant's standing as an investor accordingly remains unchanged.

[137] Rejoinder, ¶¶328-329.

[138] Claimant's Opening Statement, ¶47.

b. The quantum of the claim remains unchanged. The Claimant's quantum expert was instructed to apply the interest existing at the time of the Request for Arbitration.

b. The Tribunal's Analysis

222. In its Request for Arbitration dated 26 August 2020, the Claimant described a then current shareholding chain, corresponding with that indicated in paragraph 67 above. As appears by paragraph 68 above, that description was not fully accurate even as at 26 August 2020, in so far as it failed to refer to the involvement prior to 2 November 2015 of ATSBG, and it was also superseded in ensuing years (2022 or 2023) by the creation and intervention of ATSBG Holding GmbH.

223. The Tribunal does not consider that the points mentioned in the previous paragraph can or should prevent it addressing the actual position regarding any corporate chain as it now appears from the evidence, at whatever date or dates may be material to the present claim.

224. The main focus of the Respondent's submission that the Claimant has not shown that it was a relevant investor at all or at relevant times was on a suggested failure to show continuity in the corporate chain going back to the date of the SPA, that is 29 June 2001. The registry documentation relating to Gewista shows only that it was owned as to 67% by JCD CEE as at 20 September 2021, with the last register entry being made on the same date; so the position as at 29 June 2001 is said to be unclear. Similarly, the registry documentation relating to ATSBG only shows the position, and in particular its 51% ownership by Europlakat Int, as at 13 July 2001, though in this case with the last registry entry being shown as made on 16 February 2001.

225. The Tribunal considers that, in the case of ATSBG, it can readily be inferred, from the registry reference to the last entry being made on 16 February 2001, that Europlakat Int's 51% interest in ATSBG existed as at 29 June 2001. The position is less conclusive in relation to Gewista-Werbe, but there is no doubt, on the evidence as a whole, that the Claimant did decide to make and made an indirect investment in Rencar on 29 June 2001. There is also nothing to show that it reorganised the way in which it did so in the short period of less than three-months before 20 September 2001, as at which date the register entry shows Gewista to have been 67% owned by JCD CEE. Further, it is clear from the

register relating to JCD CEE that it merged with Gewista Holding GmbH on 26 June 2021. It is not difficult to deduce that, by virtue of and as successor under this merger on 26 June 2001, JCD CEE took over Gewista Holding's shareholding of 67% in Gewista. The Tribunal has no difficulty, in the above circumstances, about inferring that JCD CEE held its 67% shareholding from 26 June 2001 onwards.

226. Over the years the chain of companies through which the Claimant held an indirect shareholding in Rencar changed: see paragraphs 54-55 and 67-68 above. But that does not affect the Claimant's indirect interest. The Tribunal is satisfied that that interest commenced on 29 June 2001 and continued both at the date(s) of alleged breaches of the BIT and when arbitration was invoked under the BIT. That there were or may have been changes subsequent to the SPA in the shareholder chain by which the Claimant held an indirect interest in Rencar is in the Tribunal's view no obstacle to a claim under the BIT and international law. Any investment is intended to grow, and is likely to develop in ways which may not have been foreseen at its outset. An investor is free to shape or remould the way in which its investment is given effect, in order to meet current corporate or business needs. That does not mean that the investment is not the same investment throughout for the purposes of a claim under a relevant BIT.

227. As a matter of fact, the Claimant's indirect shareholding interest has due to internal restructuring within its Group, increased since the commencement of this arbitration from 46.9% to 59.6%. But this has not led to any increased claim being made in the arbitration, and can be ignored.

228. For these reasons, the Tribunal also rejects the Respondent's jurisdictional objection to the effect that the Claimant is not an investor.

VI. ATTRIBUTION

229. Having established that the Tribunal has jurisdiction over the Claimant's claims under the BIT, the Tribunal will next address the substantive issue whether the Claimant has established conduct by or otherwise attributable to the State capable of being the subject of a claim under the BIT. The essence of the Claimant's claim is, as already set out, that its

investment in Rencar was effectively expropriated or severely impaired by (i) DPP's repudiation or termination of Rencar's contractual rights under the Consolidated and/or amended Rencar Contract with DPP and/or by (ii) the process of tenders which led to the re-allocation of advertising space to which Rencar was entitled under the Rencar Contract to Big Board or associated companies. By the time of the closing oral submissions, it was clear that the Claimant was putting the emphasis on (i), that is the alleged repudiation of the Rencar Contract, from which the loss of advertising spaces followed. This was realistic, because there was and is, in the light of the evidence which the Tribunal heard, no basis for regarding the tender process as having been occasioned or influenced in any improper or untoward way by the State or anyone.

230. Repudiation or termination of a contract, albeit one made with a State-owned company (DPP) by Rencar (itself partly State-owned), is on its face a private law matter, rather than the basis for a BIT claim. But the Claimant submits that in this case the State was intimately involved in the repudiation or termination. That raises the issue of attribution.

231. In relation to attribution, both Parties invoke and accept that the relevant legal standards are set out in and can be taken from the Articles 5 and 8 of the International Law Commission's draft Articles on State Responsibility.

232. Article 5 ("*Conduct of persons or entities exercising elements of governmental authority*") provides:

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

233. Article 8 ("*Conduct directed or controlled by a State*") provides:

> "*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*"

234. Articles 5 and 8 are addressed in turn below.

(1) Article 5

a. Parties' positions

i. Claimant's Position

235. The Claimant contends that DPP's acts are attributable to the State on the basis that DPP exercised governmental authority sufficient for attribution under Article 5.[139]

236. The Claimant contends that the notion of "*elements of governmental authority*" is deliberately flexible as regards the law to be applied:[140]

a. In *F-W Oil Interests*,[141] the tribunal rejected the State's reliance on domestic laws, holding in respect of Article 5 that "*the internal law of the State will be the starting point, but not the end point*" and that "*the notion is intended to be a flexible one, not amenable to general definition in advance; and the elements that would go in its definition in particular cases would be a mixture of fact, law and practice*."

b. In *Helnan v. Egypt*,[142] the tribunal held that even if the Egyptian Company for Tourism and Hotels ("**EGOTH**") had not been officially empowered by law to exercise elements of governmental authority, "*its actions within the privatisation process are attributable to the Egyptian State.*"

c. In *Salini v. Morocco*,[143] the tribunal held that the national motorways company (ADM) was "*distinguishable from the State solely on account of its legal personality*" as "*from a structural point of view, one cannot deny that ADM is an entity controlled and managed by the Moroccan State*." At paragraph 35, the tribunal noted that "*the fact that a State may act through the medium of a company having its own legal personality is no longer unusual if one considers the*

[139] Reply, ¶13.

[140] Reply, ¶284.

[141] CL-0205, *F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006.

[142] CL-0206, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006.

[143] CL-0207, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001.

extraordinary expansion of public authority activity … the State uses a varied spectrum of modes of organisation, among which are in particular semi-public companies".

d. In *Flemingo v. Poland*,[144] the tribunal rejected the argument that actions of the Polish airports state enterprise (PPL) were not attributable. The tribunal held that "*quasi-independence and quasi-autonomy do not tip the scales*", finding instead that PPL was (i) performing a "*governmental authority*", (ii) "*controlled*" by the State and (iii) "*accountable*" to the State.

e. *Strabag v. Libya*,[145] where the tribunal again rejected the argument that acts of certain state-owned entities were not attributable, holding that the relevant entities "*could not in fact act with full independence free of the State's direction and control in a way that makes them distinguishable from the State.*"

237. Applying this test, the Claimant contends that DPP has governmental authority for the following reasons:[146]

a. DPP was established by the State through a series of official acts, founded by the City of Prague and closely controlled by the City of Prague. The Claimant refers to the commentary to Article 5, which refers to "*situations where former State corporations have been privatized but retain […] public or regulatory functions*."

b. DPP was entrusted by the State with key governmental functions, including (i) provision of public transport services in the City of Prague as the largest municipal company and provider of such services, (ii) operation of almost all public transport lines in Prague, with responsibilities including the management, supervision and regulation of the use of public property (including the installation of advertising and equipment) and (iii) acting as sole carrier within the City of Prague (i.e. excluding services to and from Prague).

[144] CL-0022, *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016.
[145] CL-0208, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020.
[146] Reply, ¶¶297-308.

c. DPP has considerable access to public funds. It entered into a long-term contract for the provision of public services to the City of Prague. It is directly funded by the City. The Czech Constitutional Court found in the Decision of the Czech Constitutional Court of 21 February 2019, File No. II ÚS 618/18 that by virtue of accessing public funds such an entity will not be in a comparable position to a private entity.

d. DPP is not an ordinary private corporation. It is owned by the City of Prague as its sole shareholder. Its Supervisory Board – which appoints and recalls the Board of Directors – has fifteen members, all of whom are directly appointed by and recalled by the General meeting, i.e. the City Council. As observed by the Czech Supreme Administrative Court, the City has a decisive influence on the formation of DPP's corporate bodies.

e. The Respondent's own submissions confirm DPP's governmental authority. The Respondent submits that DPP is a "*contracting authority*" for the purposes of the Concession Act. An entity may only be considered a "*contracting authority*" if (i) "*it was founded or established for the purpose of satisfying needs of public interest, which are not of an industrial or commercial nature*" and (ii) "*it is financed predominantly by the State or […] it is controlled by the State […] or the State […] appoints or elects more than half of the members of its statutory, administrative, supervisory or controlling body.*" In addition, the Respondent submits that DPP's obligations "*stem from public law*", referring specifically to DPP's obligations under the Czech Information Act which the Claimant says applies to a select group of "obliged subjects". Finally, the Respondent also submits that its actions "*qualify as a legitimate exercise of its police powers*". Again, this refutes the argument that DPP is disconnected from the State.

238. As regards the second limb (i.e. whether DPP exercised governmental authority regarding the specific facts invoked by the Claimant), the Claimant points to *Crystallex v. Venezuela* for the proposition that tribunals adopt a nuanced approach to the question of whether

attribution is appropriate in respect of commercial acts.[147] The Claimant contends that the tribunal's analysis went beyond the strict distinction between notions of 'commercial' and 'governmental' acts, focusing instead on the "*true nature of the act*".[148]

239. The Claimant also relies on *Bosca v. Lithuania*,[149] where it was held that the fact that the acts of the Lithuanian State Property Fund were governed by the civil code did not change the governmental nature of the acts adopted (in respect of which the "*stamp of sovereign involvement*" could not have been clearer), and *Vigotop v. Hungary*,[150] where the tribunal examined the "*true reason*" behind allegedly commercial act to determine whether there was a "*hidden political agenda*" "*designed to conceal a purely expropriatory measure*".[151]

240. Applying the test under the second limb, the Claimant submits that DPP exercised governmental authority in respect of the events relating to the Rencar Contract:[152]

a. The Rencar Contract was concluded between DPP and Rencar. DPP was established, wholly owned and operated by the City of Prague.

b. The decision to privatise Rencar was driven by the City of Prague. The City Council adopted a resolution to sell the Rencar shares, then DPP launched a public tender for the acquisition of a 72% share in Rencar. The Rencar Contract was Rencar's most valuable asset and was used to attract investors.

c. Following the acquisition of Rencar, both DPP and the City of Prague were benefited by the Claimant's performance of the Rencar Contract.

d. The evisceration of the Rencar Contract was due to the interventions of the City of Prague. The City was involved in topics ranging from the Wi-Fi connection in the metro to air-conditioning or plastic seats in public transport vehicles and must have

[147] CL-0063, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.

[148] Reply, ¶¶287-288.

[149] RL-0200, *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013.

[150] CL-0209, *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014.

[151] Reply, ¶¶289-291.

[152] Reply, ¶¶313-321.

discussed Rencar Contract matters. The [redacted] Diary, which anticipated the relevant events, demonstrates that Mr [redacted] (described by journalists as chair of the group of ANO MPs and as No. 2 of the ANO Party) *de facto* controlled DPP. [redacted]'s Second Witness Statement includes a statement to the same effect. [redacted] was also involved, announcing in 2015 that "*the City will […] interrupt the cooperation between the company* [Rencar] *and the Transport company of the capital* [DPP]". [redacted]'s threat came to fruition with the purported termination of the Rencar Contract in March 2016; and in a meeting following the termination notice, [redacted] stated that "*the mayor of the City of Prague is personally interested in the situation regarding the contractual relationship with Rencar*". [redacted]'s involvement continued after the purported termination, when she instructed DPP to initiate UOHS proceedings.

241. The Claimant makes the following points in respect of an argument made by the Respondent that many arbitral tribunals have rejected attribution under Article 5 because the relevant conduct was considered commercial:[153]

a. The cases relied upon by the Respondent are distinguishable. *Hamester v. Ghana* involved a mere "*shareholder dispute*".[154] *Bosh v. Ukraine* was based on a contract referring to "*scientific activities*", the "*organisation of events*" and "*assistance in research*"; no similar terms exist in the Rencar Contract.[155] *Tulip v. Turkey* involved a real estate investment trust in which a State entity was the minority shareholder.[156] *Jan de Nul* concerned the decisions of the Suez Canal Authority during a tender procedure.[157] *Almås v. Poland* turned on the validity of the

[153] Reply, ¶294.

[154] RL-0173, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶283.

[155] RL-0195, *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, ¶¶40-41, 177.

[156] RL-0205, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, ¶63.

[157] RL-0162, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, ¶170.

termination of a lease (whereas the Rencar Contract is subject to court proceedings).[158]

b. The tribunals' findings did not impact their decision on attribution under Article 5 in *Bayindir* and *EDF v. Romania*.

c. The tribunals' findings were conditional. In *Staur v. Latvia*, the tribunal adopted a nuanced approach by finding (i) that commercial acts will "*generally*" not be an exercise of governmental authority and (ii) such acts may nonetheless fall within governmental authority if there is "*more*" (e.g. in the case of State involvement).

d. The tribunals' findings negate the Respondent's principal argument (viz. that the main basis for the relevant assessment is Czech law). In *InterTrade v. Czechia*, the claimant's reliance on decisions of the European Commission were rejected because "*[t]he decisions of the Commission do not […] persuade the Tribunal to alter its analysis or conclusions under international law.*"[159] In *Ulysseas v. Ecuador*, the State's law designated the contract as "*an administrative contract*", but that did not change the tribunal's conclusion; the main basis for its Article 5 analysis was international law.[160]

242. In any event, the Claimant rejects the notion that DPP's activities were commercial:[161]

a. The Rencar Contract involves the City of Prague because DPP, of which the City of Prague is the sole shareholder, is a 28% shareholder of Rencar.

b. The Respondent projected its sovereign authority at multiple steps as set out above.

243. The Claimant accordingly maintains that the requirements of Article 5 are met and that DPP's actions can be attributed to the Respondent.

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[158] RL-0225, *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No 2015-13, Award, 27 June 2016, ¶¶252 et seq.

[159] RL-0188, *InterTrade Holding GmbH v. The Czech Republic*, PCA Case No. 2009-12, Final Award, 29 May 2012, ¶191.

[160] RL-0190, *Ulysseas Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012, ¶139.

[161] Reply, ¶325.

ii. Respondent's Position

244. The Respondent submits that DPP's acts cannot establish any liability of the Respondent because DPP's acts are not attributable to the Respondent.[162] DPP has an independent legal personality under Czech law and the Claimant cannot overcome the high threshold for attributing its acts to the Respondent.

245. The Respondent submits that Article 5 establishes a two-pronged test such that the Claimant must prove that (i) DPP is generally empowered to exercise governmental authority and (ii) the specific conduct raised by the Claimant as a disputed measure (i.e. the termination of the Rencar Contract) was an exercise of that governmental authority.[163]

246. The Respondent contends that neither of these two prongs are satisfied.

247. As regards limb (i), the Respondent rejects the suggestion that Article 5 permits a flexible assessment turning on a mixture of fact, law and practice.[164] The Respondent contends that municipal law is decisive, referring to the Commentary to the Articles, which states:

> "*The justification for attributing to the State under international law the conduct of 'parastatal' entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority.*"

248. There is no definition of the meaning of 'elements of the governmental authority' in the Articles, the Respondent submits, because arbitral tribunals must refer to municipal law to define governmental authority. The lack of such a definition does not permit a flexible approach. Addressing the authorities relied upon by the Claimant, the Respondent makes the following points:[165]

[162] Counter-Memorial, ¶¶432-433.

[163] Rejoinder, ¶462.

[164] Rejoinder, ¶465.

[165] Rejoinder, ¶¶472-481.

a. The comment in *F-W Oil Interests* that for the purposes of attribution under Article 5, "*[t]he internal law of the State will be the starting point, but not the end point*" was *obiter*. The tribunal rejected the claimant's claims.

b. In any event, the *obiter* comment was mistaken. This is demonstrated by *Ortiz v. Algeria*,[166] where the tribunal assessed whether Algerian law empowered three entities to exercise governmental authority and whether they acted in exercise of that authority *under Algerian law*. A similar approach was adopted by the tribunal in *UAB v. Latvia*,[167] which regarded empowerment under municipal law as a self-standing requirement for attribution under Article 5 and held that the criteria mentioned under paragraph 6 of the ILC Commentary to Article 5 (viz. that what is regarded as "*governmental*" gives rise to questions of the application of a general standard to varied circumstances) pertain only to the definition of governmental authority and do not address whether an entity is specifically *empowered* under municipal law.

c. The decision in *Helnan v. Egypt* should not be relied upon because it is a contradiction in terms to hold that EGOTH would fall under Article 5 even if it has "*not been officially empowered by law to exercise elements of the governmental authority*" because Article 5 requires the exact opposite, namely that EGOTH *is* empowered by law to exercise governmental authority. In any event, the statement on attribution was irrelevant to the final award because the tribunal found that the conduct was not a violation of the BIT. Moreover, a subsequent tribunal, asked to assess whether the conduct of EGOTH could be attributed to Egypt, denied attribution without reference to *Helnan* in this context (albeit that it had relied on the decision in respect of other issues).[168] *Salini v. Morocco* is inapposite because

[166] RL-0280, *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award, 29 April 2020, ¶¶193-204.

[167] RL-0236, *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017.

[168] RL-0281, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, ¶93.

it does not address attribution under Article 5. In *Almås v. Poland*,[169] the tribunal stated in respect of *Salini* that "*The relevance of this early decision is limited by its reliance on indeterminate categories of reference ('State company') and above all by its denial of contractual jurisdiction over ADM*."

d. *Flemingo v. Poland* and *Strabag v. Libya* are also unhelpful to the Claimant. In the former, the tribunal's first step was to identify a specific piece of Polish legislation that empowered the relevant entity under Polish law to exercise elements of governmental authority.[170] In the latter, the tribunal only considered for the purposes of Article 5 whether the entities were empowered to exercise governmental authority under Libyan law.[171]

249. The Respondent further points to the commentary to ILC Article 5, which states that "*The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits authority as part of the general regulation of the affairs of the community. It is accordingly a narrow category*."[172] The Respondent relies on the following matters as demonstrating that this criterion is not met:[173]

a. DPP, as a joint-stock company, is subject to Czech corporate law. It is self-evident that Czech corporate law does not specifically authorize joint-stock corporations to exercise governmental authority.

b. The Claimant is unable to refer to any Czech law explicitly conferring governmental authority on DPP or where DPP's actions took the form of administrative acts. The present case is different from, for example, *Hamester*,

[169] RL-0225, *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No 2015-13, Award, 27 June 2016, ¶211.

[170] CL-0022, *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶437.

[171] CL-0208, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, ¶173.

[172] Rejoinder, ¶467.

[173] Rejoinder, ¶¶458-466.

where the Ghana Cocoa Board was vested by law with powers to adopt certain regulations and impose penalties if those regulations were violated.

c. That DPP operates a transport network in Prague does not suffice under Article 5. Transportation is a business activity following commercial objectives and does not constitute governmental authority. DPP is one of 42 carriers operating in Prague and operates under the same rules as every other carrier. The Respondent refers to the statement in the commentary to Article 5 that "*the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock*)."

d. The fact that DPP operates and leases public property does not mean that it exercises governmental authority. *Almås v. Poland* and *Staur v. Latvia* (at paragraph 317) are authority for this principle.

250. As regards the matters relied upon by the Claimant in contending that the legal test under the first limb of Article 5 is met, the Respondent alleges that none of the authorities to which the Claimant refers have relied on such matters without first identifying a specific piece of municipal legislation which empowers the entity whose conduct is said to be attributable to the State.[174] The Respondent asserts:[175]

a. The way in which an entity was established is not relevant. Otherwise, the acts of every private entity that was created by virtue of a statutory privatization act would be attributed to the State. In *Staur v. Latvia*, attribution under Article 5 was rejected because Latvian law did "*not delegate any governmental authority to SJSC Airport, but merely provides for its establishment and governance.*"[176] *Nykomb v. Latvia*, relied upon by the Claimant, was not decided based on Article 5 but in any event

[174] Rejoinder, ¶484.

[175] Rejoinder, ¶¶485-498.

[176] RL-0250, *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, ¶342.

did not consider the establishment of the entity in question to be sufficient to conclude that it was an "*instrument of the State*".[177]

b. Access to public funds is not determinative. Otherwise, the acts of every private company receiving some form of State funds would be attributable to the State. In *Toto v. Lebanon*, the relevant entity received funds from amounts allocated in the State budget (rather than through a service contract) and reliance on the fact that it had access to public funds was complemented by the fact that the entity was "*in charge of implementing the decisions of the Council of Ministers*".[178]

c. The interest of a State in or its influence over an entity or the presence of its agents on its boards is not decisive. The commentary to Article 5 states that "*[T]he existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.*"

d. In respect of the Claimant's reliance on the application of the Concession Act and the Information Act to DPP, the Respondent contends that the Claimant has no authority to support the proposition that obligations under a freedom of information act or under public procurement laws amount to being empowered to exercise governmental authority. The Respondent notes that the concept of a "*public institution*" under the Czech Information Act is based on whether the State has a majority shareholding, not the conferral or exercise of governmental authority. The Respondent points to the publicly traded joint stock company ČEZ, a claimant in two investment arbitrations, as an example. Likewise, says the Respondent, the definition of a "*contracting authority*" under the Concession Act does not require

[177] CL-0210, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC Case No. 118/2001, Arbitral Award, 16 December 2003, section 4.2.

[178] CL-0211, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶53.

DPP to exercise governmental authority but rather to be "*financed predominantly by the State*" and "*controlled by the State*". By contrast, ownership is indecisive under Article 5 – the question is whether the entity is empowered to exercise specific elements of governmental authority. The Respondent adds that under Czech law (specifically Act 82/1998 Coll.) it is insufficient for State liability that an entity is owned or financed by the State or is serving a public purpose without governmental authority. The Respondent's reference to the police powers doctrine does not mean that the Respondent accepts that DPP is empowered to exercise governmental authority. It is an alternative argument that, if the tribunal were to attribute the conduct of DPP to the Respondent, that conduct would be justified under the police powers doctrine.

251. As regards limb (ii), the Respondent refers to the finding in *InterTrade v. Czech Republic* that:[179]

> "*…even when a separate legal entity exercises governmental powers, all its acts are not necessarily attributable to the State; in particular, they are not attributable if those acts were connected only to commercial activities and not to the exercise of its governmental powers.*"[180]

252. The Respondent submits that the exercise of governmental authority under the second limb of Article 5 depends on whether the particular conduct at issue was an act *de iure imperii* under governmental authority generally conferred on the entity, or whether it is an act *de iure gestionis* according to powers which every private entity may exercise.[181] Since the conferral of governmental authority requires that the entity in question is empowered with *puissance publique,* the exercise of governmental authority likewise requires the exercise of *puissance publique*. [182]As stated in *Hamester v. Ghana*:

> "*The following acts are attributable to the State, under the rules of international law: […] acts of public or private entities or persons*

[179] Counter-Memorial, ¶467.

[180] RL-0188, *InterTrade Holding GmbH v. Czech Republic*, PCA Case No. 2009-12, Final Award, 29 May 2012, ¶¶182-183.

[181] Rejoinder, ¶529.

[182] Counter-Memorial, ¶456.

exercising governmental authority, if executed in the exercise of such authority – which by definition cannot include acts de jure gestionis".[183]

253. The Respondent contends that municipal law determines which conduct is an exercise of governmental authority, again rejecting the "*flexible*" international law standard said to be advanced by the Claimant.[184] The Respondent makes the following points:[185]

a. In *InterTrade*, the tribunal assessed whether the entity in question exercised governmental authority under Czech municipal law (the Czech Forestry Act). The tribunal referred to "*its analysis or conclusions under international law*" only to distinguish the test for attribution under Article 5 from the test under EU (then EC) law relied upon by the claimant. The tribunal stated that "*the test for attribution of a State entity's acts and omissions under international law is different from the test under EC law.*" The test is one of international law, but which looks to municipal law to determine the definition, empowerment and exercise of governmental authority.

b. In *Ulysseas*, the tribunal held that there was no exercise of *puissance publique* even if the contract was an administrative contract because the exercise of powers stayed within the terms of the contract. There is nothing to suggest that the assessment was not made under Ecuadorian law and the affirmation of attribution was because the entity had regulatory powers under the Ecuadorian Power Sector Regime law.

254. The Respondent contends that there is a string of cases in which attribution has been rejected on the basis that the specific conduct was commercial, referring to (among others):[186]

[183] RL-0173, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶180.

[184] Rejoinder, ¶504.

[185] Rejoinder, ¶¶505-507.

[186] Counter-Memorial, ¶444.

a. *Jan de Nul* (Suez Canal Authority's management of a tender process for works on the canal);[187]

b. *Bayindir v. Pakistan* (highway authority's management of a motorway's tolls);[188]

c. *EDF v. Romania* (management of service contracts regarding Bucharest airport);[189]

d. *Hamester v. Ghana* (the relevant state agency's conduct of a tender procedure regarding use of State forests);[190]

e. *Bosh v. Ukraine* (a university's termination of a contract for the development of real estate);[191]

f. *Almås v. Poland* (the Polish agricultural property agency's termination of lease agreements);[192]

g. *Tulip v. Turkey* (the cancellation of a residential and commercial real estate development);[193]

h. *Staur v. Latvia* (the SJSC Airport's management of its relationship with the airport operator Rixport);[194] and

[187] RL-0162, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, ¶¶158-162.

[188] RL-0168, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶123.

[189] RL-0170, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶190.

[190] RL-0173, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶182 et seq.

[191] RL-0195, *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, ¶177.

[192] RL-0225, *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No 2015-13, Award, 27 June 2016, ¶¶207 et seq.

[193] RL-0205, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, ¶295.

[194] RL-0250, *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, ¶¶337-354.

i. *Ulysseas v. Ecuador* (conduct of national petroleum companies regarding a licence contract).[195]

255. The Respondent rejects the Claimant's attempts to distinguish these authorities, emphasising the following points:[196]

a. In *Jan de Nul*, the tribunal's analysis was not limited to public tenders but rather the expression of a general rule. In any event, the fact that *Jan de Nul* was concerned with public tenders is all the more reason to apply the analysis therein: if commercial conduct as tightly regulated as a public tender does not qualify as an exercise of governmental authority, the termination of an advertisement contract cannot do so *a fortiori*.

b. In *Hamester*, the tribunal considered the shareholder dispute to be one instance of the application of the general rule that commercial acts do not fall under Article 5. This is confirmed, the Respondent contends, by the fact that the tribunal preceded its analysis with the statement that "*if the acts of Cocobod which are the subject of complaint were performed in the exercise of governmental power, they will be attributed to the State. If they were performed in the fulfilment of commercial relations, they will not be attributable on that basis to the State.*"[197] As in *Jan de Nul*, the tribunal placed importance on the fact that "*any private contract partner could have acted in the same way*".

c. *Bosh v. Ukraine* is not substantively different from the present case: the tribunal concluded that the nature and purpose of the relevant contract did not relate to the exercise of the University's governmental authority, but was a private or commercial activity aimed to secure commercial benefits for both parties.[198]

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[195] RL-0190, *Ulysseas Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012, ¶143.

[196] Rejoinder, ¶¶510-527.

[197] RL-0173, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶200-201.

[198] RL-0195, *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, ¶177.

d. In *Almås v. Poland,* the tribunal held that the lawfulness of the termination of the lease under municipal law was not material for the question whether there was an exercise of governmental authority under Article 5; the "*purported exercise of contractual powers*" was sufficient to move the conduct outside the scope of Article 5.[199]

e. In *Staur v. Latvia*, the tribunal expressly rejected the argument that "*State involvement*" or even control, could lead to a contractual act being classified as an exercise of governmental authority, both on the facts and as a matter of principle. The tribunal affirmed that *"[c]ontrol on the part of the State within its competence as a shareholder has nothing to do with the exercise of governmental authority*."

f. The decision in *Tulip v. Turkey* cannot be distinguished on the basis that Turkey was the trust's minority shareholder. The tribunal did not consider Turkey's interest in the company at all for the purposes of Article 5. It only considered whether the entity was authorized to exercise and did in fact exercise *puissance publique*.[200]

g. The fact that the tribunals in *Bayindir v. Pakistan* and *EDF v. Romania* accepted attribution under Article 8 after rejecting it under Article 5 supports the Respondent's position: state involvement is irrelevant under Article 5.

256. The Respondent adds that *Bosca v. Lithuania* does not assist the Claimant but rather underlines the requirement that a claimant must prove that the conduct of the company was an exercise of *puissance publique* under domestic law.[201] The tribunal analysed the municipal law to determine that privatization was a governmental process such that the entity in question acted in a sovereign capacity when negotiating the purchase of the would-be-privatized company. By contrast, in the present case, there is no specific Czech law that

[199] RL-0225, *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No 2015-13, Award, 27 June 2016, ¶251.

[200] RL-0205, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, ¶¶292-300.

[201] Rejoinder, ¶520.

would render the conclusion and termination of an advertising agreement such as the Rencar Contract an exercise of sovereign power under Czech law.

257. The Respondent relies on the following features of the present case as demonstrating that the relevant activities of DPP were commercial:[202]

a. The activity in question concerns DPP's management of its advertising space. Advertising is a stereotypical commercial activity which seeks to increase sales of commercial products. The Claimant's local subsidiary paid a certain rent for the advertisement spaces and in turn collected fees from the companies that placed advertisements. There is no governmental element in the arrangement.

b. The measures in question are, in essence, DPP's decision to invoke the invalidity of the contractual relationship with the Claimant's local subsidiary. This was a mere business decision; the main objective was to issue a tender and negotiate the best price for the new lease. The basis for termination invoked by DPP was a basis that could be invoked in any normal relationship under commercial law. Authority such as *Jan de Nul*, *Almås v. Poland* and *Staur v. Latvia* clearly demonstrates that when a party utilizes mere options under contract law, there will be no attribution.

258. The Respondent also rejects the Claimant's focus on the "*true nature of the act*" (*Crystallex v. Venuezla*) and "*true reason*" for or the "*hidden political agenda*" behind the acts (*Vigotop v. Hungary*), arguing that those cases are inapposite because neither addressed the issue of attribution.[203] Instead, argues the Respondent, both concerned direct actions by the State; the tribunals were only asked to decide whether termination of a contract by the State would engage jurisdiction and liability under the BIT in the absence of an umbrella clause, or whether it was a simple contractual dispute. The tribunals did not have to decide whether there was conduct attributable to the State in the first place.

[202] Counter-Memorial, ¶¶470-473.

[203] Rejoinder, ¶509.

b. The Tribunal's Analysis

259. While the Claimant has kept open reliance on Article 5, it focused, in its closing written submissions and its oral submissions on 27 May 2025 and in its post-hearing brief, only on Article 8. That was in the Tribunal's view realistic. Some tribunals have in the past taken a very broad view regarding the attribution to States of the actions of state-owned companies: see e.g. the decision in *Salini Construttori S.p.A v. Morocco*[204], issued on 31 July 2001. But the decision on jurisdiction in that case was reached without reference to the draft ILC Articles (which were in fact only endorsed by the ILC on 31 May and 3 August 2001 and by the United Nations General Assembly on 12 December 2001). The actual language of Article 5 makes clear that this Article requires close attention to be paid to two aspects: (i) whether an entity which is not an organ of the State is "*empowered by the law of that State to exercise elements of the governmental authority*" and (ii) whether it was "*acting in that capacity in the particular instance*".

260. "*Governmental authority*" must, in the Tribunal's view, be seen in this context as an objective international legal concept. It cannot be that each individual State can decide for what conduct it answers internationally by legislating internally that this or that conduct should be regarded as involving an exercise of "*governmental authority*". On the other hand, whether and to what extent an entity has been conferred with the exercise of any element of governmental authority, so defined, must depend on examination of the actual nature, role and powers of the particular entity under the domestic law and practice of each particular State.

261. In the present case, the relevant entity is DPP. The Tribunal does not doubt the practical importance of DPP's role and activity in providing mass over- and underground transportation in Prague and in arranging for available surfaces of the relevant infrastructure to be used for advertising purposes in order to assist to finance this. Equally, the Tribunal acknowledges DPP's receipt of state property and funding for use in its operations and the corporate control which the State has over DPP. The latter involves the

[204] CL-0207, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001.

City owning DPP, the City Council acting as DPP's General Meeting, the General Meeting appointing DPP's Supervisory Board and the Supervisory Board having power to hire and fire members of DPP's Board of Directors. None of these features requires or involves however any element of governmental authority. They are features with parallels which could exist in ordinary commercial contexts.

262. The Tribunal is also of the view that the provision of mass transportation does not as such require or involve any element of governmental authority. Whether it is undertaken by a state- or a privately owned entity, it is of course likely to be subject to regulation in the public interest. But being regulated by governmental authority is not the same as having or exercising governmental authority. If DPP had or were to be given statutory powers to employ and deploy transport police with, for example, powers to detain or exclude, that could certainly mean that DPP enjoyed and was exercising an element of governmental authority. But there is nothing like that here in question. This case is concerned with DPP's treatment of contractual arrangements under the Rencar Contract and its Amendments. Whether or not DPP's treatment of the Rencar Contract and/or its Amendments was justified contractually, DPP was not thereby acting or purporting to act as a governmental authority or pursuant to any form of discernible governmental authority. The Claimant is therefore unable to rely on Article 5 to justify the attribution to the State of DPP's treatment or mistreatment of the Rencar Contact and/or its Amendments.

(2) Article 8

a. Parties' positions

i. Claimant's Position

263. Under Article 8, the Claimant contends that DPP's shareholding structure allows the Respondent to instruct, control and direct DPP's actions, and DPP acted on the instructions of the City of Prague, alternatively under the direction or control of the City, sufficient for

attribution under Article 8.[205] The Claimant begins by making the following points in relation to the scope of Article 8:[206]

a. Article 8 refers exclusively to "*international law*". This means that the designation of particular conduct under the State's domestic laws will play no role for the purposes of Article 8.

b. Article 8 refers to conduct "*in fact*". The relevant assessment accordingly centres on evidence of State involvement. It requires a case-by-case approach. The decisive question is whether "*there exists a specific factual relationship between the person or entity engaging in the conduct and the State.*" It is not correct that the threshold for State control is high (as argued by the Respondent); it must simply be addressed on the facts of each case.

c. Article 8 distinguishes between "*instruction*", "*direction*" and "*control*", which are different degrees of State intervention. As set out in the commentary thereto, it is sufficient to establish that any one of these terms is met. If the State uses its interest to achieve a "particular result" (per paragraph 6 of the Draft Articles), the conduct will be attributable.

d. Article 8 is specifically designed to attribute the wrongful conduct of either private persons or private entities. Such conduct is attributable irrespective of whether it involves commercial or "*governmental activity*".

264. The Claimant summarises the themes flowing from the case law on Article 8 in the following terms:[207]

a. Most cases concern State-owned companies and the conduct of those companies, typically related to a contract.

[205] Reply, ¶13.

[206] Reply, ¶¶329-330.

[207] Claimant's Post-Hearing Brief I, ¶72.

b. Tribunals consider a wide range of evidence, including: (i) state ownership in a company as a "*significant background factor*";[208] (ii) the "*connections*" between an entity's actions and the State's involvement;[209] (iii) the State's "*blessing*" for an entity's measures against the investor.[210]

c. Tribunals take a holistic approach considering all evidence, both direct and circumstantial. Based thereon, tribunals decide whether "*on the balance of probabilities*",[211] there was a "*certain degree of government involvement*".[212] If such involvement can be established, the conduct is attributable under Article 8.

265. For the purposes of "*instructions*", the Claimant says with reference to the ILC commentary that "*it does not matter that the person or persons involved are private individuals nor whether their conduct involves 'governmental authority'.*"[213] In *Bayindir v. Pakistan*, the tribunal confirmed at paragraph 129 that:

> "*Article 8 is without prejudice to the characterization of the conduct under consideration as either sovereign or commercial in nature. For the sake of attribution under this rule, it does not matter that the acts are commercial, jure gestionis, or contractual. […] In other words, a finding of attribution does not necessarily entail that the acts under review qualify as sovereign acts.*"[214]

266. The Claimant contends with reference to the ILC commentary that where an ownership interest is employed to achieve a particular result, ownership will be equated with control

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[208] RL-0236, *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, ¶828.

[209] RL-0168, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶125

[210] CL-0213, *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICISD Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶146.

[211] RL-0236, *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, ¶830.

[212] RL-0168, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶128.

[213] Reply, ¶330.

[214] RL-0168, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶129.

and the actions taken in achieving the particular result will be attributable to the State.[215] The Claimant relies on the following authorities as endorsing this "*particular result test*":

a. *EDF v. Romania*, where the tribunal found that the State was using its ownership interest specifically in order to achieve a particular result, being that of bringing to an end or not extending the contractual arrangements with EDF.[216]

b. *UAB v. Latvia*, where the tribunal found that there was a body of circumstantial evidence which taken as a whole established that the Municipality must have instructed the companies not to comply with the relevant agreement.[217] The Claimant emphasises the pertinence of *UAB v. Latvia* in the present case and refutes the notion that it is an *outlier* (referring to the cases below in support of this).

c. *Ampal v. Egypt*, where the tribunal held that there was overwhelming evidence that the decisions of two State-owned enterprises were taken "*with the blessing of*" the highest levels of the State's government.[218]

d. *Bayindir v. Pakistan*, where the Claimant says that an even lower threshold was applied because the tribunal's findings were premised on a "*certain degree of government involvement*" based on "*connections existing between the decision of the NHA and the involvement of the Pakistani Government with respect to the termination of the Contract*."[219]

267. The Claimant contends that the proper approach is accordingly to start with a company's ownership structure; if the State has an ownership stake, this implies a high level of control;

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[215] Reply, ¶¶334-335.

[216] RL-0170, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶201.

[217] RL-0236, *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal, 22 December 2017, ¶827.

[218] CL-0213, *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICISD Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶146.

[219] RL-0168, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶128.

if the State then uses this interest to terminate a contract with an investor, or bring about the end of the investor's activities, the conduct of the company is attributable.[220]

268. In this regard, the Claimant rejects the relevance of the ICJ's findings in the *Nicaragua* and *Bosnian Genocide* cases as to the standard of control to be applied under Article 8 (viz. that looking for "*effective control over the action during which the wrong was committed*" rather than an "*overall control*" test is appropriate):[221]

a. The context is different. The ICJ was tasked with determining State responsibility for the actions of para-military groups.

b. The ICJ's findings in those cases are not universally accepted by international courts. In the *Tadić* case, the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**") diverged from the ICJ's '*effective control'* test and instead applied the '*overall control'* test. There too, however, the ICTY's findings were placed in the specific context of responsibility for international crimes.

c. In both *Staur v. Latvia* and *Bayindir v. Pakistan*, authorities relied upon by the Respondent, the tribunals refused to rely on the *Nicaragua* and *Bosnian Genocide* cases for the purposes of attribution.

269. In response to an argument by the Respondent that the majority of awards on record on the subject have rejected State control, the Claimant emphasises that each of the awards must be considered in its own particular context.

270. The Claimant then makes several points in support of the proposition that DPP was instructed, directed and controlled by the State in attempting to destroy the Respondent.

271. First, DPP's structure puts the State in a position to exercise control.[222] The City of Prague is DPP's sole shareholder and exercises its rights through the General Meeting, the powers of which are exercised by the City Council. The General Meeting, i.e. the City Council, is

[220] Reply, ¶¶336-337.
[221] Reply, ¶¶338-342.
[222] Reply, ¶345.

the highest decision-making body of DPP and decides on the composition of DPP's bodies. DPP is financed by the City of Prague's budget and in practice the City of Prague and DPP are indistinguishable. As [redacted] notes in his Second Witness Statement, "*the service provided by DPP is a service provided by the City.*" The members of DPP's bodies are, in most cases, City officials from a coalition with the majority in the City Council. This is reflected in the fact that DPP's General Meeting is chaired by the City Mayor and by the fact that the Deputy Mayor in the present case, Mr Dolínek, was the Chairman of the Supervisory Board.

272. Second, the Claimant refers to the evidence of [redacted] in cross-examination that (i) the Board follows the "*instructions*" of the City Council; (ii) the CEO of DPP is "*always*" a "*political function*"; and (iii) selecting the CEO of DPP is "*always a political ... decision*".[223] The Claimant accordingly emphasises that the position of CEO is closely tied to the City administration in that (i) the CEO is appointed by the parties in power, (ii) the CEO is expected to implement the parties' policies and (iii) if the CEO does not, the CEO is replaced (as explained by [redacted] . The Claimant concludes in this regard that the CEO of DPP is not comparable to a CEO of any commercial entity; the CEO is a member of the City's administration, exercising a public function. The City acts through the CEO and other bodies of DPP in implementing its policies.

273. Third, DPP plays an important role in City administration as the largest municipal company and provider of transportation services in Prague.[224] In the eyes of the public, the City and DPP are indistinguishable. DPP's performance thus reflects directly on the City, influencing the voters. Political parties will accordingly seek to work closely with the CEO to implement policies in the transportation sector.

274. Fourth, by referring to DPP as a contracting authority under the Concession Act and an obliged entity under the Information Act, and by invoking the police powers doctrine, the Respondent effectively confirms that DPP is subject to State control.[225]

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[223] Claimant's Post-Hearing Brief I, ¶¶85-86.

[224] Claimant's Post-Hearing Brief I, ¶¶88-89.

[225] Reply, ¶346.

275. Fifth, ANO misused DPP's structure to gain full control over DPP's business. [226] It was not unusual for DPP's CEO to coordinate work with political parties, but what were once discussions on DPP's affairs turned into "*full control*" under ANO. This is confirmed by [redacted]'s evidence.

276. Sixth, the [redacted] Diary records the State's plan to eviscerate the Rencar Contract.[227] [redacted] *de facto* controlled DPP and his diary records the Respondent's intention to "*get rid of the contract with Rencar*".

a. The City of Prague made the future of the Rencar Contract contingent on the Claimant agreeing to the City's terms in respect of the Street Furniture Contract. [redacted] stated publicly in 2015 in respect of the Street Furniture Contract that "*Either we will reach an agreement and the contract will be more profitable for the city, or we will terminate the contract. […] this will in fact be the end of their business activities in Czechia*." [redacted] further stated that if the Respondent failed to agree to the City of Prague's terms, "*the city will also interrupt the cooperation between the company and the Transport company of the capital.*" The

b. The Respondent did not respond to the City of Prague's threats. As a result, the City moved to more formal steps. At a meeting with DPP's CEO, [redacted] insisted upon termination of the Rencar Contract.

c. On 31 March 2016, DPP sent a letter purporting to terminate the Rencar Contract. The Claimant called a meeting on 6 April 2016. In the meeting, DPP's CEO stressed that the Mayor was "*personally interested*" in the situation and that she was "*urging him to correct the problem with the unfavourable contractual relationship.*" [redacted]'s personal interest is confirmed by the fact that one day after DPP's purported termination notice, [redacted] sent a letter to DPP outlining the next key step: "*announcing a new tender procedure*" to "*dispel*" any "*doubts*".

[226] Reply, ¶348.

[227] Reply, ¶349.

d. To improve the City's bargaining position, [redacted] also then instructed DPP to file a claim with UOHS. Again, the Mayor's instructions were publicly expressed. She is quoted in a contemporaneous newspaper article as saying that "*I requested the director of … to file a motion with UOHS … There are several opinions on the contract and the city needs to know the opinion of an independent body. … I want DPP to submit a motion to UOHS to initiate proceedings. Otherwise, the UOHS will not deal with the entire problem … it is right that the director wants to straighten out the contractual conditions and get a greater financial return for the city.*"

e. Following the UOHS decision, DPP did not exercise normal commercial judgment. It decided not to appeal the decision, instead adopting the proposal of [redacted] the new CEO with ties to ANO, to "*immediately*" tender "*all DPP advertising spaces*". DPP did not seek the approval of the Municipal Council in doing so and ignored the advice given by DPP's lawyer in the 6 April 2016 meeting that no tenders should take place during ongoing litigation concerning the existing Rencar Contract.

277. Seventh, [redacted] explains in his witness statement that "[redacted] *increasingly insisted on a termination of the Rencar Contract*" and that he "*sought to reconcile my views with [redacted] s] instructions*."[228] [redacted] did not correct, supplement or deny any of the statements on record but rather accepted that she might have "*contributed*" to the ultimate decision to terminate the Rencar Contract.

278. The City of Prague thus used its ownership interest to achieve the particular result of getting rid of the Rencar Contract, ending the Respondent's business activities and announcing a new tender procedure. DPP's conduct may therefore be attributed to the State.

ii. Respondent's Position

279. The Respondent emphasises that the majority of the treaty awards on record reject attribution, demonstrating that the investor's burden to prove attribution is a difficult

[228] Claimant's Post-Hearing Brief I, ¶93.

one.[229] A mere shareholding does not suffice. The Respondent contends that Article requires more than merely general control; it requires State control over the specific measures at issue. The Respondent refers to the following decisions (among others):[230]

a. *Bosnia Genocide*. The Respondent relies on the statement at paragraph 406 that acts may be attributable "*where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility*."

b. *Jan de Nul*, where the tribunal characterised the legal standard as "*very demanding*" and rejected control due to lack of evidence.

c. *Hamester v. Ghana*, where the tribunal found that "*effective control*" was synonymous with "*direct command*".

d. *Tulip v. Turkey*, where the tribunal confirmed that the ordinary control exercised by a shareholder does not suffice under Article 8. The Respondent points to the finding at paragraph 326 that there was an absence of proof "*that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests.*"

e. *Almås v. Poland* and *White v. India*, where the tribunals rejected attribution arguments.

f. *EDF v. Romania*, where at 201 the tribunal accepted such an argument upon satisfaction of what the Respondent describes as a "*high threshold*" establishing that the State was using its ownership interest in or control of the relevant entities "*specifically in order to achieve a particular result.*"

[229] Counter-Memorial, ¶479.

[230] Counter-Memorial, ¶¶480-489.

280. The Respondent rejects the suggestion that a different or lower standard applies to investment treaty cases than under general international law in cases such as the *Bosnia Genocide* case.[231] The Respondent makes the following points:[232]

a. In the *Bosnia Genocide* case, the ICJ considered the decision of the ICTY in *Tadić* and rejected the "*overall control*" test as "*unsuitable*" to determine State responsibility, finding that it "*stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.*" The Respondent refers to the Draft Articles on State Responsibility (Article 8) in support of this.

b. In *Staur v. Latvia*, the tribunal was asked to consider the *Nicaragua* and *Bosnia Genocide* cases in the context of whether the State-owned holding company of Riga Airport was a *de facto* public authority within the meaning of Article 4. It was in this specific context that the tribunal found that comparisons with para-military forces were unhelpful.

c. *Ampal v. Egypt* is not authority for the proposition that it would be sufficient for attribution under Article 8 in investment treaty cases that actions were "*taken with the blessing*" of the State. The reference to "*blessing*" is in the Respondent's submission a "*verbal flourish in a decision taken on hard evidence.*" The tribunal had analysed several government resolutions and minutes of meetings of the company's board of directors which was composed of several government ministers and was chaired by a minister.

d. *Bayindir v. Pakistan* is the only investment treaty case on record that adopted a lower threshold for attribution in investment disputes than the test for control over specific acts defined in *Nicaragua* and the *Bosnia Genocide* case. Investment

[231] Rejoinder, ¶533.

[232] Rejoinder, ¶¶534-542.

tribunals have so routinely applied the test set out by the ICJ that the tribunal in *Marfin v. Cyprus* called it a "*jurisprudence constante*."[233]

281. The Respondent submits that ownership by the State does not imply control by the State of the particular conduct at issue; it merely shows a theoretical possibility of control which the claimant must nevertheless prove.[234] The Respondent makes the following points:[235]

a. There is no basis in the text of the Draft Articles or investment treaty jurisprudence to assert that ownership equates to control. Ownership is insufficient without the use of that interest to achieve a particular result: the Draft Articles refer to the State "*using its ownership interest in or control of a corporation specifically in order to achieve a particular result*" and explain that "*The fact that the State initially establishes a corporate entity … is not a sufficient basis for the attribution*".

b. *EDF v. Romania* illustrates this approach: the tribunal found that the Romanian State "*was using its ownership interest in or control of corporations […] specifically 'in order to achieve a particular result'*".[236] Tribunals in *Electrabel v. Hungary*,[237] *UAB v. Latvia*[238] and *Tulip v. Turkey*[239] have made the point that control or influence is insufficient for the purposes of Article 8, while the tribunal in *White v. India* made clear that the fact that the entity was "*wholly-owned by the Host State*" and that "*India had control over the appointment of [the] board of*

[233] RL-0286, *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, ¶675.

[234] Rejoinder, ¶554.

[235] Rejoinder, ¶545-553.

[236] RL-0170, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶201.

[237] RL-0196, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶7.95.

[238] RL-0236, *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal, 22 December 2017, ¶825.

[239] RL-0205, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, ¶306.

directors" was irrelevant because the State must have "*directed or controlled the specific operation*".[240]

282. The Respondent adds that control, directions and instructions require specific not circumstantial evidence:[241]

a. The circumstantial evidence relied upon by the tribunal in *UAB v. Latvia* is explained by the particular procedural situation in that case: the respondent State had not offered any fact witnesses for cross-examination.

b. The present case is different from *Eastern Sugar v. Czech Republic*, where the tribunal relied on newspaper interviews of government officials and a statement by the agriculture ministry. The Claimant is asking the tribunal to hold that there has been a conspiracy based on second-hand information in media reports which rely on statements supplied by persons connected to Rencar and alleged entries in an undated and ambiguous diary obtained in an unclear manner.

c. Reliance on circumstantial evidence is contrary to the bulk of authority. Where investment tribunals have accepted attribution under Article 8, they have usually done so on the basis of specific evidence. The Respondent refers in this regard to: the *Nicaragua* case (where attribution was rejected despite the United States' extensive support, involvement with and influence over the rebels), *Von Pezold v. Zimbabwe* (where the acts of settlers were not attributable to the State despite ample evidence of government encouragement and involvement), *Electrabel v. Hungary* (where a letter sent by the Hungarian Energy Office to a State-owned electricity supplier could not be considered an instruction because its purpose was to encourage rather than to instruct), *EDF v. Romania* (where it is said that the tribunal only accepted attribution after analysing in detail several mandates by the Ministry of Transport to the corporations directing them to take concrete decisions) and

[240] RL-0183, *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, ¶¶8.1.5, 8.1.7.

[241] Rejoinder, ¶¶556-566.

Karadeniz v. Pakistan (where the Respondent submits that the tribunal relied on specific, not circumstantial evidence).

283. The Respondent contends on the basis of these authorities that nothing less than proof that the particular measures were directed by the City of Prague or another State organ will suffice. The Respondent submits that the Claimant cannot discharge this burden:[242]

a. Article 9(1) of DPP's Articles of Association prohibits the General Meeting from instructing the Board of Directors on the company's day-to-day business management. Likewise Section 435(3) of the Czech Corporations Act. [redacted] states in his expert report that "*As there is, to the best of my knowledge, no group (concern) relationship between the City of Prague and DPP, the City of Prague is prohibited from giving instructions to DPP's Board of Directors concerning the conduct of its business and, in this respect, the law limits the degree of control that the City of Prague can exercise over DPP's business activities.*" The Respondent emphasises that the City Council acts only as the General Meeting of DPP, whereas the management of the company lies with the Board of Directors. There is no evidence of the City Council giving any instructions regarding the termination of the Rencar Contract.

b. The Claimant's theory that the ANO exercised control over DPP through [redacted] including as manifested in [redacted] testimony, is proven to be false by her evidence. Moreover, the Claimant overstates the press reports with quotes by [redacted] as she noted in her witness statement, "*only someone who has never been elected into office can truly think that all quotes ending in the press actually come from the office holder*." While the Claimant refers to the involvement of Mr Dolínek as Chairman of the Supervisory Board and Deputy Mayor, he was not from ANO but rather the coalition partner (the Social Democrats). The Social Democrats are not said to have been part of some conspiracy.

[242] Rejoinder, ¶569; Respondent's Post-Hearing Brief I, ¶¶37-81.

c. There is extensive documentary evidence of DPP's Board of Directors complying with its managerial duty to exercise business judgment. That evidence includes board protocols, legal memoranda and audits. In particular, the record of the meeting between DPP's and Rencar's representatives on 7 September 2016 shows DPP's external counsel explaining that they considered the UOHS decision to be correct and referring to DPP's duty to "*exert due managerial care*" in relation to Rencar and the Rencar Contract.

d. The Claimant's reliance on the notion of the CEO as a political appointee is also misguided. [redacted] was appointed prior to ANO's election in 2014. [redacted] was not replaced for refusing to terminate the Rencar Contract; he *did* terminate the Rencar Contract in March 2016 and was only replaced thereafter. The Respondent also refers to the fact that [redacted] did not testify orally and submits that the Tribunal should not base any award on his witness statements.

e. The Claimant's theory that DPP was directed by ANO to "*assign*" the Claimant's business to Bigboard is demonstrably false. Bigboard won several tenders in open, objective, price-based and transparent tender proceedings, which were conducted free from any external influence. [redacted]'s evidence confirms this. The Respondent notes that the Claimant does not allege that the tenders would have been rigged or were price-based.

f. The notion that the UOHS decision was controlled by [redacted] is incorrect, as confirmed by the evidence of [redacted]. The UOHS decision was impartial. This is confirmed by the evidence of [redacted] who has been a member of the UOHS' Appellate Committee since 2009.

g. The Claimant's reliance on [redacted]'s Diary is unavailing because that Diary is of no evidentiary value and its contents do not match actual events. The Respondent points to the fact that the diary is not on record having not been requested in document production, is partially illegible, is subject to mistranslations and is undated. In this latter regard, the Respondent contends that the Claimant cannot

prove that the diary sets out what is going to happen rather than simply records what has happened.

284. The Respondent also submits that the Claimant's reliance on DPP's failure to appeal the UOHS decision implicitly accepts that whether or not a party is exercising (proper) business judgment or acting in accordance with a (sensible) commercial rationale is a test of attribution. A range of legitimate commercial reasons can inform a decision not to appeal, and here not appealing was consistent with the legal advice DPP received.

b. The Tribunal's Analysis

285. The conduct of DPP is under Article 8 to be "*considered an act of a State under international law*", if DPP was "*in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*". As the Commentary to Article 8 of the ILC draft Articles on State Responsibility notes, Article 8 deals with two circumstances:

> "*The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.*"

286. The inference is that there may be direction or control in a general sense without there being, necessarily, any direct instruction.

287. By way of explanation, the Commentary says further this:

> "*(3) Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.*
>
> *....*
>
> *(5) ..... In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.*

> *(6) ..... The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity..... On the other hand, where there was evidence ..... that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.*
>
> *(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.*"

288. Drawing on the first sentence of paragraph (6), just cited, the tribunal in *Electrabel S.A. v. Republic of Hungary*[243] said, in words with which the present Tribunal agrees:

> "*More specifically, the fact that a State acts through a State-owned or State-controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State*".

289. The Tribunal therefore approaches attribution under Article 8 on the basis that State ownership of an entity - even 100 per cent ownership, and even though it means that the composition of the governing body of an entity is under the State's control - is not the test, though it is a potentially significant background factor or starting point. Attribution under Article 8 involves a fact-specific judgment taking into account all relevant circumstances. While the onus is on the Claimant to establish attribution, the onus is neither heavy nor light. The primary aim is to identify and analyse all relevant circumstances and form a conclusion, one way or the other, in their light.

290. If, despite such ownership, an entity and its governing body conduct their affairs in an ordinary business-like way, with the interests of the entity in mind, there will be no

[243] RL-0196, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012¶7.95.

attribution. Attribution on this basis requires some form of use by the State of its ownership interest in or control over the entity to achieve a particular result, e.g. by causing the entity to do something it would not otherwise have done, or, it might be, by simply intervening in such a way that it was not possible to disentangle the activities or decision-making of the State and of the entity, or to know what the entity would have done but for such intervention.

291. The Claimant relies upon several cases as examples of circumstances in which attribution was established and submits that they point to its appropriateness in the present case also: see paragraph 266 above.

292. In *EDF v. Romania*[244] the tribunal found specifically that the Ministry of Transportation had issued instructions and directions to two State-owned corporations regarding the conduct these companies should adopt in the exercise of their rights as shareholders of a third entity and had used its ownership interest in or control of the two corporations "*in order to achieve a particular result*" within the meaning of the ILC Commentary above – the particular result being in this case bringing to an end, or not extending, the contractual arrangements with EDF.

293. In *UAB v. Latvia*[245] actions of two Municipally-owned company (Rēzeknes Siltumtīkli and Rēzeknes Enerģija in pursuing proceedings against the investor company (Latgales enerģija) were attributed to the Municipality and so to the State. The actions had led to freezing orders which prevented the investor company from paying a debt, which in turn led to it losing its licence. The Mayor of the Municipality had on 13 September 2007 said in a newspaper interview that the Municipality or the Mayor himself had been in private negotiatons for three months to identify alternatives to the investor company and that its future depended on whether if paid its debt, but despite that he had gone on to state unconditionally that "*[W]e will announce a tender and choose a company that would meet our requirements*" and that the "*the future of Latgales enerģija in our city will be decided*

[244] RL-0170, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶201.

[245] RL-0236, *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal, 22 December 2017, ¶825.

on 25 September. By this date, the regular payment for the gas should be paid, and in case Latgales enerģija fails to pay it, then I would bring a question to deputies regarding termination of the agreement". Shortly before the interview and following the Mayor's alleged private negotiations with Latgales enerģija's competitors, the Municaly-owned Rēzeknes Siltumtīkli brought the civil claim against Latgales enerģija in which a freezing order was then sought and obtained on 211 September 2007, preventing Latgales enerģija from paying its debt, which in turn led to it losing its licence. Rēzeknes Enerģija was incorporated by the Municipality on 2 October 2007 leading to a further suit by Rēzeknes Enerģija brought on 27 December 2007 to the same effect. After various further legal steps there followed on 3 June 2008 the revocation of Latgales Enerģija's licences. The Respondent called no witnesses. The tribunal inferred that the respondent, through the Municipality as part of the State, had directed Rēzeknes Siltumtīkli and Rēzeknes Enerģija to bring their respective claims against Latgales Enerģija. The test for attribution was therefore satisfied. In the light of statements made by the Mayor, the tribunal inferred that the Respondent had directed the two state-owned companies to act as they did.

294. In *Ampal-American Israel Corporation v. Egypt*[246]*,* the claim related to the conduct of two State-owned companies in terminating a gas-supply contract ("**GSPA**"). The two companies, EGPC and EGAS, operated within the structure of the Ministry of Petroleum, and were represented by the Ministry in negotiations. After termination, there was a board meeting of EGPC (chaired ex office by the Minister of Petroleum and also attended by the chair of EGAS) at which the proposal to terminate was ratified. All decisions of EGPC's Board were also required to be submitted to the Minister of Petroleum for his review. The tribunal found that there was:

> "*overwhelming evidence that the decisions of EGPC and EGAS to conclude and terminate the GSPA were all taken with the blessing of the highest levels of the Egyptian Government. Such acts are attributable to the Respondent pursuant to Article 8 of the ILC Draft Articles on State Responsibility as EGPC and EGAS were 'in fact acting on the instructions of, or under the*

[246] CL-0213, *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICISD Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶146.

direction or control of the Respondent in relation to the particular conduct'."[247]

295. Finally, in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*[248], the issue was again whether a contractual termination was attributable to the State. The State argued that the fact that it was "*closely interested in this Contract, as any Government being asked to stump up hundreds of thousands of dollars, is going to be*" and the fact that it was the Claimant that kept on asking the Government to get involved, far from leading to a conclusion of attribution, in fact showed why there should be no attribution. The Tribunal relied nonetheless on this admission of what it described as involvement "*to a certain degree*". It held that all the alleged breaches stemmed from the contractual termination "*which decision received express clearance from the Pakistani Government*" and that this was sufficient to justify attribution.

296. The first two of these four decisions appear to the Tribunal to be of no particular note. The latter two may however be viewed as extending attribution to a questionable degree, at least in so far as they suggest that mere "*blessing*" or "c*learance*" will suffice. However, it is important to have regard to the context in which such words were used. In *Ampal*, the word "*blessing*" was used in the context of a finding of positive involvement consisting of "*in fact acting on the instructions of, or under the direction or control of*" the Respondent in relation to the particular conduct.

297. As to *Bayindir*, the present Respondent treats this as "*the only investment treaty case on record that adopted a lower threshold for attribution in investment treaty disputes that is lower than the test of control over the specific act as defined in the Nicaragua and Bosnian Genocide cases*".[249] Even so the present Tribunal notes that the "*clearance*" does not appear to have been a mere, passive acquiescence, but rather a step in the decision-making process that "*could not have been taken*" without some governmental guidance: see paragraph 28 which reads more fully:

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[247] *Ibid*., ¶146.

[248] RL-0168, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶128.

[249] Rejoinder, ¶542.

> "*During the hearing on the merits, it became in particular clear that at a meeting held on 12 April 2001, General Musharraf gave clearance to the Chairman of NHA, General Javed, to resort to the available contract remedies, including termination ..... Similarly, General Qazi, Minister of Communications, confirmed that the decision to terminate the Contract could not have been taken without some guidance from higher levels of the Pakistani government.*"

298. The conclusions of attribution in both *Ampal* and *Bayinder* appear less surprising when it is appreciated that the specific clearance sought was in advance of and as part of the process leading to the decision to terminate. In this connection, the Tribunal would, like the tribunal in *Electrabel v. Hungary,* draw a distinction between mere encouragement and a positive instruction to negotiate or re-negotiate: see paragraphs 7.107 to 7.114 in that case.

299. The Parties are however at odds in one important respect as regards the proper paraphrasing of the principles now stated in the 2001 ILC Articles. The Claimant contends that "*overall control*" suffices for the purposes of Article 8, relying on *Prosecutor v. Dusko Tadic*[250], where the ICTY adopted this paraphrase when considering what would suffice to make a State answerable for international crimes committed by a military group, not part of a State's armed forces but supported and funded by the State. In doing so, the ICTY rejected the International Court of Justice's pre-ILC Articles statement in *Certain Paramilitary Activities in Nicaragua* that:

> "*even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State*".[251]

[250] CL-0214, Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the Former Yugoslavia ("**ICTY**"), 15 July 1999.

[251] RL-0127, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, 27 June 1986, ¶115

300. In the *Bosnia Genocide* case[252], the ICJ returned to the issue following the issue of the 2001 ILC Articles and restated agreement with the approach indicated in *Nicaragua* case. It said that there would be attribution:

> "*where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.*"

301. The ICJ also said in the same case that:

> "*The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed* lex specialis*.*"[253]

302. The Parties cited a large number of other cases, from which the Respondent also sought to derive strength in numbers, on the basis that in most of them attribution had been refused. The Tribunal does not however think that counting heads, particularly when they are of differing sizes and shapes, is a very useful exercise. It will guide itself by the principles which it has sought to set out.

303. The Tribunal does not therefore accept that "*overall control*" suffices to enable attribution. It would, as the ICJ indicated, stretch attribution to an unacceptable degree, particularly in the context of attribution to a State of the activities or decisions of companies or corporations which would in every day parlance be described as State-owned companies. The Tribunal's approach will be to apply the words and guidance of the 2001 ILC Guidelines, so far as possible without introducing potentially inaccurate paraphrases.

304. On that approach, the major difference between the Parties lies in their respective analyses of the facts. The Claimant submits that the evidence discloses a situation in which it can

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[252] RL-0150, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, 26 February 2007, ¶406

[253] *Ibid*., ¶401.

and should be inferred that DPP was acting for and at the bidding of State or political persons. The Respondent presents the case as one where DPP acted as a properly managed corporation and reached and implemented its own decisions, even if they happened to meet with approval in State or political circles.

305. That the City and DPP were closely connected legally and organisationally is clear. The City owned and so far as necessary funded the DPP. Its Council operated as the DPP's General Meeting and was chaired by [redacted] Mayor. Its Supervisory Board was chaired by Mr Dolinek (a political ally in the ruling City coalition) as the Deputy Mayor and oversaw the Board of Directors' exercise of its powers and the company's activities. The Supervisory Board elected and removed the members of the Board of Directors. Two-thirds of the Supervisory Board's members were typically elected by the General Meeting and the remaining one-third by DPP's employees.

306. The Tribunal is also quite prepared to accept that DPP's role as the largest municipal company and provider of transportation services in Prague meant that for many, if not most, people it was indistinguishable from the City. The Tribunal also accepts [redacted]'s evidence that it meant that the identity and selection of DPP's CEO was a matter of political significance and sensitivity, in relation to which political considerations would dominate.

307. None of this means however that the legal and corporate structure to which DPP was subject can simply be ignored or treated as a sort of sham. Equally, the circumstance that, for the purposes of the Concession Act or other procurement purposes or of the Information Act, DPP was or may have been a relevant public authority fact, in no way necessarily means that it must be equated with the Respondent State for the present public international purpose of determining the question of attribution. The Respondent's reliance in this connection on the police powers doctrine was expressly as a fall-back in case its primary case that there should be no such allocation was not accepted.

308. Here, the day-to-day handling of DPP's affairs was, so far as appears, in the hands of its directors, subject to the Supervisory Board's oversight. [redacted] was also happy to accept that the Board of Directors was subject to the directions of the General Meeting, although the actual legal position, set out in paragraph 47 above, precluded the General

Meeting from setting any operating principle or giving any instruction which would interfere with the Company's business management.

309. There is however no evidence that the City Council gave any relevant instruction or direction to the Board of Directors in relation to DPP's treatment or termination of the Rencar Contract. The question which presents itself is therefore whether the ordinary decision-making processes of the Board of Directors (subject to any intervention by the Supervisory Board) were affected to any material degree by others, acting outside those processes, whether they be the City Council or [redacted] Mayor, or ANO politicians or the Czech government and whether this took place by virtue of any relevant instruction or direction or by any form of de facto exercise of control outside normal channels of decision-making.

310. The circumstances leading up to DPP deciding in 2016 to question the validity of the Rencar Contract and to give notice of its termination have been set out in paragraphs 88 to 109 above. On their face, what appears is an initially slow and then increasing development of a raft of concerns and disagreements about the Rencar Contract and/or Rencar from 2013 onwards. The DPP's Board was already involved in meetings considering the unsatisfactory nature of the Rencar Contract in July and August 2014. In or about November 2014, there took place the nomination by ANO and election as Mayor of Prague of [redacted] of ANO. ANO wished for a renegotiation of the Rencar Contract and replacement of [redacted]. Disagreements were evidently exacerbated by the argument between DPP and Rencar about the continuation of the euroAWK contract and between the City of Prague and JCDecaux about the Street Furniture Contract. The disagreements attracted the attention of the media and at least one non-governmental organization, which was able to instigate the police investigation from January 2016, as mentioned in paragraph 98 above.

311. On the face of it, however, the disagreements were handled in an ordinary commercial manner, with a further Board Meeting on 14 December 2015, a meeting between [redacted] of DPP and [redacted] of Rencar on 19 January 2016, a DPP Board Resolution on 1 February 2016 to obtain legal advice, a further Board Meeting on 14 March 2016 when the legal

advice by then available was considered, and when the Board agreed to proceed along the lines stated in its Resolution No. 4/2016/2. One of the steps upon which the Board resolved involved consulting the Competition Office, UOHS, for an opinion, and this was taken on 22 March 2016, but did not lead to any immediate answer; and, when an answer did come on 6 April 2016, it was to the effect that UOHS did not have an informal advisory role, but responded only to legal proceedings. The Board discussed the position at a Meeting on 11 April 2016, but postponed any decision to its next meeting on 28 April 2016, when it resolved on proceedings, which were begun accordingly on 29 April 2016. This line of activity can therefore have played no part in the Board decision to treat and the notice treating the Rencar Contract as at an end, both of which came on 30 March 2016. What did play a part in the Board meeting and Resolution on 30 March 2016 (treating the Rencar Contract as invalid, but giving a precautionary three-month notice of termination in case this proved wrong) seems, in all probability, to have been a Supervisory Board meeting on 23 March 2016, at which approval must have been given to the approach taken at the Board meeting and by the notice given on 30 March 2016. In all this, there is nothing, on the face of it, to take the course of events outside the ordinary conduct of DPP's business, against a background of steadily increasing dissatisfaction with the Rencar Contract over a considerable previous period.

312. The Claimant is able however to point out that, from time to time during this course of events, there were public interventions or comments on which the Claimant relies as indicating that there was, or is likely to have been, high level political or State influence on the otherwise relatively ordinary course of events by way of instruction, or at least direction or control. Thus, the Mayor, [redacted] is reported as making clear publicly in early October 2015 ANO's wishes for radical changes in DPP. She is recorded as speaking in trenchant terms, stating that "[redacted] *stated clearly that he would like a change in the transport company that we have demanded since the beginning of our entry into this city hall*[254]. *And that is currently happening*". She also pointed out that other Western European cities provided "*a maximum of 15 % of their budget to similar companies like our transport*

[254] See C-0052, [redacted] *Company has to save internally*, Mladá fronta dnes, 3 October 2015; C-0053, Studio ČT24, *The Supervisory Board did not recall the general director of DPP*, Interview with [redacted] transcripts, 2 October 2015.

company. We provide more than 25 %, and the trajectory is increasing. It's intolerable for the city."

313. At a Supervisory Board meeting shortly after these statements, there was evidently support for reconsideration of the Rencar Contract, which [redacted] agreed to undertake, but insufficient support for removal of [redacted]. [redacted]'s view that he should go at once is reported to have been supported by only six of the fifteen members, but [redacted] is reported as expressing the view that, despite this, [redacted] was (effectively) on the way out.[255]

314. In early December 2015, [redacted] addressed a perceived need to reconsider the Street Furniture Contract. In response to an apparent threat by JCDecaux to remove their street furniture if their contract was terminated, [redacted] reportedly said that, if JCDecaux obstructed in this way, "*this will be in fact the end of their business activities in Czechia*", and "*in the event of obstructions, the city will also interrupt cooperation between the company and the Transport company of the capital*." These statements, taken literally, claim or suggest an ability on the City's part to control or affect the continuation of the Rencar Contract.

315. The extent to which [redacted] was interested, or engaged, in or with the Rencar Contract is in dispute. The minutes of the meeting of 6 April 2016 between DPP and Rencar/JCDecaux record [redacted] as stating that that the Mayor [redacted] was "*personally interested in the situation regarding the contractual relationship with Rencar*". [redacted] who gave evidence at the hearing, did not attend the meeting and did not recall in evidence whether she was informed of it. But her evidence was that, if [redacted] said that, then he was lying.

316. Around the same time, there is, however, further indication of involvement on [redacted] s part in relation to the Rencar Contract. She is reported in the press as having said to the press that she had "*requested the director of [DPP] [i.e. [redacted]] to file a*

[255] See also paragraph 95 above.

motion with UOHS."[256] The Claimant relies on this as an indication of her ability to instruct, direct or control [redacted] and DPP. [redacted]'s oral evidence on the subject was that she had no memory of this, but did not exclude that [redacted] had raised the topic, albeit not in a "dedicated" meeting about that.[257]

317. The Tribunal will at this point make some general points about the evidence of both [redacted] and [redacted] Due to health reasons, [redacted] could not and did not give evidence, although he had given two witness statements and had until quite shortly before the hearing been expected by everyone to do so. A majority of the Tribunal considers that his non-attendance was not his fault (and was still less the Claimant's fault) and was for a valid reason[258]. On that basis the Tribunal will have regard to the contents of his witness statements, but will do so, of course, always bearing in mind that these statements have (due to no fault of the Respondent) not been able to be tested by cross-examination.

318. The Tribunal had the opportunity of hearing and seeing [redacted] give evidence. She spoke very freely, indeed uninhibitedly, indicating to the Tribunal that it was with some pleasure that she had left the world of politics behind her. The Tribunal was not however impressed by all aspects of [redacted]'s evidence. The Tribunal refers in particular to her statements that she was only interested in the Street Furniture Contract and not interested in the Rencar Contract. No doubt, as a former worker in the arts field, the design of Street Furniture had a special interest, and no doubt she had much on her plate, as a relatively inexperienced politician, nominated and elected to the Mayoralty on the wings of a new and rising party. But the Rencar Contract was a particularly hot potato, in the eyes of the press, the people and even the police; and her reported press statements (above) do not readily square with the almost complete detachment that she avowed in the witness box. She was certainly aware of her political mentor, [redacted] s wish for change in DPP,

[256] See C-0013, [redacted] *intervened in the dispute of DPP and Ren-car.* [redacted] *wants antimonopoly's office opinion*, id-nes.cz, 21 April 2016.

[257] See C-0013, [redacted] *intervened in the dispute of DPP and Ren-car.* [redacted] *wants antimonopoly's office opinion*, id-nes.cz, 21 April 2016; Tr. Day 4 pp. 545-546.

[258] The Tribunal's Procedural Order No. 1, paragraph 18.4 reads: "*If a witness or expert called does not appear without a valid reason at the hearing, the Tribunal may disregard that witness's or expert's statement or opinion. If it is necessary to avoid serious health concerns or to overcome travel restrictions, a witness or an expert may testify via videoconferencing*".

as she indicated to the press on 15 October 2015, after the failed attempt to obtain removal of its CEO, [redacted] [259] The Tribunal believes that she is likely to have been more interested generally in the Rencar Contract than she was prepared to admit.

319. The Tribunal was also unimpressed by [redacted] s blanket disavowal of unfavourable press reports of what she had supposedly said. She said that she did not read the press or media, and that she left her press office to answer questions for themselves. The suggestion that press officers would make up nonsense or express to the press a series of trenchant views that [redacted] did not have or share, and that without her ever noticing or correcting what they said, strikes the Tribunal as implausible. In both respects identified in this and the previous paragraph, [redacted] was, consciously or sub-consciously, distancing herself from involvement in an area and matters, which she made clear that she was glad to be out of. Neither of these adverse comments on her evidence means however, in the Tribunal's view, that her interest went to the point of over-riding or by-passing DPP's Board or its normal operating procedures and decision-making processes.

320. In answer to a question from the President of the Tribunal, [redacted] gave an answer on which the Claimant relied as a concession that she might have contributed to the ultimate decision to treat the Rencar Contract as invalid.[260] Taking the whole passage and her further ensuing evidence, the Tribunal cannot treat her as having made any significant concession. Her basic theme was that she was not involved in any discussion in this respect. Whether she "*might*" have contributed is also not what the Tribunal has to decide; and, even if she did contribute, it does not follow that anything said went beyond a mere expression of approval of what had been properly discussed and decided by DPP. The critical issue is whether, taking the evidence and material before the Tribunal as a whole, this justifies a conclusion that DPP's decision to treat the Rencar Contract as invalid and/or to terminate derived from or involved any instruction, direction or control by the City of Prague or [redacted] its Mayor, or by still higher political figures such as [redacted] That leads

[259] See C-0053, Studio ČT24, *The Supervisory Board did not recall the general director of DPP*, Interview with Ms [redacted] transcripts, 2 October 2015.

[260] See Tr. Day 4, p. 569.

directly into further questions, including important questions what weight can be given to (a) [redacted] s untested witness statements and (b) the [redacted] Diary extracts.

321. Taking [redacted] first, according to both of his statements, [redacted] was being continually pressured by [redacted] to terminate the Rencar Contract, and he resisted (because he preferred to negotiate a compromise) but the contract was eventually terminated. In paragraphs 15 to 20 of his first witness statement, [redacted] said:

> "*15 In late 2015 and early 2016,* [redacted] *increasingly insisted on a termination of the Rencar Contract. I did not want to terminate the Rencar Contract. I tried to find a commercially sensible solution and ensure better commercial terms for DPP.*
>
> *16 This of course conformed with my duty as CEO.* [redacted] *did not like that at all. She preferred actions demonstrating power. Something which was quick and visible, easily sold to the public as a victory of the new ruling party.*
>
> *17 I sought to reconcile my views with her instructions. Eventually, however, I had to send a termination notice to Rencar. This was in March 2016. To support the process DPP considered asking UOHS for a legal opinion on the Rencar Contract. Yet, UOHS was unwilling to provide a legal opinion.*
>
> *18 Then,* [redacted] *stated very publicly:*
>
> *'I want DPP to submit a motion to UOHS.'*
>
> *'I requested the director of [DPP] to file a motion with UOHS.'*
>
> *19 And so, DPP issued formal proceedings with UOHS, seeking a declaration that the Rencar Contract was illegal. From my perspective, the UOHS proceedings served to improve DPP's bargaining position with Rencar. I wanted to restart the negotiations.*
>
> *20 Yet, in May 2016, I got dismissed as CEO. I was shocked by the sudden dismissal. But today, it is clear that my dismissal had been on ANO's agenda for some time.*"

322. The critical paragraph in [redacted] s second witness statement reads as follows:

> "*7. I regularly informed* [redacted] *about DPP's business; e.g., at official meetings or meetings of the City Council, where she was interested in various issues related to the public transport in Prague. One meeting was attended by* [redacted]
> *One of the topics concerned the contractual relationship with Rencar, which I considered to be very complicated (see Section 2 of my first witness statement). I explained to* [redacted] *the reasons why I did not want to resolve this situation by terminating the Rencar Contract, but by joint negotiations between both parties. Regardless,* [redacted] *insisted that I should terminate the contractual relationship. The Rencar Contract was terminated shortly after the meeting.*"

323. These statements, if taken at face value, confirm that [redacted] advocated obtaining a UOHS opinion – but put this as occurring after the resolution to seek such an opinion had been proposed by [redacted] to and accepted at the Board Meeting of 14 March 2016 and also after UOHS had on 6 April 2016 refused to give an informal opinion on the Rencar Contract in the absence of any formal proceedings before it. So they do not themselves involve [redacted] in any discussion or meeting with [redacted] immediately preparatory to either the Board meeting of 14 March 2016 or the decision and notice to treat the Rencar Contract as invalid on 30 March 2016. Assuming that [redacted] did suggest or encourage the institution of formal proceedings before the UOHS at some point in the period from 6 April 2016 to 16 April 2016 (when [redacted] was dismissed as CEO), that was consistent with the decision which the Board had already taken and implemented to treat the Rencar Contract as at an end. There is, in the Tribunal's view, nothing surprising or irregular about such a suggestion. The institution of formal proceedings before the UOHS was the subject of discussion and decision at the two Board Meetings of 11 and 28 April 2016, both after [redacted]'s dismissal as CEO.

324. As to the subsequent history, the UOHS eventually held on 9 September 2016 that Amendment No. 2 to the Rencar Contract was invalid. The Claimant relies, as abnormal behaviour pointing to State involvement, on: (a) DPP's failure to appeal that decision (save as to the penalty imposed); (b) DPP's failure to ask for Municipal Council approval to render effective any otherwise ineffective aspect of the Rencar Contract or its Amendments; and (c) DPP's decision to go ahead with an immediate tender process, as

proposed by Mr Gillar, DPP's new CEO, at a DPP Board Meeting on 12 September 2017. But there is again nothing about any of these matters which appears to the Tribunal to be particularly surprising, or to point in any way to State intervention, bearing in mind the discontent with the Rencar Contract which had led to DPP's notice on 30 March 2016 and its wish to be free of the relationship. The fact that, at the 6 April 2026 meeting, DPP's lawyer, [redacted] expressed himself aware that "*litigation can take a very long time, during which it will not be possible to proceed to a new tender*"[261] does not bind DPP or mean that it could not take a different line, or that, if it did so, this was the result of State interference, rather than a normal commercial decision to move on.

325. The Tribunal should also mention the Claimant's initial challenge to the integrity of UOHS's decision-making, as a result of a suggested link between [redacted] and a [redacted] said to have been a member of the UOHS Appellate Committee. There was an issue whether [redacted] was on the Appellate Committee at the relevant time. But, more materially, despite journalistic suggestions on the basis of the [redacted] Diary, there is no sound evidential basis for any suggestion of improper influence by anyone over UOHS's actual decision. The possibility of any such influence was not in the event explored with [redacted] who was a member of the Appellate Committee and was tendered by the Respondent for cross-examination.

326. Nevertheless, if [redacted]'s witness statements are accepted at face value, they suggest that there had been continual insistence and "*instructions*" by [redacted] over months prior to March 2016, leading eventually to the notice to termination. But the evidence is undocumented, undated, unspecific, untested and open to question. Paragraph 7 of the second witness statement speaks baldly about a meeting attended by [redacted] and of an explanation by [redacted] to [redacted] of his views. It is unclear whether or not these are suggested to have taken place on one and the same or different occasions. Notably, however, paragraph 7 fails singularly to refer to or draw any causal connection between the meeting[s] described and the termination notice. That cannot have been an accidental omission. One may speculate that [redacted] would have been reluctant to spell out that he

[261] See C-0066, Minutes from the meeting of JCDecaux's representatives and DPP, 6 April 2016, p. 4.

had allowed his better judgment to be over-ridden, and that this was what he was also hinting in paragraphs 15 and 16 of this first witness statement. But this is all no more than untested speculation. The only certainty is that, offered the opportunity, [redacted] was not able or prepared to go further or to draw the connection which is central to the Claimant's case.

327. There is a further relevant consideration. On 31 March 2016, the day after the actual notice of termination, [redacted] signed electronically and sent to [redacted] the letter referring to the doubts raised about the Rencar Contract.[262] The letter said that the City had "*repeatedly been inquired by journalists in this regard*", saying that she assumed that the Board "*has already carefully inquired into the above-mentioned doubts*" and "*even more so if the Agreement is indeed invalid*" and adding that "*These doubts can be dispelled especially by announcing a new tender procedure that would be as transparent as possible*". Finally the letter asked for DPP's management to write to Prague City Council with the basis details and economic data and DPP's Board for its opinion on the alleged disadvantages of the Rencar Contract and the possibility of a new transparent tender procedure.

328. [redacted] deployed this letter at the disputatious meeting which took place with JCDecaux personnel on 6 April 2016 about the termination notice of 30 March 2016. He also answered its substance by a very lengthy and detailed letter dated 19 April 2016, in which he wrote:

> "*Following the above mentioned letter, I would like to inform you about the current procedure of the DPP's Board of Directors in the matter of reviewing the Lease Contract.*
>
> *Based on internal findings and external suggestions, the issue of the Lease Contract has been a regular item on the DPP Board of Directors' agenda for several months. Briefly, it can be stated that the DPP Board of Directors started to address doubts about the profitability of the Lease Contract because of a) internal control of the performance of this contractual*

[262] R-0119, Letter from the Mayor, [redacted] 31 March 2016.

relationship, b) receipt of competitive bids and c) initiation of an investigation of the Lease Contract by the Police of the Czech Republic.

In the context of gathering documents for its decision, the DPP's Board of Directors proceeded to a thorough analysis of the Lease Contract, primarily in terms of verifying the possibility of possible fundamental changes to this contractual relationship (including possible termination or shortening of the duration of the contractual relationship).

One of the reasons for this procedure was the question of whether the original economic parameters of the Lease Contract, as amended by a series of amendments, correspond to the current market reality. I note here that the Lease Contract was in fact concluded in 1997 without any competition, but at that time, DPP had control over Rencar. However, DPP lost this control in 2001 when EUROPLAKAT (part of the JCDecaux group) became the majority shareholder. Since 2001, the economic parameters of the Lease Contract have not passed the market test, so it cannot be excluded that the current economic parameters no longer correspond to market reality.

In connection with the legal examination of the possibility of amending the Lease Contract, serious legal defects in this contractual relationship were identified. I would like to point out here that all legal opinions confirm the existence of legal defects including the legal opinion submitted by Rencar.

The most serious legal defects can be very briefly characterized as a) non-compliance with the Concession Act, which since 2007 should have governed all major changes to the contract, b) doubts about the contractual relationship due to its indefiniteness and c) invalidity of the contract due to defects in the expression of the validity of the will.

The legal consequences of the mentioned defects may mean that a) any substantial changes to the Lease Agreement can only be made in the regime of the Concession Act, b) the extension of the contractual relationship from 2009 until 2031 is invalid and c) the contractual relationship will end on June 30, 2016. The legal opinion presented by Rencar contradicts these legal implications (of course).

In view of the above, the DPP's Board of Directors unanimously decided to send the termination of the Lease Contract. This notice was delivered to Rencar on 30 March, 2016, with the understanding that the contractual relationship will terminate upon expiration of the three-month notice period (i.e., upon the expiration of June 30 March, 2016). The DPP's Board of Directors proceeded to file the notice only out of procedural caution, in

case of the existence of a so-called implicit contractual relationship for an indefinite period between DPP and Rencar.

The current situation is therefore such that, from DPP's point of view, the contractual relationship with Rencar will expire on 30 June, 2016. In this context, DPP is preparing documents for an open tender, which is the only way to verify the current market value of the advertising space that DPP offers to lease. n this context,

…….

With regard to the material complexity of the entire case and individual legal aspects, there is a risk that individual Prague Assembly representatives do not have enough information necessary for factual orientation in a legally complicated contractual relationship. In such a case, there is a risk that Rencar's unilaterally presented claims may lead some representatives to conclude that the DPP's course of action is not in the interest of HMP. Especially in a situation where the Rencar company threatens to start international arbitrations or large-scale lawsuits.

I would like to suggest considering the possibility of a DPP representative speaking at the Prague City Assembly. The management of DPP approaches the solution of the whole matter objectively and with media sobriety. However, Rencar's current practices show an effort to create information asymmetry by concealing and distorting legally significant facts.

Presenting all relevant information about the substance of the legal steps at the Prague City Assembly would contribute to a higher awareness of the representatives necessary for a factual evaluation of the correctness of the procedure of the DPP management. The DPP's Board of Directors is convinced that the termination of the contractual relationship with Rencar and the subsequent announcement of an open tender is clearly in line with the interests of the shareholder and is ready to defend the chosen procedure before the shareholder (or Prague City Assembly or Prague City Council)".

329. It is difficult to reconcile this correspondence - the Mayor's letter of 31 March and [redacted]'s reply of 19 April 2016 - with the Claimant's case that [redacted] or her superiors had been involved in and had interfered with the Rencar Contract and had influenced DPP's Board with regard to its handling. The correspondence reads to the contrary. It may of course be suggested to be an odd coincidence that the Mayor's letter was sent the day after the notice of termination, although one may also speculate that news

of the DPP Board's decision to send such a notice had leaked out. To go further and suggest that the correspondence was not genuine would be without any foundation at all.

330. A loose end which it is convenient at this point to tie up is the significance, if any, of the removal from DPP's Board and then from his office as CEO of [redacted]. The evidence indicates that the removal of [redacted] was something which it was decided at a political level should take place: see [redacted] herself at Tr. Day 5, pp. 564-565. In this respect, [redacted] evidently failed to carry the day in October 2015, but succeeded in April 2016, by when sufficient political support had been put together to achieve the desired result in the Supervisory Council. But the dismissal took place after [redacted] had concurred in the decision to treat the Rencar Contract as invalid and to give notice of termination, and after such notice had been given. It does not support a case for saying that that different decision was influenced by any irregular or politically-induced instruction, direction or control. The removal of [redacted] for political reasons is, if anything, just as suggestive of his and the Board's independence in the handling and termination of the Rencar Contract in the period up to such removal as it is suggestive of any opposite understanding of what was occurring.

331. The Tribunal turns to consider the significance of the [redacted] Diary extracts, on which the Claimant places considerable weight. These are undated and not presented in any order. They bear out a wish to replace [redacted] (and his "*team*") by Mr Gillar (as happened) but it seems clear that the diary entries referring to this were written at or very close to the time when this replacement happened. Take the extract reading:

> "*Recall of* [redacted] *– tomorrow. When to appoint a new CEO!*
>
> [redacted] *– recall* [redacted] *immediately?? Or in June?*"

It can be inferred that this was probably written not long before [redacted] s removal as CEO on 18 May 2016. The only, less convincing alternative seems to be before his removal as a Director on 16 April 2016. The same applies to the extract containing text including the words

> "*Gillar – for CEO??*

30 people to replace – [redacted] *s people*"

332. A further extract as translated by the Respondent[263] reads:

> "*Recall of* [redacted] *- tomorrow and in 2-3 days appoint a new CEO! Or PT [i.e public tender] –* [redacted] *is making some weird moves – termination of ad agency Rencar? – BigBord [sic!]*"

The timing must again be in April or the first half of May 2016. The reference to [redacted] does not suggest that he had acted under instruction, direction or control. What if any significance might attach to the references to a possible public tender and to BigBoard taking over from Rencar is essentially speculative without explanation. So too are other extracts, apparently suggesting that JCDecaux would be replaced by BigBoard. The mere reference to BigBoard as potential successors to JCDecaux does not necessarily mean more than that JCDecaux's removal would present an obvious opportunity for BigBoard in any public tender.

333. This brings the Tribunal to a further point, that is the conduct of the tender process. For much of this case, it appeared as if some form of orchestration or "*rigging*" of the three tenders held between 2016 and 2019 would be an important element in the Claimant's case. The Respondent was however able to call direct evidence from [redacted] who was engaged by [redacted] in 2016, and who acted as the "contact person" for each tender and was present at each of the envelope openings, sitting on each of the "*commissions*" of individuals involved in such openings. He described how he accepted the role on the basis that it would be free of any influence and how the procedures adopted were designed to and did ensure that the highest bid was accepted. The highest bidder was in every case BigBoard, save in one case where Railreklam was the highest bidder, but where there had for legal reasons related to public procurement to be a supplementary tender, in which Railreklam decided not to bid and BigBoard was the highest bidder.[264]

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[263] C-0047, [redacted] *s diary:* [redacted] *is out of control.* [redacted] *s teaming up with Křetínský*, Seznam Zprávy, 8 April 2021; see Counter-Memorial ¶317.

[264] *See* paragraph 128 above.

334. [redacted]'s evidence was clear and convincing and barely challenged. The Tribunal regards it as entirely inconsistent with and dispositive of the Claimant's case that the tenders were in any way orchestrated or distorted in a manner meaning that it was not or would not have been worth the Claimant's while to take part in them. It was the Claimant's choice not to take part in any of them. The result, as the Claimant recognized in its oral closing submissions, is that the Claimant's case must turn exclusively on DPP's treatment and/or repudiation of the Rencar Contract and the ability to attribute such treatment and/or repudiation to the Respondent State.

335. Standing back, and viewing the issue of attribution, the Tribunal has given very careful thought to the evidence and to the application of Article 8 of the ILC Articles on State Responsibility in the present case. It must take the evidence in the form in which it was put and admitted, but that does not mean that untested written statement evidence must necessarily be given the same weight as if it had been thoroughly tested by cross-examination in the light of its contents and other relevant events and documents. That is particularly so, when the written statement evidence is open on its face to some questions. The Tribunal cannot predict how the position might have looked, had [redacted] been fit enough to give evidence. But he was not available, and very significant passages in his witness statements would have merited, but did not as a result receive, explanation, elaboration and justification from his mouth. The Tribunal has heard [redacted] and has found itself unconvinced by her evidence about the level of her interest in the Rencar Contract and also about the extent to which her reported recorded statements to the press about that Contract are likely to have emanated from her or to have reflected her, rather than her press officers' views. But, while she may with time have convinced herself that she had and expressed little interest in the Rencar Contract while she was Mayor, she came across generally as an honest witness who had basically detached herself from the political scene, and was speaking frankly about her role and conduct.

336. In particular, [redacted]'s own letter of 31 March 2016 gives what the Tribunal concludes on all the material before it to be the right impression, namely that the decision

to raise and rely on the potential invalidity of the Rencar Contract and to give precautionary notice of its termination were matters decided by DPP's Board, with [redacted] in support as CEO, rather than instigated or influenced by any instruction, direction or control issued or exercised by [redacted], or by the City or by ANO or the Czech government.

337. On that basis, the Tribunal holds that the case on attribution fails and that the claim against the Respondent State must also fail as a whole accordingly.

338. It is in these circumstances unnecessary to go into the further issues which would have arisen, had the Claimant overcome the burden of attribution, and the Tribunal will not do so.

VII. COSTS

A. CLAIMANT'S COST SUBMISSIONS

339. In its submissions on costs dated 9 January 2023, 21 October 2025, and 28 April 2026, the Claimant claims the following legal and other costs totalling EUR 3,337,280.08 and CZK 367,365.04 and in addition for advances of USD 585,000.00 made to ICSID. The legal and other fees claimed are made up as follows:

a. Counsel's fees and expenses:

[redacted]

b. Experts' Costs:

[redacted]

Total: EUR 486,728.47 + CZK 349,000.00

c. JCDecaux's Internal Costs and Expenses:

i. [redacted]

ii. [redacted]

Total: EUR 6,931.05 + CZK 18,365.04

B. RESPONDENT'S COST SUBMISSIONS

340. In its submissions on costs dated 9 January 2023, 21 October 2025, and 28 April 2026, the Respondent claims the following legal and other costs totalling EUR 2,189,386.91 and CZK 3,317,252.29 and in addition for advances totalling USD 560,000 made to ICSID. The legal fees and other costs claimed are made up as follows:

a. Costs incurred of bifurcated phase addressing the Respondent's preliminary objections:

[redacted]

Total costs for the bifurcated phase: EUR 216,500.62 + CZK 368,933.70

b. Costs incurred for the remainder of the arbitration:

[redacted]

Total costs remainder of the arbitration: EUR 1,972,886.29 + CZK 2,948,318.59

c. Total legal and other costs incurred in the arbitration (excluding ICSID advances):

i. Costs of bifurcated phase: EUR 216,500.62 + CZK 368,933.70

Costs remainder of the arbitration: EUR 1,972,886.29 + CZK 2,948,318.59

Total costs incurred in the arbitration (excluding ICSID advances): EUR 2,189,386.91 + CZK 3,317,252.29.

C. THE TRIBUNAL'S DECISION ON COSTS

341. Article 61(2) of the ICSID Convention provides:

> "*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*"

342. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

343. The arbitration was bifurcated into two phases, which were the subject of successive hearings and decisions. The first phase was the subject of a hearing on 12 October 2022 and of the Tribunal's Decision dated 28 July 2023 (referred to in paragraph 16 above and forming part of this Award and attached as Annex A) dismissing the objections. The second hearing addressing liability took place from 19 to 27 May 2025 and the issues raised by it are determined by this Award. As regards costs, the Tribunal needs to address both phases in this Award.

344. The first phase arose from the Respondent's preliminary objections to the Tribunal's jurisdiction based on European Union law considerations. The Respondent's submission was that the Tribunal lacked jurisdiction due to the alleged invalidity of the offer to arbitrate contained in Article 10(2) of the BIT and/or should not purport to exercise any jurisdiction which it might otherwise have. The alleged invalidity was said to stem primarily from the allegedly retroactive effect of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, in force since 10 December 2021 for both the French Republic and the Czech Republic ("**Termination Agreement**"), but also from alleged inconsistency with European Union law, as interpreted by the Court of Justice, and from Article 30(4) of the Vienna Convention on the Law of Treaties ("**VCLT**") as well as from EU Member States' Declarations and entry into the Termination Agreement even before it came into force.

345. Having lost on its preliminary objections relating to its jurisdiction based on European legal considerations, the Respondent raised in the second phase a series of further preliminary legal objections relating to its jurisdiction based on the terms of the relevant BIT and the alleged effect of international law. The Tribunal has addressed these further objections in paragraphs 133 to 228 above, and each of them has failed for the reasons there given.

346. The Tribunal's Award goes on to address the issue of attribution and the Tribunal has found that, on this issue, the Claimant fails, with the result that its claim under the BIT falls to be dismissed and it is unnecessary for the Tribunal to determine other issues, such as the alleged invalidity under Czech law of the Contracts which were, so the Claimant submitted, wrongfully terminated or expropriated in breach of the BIT.

347. At the end of the day, the Claimant has been unsuccessful in its claim and the Respondent has succeeded in its defence. However, it is evident that much time has been spent and much expense incurred on discrete issues which the Respondent raised and on which it failed. Taking the first phase alone, the Respondent puts its costs (converting the minor costs incurred in CZK) at over EUR 230,000, whereas the Claimant puts its costs at over EUR 440,000. The time taken and attention given to the further preliminary objections during the second phase must also have been significant. The Tribunal considers the Claimant's success on all these issues to be an important factor to take into account when determining an appropriate allocation of costs.

348. The Respondent in all its Costs Submissions submitted that, in addition to the costs of outside legal representatives, it should also be entitled to recover the costs of counsel from the Czech Ministry of Finance's International Arbitration and Investment Protection Unit, totalling CZK 2,904,438.61 (or around EUR 119,000). In its first Costs Submission, it referred in this connection to *Stadtwerke München GmbH v. Kingdom of Spain*[265], but that reference does not really do more than affirm a State's right to incur costs defending itself; it does not consider how far internal legal costs may be recoverable, particularly when

[265] CL-0153, *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, ¶399.

outside lawyers are also engaged.[266] The Tribunal does not know how the Respondent's internal legal staff in the relevant Unit are engaged or paid, how the costs claimed in respect of them are calculated and what relationship such costs have to any normal salaries they may be paid. The Tribunal also notes that, overall, the number of counsel engaged on the Respondent's side is put at nine, two more than on the Claimant's side.

349. Subject to those points, the costs claimed by the Respondent are somewhat less than those incurred by the Claimant. The Tribunal considers in all the circumstances that the Respondent should

a. bear its own costs of the first, bifurcated phase of the arbitration; and

b. pay, and give credit against the costs awarded to it under sub-paragraph c below for, EUR 441,406.68 in respect of the Claimant's costs incurred in respect of the first, bifurcated phase; and

c. recover from the Claimant 75% of all its own costs other than those incurred in respect of the first bifurcated phase, that is 75% of EUR 1,972,886.29 and CZK 2,948,318.59, making EUR 1,479,664.71 plus CZK 2,211,238.94.

The effect is that the Claimant must pay to the Respondent on account of legal fees and costs a total of recover EUR 1,038,258.03 plus CZK 2,211,238.94.

350. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, and ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Jonathan Hugh Mance	[redacted]
Kaj Hobér	[redacted]
Raúl Vinuesa	[redacted]
Assistant's fees and expenses	[redacted]

[266] It is, however, the Tribunal notes in parenthesis, a case where an issues-based costs order was made: see ¶¶401-405.

ICSID's administrative fees	[redacted]
Direct expenses	[redacted]
Total	**1,137,789.64**

351. The above costs totalling USD **1,137,789.64** have been paid out of advances totalling USD 1,120,000.00 made by the Parties in equal parts of USD 560,000, plus investment income of USD 59,445.55.[267] After their payment, there remains USD 41,655.91 which shall be returned to the Claimant and the Respondent in equal shares. The Tribunal orders the Claimant to cover 75% of the above costs, which means that the Claimant is ordered to pay to the Respondent USD 284,447.41.

352. The Claimant, in order to commence the present proceedings, also paid and shall bear the ICSID arbitration lodging fee of USD 25,000.

353. The Claimant in their Memorial dated 19 October 2021 claimed post-award interest at a rate equivalent to LIBOR plus 2% compounded annually.[268] In its Post-Hearing Brief dated 29 July 2025 it claimed both pre- and post-award interest at a rate equivalent to the EURIBOR (LIBOR having ceased to exist from 30 September 2024) plus 2% compounded annually for a period beginning 1 November 2019.[269] The Respondent in its Counter Memorial dated 10 November 2019, paragraph 654 responded to the effect that

> "*Finally, the pre-award interest of LIBOR + 2% points that Claimant claim from 1 November 2019 onwards is exaggerated. Instead, pre-award interest (if any) can only be the risk-free rate or, if at all, Respondent's cost of borrowing. The legal authorities from the recent years that pre-award interest should not be higher, are numerous.*"

The Respondent went on to cite a number of authorities which the Tribunal has reviewed.

[267] The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

[268] Memorial, ¶360(c).

[269] Claimant's Post-Hearing Brief I, ¶224(c).

354. In its Post-Hearing Brief dated 29 July 2025 the Respondent repeated its submission that pre-Award interest could at best be based on the Respondent's cost of borrowing, and claimed an order for all fees and costs of these proceedings with interest (at an unspecified rate) from the date of this Award until the date of payment.[270] In its Reply Post-Hering Brief, the Claimant responded as follows: "In Chapter V.I of its Post-Hearing Brief, the State says that Czechia's cost of borrowing is the appropriate pre-award interest. That is unavailing: as explained by [redacted] JCDecaux's borrowing rate provides a better estimate of JCDecaux's actual economic loss from having been deprived of the monetary value of the compensation."[271]

355. The Tribunal did not receive any further submissions or information about the parties' financial circumstances, how either of them might have deployed money, had it not been out of it, or the interest rate that might be appropriate on a borrowing or other basis. In the circumstances, and bearing in mind that it is now only concerned with interest on costs and that the Claimant succeeded on the first, bifurcated phase of the proceedings which involved substantial costs incurred some two years before the main hearing on liability on which it failed, the Tribunal thinks that justice will be done if the Claimant is ordered to pay interest, compounded annually, from the date of this Award at EURIBOR, on (a) the net EUR 1,038,258.03 plus CZK 2,211,238.94 payable as set out in paragraph 349(c) above and (b) the USD 284,447.41 payable as set out in paragraph 351 above.

VIII. AWARD

356. For the reasons set forth above, the Tribunal decides as follows:

(1) The jurisdictional objections raised by the Respondent fail and are dismissed.

(2) The conduct relied upon by the Claimant for its claim under the BIT and/or under international law was not and is not attributable to the Respondent.

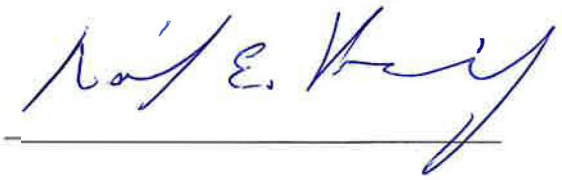
[270] Respondent's Post-Hearing Brief I, ¶¶274 and 275(II).

[271] Claimant's Post-Hearing Brief II, ¶77.

(3) The Claimant's claim against the Respondent accordingly fails and is dismissed.

(4) The Claimant shall pay the Respondent (a) the sum of EUR 1,038,258.03 plus CZK 2,211,238.94 payable as set out in paragraph 349(c) above and (b) the sum of USD 284,447.41 payable as set out in paragraph 351 above.

(5) Claimant shall, from the date of this Award until payment, also pay interest, compounded annually at EURIBOR on (a) the said sums of EUR 1,038,258.03 plus CZK 2,211,238.94 payable as set out in paragraph 349(c) above and (b) the USD 284,447.41 payable as set out in paragraph 351 above.



Professor Raúl E. Vinuesa
Arbitrator
Date: 5 June 2026

Professor Kaj Hobér
Arbitrator
Date:

The Rt. Hon. Lord Jonathan Mance
President of the Tribunal
Date:

Professor Raúl E. Vinuesa
Arbitrator
Date:

Professor Kaj Hobér
Arbitrator
Date: 5 June 2026

The Rt. Hon. Lord Jonathan Mance
President of the Tribunal
Date:

Professor Raúl E. Vinuesa
Arbitrator
Date:

Professor Kaj Hobér
Arbitrator
Date:

The Rt. Hon. Lord Jonathan Mance
President of the Tribunal
Date: 5 June 2026

Annex A

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

JCDECAUX SA

Claimant

and

CZECH REPUBLIC

Respondent

ICSID CASE NO. ARB/20/33

DECISION ON PRELIMINARY OBJECTIONS

Members of the Tribunal
The Rt. Hon. Lord Jonathan Mance, President of the Tribunal
Professor Kaj Hobér, Arbitrator
Professor Raúl E. Vinuesa, Arbitrator

Secretary of the Tribunal
Ms. Alicia Martín Blanco

Date of dispatch to the Parties:
28 July 2023

REPRESENTATION OF THE PARTIES

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TABLE OF FREQUENT ABBREVIATIONS

ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings, in force as of 10 April 2006
Answer to Bifurcation Request	Claimant's Answer to Respondent's Request for Bifurcation, dated 11 January 2022
BIT	Agreement between the French Republic and the Czech and Slovak Federal Republic on the reciprocal promotion and protection of investments, dated 13 September 1990
Claimant	JCDecaux SA
C-[#]	Claimant's Exhibit
Counter-Memorial on Preliminary Objections	Claimant's Counter-Memorial on Preliminary Objections, dated 7 June 2022
CL-[#]	Claimant's Legal Authority
CJEU	Court of Justice of the European Union
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Memorial	Claimant's Memorial on the Merits, dated 19 October 2021
R-[#]	Respondent's Exhibit
Rejoinder on Bifurcation Request	Claimant's Rejoinder on Bifurcation Request, dated 8 February 2022
Rejoinder on Preliminary Objections	Claimant's Rejoinder on Preliminary Objections, dated 6 September 2022
Request for Bifurcation	Respondent's Request for Bifurcation of Preliminary Objections, dated 30 November 2021

Reply on Bifurcation Request	Respondent's Reply on Bifurcation Request, dated 25 January 2022
Reply on Preliminary Objections	Respondent's Reply on Preliminary Objections, dated 26 July 2022
Respondent	Czech Republic
RL-[#]	Respondent's Legal Authority
Termination Agreement	Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union
Transcript p.	Hearing transcript page
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the French Republic and the Czech and Slovak Federal Republic on the reciprocal promotion and protection of investments, which entered into force on 27 September 1991 (the "**BIT**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**")

2. The claimant is JCDecaux SA (the "**Claimant**"), a company incorporated under the laws of the French Republic.

3. The respondent is the Czech Republic (the "**State**" or the "**Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i)

5. This dispute relates to the alleged breaches by the State of standards of protection guaranteed by the BIT and international law, including fair and equitable treatment, no expropriation or nationalization, full protection and security, national and most favourable treatment, no unjust or discriminatory measures, and the BIT's umbrella clause.

6. In this ruling, the Tribunal decides the preliminary objection submitted by the Respondent that the Tribunal lacks jurisdiction due to the alleged invalidity of the offer to arbitrate contained in Article 10(2) of the BIT and/or should not purport to exercise any jurisdiction which it might otherwise have. The alleged invalidity would stem primarily from the allegedly retroactive effect of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, in force since 10 December 2021 for both the French Republic and the Czech Republic ("**Termination Agreement**"), but also from alleged inconsistency with European Union law, as interpreted by the Court of Justice, and from Article 30(4) of the Vienna Convention on the Law of Treaties ("**VCLT**") as well as from EU Member States' Declarations and entry into the Termination

Agreement even before it came into force. The submission that the Tribunal should not purport to exercise any jurisdiction it might otherwise have rests on submissions made by the Respondent of lack of good faith on the Claimant's part, comity, and the Tribunal's alleged duty to render an enforceable award.

II. PROCEDURAL HISTORY

7. On 26 August 2020, ICSID received a request for arbitration from JCDecaux SA against the Czech Republic, with factual exhibits C-001 through C-011 and legal exhibit CL-001 (the "**Request**").

8. On 16 September 2020, the Secretary-General of ICSID registered the Request in accordance with Article 36 of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

9. By correspondence of 26 and 29 October 2020, the Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators; one to be appointed by each Party and the third, presiding arbitrator, to be appointed by the co-arbitrators.

10. By letter of 19 November 2020, Claimant appointed Prof. Kaj Hobér, a national of Sweden, as an arbitrator in this case. Prof. Hobér accepted his appointment on 20 November 2020.

11. By correspondence of 4 January 2021, Respondent appointed Prof. Raúl Emilio Vinuesa, a national of Argentina and Spain, as an arbitrator in this case. Prof. Vinuesa accepted his appointment on 5 January 2021.

12. On 10 March 2021, the Claimant informed the Secretary-General of the Parties agreement to appoint The Rt. Hon. Lord Jonathan Mance, a national of the United Kingdom, as President of the Tribunal. Respondent confirmed the agreement on the same day. Lord Mance accepted his appointment on 12 March 2021.

13. On 12 March 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and, therefore the Tribunal was deemed to have been constituted on that date. Ms. Aurélia Antonietti, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal.

14. The Tribunal is composed of The Rt. Hon. Lord Jonathan Mance, a national of the United Kingdom, President, appointed by agreement of the Parties; Prof. Kaj Hobér, a national of the Kingdom of Sweden, appointed by the Claimant; and Prof. Raúl E. Vinuesa, a national of the Argentine Republic and the Kingdom of Spain, appointed by the Respondent.

15. On 18 March 2021, Lord Mance submitted a disclosure.

16. By letter of 18 March 2021, the Respondent requested full disclosure regarding Prof. Hobér's work in "intra-EU" and "contra-EU" cases. Prof. Hobér provided a response on 22 March 2021. The Responded requested further confirmations on 24 March 2022, which were provided by Prof. Hobér on the same day.

17. In accordance with ICSID Arbitration Rules 13(1) and 20(1), the Tribunal held the first session and preliminary procedural consultation with the Parties on 4 May 2021 by videoconference.

18. On 14 May 2021, the Tribunal issued Procedural Order No. 1, recording the agreements of the Parties and the decisions of the Tribunal on procedural matters, including the procedural calendar (Annex B). Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, the procedural language would be English, and the place of proceedings would be Paris, France, although the Tribunal may hold in-person hearings at any other place in geographical Europe that it considers appropriate having consulted the Parties.

19. On 19 October 2021, the Claimant filed its Memorial on the Merits along with Factual Exhibits C-0001 to C-0091, Legal Authorities CL-0001 to CL-0080 (the "**Memorial**"). The pleading was also accompanied by three witness statements and an expert report, as follows: *(i)* Witness Statement of [redacted], dated 13 October 2021 (the

'[redacted] **Statement**"); *(ii)* Witness Statement of [redacted] dated 14 October 2021 (the '[redacted] **Statement**"); Witness Statement of [redacted], dated 24 of September 2021 (the '[redacted] **Statement**"); and *(iii)* Expert Report from [redacted] dated 12 October 2021, (the '[redacted] **Report**").

20. On 30 November 2021, Respondent filed its Request for Bifurcation and Memorial of Preliminary Objections along with Legal Authorities RL-0001 to RL-0090 (the "**Request for Bifurcation**").

21. On 11 January 2022, the Claimant filed its Answer to Respondent's Request for Bifurcation along with Legal Authorities CL-0081 to CL-0093.

22. On 25 January 2022, Respondent filed its Reply on Bifurcation along with Legal Authorities RL-0091 to RL-0097.

23. On 8 February 2022, Claimant filed its Rejoinder on Bifurcation along with Legal Authorities CL-0094 to CL-0100 and a list of Intra-EU Decisions (Appendix 1).

24. On 24 February 2022, the Tribunal issued Procedural Order No. 2 granting the bifurcation of the preliminary objections and the merits. By correspondence of the same day, the Parties were invited to confer and comment on the amended procedural timetable proposed by the Tribunal.

25. Further to the Parties' comments, on 3 March 2022, the Tribunal issued Procedural Order No. 3, containing the timetable on the preliminary objections.

26. Following a case redistribution, on 3 March 2022, the Centre informed the Tribunal and the Parties that Ms. Alicia Martín Blanco, ICSID Legal Counsel, had been assigned to serve as Secretary of the Tribunal going forward.

27. On 14 April 2022, the Tribunal proposed that provisional arrangements be made at the International Dispute Resolution Centre (IDRC) in London to preserve the possibility that the hearing be held in person given that the World Bank Paris facilities, as well as the ICC Hearing Centre in Paris, would not be available to host the hearing.

28. On 20 April 2022, the Parties agreed with the provisional arrangements for an in-person hearing at the IDRC in London and disagreed on whether the hearing should be held remotely or in person, and on when the decision should be made. Further to the Parties' communications of 22 April 2022, and of 16, 17, 18, 20, and 23 May 2022, on 23 May 2022, the Tribunal indicated that an in-person hearing was on the face of it both feasible and appropriate, and that none of the other alternatives for its location seemed wholly satisfactory. In the circumstances, the Tribunal took the view that hearing should be confirmed at the IDRC in London.

29. On 7 June 2022, Claimant filed its Counter-Memorial on Preliminary Objections along with Legal Authorities CL-0001 to CL-0165 and a list of Intra-EU Decisions Post-Achmea (Appendix 1) (the "**Counter-Memorial on Preliminary Objections**").

30. On 26 July 2022, Respondent filed its Reply on Preliminary Objections along with Legal Authorities RL-0098 to RL-0122 (the "**Reply on Preliminary Objections**").

31. On 6 September 2022, Claimant filed its Rejoinder on Preliminary objections along with Factual Exhibits C-0001 to C-0092 and Legal Authorities CL-0001 to CL-0190 (the "**Rejoinder on Preliminary Objections**").

32. On 22 September 2022, the Tribunal issued procedural order No. 4 on the organization of the hearing.

33. The hearing on preliminary objections was held on 12 October 2022 at the premises of the International Dispute Resolution Centre (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:	
Jonathan Mance	President
Kaj Hobér	Arbitrator
Raúl E. Vinuesa	Arbitrator
ICSID Secretariat:	
Alicia Martín Blanco	Secretary of the Tribunal
For the Claimant:	
Leon Kopecký	Schönherr Rechtsanwälte GmbH

Sebastian Lukic [redacted] [redacted]	Schönherr Rechtsanwälte GmbH JCDecaux SA JCDecaux SA
For the Respondent:	
Sabine Konrad	Morgan, Lewis & Bockius LLP
Maximilian Pika	Morgan, Lewis & Bockius LLP
Pierre Trippel	Morgan, Lewis & Bockius LLP
Martina Matejová	Ministry of Finance of the Czech Republic
Jaroslav Kudrna	Ministry of Finance of the Czech Republic
Lucie Ostrá	Ministry of Finance of the Czech Republic
Court Reporter:	
Diana Burden	

34. On 31 October 2022, the Parties submitted their agreed corrections to the Hearing transcript.

35. The Parties filed their respective submissions on costs on 9 January 2023.

III. FACTUAL BACKGROUND

36. On 27 September 1991, the BIT between the Czech and Slovak Federal Republic, and the French Republic entered into force, and it remained in force for the Czech Republic after the dismemberment of the Czech and Slovak Republic Federal Republic in 1992.[1]

37. The French Republic became a member of the European Union ("**EU**") on 1 January 1958.[2]

38. On 1 May 2004, the Czech Republic acceded to the EU.[3]

39. On 6 March 2018, the Court of Justice of the European Union ("**CJEU**") rendered the *Achmea* Judgment.[4]

[1] Request for Bifurcation, para. 2.

[2] Request for Bifurcation, para. 2.

[3] Request for Bifurcation, para. 3.

[4] Request for Bifurcation, para. 4, relying on *Slovak Republic v. Achmea BV. CJEU*, Case C-284/16, Judgment of the Court (Grand Chamber), (the "*Achmea judgment*") 6 March 2018 (**RL-0001**).

40. On 15 and 16 January 2019, the EU Member States issued declarations "*on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union*" and "*on the enforcement of the judgment of the Court of Justice in Achmea and on investment protection in the European Union*" ("**Declarations**").[5]

41. On 25 February 2020 the Claimant served a Notice of Dispute on the Respondent.[6]

42. On 29 May 2020, the EU Member States concluded the Termination Agreement.[7]

43. On 26 August 2020, Claimant filed the Request for Arbitration.[8]

44. On 28 August 2021, the Termination Agreement entered into force for France.[9]

45. On 10 December 2021, the Termination Agreement entered into force for the Czech Republic.[10]

IV. THE PARTIES' REQUESTS FOR RELIEF

46. The Respondent requests that the Tribunal:[11]

- DECLARE that it has no jurisdiction over Claimant's claims;
- ORDER Claimant to fully reimburse the Czech Republic for all costs it has incurred in relation to the present arbitration.

[5] Request for Bifurcation, paras. 5 and 32, relying on the following Declarations: *Declaration of the Representatives of the Governments of the Member States*, 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (**RL-0005**); *Declaration of the Representatives of the Governments of the Member States*, 16 January 2019 on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (**RL-0006**); and *Declaration of the Representative of the Government of Hungary*, 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (**RL-0007**).

[6] Request for Arbitration, para.28.

[7] Request for Bifurcation, para. 6, relying on *The Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union*, signed on 5 May 2020 (**RL-0009**).

[8] Request for Bifurcation, para. 7.

[9] Request for Bifurcation, para. 8.

[10] Request for Bifurcation, para. 9.

[11] Reply on Preliminary Objections, para. 138.

47. The Claimant requests that the Tribunal:[12]

- DISMISS Czechia's Preliminary Objections;
- ORDER Czechia to pay for all the associated costs.

V. SUMMARY OF THE PARTIES' ARGUMENTS

48. The Parties' positions on each issue are summarized briefly below. Each such summary is not intended to be exhaustive, but rather to reflect the Parties' principal arguments. For the avoidance of doubt, the Tribunal has carefully considered the entirety of the Parties' submissions in arriving at its determination, and the absence of reference to any particular matter should not be taken as an indication that the Tribunal has not considered it.

A. THE RESPONDENT'S POSITION

49. The Respondent contends that the Tribunal lacks jurisdiction because Article 10(2) of the BIT "can no longer serve as a basis for the Tribunal's jurisdiction". The case is, according to the Respondent, about what States can do by treaty, and the answer given is that (there being no question of jus cogens) they can do anything they like.[13] According to the Respondent, Article 10(2) is incapable of operating because of "the Termination Agreement's retroactive effects" and, separately, because of "the invalidity of the offer to arbitrate" under Article 30(4)(a) of the VCLT, having regard to the binding interpretation of the effect of the European Treaties established by the CJEU.[14] The Claimant may pursue its domestic rights under French law before French courts, and its substantive claims before Czech courts.[15] Moreover, the principle of comity and the duty to render enforceable awards prevent the Tribunal from assuming jurisdiction.[16]

[12] Rejoinder on Preliminary Objections, para. 235.
[13] Transcript pp.8-9 and 28.
[14] Reply on Preliminary Objections, paras. 3 and 86.
[15] Reply on Preliminary Objections, para. 4.
[16] Reply on Preliminary Objections, para. 5.

(1) The *Achmea* Judgment, Validation by EU Stakeholders, and EU Policies

50. The Respondent explains that the CJEU in *Achmea* held that ISDS clauses contained in treaties concluded between EU Member States are incompatible with EU law and therefore inapplicable. As to reasoning, the CJEU relied on the principle of autonomy of EU law in Article 344 TFEU, on the obligation of EU Member States to respect EU law, on the importance of the EU legal system, and on the key value of the option to request a preliminary ruling under Article 267 TFEU. The CJEU found that BIT investment tribunals do not qualify as courts or tribunals that can make a request for a preliminary ruling under Article 267 despite the fact that BIT arbitration may concern the application or interpretation of EU law, which adversely affects the autonomy of EU law. The CJEU concluded that the ISDS clause in the *Achmea* BIT was incompatible with Articles 267 and 344 TFEU in a way that precludes ISDS provisions such as the one in *Achmea*.[17]

51. As established in the settled case law of the CJEU and confirmed by the Court in *PL Holdings,* the *Achmea* judgment merely clarified the provisions that already existed in the TFEU from the moment of its entry into force. Accordingly, "the source of the binding rule imposing invalidity of arbitration clauses in intra-EU BITs is not the *Achmea* judgment, but the TFEU."[18]

52. Following the *Achmea* judgment, various EU stakeholders have acknowledged the judgment and declared its consequences:[19]

53. The European Commission. The European Commission in its Communication of 19 July 2018 (i) recognized that the CJEU had confirmed its longstanding position that intra-EU BITs are incompatible with EU law and argued that the EU Member States are obliged to terminate all intra-EU BITs; and (ii) explained that EU law protects all intra-EU

[17] Request for Bifurcation, paras. 16-25.

[18] Request for Bifurcation, paras. 48-53, relying on *Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l.,* CJEU, Case 61/79, Judgment, 27 March 1980, para.16 **(RL-0013)**; and *Republiken Polen v. PL Holdings Sàrl.,* CJEU, Case C-109/20, Judgment of the Court (Grand Chamber), 26 October 2021, paras. 57, 58 (**RL-0011**). The Respondent further relies on *Theodoros Adamakopoulos and others v. Republic of Cyprus,* ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo G. Kohen, 3 February 2020, para. 6 (**RL-0014**).

[19] Request for Bifurcation, para. 26.

investments and that disputes are to be resolved in the domestic courts of the EU Member States.[20]

54. The EU Member States: In their Declarations, the EU Member States –including France and the Czech Republic – (i) stated that arbitration clauses in intra-EU BITs "are contrary to Union law and thus inapplicable"; (ii) recognized that intra-EU investments fall within the scope of protection of EU law; and (iii) formally declared that they would terminate all intra-EU BITs by means of a multilateral treaty.[21]

55. In the Termination Treaty, 23 EU Member States – including France and the Czech Republic – (i) confirm that intra-EU ISDS clauses are inapplicable and cannot serve as legal basis for arbitration proceedings; (ii) terminate the intra-EU BITs concluded between them, including the sunset clauses; and (iii) offer investors two new options to settle their disputes through the "structured dialogue for settlements" and before national courts.[22]

56. The CJEU In *PL Holdings*, the CJECU followed its findings in *Achmea* and found that the ISDS provision in the relevant intra-EU BIT was invalid due to incompatibility with EU law. The Court went one step further to confirm that ISDS agreements which have the same content as ISDS provisions in intra-EU BITs are contrary to EU law regardless of whether they are incorporated in international treaties or as *ad hoc* contracts.[23]

57. The Respondent explains the policies that underline the preclusion of intra-EU ISDS under EU law,[24] as follows:

[20] Request for Bifurcation, paras. 27-31.

[21] Request for Bifurcation, paras. 32-36, relying on *Declaration of the Representatives of the Governments of the Member States*, 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (**RL-0005**); *Declaration of the Representatives of the Governments of the Member States*, 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (**RL-0006**); and *Declaration of the Representative of the Government of Hungary*, 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (**RL-0007**).

[22] Request for Bifurcation, paras. 37-41.

[23] Request for Bifurcation, paras. 43-47, relying on *Republiken Polen v. PL Holdings Sàrl.*, CJEU, Case C-109/20, Judgment of the Court (Grand Chamber), 26 October 2021 (**RL-0011**).

[24] Request for Bifurcation, para. 54.

58. EU law provides procedural and substantive protection to cross-border investments within the EU that overlap with the protection provided in investment treaties and must be resolved in favour of EU law and the EU national courts, including, (i) as regards substantive protection, through the four fundamental freedoms, the obligation that EU Member States accord nationals or another Member State the same treatment as their nationals regarding participation in the capital of companies or firms, the rights granted to intra-EU investors in The Charter of Fundamental Rights of the European Union, and the principles of proportionality, legal certainty and legitimate expectations; and (ii) as regards procedural protection, though the guarantees of due process, enshrined in the value of the rule of law, and the possibility of preliminary referral to the CJEU, which ensures that EU law is applied in a uniform manner.[25]

59. The principle of mutual trust, which is one of the fundamental principles for European integration and was addressed by the CJEU in the *Achmea* judgment, (i) constitutes a liberty of EU Member States to be confident that the shared values enshrined in Article 2 TUE will be respected by other EU Member States; and (ii) results in an obligation between EU Member States to respect each other's judicial decisions and not to turn to other methods of dispute resolution outside the EU national courts.[26]

60. The principle of autonomy of EU law is closely tied to the special nature of the integration in the EU, has brought about "a new legal order of international law for the benefit of which the states have limited their sovereign rights", and is protected by the CJEU through its authoritative and uniform interpretation of EU law by means of the preliminary rulings under Article 267 TFEU.[27]

(2) The Issue Is about the Arbitration Agreement, not the ICSID Convention

61. The Respondent explains that the jurisdiction of an arbitral tribunal is based on the consent of the disputing parties. Such consent derives from the applicable international investment agreement, and there is no difference between an ICSID and UNCITRAL arbitration for

[25] Request for Bifurcation, paras. 56-70.

[26] Request for Bifurcation, paras. 71-77.

[27] Request for Bifurcation, paras. 79-84.

the purpose of assessing whether a valid arbitration agreement was concluded. Article 25 contains additional jurisdictional requirements, but the ICSID Convention is not the basis for the Tribunal's jurisdiction.[28]

62. The *Achmea* judgment is relevant to determine the validity of the arbitration agreement, and it also determines that intra-EU ICSID arbitrations pose a higher risk to the uniform application of EU law than UNCITRAL arbitrations, since ICSID awards cannot be subject to any domestic court review.

(3) Invalidity of the Arbitration Offer Resulting from the Termination Treaty

63. The Respondent contends that the jurisdictional requirements under Article 25(1) of the ICSID Convention are not met because of the Termination Treaty. In particular, the Respondent claims that the Termination Treaty is worded to apply retroactively, which would have prevented the perfection of an arbitration agreement in August 2020 through the Request for Arbitration.

a. The February 2020 Notice of Dispute Did Not Perfect an Arbitration Agreement

64. The Notice of Dispute of 25 February 2020 failed to perfect an arbitration agreement as consent cannot be presumed and, in this case, it did not include an acceptance that was clear and unequivocal.[29] To the contrary, the wording used constitutes a warning that the offer might be accepted in the future, as it does not contain the words "accept" or "consent to", but uses conditionals ("unless") and hypotheticals ("would be forced"). In addition, it is not clear which investor would have accepted the offer as the Notice of Dispute was sent on behalf of JCDecaux SA (France) and JCDecaux Central Eastern Europe Holding GmbH (Austria), and it not clear either whether consent was to

[28] Request for Bifurcation, paras. 87-91.

[29] Reply on Preliminary Objections, paras. 29-31, relying on *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, ConocoPhillips Gulf of Paria BV and ConocoPhillips v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, para. 254 (**RL-0100**) (omitting references); *Tenaris SA & Talta Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, para. 337 (**RL-0099**); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 160.3 (**RL-0101**); and *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 280 (**RL-0102**). See also Transcript p.10.

UNCITRAL or ICSID arbitration as the Notice does not specify which of the two potential BITs it references.[30]

b. The August 2020 Arbitration Agreement Became Invalid Ex Tunc Under the Termination Treaty and the VCLT

65. The Respondent contends that the Termination Treaty is intended to apply retroactively at least as regards any offer or consent to arbitrate BIT disputes.[31] The retroactive application follows from the wording of Articles 1(6), 4(1), and 5, which indicate that the present arbitration constitutes a New Arbitration Proceeding under the Termination Treaty, and that the BIT shall not serve as a legal basis for it. The retroactive application is further supported by the wording of Article 9, which is addressed to investors in pending arbitrations and would not make sense otherwise, by the object and purpose of the Termination Treaty as expressed in its Preamble (4), and by the rationale of the signatories to implement *Achmea*, as confirmed by *PL Holdings*. The retroactive application is also in line with the termination of the sunset clauses pursuant to Article 3 of the Termination Treaty.[32]

66. The Respondent further contends that the Termination Treaty can apply retroactively because the VCLT allows for retroactive treaty terminations. Article 28 of the VCLT provides that, where (as here) States intend, a treaty can apply retroactively, and Article 70(1) provides that they can also terminate a treaty with retroactive effects. The retroactive effect of the Termination Treaty between its signature and entry into force is also consistent with Article 18 of the VCLT, which obliges States to refrain from acts that would defeat the object and purpose of a treaty, and with Article 24(4), which provides for the application of certain provisions of a treaty before its entry into force.[33] The potential separability of an arbitration clause in a commercial contract is irrelevant; it addresses the validity of such a clause in a context where the commercial contract is open to some

[30] Reply on Preliminary Objections, paras. 32-37.

[31] Transcript pp. 12-15.

[32] Reply on Preliminary Objections, paras. 9-18; Request for Bifurcation, paras. 195-200.

[33] Reply on Preliminary Objections, paras. 19-24.

challenge, not the present international law problem where it is the clause itself which is invalid.[34]

67. According to the Respondent, it is irrelevant whether the Claimant initiated the arbitration before the Termination Treaty entered into force as the Claimant does not have any independent rights that could override the VCLT. Outside the area of *jus cogens*, individual rights, even human rights, depend on and are subject to the will of the parties to the treaty creating them.[35] Here, the Claimant's rights are derivative of France. This is shown by the historical context, where (before investment treaties and investment arbitration) investors were protected through diplomatic protection. It is shown by the nature of the BIT, which is expressed as being "conducive to the stimulation of capital and technology transfer between the two countries in the interest of their economic development", in other words entered into to further the two States' public good and development, not in the individual interest of companies claiming under the BIT.[36] Arbitration clauses in investment treaties constituted "a shortcut of protection" that does not change the derivative nature of the investor's rights. Any issue in this regard is between the Claimant and France under domestic French law.[37]

68. The Respondent contends that, even if the Claimant had any independent rights that could limit the contracting States' power to terminate the BIT retroactively, these rights would not apply since its consent to arbitrate in the Request for Arbitration was not performed in good faith. At the time of the Request for Arbitration in August 2020, the Claimant knew of the wording of the Termination Treaty, which the Claimant acquired in May 2020 at the latest, when the Termination Treaty became public.[38] The treaty did not come as a surprise given the extensive discussions on intra-EU BITs since *Achmea* as well as the Declarations of France and the Czech Republic and their undertaking to terminate all intra-EU BITs. As a consequence of this knowledge, the purported acceptance of the arbitration offer in August 2020 was not made in good faith and cannot be protected by Article 69 of the

[34] Transcript pp. 37-38.

[35] Transcript pp.17-20.

[36] Transcript p. 20.

[37] Request for Bifurcation, paras. 207-215; Tanscript p. 35

[38] Transcript p. 24.

VCLT, a provision which protects acts performed in good faith in the scenario where a treaty is invalid.[39]

69. According to the Respondent, the Claimant has not disputed and cannot dispute that the Termination Treaty is worded to apply retroactively, that the VCLT allows for retroactive treaty terminations, and that at the time of the Request for Arbitration in August 2020 the Claimant knew of the wording of the Termination Treaty.[40]

70. For these reasons, as "a simple consequence of the VCLTs rules and the decision of the signatories to the Termination Agreement", Article 10(2) BIT and the arbitration agreement became invalid retroactively *ex tunc*,[41] and the Claimant's allegations to the contrary are to no avail.

71. The allegation that jurisdiction is assessed at the date when the tribunal is seized is irrelevant since Article 10(2) became invalid *ex tunc*.

72. The submission that the termination of the treaty cannot retroactively divest a seized tribunal of jurisdiction is incorrect, as offers to arbitrate included in treaties are subject to the VCLT's rules on retroactivity and good faith:[42] (i) international law, including the VCLT, is the law applicable to the arbitration agreement;[43] (ii) the VCLT does not distinguish between ISDS and other provisions;[44] (iii) the sovereignty rationale behind Article 70 VCLT apply to ISDS provisions as much as to substantive protection provisions;[45] (iv) the Claimant cannot claim self-standing rights on equal footing with States and simultaneously escape the application of the VCLT rules on retroactivity and good faith;[46] (v) the principle of good faith is a fundamental principle with regard to jurisdiction, and Tribunals have declined jurisdiction because the investor did not acquire

[39] Reply on Preliminary Objections, paras. 25-28; Request for Bifurcation, paras. 217-221.
[40] Reply on Preliminary Objections, p. 4.
[41] Reply on Preliminary Objections, para. 38.
[42] Reply on Preliminary Objections, para. 41.
[43] Reply on Preliminary Objections, para. 42.
[44] Reply on Preliminary Objections, para. 43.
[45] Reply on Preliminary Objections, para. 44.
[46] Reply on Preliminary Objections, para. 45.

standing or initiate arbitration in good faith;[47] (vi) the ICJ jurisprudence relied on by the Claimant is irrelevant since none of those cases concerns "a *treaty* terminating jurisdiction, let alone with explicit *retroactive* effect";[48] (vii) it would not make sense for the ICJ to decide over an expressly retroactive termination of jurisdiction in a treaty;[49] and (viii) none of the investment tribunal decisions relied on by the Claimant support the same fact pattern as the current case.[50]

73. The ICSID Convention does not establish jurisdiction by itself. To establish jurisdiction, the ICSID Convention requires a valid arbitration agreement and imposes jurisdictional requirements *ratione personae* and *ratione materiae* in addition to the requirements under the BIT. In this case, the Respondent contends that the Claimant does not meet the requirements under the BIT because the treaty, including its Article 10(2), ceased to apply retroactively under the VCLT, and the Claimant's reliance on the ICSID Convention is inapposite: (i) the Termination Treaty does not constitute a unilateral withdrawal of consent in the sense of the second sentence of Article 25(1) of the ICSID Convention; and (ii) the Preamble to the ICSID Convention is insufficient to establish jurisdiction without consent.[51]

[47] Reply on Preliminary Objections, paras. 46-49, relying on *Phoenix Action Ltd v. The Czech Republi*c, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 107 **(RL-0109)**; *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, paras. 404, 407, 412, 413, 414, 420, 423, 440, 444, 483, 487, 536, 537 **(RL-0110)**; and *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, para. 206 **(CL-0122)**.

[48] Reply on Preliminary Objections, paras. 50-53, (emphasis in original), relying on *Nicaragua v. Colombia*, Judgement, 21 April 2022, para. 42 (**CL-0135**); *Nottebohm (Liechtenstein v. Guatemala)*, Judgement, I.C.J. Reports 1953, p. 120 (**CL-0092**); *Libyan Arab Jamahiriya v. United States of America*, Preliminary Objection, Judgment, 27 February 1998, I.C.J. Reports 1998, pp. 128-129 (**CL-0095**); and Arrest Warrant of 11 April 2000 *Democratic Republic of the Congo v. Belgium*, Judgment, I.C.J. Reports 2002, pp. 12-14 (**CL-0093**).

[49] Reply on Preliminary Objections, para. 54.

[50] Reply on Preliminary Objections, para. 55, relying on *Spółdzielnia Pracy Muszynianka v. Slovak Republic,* PCA Case No. 2017-08, Award, 7 October 2020 **(CL-0090)**.

[51] Reply on Preliminary Objections, paras. 57-67; and see also Transcript pp. 29-31, submitting that the ICSID Convention preceded the concept of a BIT, and that the parties whose consent was envisaged under Article 25 of the Convention would have been States; and Transcript pp. 44-45.

c. In Any Event, There Are No Substantive Rights and, Therefore, No Dispute Under Article 25(1) of the ICSID Convention

74. In any event, even if the Tribunal were to find that the arbitration agreement remained valid despite the retroactive application of the Termination Treaty and the Claimant's lack of good faith when it initiated the arbitration, there is no dispute under Article 25(1) of the ICSID Convention as the substantive rights under the BIT have ceased to exist.[52] According to the Respondent:

> *a.* T*he Claimant's rights are only derivative rights of its home State, France, as supported by international law and legal authorities such as Mavromatis, Lowen, and HICEE;*[53] *and*
>
> *b. Even if the investor exercises its own substantive rights under the BIT, these rights cannot exist against the declared will of both signatories to the BIT, i.e., "while investors may be able to rely on BIT rights, States* ***establish and terminate*** *BIT rights, including retroactively."*[54]
>
> *c. The Claimant has not pointed to any authority, including Occidental, that supports the position that the contracting States' treaty-making power is restricted by the investment-treaty rights of the investors, and such rule would be inconsistent with the following rules and principles: (i) States are sovereign and their treaty-making power is only restricted by ius cogens; (ii) multinational companies are not on equal footing with States as regards the treaty's fate; (iii) international law does not impose duties on States to provide diplomatic protection; and (iv) Tribunals should not intervene in domestic disputes as is any disagreement that the Claimant may have with the fact that France consented to the retroactive termination of the BIT*.[55]

[52] Reply on Preliminary Objections, paras. 69.

[53] Reply on Preliminary Objections, paras. 71-75, relying on *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. B) No. 3, Judgement, 30 August 1924, p. 12 **(RL-0113)**; *Loewen Group, Inc. and Raymond L. Loewen v. United States of Americ*a, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 233 **(RL-0114)**; and *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, paras. 138-139 **(RL-0115)**.

[54] Reply on Preliminary Objections, paras. 76, emphasis in original, and 85.

[55] Reply on Preliminary Objections, paras. 77-84, referencing *Occidental Exploration & Production Company v. Republic of Ecuador*, [2005] EWCA Civ. 1116, (**CL-0100**); and *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. B) No. 3, Judgement, 30 August 1924, p. 12 (**RL-0113**), *Status of Eastern Carelia*, 1923 P.C.I.J. (ser. B) No. 5, Advisory Opinion, 23 July 1923, p. 27 (**RL-0118**).

(4) Invalidity of the Arbitration Offer Pursuant to Article 30(4)(a) of the VCLT

75. The Respondent submits that Article 30(4)(a) operates as a separate reason for the invalidity of the offer to arbitrate in Article 10(2) BIT.

a. Article 10(2) is inconsistent with subsequent Treaties

76. This submission proves to have two branches. First, in oral submissions, the Respondent argued that the Termination Treaty between France and Czechia had the same subject-matter as, and was, once it came into effect retrospectively, the "anti-matter" to the earlier BIT between the same parties, in so far as both addressed the issue of dispute resolution for investor claims.[56]

77. Second, the Respondent points out that the BIT was also earlier in time than, and, in the light of the *Achmea* line of decisions, inconsistent with, the later Treaty on the Functioning of the European Union ("**TFEU**"). More specifically, the relevant EU Treaties constitute the later treaties in the sense of Article 30 VCLT because (i) the BIT entered into force on 27 September 1991; and (ii) the TEU and TFEU entered into force between both France and the Czech Republic when the Czech Republic acceded to the EU on 1 May 2004.[57] The Respondent also points out that the Treaty of Lisbon that amended the TEU and TFEU and made the CFREU legally binding at the same level entered into force on 1 December 2009.[58] Article 10(2) BIT is thus also incompatible with Articles 267 and 344 TFEU in the sense of Article 30 VCLT.

78. As a consequence of one or both of these conflicts, Article 10(2) BIT is inapplicable and the offer it contains has been invalid since the Czech's Republic's accession to the EU in 2004 and/or since the coming into effect of the Termination Treaty, "leading to invalidity of the offer to arbitrate at the moment of its acceptance by Claimant."[59]

[56] Transcript p. 29.

[57] Request for Bifurcation, paras. 100-101, 103.

[58] Request for Bifurcation, para. 102.

[59] Reply on Preliminary Objections, paras. 86-88; Request for Bifurcation, paras. 95-99, and 189-191.

b. The Decisive Test for Overlap in Subject-Matter under Article 30(4)(a) VCLT is the ILC's Incompatibility Test

79. The Respondent contends that the decisive test under Article 30(4)(a) of the VCLT is the one described in the Report of the Study Group on Fragmentation by the International Law Commission ("**ILC**")[60], as follows:

> *[t]he test of whether two treaties deal with the 'same subject matter' is resolved through the assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another. This 'affecting' might then take place either as strictly preventing the fulfilment of the other obligation or undermining its object and purpose in one or another way.*

80. According to the Respondent, there is no confusion between sameness and incompatibility on the part of the ILC, and the authority on which the Claimant relies, EURAM[61], addressed the requirements under Article 59 VCLT, not the test under Article 30(4)(a) VCLT.62.

81. The Respondent further contends that this test applies not only to substantive provisions, but also to procedural ones, and that it is irrelevant whether the treaties contain the same rules on a specific issue or whether they apply the same degree of precision.[63]

82. Under the ILC test, there is an identity of the subject matter of the BIT and the EU Treaties because Article 10 of the BIT provides for arbitration, whereas Articles 267 and 344 of the TFEU require the mandatory submission of disputes to national EU courts, such that the Respondent cannot comply with the obligations under the BIT without infringing those under the FTEU and *vice versa*.[64]

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[60] Reply on Preliminary Objections, paras. 95, 97; Request for Bifurcation, paras. 104-108, relying on *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, p. 130 (**RL-0033**). See also Transcript pp. 46-48.

[61] European American Investment Bank AG (Austria) v. The Slovak Republic, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012.

[62] Reply on Preliminary Objections, paras. 99-100, relying on *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, paras. 169-175 (**CL-0127**).

[63] Request for Bifurcation, paras. 109-110.

[64] Request for Bifurcation, paras. 113-114; Reply on Preliminary Objections, para. 101.

c. Even If Further Overlap of the Treaties Were Required, the Treaties Overlap in Substance

83. The Respondent argues that even if the Tribunal were to accept the Claimant's position on the same subject-matter test, there would be identity of subject-matters between the BIT and the EU Treaties, as EU law provides effective protection in terms of substantive and procedural standards that is at least equivalent to the protection under the BIT.[65]

84. As to the substantive standard, the Respondent contends that:

a. The European Commission's communication of 19 July 2018 explains that "*the [TFEU] prohibits measures unduly preventing or discouraging cross-border capital movements and payments*";[66]

b. EU law provides the protection of the national treatment standard under the non-discrimination principle in Articles 18 and 55 TFEU, and Article 21(2) CFREU;[67]

c. Articles 18 TFEU and Article 21(2) CFREU also correspond to the rationale of the MFN standard in that they ensure that the treatment provided by an EU Member State cannot be discriminatory on the grounds of nationality;[68]

d. The courts of EU Member States are obliged to apply EU law and make preliminary references to the CJEU for EU law to be applied consistently, effectively, and uniformly, which is a guarantee of protection equivalent to the full protection and security standard in the BIT even if the BIT standard "*would, arguendo, encompass legal protection and security*";[69] Moreover, the preliminary ruling mechanism under EU law provides a uniformity and predictability that surpass the differences in interpretation offered by investment Tribunals regarding standards of protection such as MFN and the umbrella clause;[70]

e. Protection against unlawful expropriation under EU law can be included under the right to property in Article 17 CFREU and under the freedom to establish and provide services in Articles 49 and 56 of TFEU. These provisions provide protection that is at least equal to the protection under the BIT, and the Claimant

[65] Reply on Preliminary Objections, paras. 102-103, 114.

[66] Reply on Preliminary Objections, para. 104, relying on European Commission, *Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment*, COM (2018) 547 final, 19 July 2018, p. 2 (**RL-0003**).

[67] Request for Bifurcation, paras. 133-140.

[68] Reply on Preliminary Objections, para. 105; Request for Bifurcation, paras. 154-156.

[69] Reply on Preliminary Objections, para. 106.

[70] Request for Bifurcation, paras. 157, 160.

has not provided any authority for the proposition that EU law does not provide protection against creeping expropriation;[71]

f. The FET standard has been interpreted to have the international minimum standard of treatment as its lowest common denominator, which in turn encompasses the protection against interference, denial of justice, due process, and transparency, all of which are covered under EU law.[72] To the extent that FET includes the additional elements of protection of legitimate expectations, legal certainty, and non-discrimination, the Respondent contends that these are also covered by EU law.[73] Legitimate expectations in particular are ensured under EU law, which was specifically confirmed by the EU Member States as well as by the EU Commission;[74]

g. While the Respondent contends that the BIT does not contain an umbrella clause, the Respondent argues that EU law reaches the same goal of protection through different means.[75]

85. As to the procedural standards, the Respondent contends that the Claimant's argument that there is no direct ISDS mechanism under EU law is irrelevant because the effective implementation of an investor's substantive rights is ensured before the national EU courts through the following standards: (i) the direct application and effect of EU law, which include the possibility of an individual invoking an EU law provision against an EU Member State; (ii) the possibility or the obligation of national EU courts to refer matters to the CJEU for a preliminary ruling; and (iii) the fact that individuals can, under certain conditions, claim damages before EU courts against EU Member States for violations of rights granted to them by EU law.[76]

[71] Request for Bifurcation, paras. 123-132; Reply on Preliminary Objections, para. 108.

[72] Request for Bifurcation, paras. 141-149.

[73] Request for Bifurcation, paras. 150-152.

[74] Reply on Preliminary Objections, para. 107, relying on *Declaration of the Representatives of the Governments of the Member States*, 15 January 2019, on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, p. 2 (**RL-0005**); *Declaration of the Representatives of the Governments of the Member States*, 16 January 2019, on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, p. 29 (**RL-0006**); *Declaration of the Representative of the Government of Hungary*, 16 January 2019, on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, p. 2 (**RL-0007**), and European Commission, *Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment*, COM (2018) 547 final, 19 July 2018, p. 14 (**RL-0003**).

[75] Request for Bifurcation, paras. 158-159.

[76] Reply on Preliminary Objections, paras. 109-113; Request for Bifurcation, paras. 161-178.

d. The Claimant's Assertions on EU Law Contravene the Position of All EU Stakeholders

86. According to the Respondent, the Claimant (i) does not dispute that the CJEU, the European Commission and all EU Member States agree that intra-EU arbitrations are impermissible under EU law, and (ii) instead argues that all the EU stakeholders are interpreting Articles 267 and 344 TFEU incorrectly. The Respondent contends that it is the Claimant's interpretation that is incorrect and that intra-EU arbitration clauses are incompatible with Articles 267 and 344 TFEU.[77]

e. In Any Event, the Agreement of the EU Member States Parties to the BIT and the CJEU on the Subject-Matter Identity and Superiority of EU Law Must Be Given Priority

87. The Respondent argues that, even if the Tribunal were to have concerns regarding the same subject matter issue, the Tribunal must give effect to the understanding that France and the Czech Republic expressed in subsequent agreement and practices after the *Achmea* judgment, in accordance with Article 31(3)(a) and (b) VCLT. This understanding was expressed in the Declaration of 15 January 2019 and in the Termination Treaty, both of which confirm that the EU Treaties take precedence over the BIT. The wording used shows that the signatories consider the EU Treaties to cover investment protection.[78]

88. The Respondent contends that there are legal authorities supporting its position, such as *BayWa*, which confirms that the obligations in the subsequent treaty as interpreted by the CJEU in *Achmea* override conflicting obligations under the BIT. The *BayWa* Tribunal held that the conclusions in *Achmea* were not applicable to the Energy Charter Treaty because of its multilateral nature and inclusion of the EU itself, different from the bilateral nature of the treaty at issue in *Achmea*, from which it follows that the conclusions in *Achmea* "authoritatively establish that the TFEU takes priority between the concerned EU Member States" as regards the BIT.[79]

[77] Reply on Preliminary Objections, paras. 90-94.

[78] Request for Bifurcation, paras. 179-188.

[79] Reply on Preliminary Objections, paras. 115-119, relying on *BayWA r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB 15/16, Decision on Jurisdiction, Liability and

89. The Respondent further contends that the *Green Power* Tribunal confirmed that the declaration of the EU Member States of 15 January 2019 is "relevant as an authentic interpretation" of the States concerned and, although the *Green Power* Tribunal considered the declaration in the context of the Energy Charter Treaty, this conclusion is applicable in the context of the BIT. This Tribunal further confirmed that the primacy of EU law as regards the relationship between EU Member States is "one of lex superior".[80]

(5) Comity and Enforceability

90. The Respondent contends that the lack of a valid arbitration agreement already leads to the lack of jurisdiction of the Tribunal over this dispute under Article 25(1) of the ICSID Convention. However, there are two further "substantial obstacles preventing the Tribunal from assuming jurisdiction", namely the principle of comity towards the CJEU's judgment in *Achmea*, and the principle that arbitrators have a duty to render enforceable awards.[81]

91. As to the principle of comity, the Respondent contends that it remains a significant principle of international law that should guide the Tribunal in this case as it ensures stability and predictability and prevents inconsistent judgments by allowing a tribunal to limit its own jurisdiction where exercising it would be inappropriate or unreasonable. According to the Respondent, assuming jurisdiction in this case "in direct contradiction to the CJEU's *Achmea* judgment would be inappropriate and unreasonable". The legal authority on which the Claimant's rely, *A.M.F*, acknowledged the existence of this principle and did not exclude it altogether, but rather limited it to "extreme cases". The Respondent considers that this is such an extreme case as refusing to exercise comity would be inefficient, lead to uncertainty on the available fora within the EU, and subject the Respondent to contradictory obligations.[82] The Respondent adds that there is nothing odd

Directions on Quantum, 2 December 2019, paras. 280-282 (**CL-0152**). See Transcript pp. 48-50 for the submissions developed on these cases.

[80] Reply on Preliminary Objections, paras. 120-121, relying on *Green Power K/S and SCE Solar Don Benito APS v. The Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, paras. 370, 372 (**RL-0119**); and Decl*aration of the Representatives of the Governments of the Member States*, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (**RL-0005**).

[81] Reply on Preliminary Objections, paras. 122-124.

[82] Reply on Preliminary Objections, paras. 125-130, relying on *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany) v. The Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020, para. 405

about an investment Tribunal exercising comity towards the CJEU, and points to the *MOX Plant* case.[83]

92. As to the duty to render an enforceable award, the Respondent contends that any award that this Tribunal renders would be unenforceable in the EU pursuant to the limits of Article 54 of the ICSID Convention, which assimilates ICSID awards to final judgments of domestic courts and therefore implies that enforcement may be resisted where domestic rules provide for the exceptional possibility to refuse enforcement of a final judgment. This would be the case within the EU where an award violates EU law, as illustrated by the Swedish courts' refusal to enforce the pre-*Achmea* award in *Micula*. The incompatibility of intra-EU BITs with EU law constitutes one such circumstance that leads to unenforceability in the EU.[84]

93. The Respondent further contends that should the Tribunal proceed anyway, it would violate the duty to render an enforceable award. According to the Respondent, this duty is part of an arbitrator's legal and ethical obligations, and it is not relevant that the duty is not specifically stated within the ICSID Convention and the BIT as it exceeds institutional rules and is "the arbitrator's equivalent to the Hippocratic Oath."[85] The Respondent contends that although enforcement of ICSID awards may be sought in any ICSID State, enforcement will still be sought where there are available assets that are not exempted from execution, and most of the economic activities and assets of the Czech Republic are located in the EU. The Tribunal is therefore unable to render an enforceable award in this matter and must decline jurisdiction.[86]

(**CL-0115**); Request for Bifurcation, paras. 224, 226, and 229-230, relying, among others, on, case concerning *The Northern Cameroons, Cameroon v. United Kingdom*, International Court of Justice, Judgement on Preliminary Objections, I.C.J. Reports 1963, 2 December 1963, p. 29 (**RL-0072)**.

[83] Request for Bifurcation, para. 230, relying on, *MOX Plant Case, Ireland v. United Kingdom*, PCA Case No. 2002-01, Order No. 3 - Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, paras. 20, 28 (**RL-0073**).

[84] Request for Bifurcation, paras. 232-237, relying on, *Ioan Micula and others v. Romania*, Nacka District Court, Case No. Ä 2550-1, Decision, 23 January 2019, p. 13 (**RL-0075**).

[85] Reply on Preliminary Objections, paras. 131-133, and 137.

[86] Request for Bifurcation, paras. 238-242.

94. According to the Respondent, the legal authorities on which the Claimant relies in the context of the duty to render an enforceable award are irrelevant as those decisions were rendered under different factual circumstances. In particular, the Respondent contends that in *Micula* this issue was not raised by the respondent, and that the conclusions of the *Achmea* judgment have been further confirmed since *United Utilities* by (i) the CJEU in *PL Holdings* and *Komstroy*, and by (ii) the EU Member States in their Termination Treaty.[87]

B. THE CLAIMANT'S POSITION

95. The Claimant contends that (i) the Respondent "does not engage with the key arguments", namely, that it has unconditionally consented to ICSID arbitration and that "a uniform body of ICSID case law supports that, as a matter of international law, EU law does not automatically vitiate a State's consent to ICSID arbitration". The Tribunal does not derive its jurisdiction from EU law, but from the BIT and the ICSID Convention.[88] Instead, the Respondent attempts to mischaracterize the Claimant's arguments and rebuts arguments that were not made. The Claimant further considers that (ii) the Respondent "indiscriminately mixes legal concepts and builds arguments on provisions that plainly do not apply in this case", like its argument on Article 69 VCLT. The Claimant also states that (iii) the Respondent "fails to engage with the case law supporting JCDecaux's position" and, when it does, it takes decisions out of context or incorrectly describes the issues.[89]

(1) The Termination Treaty Did Not Retroactively Invalidate the ICSID Arbitration Agreement

96. The Claimant contends that the Termination Treaty came into effect after the Claimant had accepted the Respondent's consent, thus perfecting an ICSID arbitration agreement. This agreement is a distinct legal act, and the relevant question is therefore whether the

[87] Reply on Preliminary Objections, paras. 134-136, relying on *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paras. 331-333 (**CL-0137**); and *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, para. 490, 541 (**CL-0105**); and relying on *PL Holdings Sàrl.R v. epubliken Polen*, CJEU, Case C-109/20, Judgment of the Court (Grand Chamber), 26 October 2021, paras. 44-46 (**RL-0011**); and *Komstroy LLC. v. Republic of Moldova*, CJEU, Case C-741/19, Judgment of the Court (Grand Chamber), 2 September 2021, paras. 47-60 (**RL-0012**).

[88] Transcript p. 63.

[89] Rejoinder on Preliminary Objections, paras. 1-11, Counter-Memorial on Preliminary Objections, para. 1.

Termination Treaty can retroactively terminate the ICSID arbitration agreement, not whether States can retroactively terminate treaties.[90] The Claimant contends that, to evade this conclusion, the Respondent argues that the Claimant has only derivative rights of its home State. However, the Claimant's rights are direct rights in international law.[91]

a. The Claimant Vindicates Its Own Rights, Not the Rights of Its Home State

97. The Claimant contends that its position that it vindicates its own rights rather than those of its home State "conforms with the purpose of investment treaties and the ICSID scheme, a long line of case law, and academic writing." The Respondent's contrary position ignores that the investment treaty regime is materially different from diplomatic protection, which was developed at a time when only States were subjects of international law and relied on the fiction that an injury to a national was an injury that national's State.[92]

98. According to the Claimant, the diplomatic protection principles cannot be transferred to this arbitration. In modern international law, treaties frequently confer upon individuals direct rights. In particular, it is the "very purpose" of investment treaties to give direct rights in international law to investors. Likewise, the ICSID Convention was "designed to give investors a direct right to international law remedies" and, as a trade-off, Article 27 of the ICSID Convention excludes recourse to diplomatic protection once a dispute is brought to arbitration.[93]

99. Investment Tribunals have also consistently endorsed the view that the rules of diplomatic protection cannot be transferred to investment treaties and the ICSID Convention.[94] The

[90] Transcript pp.56-57.

[91] Rejoinder on Preliminary Objections, paras. 17-21.

[92] Rejoinder on Preliminary Objections, paras. 23-26; Counter-Memorial on Preliminary Objections, paras. 143-146.

[93] Rejoinder on Preliminary Objections, paras. 27-34; Counter-Memorial on Preliminary Objections, paras. 143-146.

[94] Rejoinder on Preliminary Objections, para. 35, relying on *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 69 (**CL-0172**); *Occidental Exploration & Production Company v. Republic of Ecuador*, [2005] EWCA Civ. 1116, para. 20 (**CL-0100**), citing to *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005, para. 145 and *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/7, Decision on Jurisdiction, 10 June 2005, para. 44 (emphasis added); *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005, para. 34 (**CL-0006**) (emphasis added); and *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, 15 January 2008, para. 169 (**CL-0173**).

Claimant contends that, to escape the conclusion that it exercises a direct right, the Respondent relies on *Loewen* and *HICEE*, but *Loewen* is ambiguous on the issue and *HICEE* was not constituted under the ICSID Convention, did not engage in any detail with the issue and therefore lacks the weight to override the authorities on which the Claimant relies.[95]

b. The Claimant Accepted the Respondent's Offer and Perfected an ICSID Arbitration Agreement

100. The Claimant contends that when an investor accepts a State's standing offer to arbitrate future disputes, it perfects an arbitration agreement. This agreement is not between States, but between the investor and the host State, and it does not include the investor's home State. This agreement is also "a separate and binding act of international law" and, pursuant to ICSID Article 25(1), consent to this agreement cannot be withdrawn unilaterally by the State. The Claimant explains that, applied to this case, this means that:[96]

(a) The Respondent unconditionally consented to ICSID arbitration;

(b) Its consent was open to acceptance at the time when the Claimant accepted the offer, and so perfected an ICSID arbitration agreement;

(c) The Respondent's argument that the Termination Agreement retrospectively defeats the arbitration agreement runs contrary to Article 25(1) of the ICSID Convention, and is irreconcilable with the VCLT and the well-established principle that jurisdiction is established at the date when a court or tribunal is seized.

c. The Respondent unconditionally consented to ICSID arbitration.

101. The Claimant submits the Respondent has not rebutted the Claimant's case that:

[95] Rejoinder on Preliminary Objections, para. 37, relying on *Loewen Group, Inc. and Raymond L. Loewen v. United Stated of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 223 (**RL-0114**); and *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011 (**RL-0115**). See also Transcript pp. 33-35.

[96] Rejoinder on Preliminary Objections, paras. 39-43.

a. the Tribunal does not derive its jurisdiction from EU law, but from the BIT and the ICSID Convention;[97]

b. the ICSID Convention is a multilateral treaty that creates a self-contained regime that constitutes a distinct legal order of public international law, different from the legal order of the EU;

c. Article 10(2) of the BIT contains an unqualified consent to ICSID arbitration, which is not put in question by anything in the wording, the context, or the preamble of the BIT, nor does its meaning leave any "interpretative doubt"; and

d. the Respondent could have conditioned its consent in Article 10(2) of the BIT, or under Article 25(4) of the ICSID Convention at any time since its accession to the EU in 2004, but the Respondent did not do so – nor did the Respondent require the exhaustion of local remedies as a condition to consent under Article 26 of the ICSID Convention.[98]

102. The Claimant further contends that there is no "interpretative doubt" about the meaning of Article 13 BIT, which provides that the BIT will continue in force until terminated per its terms and contains a 15-year sunset clause; it further alleges that the Respondent could have conditioned its consent in Article 10(2) of the BIT, or required the exhaustion of local remedies as a condition to consent under Article 26 of the ICSID Convention, but the Respondent did not.[99]

103. The Claimant further notes that the Respondent does not engage with its submission that, as a matter of international law, EU law does not automatically vitiate consent to ICSID arbitration.[100] According to the Claimant, the ICSID Convention creates a self-contained regime and a distinct legal order of public international law that has international law as its *lex arbitri*.[101] Unlike in the case of *Achmea* and *PL Holdings*, a respondent State in an ICSID arbitration owes a duty to comply with the Convention to all ICSID Contracting

[97] Transcript pp.63-64.

[98] Rejoinder on Preliminary Objections, paras. 44-48; Counter-Memorial on Preliminary Objections, paras. 5-21. See also Transcript p. 59 Article 25(4) provides that a Contracting State "*may, at the time of ratification, acceptance or approval of this Convention, or at any time thereafter, notify the Centre of a class of disputes which it would not consider submitting to the jurisdiction of the Centre.*" Article 26 provides that a Contracting State "*may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.*"

[99] Counter-Memorial on Preliminary Objections, paras. 13-20.

[100] Rejoinder on Preliminary Objections, para. 49; Counter-Memorial on Preliminary Objections, paras. 23-77.

[101] Transcript pp. 62-65.

States, such that the arbitration agreement is therefore not a purely internal matter between EU Member States.[102] The Claimant explains that CJEU case law does not suggest that acceding Member States must denounce or breach their duties towards third States.[103] And even if the CJEU were to extend to ICSID, EU law would not automatically invalidate the Respondent's consent because: (i) CJEU judgments are not binding on ICSID tribunals as they operate in different legal orders; (ii)[104] the authority of the CJEU extends only to the interpretation of EU law and its assessments are from the perspective of EU law and premised on constitutional principles of EU law; (iii)[105] any decision by the CJEU that consent to arbitration in a BIT is precluded under EU law could only create obligations for the Respondent under EU and would, at most, result in the breach of EU law, but "wrongful consent nonetheless constitutes consent";[106] (iv) adopting the view that EU law automatically invalidated the Respondent's consent to ICSID arbitration despite Article 13 of the BIT setting out that the BIT would continue in force until terminated in accordance with its terms would be contrary to Articles 26 and 27 VCLT.[107] Finally, the Claimant contends that, as a matter of international law, policy statements by various EU "stakeholders" do not bear on the jurisdiction of ICSID Tribunals.[108]

d. The Claimant validly accepted the Respondent's offer

104. The Claimant contends that it accepted the Respondent's offer on 25 February 2020, when it gave notice that it was prepared to resort to ICSID arbitration under Article 10(2) of the BIT. Alternatively, it perfected the arbitration agreement by submitting a Request for ICSID Arbitration on 26 August 2020.[109]

105. According to the Claimant, the Respondent's denial that the agreement was perfected in February 2020 is based on formalities that are not required by the BIT. However, the

[102] Counter-Memorial on Preliminary Objections, paras. 24-41.
[103] Counter-Memorial on Preliminary Objections, para. 42.
[104] Counter-Memorial on Preliminary Objections, paras. 43-46.
[105] Counter-Memorial on Preliminary Objections, paras. 47-58.
[106] Counter-Memorial on Preliminary Objections, paras. 59-60. See also Transcript p.67.
[107] Counter-Memorial on Preliminary Objections, paras. 61-69.
[108] Counter-Memorial on Preliminary Objections, paras. 70-76.
[109] Rejoinder on Preliminary Objections, para. 51.

February notice "reflects a sufficiently clear intention to submit the dispute to ICSID arbitration as per Article 10 of the BIT and is therefore an acceptance of Czechia's offer", such that the Request for Arbitration merely reiterated the Claimant's request. The fact that other treaties are mentioned in the notice does not vitiate the Claimant's acceptance, nor does the fact that the notice sought to resolve the dispute amicably before submitting it to arbitration, which is a condition under the BIT.[110]

106. In any event, the Claimant contends that it is irrelevant whether the arbitration was perfected in February or in August 2020 since on both dates the Termination Treaty had not yet become effective, the BIT was in force, and the State's offer was open to acceptance.[111] The Respondent in turn contends that the arbitration was not initiated in good faith. However, according to the Claimant, this argument is unavailing[112] since:

a. The Respondent relies on Article 69 VCLT, but this provision does not apply to this case as it is concerned with the invalidity of treaties, not with their termination, and therefore the Claimant need not rely on the good faith exception embodied in Article 69(2)(b) VCLT. To offset this, the Respondent points to *Phoenix* and *Philipp Morris*, but the Tribunals in those cases rejected jurisdiction because the investments had been restructured with the purpose of bringing the claim under the BIT.[113]

b. Nowhere does the Termination Treaty use the term "retroactive", and the Respondent's position that it should be read into Articles 4 and 5 of the Termination Treaty is unpersuasive, as is the attempt to attribute to the Claimant knowledge that the Claimant did not have. What the Claimant did know is that a uniform body of international law authorities confirms that an investor may accept an offer to arbitrate contained in an investment treaty at any time during that treaty's validity.[114]

[110] Rejoinder on Preliminary Objections, paras. 52-54.

[111] Rejoinder on Preliminary Objections, paras. 55-60.

[112] Rejoinder on Preliminary Objections, para. 61; Counter-Memorial on Preliminary Objections, paras. 147-150.

[113] Rejoinder on Preliminary Objections, paras. 62-67, relying on *Phoenix Action Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 143-145 (**RL-0109**); and *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 585 (**RL-0110**).

[114] Rejoinder on Preliminary Objections, paras. 68-69, relying on *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, paras. 558-559 (**CL-0105**); *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, para. 593 (**CL-0119**); and *Magyar Farming Company Ltd, Kintyre Kft and Inícia Zrt v. Hungary*, ICSID Case N. ARB/17/27, Award, 13 November 2019, para. 213 (**CL-0098**).

c. Claims of bad faith are subject to a high threshold. By definition, a party complying with a uniform body of international law authorities does not act in bad faith.

d. Treaty law distinguishes between the signing of a treaty and its ratification, and only the latter brings a treaty into effect. According to the Claimant, the Respondent in fact agrees with this position, as shown by the fact that the Ministry of Finance had listed the BIT as a valid treaty while the Respondent's Parliament discussed whether to ratify the Termination Treaty, and these discussions continued long after the commencement of this arbitration. The Respondent cannot escape this conclusion by relying on Articles 18 and 24 of the VCLT, which govern State conduct.[115]

e. Once perfected, party consent is irrevocable

107. The Claimant contends that the Respondent's retroactivity argument is contrary to[116]:

a. The ICSID Convention. The second sentence of Article 25(1) of the ICSID Convention provides that party consent is irrevocable once consent has been perfected.[117] The principle of irrevocability is reinforced by the Convention's preamble, which refers to the arbitration agreement as "binding". To take the opposite view would undermine the effectiveness of all investment treaties and the ICSID system.[118]

b. The well-settled principle that jurisdiction is established at the date when the Tribunal is seized, as well the doctrine of acquired rights.[119]

108. To escape the conclusion that the Claimant's acceptance brought into operation Article 25(1) of the ICSID Convention, the Claimant contends that the Respondent makes the following unavailing arguments:

[115] Rejoinder on Preliminary Objections, paras. 72-77.

[116] Rejoinder on Preliminary Objections, para. 79.

[117] Transcript pp.77-78, citing *Principles of International Investment Law*, Dolzer, Schreuer, and Kriebaum, Oxford press 2022, 3nd Edition, pp. 22-23 (**CL-0139**), and *ICSID, History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention,* vol. II-1, 9 July 1964, p.334 (**RL-0074**), where Aron Broches, as chair of the drafting Convention, is recorded as explaining that: "*There would be no point in contemplating a Convention unless a government's word was regarded as its bond. The decision to submit a dispute was voluntary, but once made, became binding*",

[118] Rejoinder on Preliminary Objections, paras. 80-84; Counter-Memorial on Preliminary Objections, paras. 138-139.

[119] Rejoinder on Preliminary Objections, paras. 85-87, relying on *Eskosol S.p.A in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, para. 226 (**CL-0122**); A.*M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany) v. The Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020, para. 338 (**CL-0115**); and *Magyar Farming Company Ltd, Kintyre Kft and Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, para. 214 (**CL-0098**); Counter-Memorial on Preliminary Objections, paras. 140-142.

a. The Respondent's argument that its withdrawal is not covered by Article 25(1) because it was not unilateral, as the Termination Treaty was also signed by France. According to the Claimant, this argument is misconceived as the term "parties" in Article 25(1) refers to the parties to the arbitration agreement, which is confirmed by the context of the rule and accords with the preparatory work of the Convention. The Claimant explains that only an agreement between the investor and the host State (which does not exist in this case) could undo an arbitration agreement, and that the Respondent's interpretation would create an unprecedented result and depart from the clear text of the Convention[120].

b. The Respondent's argument that the Termination Treaty has "explicit retroactive effect" such that none of the ICJ cases relied on by the Claimant applies to the facts of this case. According to the Claimant, the ICJ case law is based on the principle that States cannot withdraw from the instrument conferring jurisdiction upon the institution of proceedings; that principle applies to this case, is not driven by the individual facts, and is further supported by ICSID Tribunals. The Respondent relies on three incorrect assumptions: (i) that the Termination Treaty contains "expressly retroactive" rules; (ii) that the arbitration agreement is between the Czech Republic and France; and (iii) the Claimant enforces France's rights.[121]

c. The Respondent's argument that the Claimant has been stripped of substantive rights by the Termination Treaty and therefore there is no "dispute". According to the Claimant, the provisions of the Termination Treaty on which the Respondent relies only mention arbitration clauses (not substantive rights), and the Termination Treaty does not establish (i) that investors can or should be retroactively stripped of substantive treaty rights acquired before its entry into force; or (ii) that EU Member States should be retroactively excused for breaches of international law duties owed under investment treaties.[122]

d. The Claimant further contends that the Respondent's subsidiary argument based on the arguendo assumption that the Claimant exercises its own rights are in fact based on the incorrect view that the Claimant exercises derivative rights. The Claimant explains that "international law has moved on since the Westphalian Peace in 1648", that individuals are subjects of the international legal order and acquire their own rights, and those rights are protected including by the doctrine of vested rights, a principle which forms part of generally accepted international law. According to the Claimant, the VCLT does not give States the right to strip individuals of vested

[120] Rejoinder on Preliminary Objections, paras. 90-98.

[121] Rejoinder on Preliminary Objections, paras. 99-107, relying on *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, paras. 60 et seqq (**CL-0096**): *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 255 (**CL-0097**); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 14 November 2005, para. 178 (**CL-0179**); *Magyar Farming Company Ltd, Kintyre Kft Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, para. 214 (**CL-0098**).

[122] Rejoinder on Preliminary Objections, paras. 108-111.

rights, and international authorities contradict the Respondent's position: (i) ARSIWA Article 13 provides that a breach of an international duty occurs if the wrongful act is perpetrated while the State is bound by the obligation in question; (ii) Article 28 of the VCLT does not govern retroactivity in relation to treaties already in force at the time of the alleged breaches; (iii) Articles 28 and 70(1)(b) do not extend to vested rights of individuals.[123]

e. Finally, the Claimant rejects the argument that any disagreement is to be addressed with France, under French law and in French courts, as it is premised on the view that "the Termination Agreement retroactively stripped JCDecaux of its acquired rights in international law, and France agreed to a departure from most basic international law rules"; the Claimant's dispute is with the Respondent.[124]

(2) Article 30 of the VCLT Does Not Apply

109. The Claimant contends that Article 30 VCLT does not apply as (i) this provision calls for a two-stage analysis; and (ii) the Respondent has failed to show that its conditions are met.[125]

a. Article 30 VCLT Calls for a Two-Stage Analysis

110. According to the Claimant, Article 30 VCLT does not establish a test of incompatibility, but rather involves two stages that must be met sequentially, as consistently reflected in the practice of ICSID Tribunals. The Tribunal must analyse first whether the treaties in question relate to the same subject matter and, if so, whether there is a normative conflict. The same-subject-matter requirement follows from the ordinary meaning of the terms used in the provision, constitutes a precondition, and cannot be replaced by a test of

[123] Rejoinder on Preliminary Objections, paras. 112-125, relying on *Certain German Interests in Polish Upper Silesia v. Poland* (Merits), P.C.I.J. Ser A No. 7, 1926, p. 42 (**CL-0181**); *Magyar Farming Company Ltd, Kintyre Kft and Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, paras. 343-344 (**CL-0098**); *Saudi Arabia v. Arabian American Oil Co (Aramco)*, ILR 117, Award, 23 Aug 1958, p. 205 (**CL-0182**); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 386 (**CL-0183**); *Occidental Exploration & Production Company v. Republic of Ecuador*, [2005] EWHC 774 (Comm), para. 85 (**CL-0184**); and *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, para. 263, footnote 382, para. 264 (**CL-0090**).

[124] Rejoinder on Preliminary Objections, paras. 126-127.

[125] Rejoinder on Preliminary Objections, para. 131.

incompatibility.[126] The Claimant submits that the correct approach in assessing the same-subject-matter requirement is to determine the scope of the two relevant treaties.[127]

111. The Respondent argues that the Tribunal in *EURAM* was addressing Article 59 and not Article 30 VCLT, but the Claimant explains that the *EURAM* Tribunal also applied a two-stage analysis in relation to Article 30, and that both provisions share a common conceptual ground.[128]

112. The Respondent also relies on the work of the ILC. However, according to the Claimant, the Respondent only provides a selective account of it. The Claimant's position is that, for the ILC, the question is whether the treaties "are linked institutionally and […] part of the same concerted effort" and, when they are not, "the emphasis should be on guaranteeing the rights set up in the relevant conventions." The ILC further considers that "[i]n international law, there is a strong presumption against normative conflict."[129]

b. The Conditions of Article 30 VCLT are Not Met

113. The Claimant contends that the Respondent fails to show that the conditions of Article 30 VCLT are met as (i) the BIT and the EU Treaties do not share the same subject matter;

[126] Rejoinder on Preliminary Objections, paras. 132-140, relying, among others, on *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 May 2021, para. 641 (**CL-0087**); *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, para. 587 (**CL-0119**); *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany) v. The Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020, para. 350 (**CL-0115**); *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, para. 175 (**CL-0127**); *Magyar Farming Company Ltd, Kintyre Kft and Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, para. 191 (**CL-0098**); *Renergy S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, para. 388 (**CL-0120**); *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, para. 543 (**CL-0105**); Counter-Memorial on Preliminary Objections, paras. 82-83.

[127] Counter-Memorial on Preliminary Objections, paras. 90-91, relying on *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, para. 172 (**CL-0127**).

[128] Rejoinder on Preliminary Objections, paras. 141-142, relying on *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, para. 267 (**CL-0127**).

[129] Rejoinder on Preliminary Objections, paras. 144-146, relying on the Report of the Study Group of the ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, paras. 37, 255, 323 (**RL-0033**); Counter-Memorial on Preliminary Objections, paras. 84-85.

and, even if they did, (ii) there would be no incompatibility within the meaning of this provision.[130]

c. The BIT and the EU Treaties Do Not Share the Same Subject Matter

114. The Claimant explains that the BIT and the EU Treaties do not share the same subject matter because:

a. The objectives of the BIT and the EU Treaties are different, as the BIT deals with "*the fostering of international flows of investment by protecting the rights of the investors once the investment is made*", whereas the objectives of the EU are multi-faceted;[131]

b. The scope and focus of the BIT and the EU Treaties are not the same, with the BIT focusing on the period after the investment has been made, actively encouraging investments, and providing protection regardless of the link to EU law, and EU law focusing on the pre-establishment period, removing discouraging measures, and not applying to measures that have no link to EU law. As a result, "*State acts which are the cause of action in treaty cases could not be the basis for EU law claims and vice versa*";[132]

c. The State responsibility rules governing the BIT and EU law are not the same: (i) BIT investors are not required to show a "serious" breach of international law, as is the case for State liability in EU law; and EU law provides no equivalent protection against (ii) the conduct of persons or entities exercising elements of governmental authority, and conduct directed or controlled by State; (iii) breaches arising from a composite act; or (iv) any act or omission of a host State which has an impact on a foreign investor and their investment;[133]

d. The substantive protections under the BIT and EU Treaties are not the same: (i) EU law contains no MFN clause, and the fact that the principle of non-discrimination and the MFN clause may have the same rationale does not mean that they afford the same protection; (ii) there is nothing as specific as the FPS standard in EU law, and the fact that EU courts are obliged to apply EU law does not mean that EU law provides equivalent protection: (iii) FET provides wider protection in investment treaties than those available under EU Law, and the Respondent has not cited case law giving effect to the concept of legitimate expectations in circumstances similar

[130] Rejoinder on Preliminary Objections, para. 148.

[131] Rejoinder on Preliminary Objections, para. 149(i), paras. 151-154; Counter-Memorial on Preliminary Objections, paras. 94-96.

[132] Rejoinder on Preliminary Objections, para. 149(ii), paras. 155-164; Counter-Memorial on Preliminary Objections, para. 97.

[133] Rejoinder on Preliminary Objections, para. 149(iii), paras. 165-166; Counter-Memorial on Preliminary Objections, para. 98.

to those at issue in BIT cases, or addressed all other FET sub-standards, or the fact that " *FET entitles investors to a remedy for any degree of interference by the host State*", or the fact that EU law does not protect against measures which have no link to EU law, malicious misapplication of national law, or creeping FET breaches; (iv) the protection against expropriations afforded by BITs is far wider than that afforded by EU law, e.g., EU law does not provide protection where there is no link to EU law, or in cases of creeping expropriation, and the Respondent's reference to Article 17 of the CFR overlooks that this rule envisions fair compensation, whereas the BIT provides for prompt and adequate compensation. The duty to make full reparation for unlawful expropriations further distinguishes the BIT from EU law;[134]

e. The procedural rights under the BIT and the EU Treaties are not the same. The Claimant explains that the cause of action in this case is the Respondent's breach of the Claimant's treaty rights, not EU rights, and that vindicating treaty rights before an ICSID tribunal is not the same as vindicating those rights before the host State courts. According to the Claimant, the ability to enforce treaty rights outside the host State's judicial system is fundamental, and the concept of "*State liability for damages if EU law is breached*" is different from BIT arbitration as (i) it must be brought before the national courts of a host State; and (ii) it requires a "serious" breach of EU law.[135]

115. According to the Claimant, the Respondent's argument (based on the January 2019 Declaration and the Termination Treaty) that France and the Czech Republic agree on the subject-matter identity of the BIT and the EU Treaties is unavailing, as those instruments do not address the same-subject-matter issue and "are not directed to interpret or apply BITs as a matter of international law." The Claimant contends that the *BayWa* Tribunal held that EU law and the ECT do not relate to the same subject matter, and the *Green Power* Tribunal, which reasoning has been dismissed by ICSID Tribunals, was careful to limit its reasoning to the non-ICSID context of an SCC tribunal seated in Stockholm. According to the Claimant, and as uniformly concluded by Tribunals, it is also incorrect to say that *Achmea* decided on the same-subject-matter question, or that EU law enjoys superiority in all circumstances.[136]

[134] Rejoinder on Preliminary Objections, para. 149(iv), paras. 167-168; Counter-Memorial on Preliminary Objections, para. 99.

[135] Rejoinder on Preliminary Objections, para. 149(v), paras. 169-184; Counter-Memorial on Preliminary Objections, paras. 100-105.

[136] Rejoinder on Preliminary Objections, paras. 185-193, relying on *BayWA r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB 15/16, Decision on Jurisdiction, Liability and

d. The Incompatibility Element Is Not Met

116. The Claimant contends that the incompatibility analysis of the Respondent glosses over the fact that there is a presumption against normative conflict.[137] The Claimant argues that the incompatibility element of the analysis is not met, and that the Respondent's reliance on statements made by "stakeholders" do not bear upon the jurisdiction of ICSID Tribunals.[138]

117. The Claimant argues that the Respondent relies on incorrect assumptions when it contends that *Achmea* and *PL Holdings* establish that consent to ICSID arbitration is incompatible with the EU Treaties. In particular: (i) this ICSID Tribunal does not derive its authority from the EU Treaties, nor does EU law apply to issues of jurisdiction: (ii) this is not a dispute about EU law and it is not concerned about the enforcement of EU law rights; and (iii) EU law does not compel the conclusion that Articles 267 and 344 TFEU prohibit ICSID arbitration in all circumstances as (a) the CJEU did not extend its rulings to ICSID arbitrations and therefore a narrower interpretation is to be preferred in line with the presumption against normative conflict in international law, considering the uniform interpretation by international tribunals that there is no incompatible conflict, and (b) consent to ICSID arbitration brings into operation a multilateral treaty creating a distinct legal order of international law with features such a self-contained regime, and a duty to comply that is owed to all ICSID Contracting States.[139] According to the Claimant, the

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Directions on Quantum, 2 December 2019, paras. 271-273 (**CL-0152**); and *Green Power K/S and SCE Solar Don Benito APS v. The Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, para. 161 (**RL-0119**), and relying, among others, on *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Respondent's Second Request for Reconsideration, 19 August 2022, paras. 41, 45 (**CL-0190**); *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 May 2021, para. 594, 616 (**CL-0087**); *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 para. 131 (**CL-0160**); *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "*Intra-EU*" Jurisdictional Objection, 25 February 2019, paras. 178 and 194 (**CL-0099**); and *Fynerdale Holdings B.V. v. The Czech Republic*, PCA Case No. 2018-18, Award, 29 April 2021, para. 278 (**CL-0091**); Counter-Memorial on Preliminary Objections, paras. 106-110, relying, among others, on *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 May 2021, paras. 573, 574 and 578 (**CL-0087**); *Ioan Micula, Viorel Micula and others v. Romania (II)*, ICSID Case No. ARB/14/29, Award, 5 March 2020, para. 286 (**CL-0140**).

[137] Counter-Memorial on Preliminary Objections, para.114.

[138] Rejoinder on Preliminary Objections, paras. 194-195.

[139] Rejoinder on Preliminary Objections, paras. 196-214, relying, among others, on *Magyar Farming Company Ltd, Kintyre Kft and Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, para. 246 (**CL-0098**); *Spółdzielnia Pracy Muszynianka v. The Slovak Republic*, PCA Case No. 2017-08, Award,7 October 2020, para. 256 (**CL-0090**); *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU

Article 267 system does not confer on the CJEU global jurisdiction, or preclude the application of EU law outside the judicial framework of the EU or impede investors from vindicating their rights under a BIT.[140] Any conflict is between the EU Treaties and the ICSID Convention.[141]

118. Even if the CJEU decisions were to extend to ICSID, the Claimant contends that they would only be authoritative as a matter of EU law, as the CJEU only has authority within the EU legal order.[142]

119. As for the EU principle of mutual trust, the Claimant contend that the BIT does not preclude investors from invoking the jurisdiction of the host State courts, and that the Respondent could have terminated the BIT or carved out intra-EU disputes under Article 25(4) of the ICSID Convention if it believed that this principle required mandatory submission to national courts.[143]

(3) The Tribunal Must Exercise Its Jurisdiction

120. The Claimant disagrees with the Respondent's argument that the Tribunal should not exercise jurisdiction "out of comity", and its "inability to produce an enforceable award".[144]

Objection, 14 May 2021, paras. 651, 653-654 (**CL-0087**); Counter-Memorial on Preliminary Objections, para. 115-123.

[140] Counter-Memorial on Preliminary Objections, para. 127, relying on *Magyar Farming Company Ltd, Kintyre Kft and Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, para. 246 (**CL-0098**).

[141] Counter-Memorial on Preliminary Objections, para. 116.

[142] Rejoinder on Preliminary Objections, paras. 215-218, relying, among others, on *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID, Case No. ARB/17/34, Decision on the Respondent's Jurisdictional Objections, 30 September 2020, para. 220 (**CL-0104**); *Magyar Farming Company Ltd, Kintyre Kft and Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, para. 207 (**CL-0098**); *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, para. 211 (**CL-0103**); *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, para. 366 (**CL-0114**) *Ioan Micula, Viorel Micula and others v. Romania (II)*, ICSID Case No. ARB/14/29, Award, 5 March 2020 (**CL-0140**); *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID, Case No. ARB/17/34, Decision on the Respondent's Jurisdictional Objections, 30 September 2020, para. 220 (**CL-0104**); *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 May 2021, para. 594 (**CL-0087**).

[143] Counter-Memorial on Preliminary Objections, paras. 130-133.

[144] Rejoinder on Preliminary Objections, para. 219.

a. The Comity Argument Fails

121. According to the Claimant, the comity argument fails as it finds no support in authority, including *Mox Plant*, *A.M.F.*, and *Cameroon v United Kingdom*. The Claimant contends that it would not be unreasonable or inappropriate for the Tribunal to accept jurisdiction, and that ICSID Tribunals confirm that they have a duty to do so. The Claimant further argues that it is not "extreme" for an investor to seek to enforce its rights during the BIT's validity.[145]

b. The Unenforceability Argument Fails

122. The Claimant contends that ICSID awards are enforceable, and that the Respondent's unenforceability argument is premised on the assumption that the latter will breach its obligation to comply with the award under the ICSID Convention and on speculations as to the likely State of enforcement. The Claimant explains that a Tribunal cannot refuse jurisdiction on that basis under the ICSID Convention. To the contrary, the Tribunal has a duty to exercise the jurisdiction it has found to exist.[146]

VI. TRIBUNAL'S ANALYSIS

A. WHEN WAS ICSID ARBITRATION VALIDLY INVOKED UNDER THE BIT?

[145] Rejoinder on Preliminary Objections, paras. 220-225, relying, among others, on *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany) v. The Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020, para. 413 (**CL-0115**); *Eskosol S.p.A in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, para. 186 (**CL-0122**); Counter-Memorial on Preliminary Objections, paras. 154-167, relying, among others, on *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 May 2021, para. 654 (**CL-0087**); *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, para. 278 (**CL-0103**).

[146] Rejoinder on Preliminary Objections, paras. 226-231, relying, among others, on *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 340 (**CL-0137**); *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, para. 541 (**CL-0105**); and *Renergy S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, para. 416 (**CL-0120**); Claimants' Counter-Memorial on Preliminary Objections, paras. 169-180, relying, among others, on *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, paras. 233, 236 (**CL-0138**); and *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, para. 235 (**CL-0122**).

123. The question here is whether the Claimant's February Notice of Dispute dated 25 February 2020 amounted to valid invocation of ICSID arbitration under Article 10(2) of the BIT, either because it amounted to a request by the Claimant to submit its dispute with the Respondent to ICSID arbitration or because it manifested the Claimant's consent to ICSID arbitration capable of satisfying Article 10(2).

124. The Tribunal answers that question in the negative. Article 10(2) provides that:

> *a dispute, if it cannot be settled amicably within six months from the notification thereof by any party to such dispute, shall be submitted to [ICSID] for arbitration upon request of any of the parties to the dispute.*

125. Article 10(2) may be open to the reading that it is only "upon request" for arbitration by a party that there is a valid submission to ICSID arbitration. That is not, however, as the Tribunal understands it, the basis on which Respondent submits that the Notice of Dispute dated 25 February 2020 is inadequate to give rise to a perfected ICSID arbitration agreement.

126. Rather, the Respondent's submission is that, in order to perfect such an arbitration agreement, there had to be shown to be a "voluntary and indisputable", "clear and unambiguous" consent, and that the letter dated 25 February 2020 did not meet this test. In this connection, the Respondent cites *ConocoPhillips Petrozuata B v. Bolivarian Republic of Venezuela*[147]. The Tribunal notes, in passing, that the issue in that case was not identical with that in the present. It was whether the terms of a Venezuelan Investment Law, referring to the submission to ICSID arbitration of investment disputes constituted vis-à-vis an investor a consent by the Republic to ICSID arbitration, for the purposes of Article 25 of the ICSID Convention, rather than for the purposes of specific wording of a BIT. In the event, however, it is sufficient for the Tribunal to consider both whether ICSID arbitration was clearly and unambiguously requested and (to the extent that there may be a difference) whether the Claimant clearly and unambiguously consented to ICSID arbitration. On neither basis does the Tribunal consider that Article 10(2) of the BIT or

[147]*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, ConocoPhillips Gulf of Paria BV and ConocoPhillips Company v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, para. 254 (**R-L0100**)

ICSID arbitration was invoked in terms sufficient to give rise to a perfected agreement to arbitrate the present substantive dispute.

127. First, the Claimant's letter dated 25 February 2020 was headed "Notice of Dispute and Request for Amicable Settlement". It was written on behalf of the Claimant and three associated companies (together described as "the Investors"). Its text read "We notify you of a **dispute**..." said to have arisen from actions and omissions of or attributable to the Respondents in breach of both the France-Czechia BIT and an Austria-Czechia BIT dated 1 October 1991. It continued by saying that:

> *To resolve the dispute amicably as contemplated by [the two BITs] the Investors serve Czechia this notice of dispute and request for amicable settlement. Unless the dispute is settled amicably within the there-prescribed period, the Investors intend to commence* ***investment arbitration*** *proceedings under the respective BITs.*

128. At the end of the letter, the Investors repeated their will to settle the dispute amicably, but ended:

> *Should the Government of Czechia not be prepared to engage in amicable discussions, the Investors would be forced to resort to the dispute settlement mechanism established under the BITs, six months after Czechia's receipt of this notice, i.e. on [24] July 2020.*

129. For legal purposes, the letter dated 25 February 2020, on its proper construction, did no more than give notice of the dispute and call for an attempt at amicable settlement. Its statements regarding arbitration were, in contrast, couched only in terms of present intention and of conditional warnings regarding future conduct. It was only after six months that the Claimant on 26 August 2020 made its actual request for arbitration or indicated unambiguously any consent to arbitrate the then also still unresolved dispute. It is not without note that this was only served by the Claimant, not the other three Investors, and only under the France-Czechia BIT. The fact that the letter dated 25 February 2020 was couched only in terms of intention and warning allowed for this.

130. The Tribunal is therefore satisfied that, whether the question posed is whether the Claimant requested ICSID arbitration or is whether it gave clear and unambiguous consent to ICSID

arbitration under the BIT, on neither basis can it be said that the Claimant did this by its 25 February 2020 letter or until 26 August 2020.

B. THE TRIBUNAL'S JURISDICTION

131. The Tribunal turns on this basis to the central issues regarding its jurisdiction. Under ICSID Article 41(1), the Tribunal "shall be the judge of its own competence".

132. The Respondent, in their oral submissions, started with the question whether the Termination Agreement had the effect retrospectively of invalidating any prior consent or agreement for the submission of the substantive dispute to arbitration. Chronologically, however, it is the Respondent's other way of putting their submissions that comes first, namely that the principle established by Case C-264/16 *Achmea BV v. Slovak Republic* and subsequent cases precludes the existence of any valid consent to ICSID arbitration. The Tribunal will start with that way in which the Respondent's case is put.

(1) The *Achmea*

133. *Achmea* concerned an UNCITRAL arbitration claim made by a Dutch investor against Slovakia under a BIT between the Netherlands and Slovakia. The tribunal chose to sit in Frankfurt am Main, making the seat of the arbitration German. The tribunal rejected an objection to its jurisdiction, and made an award against Slovakia, which brought an action to set aside the award. A reference was made by the German Federal Court of Justice on the question whether the arbitration clause in the BIT was consistent with EU law.

134. The CJEU held that the arbitration clause was not consistent with EU law. More particularly, it said in the *dispositif*, that:

> *Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*

135. Article 267 of the TFEU (essentially reproducing Article 177 EEC Treaty and Article 234 TEC) reads:

> *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
>
> *(a) the interpretation of the Treaties;*
>
> *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.*

136. Article 344 TFEU (essentially reproducing Article 219 EEC Treaty and Article 292 TEC) reads:

> *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.*

137. The detailed reasoning with reference to Articles 267 and 344 TFEU leading the CJEU to the conclusion expressed in the *dispositif* in *Achmea* has been usefully summarised by a tribunal consisting of Lord Collins of Mapesbury, Daniel P. Haigh KC and Daniel Bethlehem KC in *Cavalum SGPS, S.A. v. Kingdom of Spain*[148], in terms which the present Tribunal can for present purposes gratefully adopt:

> *343. The crucial steps in the legal reasoning were:*
>
> *(1) An international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the court.*
>
> *(2) That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement*

[148] *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020 (**CL-0114**).

other than those provided for in the Treaties: CJEU Opinion 2/13 (European Convention on Human Rights).

(3) The autonomy of EU law with respect both to the law of the member states and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law.

(4) EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of provisions which are applicable to their nationals and to the Member States themselves.

(5) Those characteristics given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other: Opinion 2/13, paras 165-167.

(6) The Member States are obliged, by reason, inter alia, of the principle of sincere co-operation, to ensure the application of and respect for EU law, and to take for those purposes any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU: Opinion 2/13, paras 168 and 173.

(7) In order to ensure that the specific characteristics and the autonomy of the EU legal order, it for the national courts and tribunals and the CJEU to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law.

(8) The EU judicial system has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as the particular nature of the law established by the Treaties: Opinion 2/13, para.176.

344. The application of those principles involved the following steps:

(1) Under the terms of BIT Article 8.6, the arbitral tribunal was called on to rule on possible infringements of the BIT, but in order to do so it was obliged to take account in particular of the law in force of the Contracting Party concerned and other relevant agreements between the Contracting Parties, and might therefore be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.

(2) The arbitral tribunal was not part of the judicial system of the Netherlands or Slovakia, and it was the exceptional nature of the tribunal's jurisdiction

compared with that of the courts of the two Member States that was one of the principal reasons for the existence of Article 8 of the BIT.

(3) Consequently, it could not be classified as a court or tribunal 'or a Member State' within the meaning of Article 267 TFEU.

(4) Under Article 8.7 of the BIT, the decision of the arbitral tribunal was final, and, pursuant to Article 8.5 of the BIT, the arbitral tribunal was to determine its own procedure applying the UNCITRAL arbitration rules and was itself to choose its seat and consequently the law applicable to the procedure governing judicial review of the validity of the award.

(5) Because the arbitral tribunal chose to sit in Frankfurt am Main, German law was applicable to the procedure governing judicial review of the validity of the arbitral award, but the review was a limited review, concerning in particular the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the arbitral award.

(6) By contrast with commercial arbitration, where the requirements of efficient arbitration proceedings justify limited review of arbitral awards by the courts of the Member States, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference for a preliminary ruling, arbitration proceedings under Article 8 of the BIT derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies in the fields covered by EU law, disputes which may concern the application or interpretation of EU law.

(7) By concluding the BIT, the Member States established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensured the full effectiveness of EU law, even though they might concern the interpretation or application of that law.

138. Article 8(2) of the BIT in *Achmea* provided that each contracting State "hereby consents to submit a dispute [between such State and an investor of the other State concerning an investment] to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months". Article 8(6) provided that the tribunal "shall decide on the basis of the law, taking into account", inter alia, "the law in force of the Contracting Party concerned" and "the general principles of international law". Article 8(6) appears to

address the applicable substantive law, rather than any issue arising as to whether there had been a valid consent by a State accepted by the investor.

a. The scope of the Achmea principle under EU law

139. Following *Achmea*, some investment tribunals saw, in the reference in the *dispositif* in *Achmea* to EU law precluding a provision in an international agreement concluded between Member States, "such as Article 8", the possibility of a different outcome in situations not on all fours with *Achmea*, for example in an ICSID arbitration under a BIT or in an arbitration under the ECT. The CJEU has however now made clear, in the present Tribunal's view, that it was speaking generally and that the principle in the *Achmea* extends to both those situations.

140. In its *Opinion 1/17* (*the CETA Opinion*)[149], the CJEU stressed that, although the principle of mutual trust between Member States was not engaged, the need to preserve the autonomy of the EU legal order still applied in relation to the creation of an international CETA Tribunal charged with the resolution of disputes between EU investors and a third State, Canada; but (in summary) that this need was satisfied by provisions which excluded any jurisdiction on the part of the proposed CETA Tribunal to interpret or apply rules of EU law other the provisions of CETA. In Case C-109/20 *PL Holdings Sarl v. Poland*[150] the CJEU held that the principle in the *Achmea* also precluded a EU Member State's tacit acceptance of an investor's request for arbitration under an intra-EU BIT from giving rise to a valid ad hoc arbitration agreement. In Case C-741/19 *Komstroy LLC v. Republic of Moldova*[151] the CJEU held that the provision in the ECT (to which the EU itself was party) permitting an investor to submit any dispute to ICSID, UNCITRAL or SCC arbitration was equally covered by the principle in *Achmea*, when the investor was based in one EU Member State and the respondent was another Member State.

[149] *Opinion 1/17 of the Court*, CJEU, 30 April 2019 (**CL-0134**).

[150] *PL Holdings Sàrl. V. Republiken Polen*, CJEU, Case C-109/20, Judgment of the Court (Grand Chamber), 26 October 2021 (**RL-0011**).

[151] *Komstroy LLC. v. Republic of Moldova*, CJEU, Case C-741/19, Judgment of the Court (Grand Chamber), 2 September 2021, paras. 47-60 (**RL-0012**).

141. More particularly, the CJEU reasoned in *Komstroy*:

> *62. …[T]he exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed.*
>
> *63. Such a possibility would, as the Court held in the case giving rise to the judgment of 6 March 2018, Achmea (C-284/16, EU:C:2018:158, paragraph 58) and as the Advocate General observed in essence in point 83 of his Opinion, call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties, ensured in particular by the preliminary ruling procedure provided for in Article 267 TFEU.*
>
> *64. It should be noted in that regard that, despite the multilateral nature of the international agreement of which it forms part, a provision such as Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the bilateral investment treaty at issue in the case giving rise to the judgment of 6 March 2018, Achmea (C-284/16,EU:C:2018:158, paragraph 58).*
>
> *65. It follows that, although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States who are also Contracting Parties to that treaty as regards investments made by the latter in those Member States, preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves.*
>
> *66. In the light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.*

142. The present Tribunal agrees in these circumstances with the conclusion expressed by the tribunal in *AS PNB Banka v. Republic of Latvia*[152] in an arbitration under the Latvia/United Kingdom BIT dated 1994, Article 8 of which provided simply for ICSID arbitration of any dispute arising. The tribunal said:

> *503. With respect to the learned tribunals that have distinguished Achmea, this Tribunal is of the view that the constitutional principles actually applied by the*

[152] *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 May 2021 (**CL-0087**).

> *CJEU in that case did not turn on the lex arbitri under the UNCITRAL Rules and the applicable law provision in the BIT there under consideration. The principle of autonomy, specifically the protection of the preliminary ruling procedure by the CJEU, is the fundamental basis of the decision. In this respect, Article 8 of the BIT answers the description of a provision "such as" the ISDS clause in Achmea.*
>
> *504. As a matter of EU law, on the materials before the Tribunal, Achmea is not distinguishable. What the effect of the decision is on the law applicable to this Tribunal's jurisdiction is a distinct matter. The Tribunal's jurisdiction does not derive from EU law.*

143. *Achmea*, *PL Holdings* and *Komstroy* are all judgments reached by the EU's highest court in performance of its role under Article 267 TFEU. They establish the EU legal position in a manner which is binding under EU law and on any court in an EU member State charged with the application of EU law. Further, the legal position which they establish in EU law is one which, under EU law and in accordance with ordinary principles governing judicial interpretation, must be taken to have reflected EU law from the time when Articles 267 and 344 TFEU and their essentially identical predecessors were first agreed by Member States: see *PL Holdings v. Poland*[153]. In that case the CJEU expressly refused to exercise the power, which it has in "quite exceptional" cases, to limit the temporal effects of its judgment, so as not to affect previously concluded arbitration agreements.

144. Reference was made by the Respondent to the suggested endorsement of the significance of the *Achmea* by the European Commission[154] and all EU Member States, by two Declarations of 15 and 16 January 2019.[155] The Declarations recited the CJEU's decision in *Achmea* that arbitration provisions in intra-EU BITs were "precluded" under EU law. The first, signed by the majority of Member States continued with a "preambular paragraph," reading:

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[153] *Republiken Polen v. PL Holdings Sàrl., CJEU*, Case C-109/20, Judgment of the Court (Grand Chamber), 26 October 2021 paras. 58-69 (**RL-0011**).

[154] In its Communication on Intra-EU Investment; European Commission, *Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment*, COM(2018) 547 final, 19 July 2018 (**RL-0003**), saying that the CJEU had in *Achmea* confirmed that intra-EU BIT arbitration clauses were "unlawful" and that, following this, "*Commission has intensified its dialogue with all Member States, calling on them to take action to terminate the intra-EU BITs, given their incontestable incompatibility with EU law*".

[155] Request for Bifurcation, paras. 32-36.

> *Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable […]. An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.*

145. The second Declaration contained a sentence basically the same as the second sentence of this "preambular paragraph" in the first Declaration. By the operative parts of the Declarations, Member States then undertook to inform investment arbitration tribunals "about the legal consequences of the *Achmea*" and stated in paragraph 5 that:

> *In the light of the Achmea judgment, Member States will terminate all bilateral investment treaties concluded between them by means or a plurilateral treaty or, where that is mutually recognized as more expedient, bilaterally.*

146. This statement was combined with undertakings to make best efforts to ratify, approve or accept such termination treaty no later than 6 December 2019, though the Termination Treaty was in fact only concluded on 29 May 2020, and only came into effect as regards France on 28 August 2021 and as regards Czechia on 10 December 2021.

147. Having set the scene by the recitals, the operative part of the Declarations therefore recognized the need for formal termination of existing intra-EU BITs. As the tribunal said in *United Utilities (Tallinn) B.V. v Estonia*[156], this "*implies that the BIT remains in force and that its [provision offering to arbitrate] constitutes a valid offer to arbitrate, which Claimants accepted*". Similarly, and more recently, the tribunal said in *Fynerdale Holdings B.V. v. Czech Republic*[157]:

> *In the view of the Tribunal, paragraph 5 of the operative part of the Declaration indicates that the statement in the preambular paragraph quoted above is of a political and not a legally binding nature. It reflects the view of the Member States, but as indicated in paragraph 5 of that Declaration, the Member States are aware and accept the legal fact that termination of an international law-based treaty can*

[156] *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, para.559 (**CL- 0105)**.

[157] *Fynerdale Holdings B.V. v. The Czech Republic*, PCA Case No. 2018-18, Award, 29 April 2021, para. 290 (**CL-0091**).

> *only been achieved by a consent-based agreement amongst the parties of that treaty concerned.*

148. The Tribunal takes the same view. In so far as the Commission Communication and the Declarations recite the effect under EU law of the *Achmea*, they carry the legal analysis no further. In so far as they related to the existing BITs with their arbitration provisions, they expressly contemplated that these continued in existence and required a Treaty to determine.

b. The Tribunal's role and position

149. The Tribunal is not a court, still less a court of an EU Member State, and, unlike the tribunals in *Achmea* and *Komstroy*, it is not seated in any EU Member State. As an ICSID tribunal, it is commonly regarded as having no national seat at all, though, if any connection with any State were to be sought, it would be with Washington DC, the headquarters of ICSID. Further it is clear that, as a matter of general international law and subject to the impact of EU law, the Tribunal has both come into existence under, and is charged with the resolution of the parties' dispute under, the terms of the BIT to which both parties have subscribed by their agreement to arbitrate, and which are subject to international law. It has come into existence as a result of the combined operation of the mutual consent of the parties to the present dispute and of Article 25 of the ICSID Convention.

150. Article 25 of the ICSID Convention provides:

> *(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. […]*
>
> *(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre…*

151. For Article 25 to confer jurisdiction on an ICSID tribunal in respect of any dispute, the parties to the dispute must therefore have consented in writing to submit the dispute to the

jurisdiction of ICSID. Such consent is, prima facie, found in the case of the present arbitration in the form of the standing offer made by Czechia by the BIT of ICSID arbitration of disputes under the BIT, and its acceptance by the Claimant by its Notice dated 26 August 2020.

152. The principle in the *Achmea* is relied upon as negating the validity of any such standing offer by the Respondent, and so precluding any valid acceptance by the Claimant. In its decision in *Cavalum v. Kingdom of Spain* [158], the tribunal said:

> *368. The Achmea ruling says that the agreement to arbitrate is precluded, not that it is void, or incompatible with the TEC/TFEU, and consequently the ruling leaves open the question of the effect of preclusion, and in particular whether its effect is that any such provision ceased to have effect, or whether Member States should modify or abrogate the BITs between them.*

153. In another, still more recent award under the ECT, *Renergy v. Kingdom of Spain*[159], the tribunal raised the same point, namely whether, even under EU law, the *Achmea* principle voids any consent, saying:

> *356. In the Tribunal's view, the Achmea and Komstroy Judgments thus mean that from an internal EU law perspective, EU Member States should not have entered into the ECT in its current form and may even mean that EU Member States should try to amend their obligations thereunder (an interpretation of the necessary process that also finds an expression in the existence and content of the EU Member States Declarations). However, it is doubtful to this Tribunal whether, in such a scenario, the Achmea or Komstroy Judgment, from an internal EU law perspective, could mean that the obligations of EU Member States under the ECT are void, invalidated, or could not have been validly entered into, as the Respondent seems to argue. It is furthermore uncertain whether the CJEU assumes that its judgments do have, or could have, such an effect.*
>
> *357. Therefore, it is not apparent whether EU law, as interpreted by the Achmea and Komstroy Judgments, from an EU-internal point of view, has the legal consequences for an ECT Tribunal that the Respondent attributes to it.*

154. The present Tribunal does not find it necessary or appropriate to consider this point further, particularly because it was not developed in submissions before it. The Tribunal will

[158] *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, (**CL-0114**).

[159] *Renergy S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022 (**CL-0120**).

proceed on the basis that, under EU law, the effect of *Achmea* would be to prevent or invalidate any consent to ICSID arbitration that could otherwise have existed by virtue of Czechia's standing offer and the Claimant's Notice dated 26 August 2020.

c. Is the Achmea principle part of international law which it is for the Tribunal to apply?

155. On this basis, the question arising is how far EU law is part of the international law which the Tribunal has to apply in order to decide whether the parties validly consented to ICSID arbitration under Article 8 of the BIT and for the purposes of Article 25(1) of the ICSID Convention. This question has been addressed by a number of investment tribunals. In *Vattenfall AB v. Federal Republic of Germany*[160] the tribunal agreed with the view expressed by an earlier tribunal in *Electrabel v. Hungary*[161] that "EU law is international law because it is rooted in international treaties," but went on:

> *It would be more exact to say that the corpus of EU law derives from treaties that are themselves a part of, and governed by, international law, and contains other rules that are applicable on the plane of international law, while also containing rules that operate only within the internal legal order of the EU and, at least arguably, are not a part of international law; …*

156. In *Cavalum v. Spain*[162] the tribunal cited these two awards, but went on:

> *But in the view of this Tribunal, the point that EU law (or most of it) is international law, or that the rulings of the CJEU are part of international law is not in any sense conclusive. The question still remains whether EU law and the rulings of the CJEU are part of the applicable international law.*

157. The tribunal then turned to examine EU law, and said:

> *363. Although phrased in terms of interpretation of two provisions of the TFEU, it is hard to read the Achmea ruling as a normal case of treaty interpretation, since Article 267 is simply the latest iteration (originally in Article 177 of the EEC Treaty) of the power (and in some cases the duty) of national courts to make references to the CJEU, and Article 344 (originally Article 219 of the EEC Treaty)*

[160] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para.146 (**CL-0160**).

[161] *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012.

[162] *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, para. 359 (**CL-0114**).

> *simply prevents Member States from submitting disputes concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.*
>
> *364. The residual remedy for a national of an EU Member State who wishes to complain of a breach by an EU Member State of the relevant provisions of the ECT is to commence an ICSID arbitration against that State. The only time at which national courts will normally be engaged in this process is at the time of enforcement.*
>
> *365. It is impossible to see how, on the face of Articles 267 and 344 TFEU, and in accordance with normal rules of treaty interpretation, the effect of Article 26.3 ECT is to prevent national courts from making references to the CJEU or to allow Member States to submit disputes concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the EU Treaties.*
>
> *366. The Achmea ruling is a decision on the constitutional order of the EU in support of the policy of European integration rather than an orthodox application of the rules of treaty interpretation. As such the ruling of the CJEU is entitled to the greatest respect from an international arbitral tribunal. But such a tribunal is not in any sense bound by the ruling. Nor, consequently, can the Tribunal find that on any normal basis of interpretation under customary international law or the VCLT that the dispute resolution provisions of the ECT are incompatible with Articles 267 and 344 TFEU.*
>
> *367. It follows that, in the view of the Tribunal, there is no conflict between Article 26.1-3 ECT and Articles 267 and 344 TFEU such as to bring the principles reflected in Articles 30 or 41 VCLT into play. …..*

158. In *AS PNB Banka* the tribunal found it necessary to consider whether the *Achmea* principles "operate only within the internal legal order of the EU"[163]. Its answer was that:

> *525. The Tribunal does not accept that CJEU decisions are international law of the same character as the Treaties. It accepts the formulation in Electrabel, endorsed in Vattenfall, that CJEU decisions are "applicable on the plane of international law". This distinction is of significance for the application of conflict rules, as we have to consider a conflict between a treaty and judicial decisions.*
>
> *526. As we have noted, CJEU decisions are not based on principles of interpretation, codified in the VCLT, applicable to treaties, but on a teleological approach applicable to constitutional law. As further discussed below, we do not identify a conflict between the BIT and the EU Treaties. The conflict arises from*

[163] *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 May 2021, para. 524 (**CL-0087**).

> *an incompatibility between the BIT and the CJEU's interpretation of those Treaties by application of the teleological approach.*

159. Most recently, the tribunal in *Renergy Sarl v. Kingdom of Spain*[164] drew a similar distinction, in the context of the ECT, between the international law which governed its jurisdiction and EU law, saying that:

> *…, even assuming that those judgments (i.e. in Achmea and subsequent caselaw), from an EU-law perspective, did purport to directly void or rewrite a clause in an international agreement of one of its Member States, the question that is relevant for this Tribunal is not one of EU-internal law. The question that is relevant for this Tribunal is whether, from the viewpoint of the ECT, i.e. the perspective that matters to this Tribunal, in a decision on jurisdiction under the ECT, there are points of contact with EU law through which the EU-internal reading of the law and the ECT could become relevant to this ECT.*

160. The same tribunal also, highlighted the discrepancy between the CJEU's approach to interpretation and that required by the VCLT and general international law, saying, at [370] that "neither the ordinary meaning of the terms used by the ECT, nor the systematic analysis of its provisions, offer a basis for the Tribunal to conclude that the ECT is to be construed as removing intra-EU claims from ECT dispute settlement."[165]

161. The approach taken by the three tribunals in *Cavalum*, *AS PNB* and *Renergy* treats the interpretation put on the EU Treaties by the CJEU in *Achmea* and subsequent caselaw as involving or creating no more than a sub-branch of international law. This sub-branch was not bound to generate different legal principles from those applicable in general international law. However, according to the analysis adopted in these three tribunal authorities, this is what the CJEU has in fact done; it has developed wide-ranging constitutional principles regarding the autonomy, primacy and exclusivity of EU law and the EU legal system, which Member States are bound to preserve to the exclusion of any other arrangements for dispute resolution between Member States or between investors in one Member State against another Member State. Further, these principles have not been developed by reference to ordinary treaty methods of interpretation crystallised in the VCLT, but by a teleological approach which is particular to EU law. In these

[164] *Renergy S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022**,** para. 358 (**CL-0120**).
[165] Renergy S.à.r.l v. Kingdom of Spain, ICSID Case No. ARB/14/18, Award, 6 May 2022, para. 370 (**CL-0120**)

circumstances, the Claimant submits that the Tribunal, which is charged with the application of international law, is not bound to adopt the reasoning or result that would follow under the special approach developed by the CJEU under EU law for EU constitutional or internal purposes.

162. In support of this analysis, the novelty of the interpretational approach adopted by the CJEU in relation to Articles 267 and 344 may be said to be confirmed, by recalling that the European Communities, predecessor to the EU, were party to the ECT when signed in 1994 and have been since it came into force in April 1998. It cannot have been thought then that the ECT was or would be held inconsistent with the EU Treaties. This point was noted by the tribunal in *Eskosol S.p.A. v. Italian Republic*[166] with reference to similar observations in *Electrabel*. Further, when the predecessors to Articles 267 and 344 TFEU were agreed and when Czechia joined France and other Member States in 2004, the outcome arrived at in the *Achmea* was clearly never envisaged. As Advocate General Wathelet said in his Opinion[167] in that case:

> *39. The Commission's argument [challenging intra-EU BIT arbitration clauses] is also striking.*
>
> *40. For a very long time, the argument of the EU institutions, including the Commission, was that, far from being incompatible with EU law, BITs were instruments necessary to prepare for the accession to the Union of the countries of Central and Eastern Europe. The Association Agreements between the Union and candidate countries also contained provisions for the conclusion of BITs between Member States and candidate countries…*

163. The Respondent in response to the Claimant's submissions and analysis, draws attention to other investment arbitration decisions, notably *BayWa R.E. Renewable Energy GmbH v. BayWa R.E. Asset Holding GmbH, Green Power Partners K/S and anor v. Kingdom of*

[166] *Eskosol S.p.A in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, para. 106 (**CL-0122**).

[167] *Slowakische Republik v. Achmea BV*, Case C-284/16, Opinion of Advocate General Wathelet, 19 September 2017 (**CL-0132**)

Spain[168] and the statement of dissent by Professor Marcelo Kohen in *Adamakopoulos v. Republic of Greece*[169].

164. In *BayWa*[170], the tribunal was concerned with an ICSID arbitration under the ECT, and said that:

> *For these reasons, the Tribunal, if it were free to do so, would hold that under international law the TFEU did not modify inter the provisions of the ECT, either as to substance (Part III, notably Article 10) or as to jurisdiction (Part V, notably Article 26). The question is whether the CJEU's decision in Achmea compels the contrary conclusion. For just as the European treaties are part of international law, so the CJEU, which exercises jurisdiction as between EU Member States, is an international court whose decisions are binding on those states inter se. International law allows the states parties to a regime treaty to establish their own international courts with jurisdiction over and authority to bind the Member States on issues of international law affecting them. It also allows those States to establish the priority of the regime treaty over other sources of international law, at least so long as peremptory norms are not implicated.*

165. After quoting the *dispositif*[171] in *Achmea*, the tribunal said at [282]:

> *282. If this dictum were to be applied to the ECT, it would authoritatively establish, as between Germany and Spain, that the TFEU modifies Article 16 of the ECT on an inter se basis.*

166. But the tribunal then went on at [282] to distinguish *Achmea* and hold it inapplicable under the ECT, for two reasons: First,

> *…. the CJEU in Achmea was considering a bilateral treaty 'concluded between Member States', not a multilateral treaty such as the ECT. Secondly, the CJEU was discussing 'an agreement which was concluded not by the EU but by Member States', whereas the ECT was concluded also by the EU and its terms are opposable to the EU.*

[168] *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022 (**RL-0119**).

[169] *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo G. Kohen, 3 February 2020 para. 38 (**RL-0014**).

[170] *BayWA r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB 15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, para. 280 (**CL-0152**).

[171] See para. 134 above.

167. Both these grounds of distinctions have, under EU law, been disapproved by the *Komstroy* judgment. In the present case, the Respondent relies upon the general statements in paragraph 280 and 282 as supporting its submission, that, leaving the ECT aside, a tribunal applying international law should treat *Achmea* as a decision by a court, set up by the parties to a "regime treaty", also applying international law and having authority "to establish the priority of the regime treaty over other sources of international law" (there being no question here of any relevant jus cogens).

168. As to *Green Power*, the arbitration there was an SCC arbitration, with a seat in Stockholm. The tribunal on that basis held that EU law was "part of the law applicable to the determination of jurisdiction" and took care to distinguish ICSID arbitrations where "the reasoning did not take into account the relevance for jurisdictional matters of the applicable law attracted by the selection of the seat in an EU Member State". [172]

169. Finally, in *Adamakopoulos*, the dissenting view of Professor Kohen proceeded on the basis that EU law was part of both the national law of Cyprus and international law, both of which were applicable law for the tribunal's purposes[173], and that *Achmea* was "an authoritative interpretation of EU Treaties and of their impact on other rules of international law, i.e. the BITs concluded by EU Member States at a time one of the parties to those treaties was not a member of the EU"[174]. Professor Kohen went on to hold that the EU Treaties as interpreted in *Achmea* dealt with the same subject-matter as, and were incompatible with, the BITs; and that they prevailed over the BITs "by virtue of the rules embodied in Article 30 of the VCLT and in Article 351 of the TFEU"[175].

170. At the times when the BIT was agreed and when the Respondent joined France as an EU State, the Tribunal is confident that no-one would have regarded the BIT or its arbitration

[172] *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, paras. 439 and 441 (**RL-0119**).

[173] *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo G. Kohen, 3 February 2020, para. 3 (**RL-0014).**

[174] *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo G. Kohen, 3 February 2020, para. 6 (**RL-0014**).

[175] *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo G. Kohen, 3 February 2020, para. 48 et seq. (**RL-0014**).

provision (Article 10) as other than valid and enforceable. As other tribunals, already cited, have observed, *Achmea* and the subsequent caselaw involve a teleological approach to interpretation, rather than a conventional application of the VCLT or its principles. The effect of this approach to interpretation of the Treaties has been to develop a closed constitutional regime, focused on the autonomy and primacy of the EU legal order and its courts, and excluding the operation of any intra-BIT system of arbitration, on the basis of a mere risk that a BIT tribunal might have to pronounce on EU law, and be unable to refer a question to an EU court.

171. Under EU law, this interpretation and effect are to be taken as having applied and existed since the predecessors of Articles 267 and 344 TFEU were first agreed. The CJEU had power but refused, under EU law, to limit the *Achmea* principle so that it would apply only prospectively. But it does not follow axiomatically that the Tribunal, applying general international law, is bound to treat the *Achmea* principle as invalidating Article 10(3) of the BIT *ab initio* or from the moment that the Respondent became an EU Member. To do so would, on the face of it, amount to a retrospective invalidation of what were and would have been regarded unquestionably as valid Treaty provisions, under ordinary principles of international law, prior to the development and recognition by the CJEU in EU law of the *Achmea* principle. That would undermine the legal security which the BIT arbitration provisions clearly intended to provide not only to States, but also to their investors.

d. Article 30 of the VCLT

172. The Respondent submits that, even if EU law doctrines of primacy and autonomy are confined to the EU legal sphere, the interpretation of the EU Treaties adopted in *Achmea* and subsequent caselaw disentitles Member States from agreeing or maintaining in force between themselves arbitration provisions such as Article 10 of the BIT; and that this brings into operation a question of priority as between successive treaties, which falls to be answered by reference to Article 30 of the VCLT. As will appear, this submission travels to a considerable extent over terrain examined under the immediately preceding head in paragraphs 155 to 171 above.

173. Article 30 VCLT provides so far as material:

> *Application of successive treaties relating to the same subject matter*
> *1. Subject to Article 103 of the Charter of the United Nations, 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.*
> *2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.*
> *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 later treaty.*
> *4. ….*

174. Czechia has at all material times been a party to the VCLT. France has not, but the Tribunal understands it to be accepted that the principles of the VCLT are to be taken to apply to France, as part of customary international law.

175. Nothing in the EU Treaties or the BIT makes Article 30(2) relevant. The Respondent relies on Article 30(3), read with Article 30(1). It is not in dispute that the BIT dating from 1990 constitutes an earlier Treaty than the EU Treaties, to which the Respondent only became party in 2004. Under the language of these Articles, two conditions exist to the application of Article 30(3): one, the existence of successive Treaties "relating to the same subject matter"; the other, incompatibility between provisions of the earlier and later Treaties, in which case Article 30(3) provides that the earlier Treaty (here the BIT) "applies only to the extent that its provisions are compatible with those of the later treaty".

176. Both the caselaw and the parties' submissions to the Tribunal have however ranged wide on the question what constitutes a "conflict" for the purposes of Article 30. The Tribunal will therefore also address observations to this question. The Respondent cites the ILC Study Group Report on *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* of 13 April 2006[176], in particular paragraph 22 in section B of its Report. The Tribunal will set out the surrounding text:

> *21. This report examines techniques to deal with conflicts (or prima facie conflicts) in the substance of international law This raises the question of what is a "conflict"? This question may be approached from two perspectives: the subject-*

[176] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006 A/CN.4/L.682. (**RL-0033**)

matter of the relevant rules or the legal subjects bound by it. Article 30 VCLT, for example, appears to adopt the former perspective. It suggests techniques for dealing with successive treaties relating to the "same subject-matter". It is sometimes suggested that this removes the applicability of article 30 when a conflict emerges for example between a trade treaty and an environmental treaty because those deal with different subjects. But this cannot be so inasmuch as the characterizations ("trade law", "environmental law") have no normative value per se. They are only informal labels that describe the instruments from the perspective of different interests or different policy objectives. Most international instruments may be described from various perspectives: a treaty dealing with trade may have significant human rights and environmental implications and vice versa. A treaty on, say, maritime transport of chemicals, relates at least to the law of the sea, environmental law, trade law, and the law of maritime transport. The characterizations have less to do with the "nature" of the instrument than the interest from which it is described. Borgen, "Resolving Treaty Conflicts", supra, note 10, pp. 603-604.

22. If conflict were to exist only between rules that deal with the "same" subject-matter, then the way a treaty is applied would become crucially dependent on how it would classify under some (presumably) pre-existing classification scheme of different subjects. But there are no such classification schemes. Everything would be in fact dependent on argumentative success in pigeon-holing legal instruments as having to do with "trade", instead of "environment", "refugee law" instead of "human rights law", "investment law" instead of "law of development". Think again about the example of maritime carriage of chemical substances. If there are no definite rules on such classification, and any classification relates to the interest from which the instrument is described, then it might be possible to avoid the appearance of conflict by what seems like a wholly arbitrary choice between what interests are relevant and what are not: from the perspective of marine insurers, say, the case would be predominantly about carriage while, from the perspective of an environmental organization, the predominant aspect of it would be environmental. The criterion of "subject-matter" leads to a reductio ad absurdum. Therefore, it cannot be decisive in the determination of whether or not there is a conflict.19 As pointed out by Vierdag in his discussion of this criterion in regard to subsequent agreements under article 30 VCLT:

> *the requirement that the instruments must relate to the same subject-matter seems to raise extremely difficult problems in theory, but may turn out not to be so very difficult in practice. If an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results, it can safely be assumed that the test of sameness is satisfied.*

23. This seems right. The criterion of "same subject-matter" seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party."

177. The Respondent relied on this analysis as indicating why Article 30(3) should be understood as focusing on inconsistency, rather than any general attempt to classify the two treaties under consideration as falling or not falling within some general category. It is however of some interest to note what the Study Group also said when it returned to the same phrase at a later stage in section E of its Report. It said:

> *253. Article 30 deals with the issue of conflict between prior and subsequent treaties. As many commentators have noted, however, it does not appear to do so very successfully. One of the problems is that the title of the article (and paragraph 1) seems to limit it to a conflict between treaties "relating to the same subject-matter". If that limitation is interpreted strictly, then it seems to lift most of the important cases - for example conflicts between environmental and trade treaties, or conflicts between human rights and humanitarian law treaties - outside its scope. However, as pointed out in section B above, this is neither a necessary nor a reasonable interpretation of the expression "same subject-matter"*
> *…*
>
> *255. As pointed out above, the test of whether two treaties deal with the 'same subject matter"' is resolved through the assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another. This "affecting" might then take place either as strictly preventing the fulfilment of the other obligation or undermining its object and purpose in one or another way. Nevertheless, it will also be argued below that the question of the relationship between two treaties cannot be resolved completely in abstraction from any institutional relationship between them. The way a WTO treaty links with a human rights treaty, for example, is not identical to the way a framework treaty on an environmental matter relates to a regional implementation instrument. It may not be possible to determine in an abstract way when two instruments deal with the "same subject-matter". But this does not mean that it would be impossible to establish an institutional connection between "chains" or clusters of treaties that are linked institutionally and that States parties envisage as part of the same concerted effort. The significance of identifying such "treaty regimes" lies in the way it seems relatively less complicated to establish a relationship between two instruments within one such regime than between two instruments across different regimes. For example, the argument from lex posterior or lex specialis seems clearly more powerful between treaties within a regime than between treaties in different regimes. In the former case, the legislative analogy seems less improper than in the case of two treaties concluded with no conscious sense that they are part of the "same project".*
>
> *256. The distinction between treaties dealing with the "same subject-matter" and treaties within the same "regime" may appear slight, but it constitutes an important practical shift of perspective. In the former case, focus is on the object that is being regulated while in the latter case, focus is on the intent of the States*

> *parties and the institutions they have established. The former is dependent on an abstract characterization of an issue as a "human rights issue", an "environmental problem" or a "trade question" - and meets with the difficulty that often many characterizations may be applied to a single problem and different actors may have an interest to characterize the problem in different ways so as ensure that their preferred rule-systems will be applied. By contrast, the notion of a "regime" points to the institutional arrangements that may have been established to link sets of treaties to each other. Treaties may of course enter into conflict both within and across regimes. To make that distinction is merely to point out that the task of settling the conflict - for example, by seeking a "mutually supportive solution" - may be much easier or more straightforward in the former than in the latter situation where at issue is often a conflict of wider objectives or values underlying the very regimes themselves.*

178. The caselaw of investment tribunals contains considerable discussion of the meaning and application of both conditions. On one approach, the "same subject matter" necessarily involves an overall comparison of the two treaties. Thus, the tribunal said in *Eskosol*[177]:

> *It is notable, moreover, that the comparators in Articles 30(1) and 30(3) are different: Article 30(1) examines the relationship between treaties as a whole (whether they "relat[e] to the same subject matter"), while Article 30(3) examines the relationship between particular provisions within such related treaties (whether they are "compatible").*

179. Similarly, the tribunal in *Spółdzielnia Pracy Muszynianka v. Slovak Republic*[178] said this:

> *232. According to certain highly qualified publicists, the term "same subject-matter" should be understood widely. However, the Tribunal concludes that this cannot be reduced to a requirement that the two treaties be potentially applicable to or govern the same set of circumstances or facts. As noted by the tribunal in EURAM:*
>
> > *'Even if two different rules deal with issues arising from the same facts, it does not necessarily mean that they have the same subject matter. This can be seen from a simple example: a treaty on environmental protection and a treaty on trade may both apply to the same factual situation but the subject matter with which they deal is quite different.'*

[177] *Eskosol S.p.A in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019 (**CL-122**)

[178] *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020 (**CL-0090**).

233. In this context, investment arbitration tribunals have held that subject matter identity of treaties is defined by the matters with which the treaty's constituent provisions deal. For instance, the Oostergetel tribunal held:

> *'The requirement [...] that the two treaties relate to the "same subject matter" has to be construed in line with the dominant view expressed in scholarly writings to the effect that two treaties can be considered to relate to the "same subject matter" only if the overall objective of these treaties is identical and they share a degree of general comparability.'*

234. In respect of the EU Treaties, investment arbitration tribunals have held that investment treaties do not share the same subject matter with the EU Treaties. The Wirtgen tribunal considered it "obvious" that intra-EU investment treaties and EU Treaties did not have identical subject matters. As noted in Marfin, the EU Treaties and BITs do not only have a different objective, but the protections afforded by the latter are not coextensive or exhausted by the former. Similarly, the Eastern Sugar tribunal had earlier observed that:

> *'[BITs provide] for fair and equitable treatment of the investor during the investor's investment in the host country, prohibits expropriation, and guarantees full protection and security and the like. The BIT[s] also provide [] for a special procedural protection in the form of arbitration between the investor state and the host state and, especially arbitration of a "mixed" or "diagonal" type between the investor and the host state, as in the present case. From the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties. Whereas general principles such as fair and equitable treatment or full security and protection of the investment are found in many international, regional or national legal systems, the investor's right arising from the BIT's dispute settlement clause to address an international arbitral tribunal independent from the host state is the best guarantee that the investment will be protected against potential undue infringements by the host state. EU law does not provide such a guarantee.'*

235. The findings in Eastern Sugar were recently stressed by the tribunal in Magyar as follows:

> *'[A]s the most evident distinction [between the EU Treaties and investment treaties], the application of [BITs] is contingent upon an investor of one State making a cross-border investment in the other State. In turn, the EU Treaties provide guarantees for nationals of the EU Member States irrespective of an investment. Due to this crucial distinction, the substantive protections afforded to a foreign investor under the Treaty are unsurprisingly not comparable to, or of the same nature as, those offered to EU nationals under the BIT. By way of an example, as the Eureko v. Slovakiatribunal observed, the protections afforded by BITs under the FET*

> *standard are not limited to the existing EU law provisions prohibiting discrimination. Similarly, while EU law may condition expropriatory takings upon public interest and fair compensation, it has not been established that it offers comparable protections to those available under the Treaty in case of indirect expropriations, or that it applies the protections to "every kind of asset". The BIT and the EU Treaties also differ in their overarching goals. As the Oostergetel tribunal underscored, the EU treaties' objective is to promote economic integration, including by creating a common market, among the Member States, whereas the objective of BITs (including the Treaty) is to provide for specific guarantees in order to encourage the international flows of investment into particular States.'*
>
> *236. The Tribunal shares the views expressed in these decisions. Therefore, it comes to the conclusion that the BIT and the EU Treaties do not share the same subject matter for the purposes of the VCLT. For this reason, Articles 30 and 59 of the VCLT are inapplicable to the present case."*

180. There is therefore a strong body of authority pointing towards a conclusion that the BIT and the EU Treaties (even as interpreted by the CJEU in *Achmea*) differ in nature and subject-matter, so that, on this ground also, no question of inconsistency can arise under Article 30. However, the caselaw also contains some contrary views, which the Tribunal will address.

181. First, the Tribunal in *AS PNB Banka* was, evidently, not so confident about the correctness of the approach taken in the caselaw referred to in paragraphs 178-179. It recognised that considerations of comity and legal certainty meant that "normally a substantial body of prior decisions that appears to represent a shared view will be treated with appropriate respect" ([644]) but it preferred nonetheless to decide the case on an assumption that the same subject matter threshold was satisfied ([649]). As to that threshold it said:

> *"645. The Tribunal has before it a number of analyses of the overlap between protection of investments under the BITs and under EU law. Advocate-General Wathelet set out considerable detail on this issue in his Opinion before the Court in Achmea. There are also some detailed academic writings. The EC published a statement in support of this approach.*
>
> *646. No doubt drawing on these materials, Latvia's submissions focused on three aspects of the EU which it contended showed a substantial degree of overlap between EU law and the BIT. First, it identified the requirements of a single market and the means by which that is enforced, notably by the principles against*

> *discrimination between Member States. Secondly, and overlapping with the first, the existence and application of the four freedoms guaranteed by the TEU: freedom of movement of goods, services, capital and persons. Thirdly, protection of the right to property under the Charter of Fundamental Rights of the European Union.*
>
> *647. The objective of the BIT set out in the Preamble the Tribunal has quoted above, is the promotion of cross-border investment. The EU single market and the four freedoms have a similar purpose within the borders of the EU. Further, the Tribunal accepts that there is substantial overlap between the protections available under the four freedoms and the Charter with respect to expropriation protection under the BIT and, in view of the EU law on legitimate expectations, with the fair and equitable treatment standard. However, these are matters going to merits."*

182. Second, the decision in *Adamakopoulos*[179] also evidences the dichotomy of views capable of being taken in this area. Professor Marcelo Kohen in his strong dissent addressed this as follows:

> *24. The majority recognizes that both BITs and EU Treaties deal with investment and that "at a certain, general, level the treaties deal with the same subject matter". Indeed, the fact that one treaty has a wider scope than another treaty but deals with matters covered by the latter, does not mean that they have different "subject matters". My colleagues consider, however, that "at a more specific level they deal with a different subject matter". For them, the crucial point is that BITs "provide a mechanism for nationals of one party to bring a claim against another party, something that is not provided for in the EU treaties". Before demonstrating that this is not correct, I consider necessary to show that on substantial issues relating to the treatment to be granted to investment, both the BITs and EU Treaties deal with the same subject. The next section, analyzing the incompatibilities of the BITs with EU Treaties, will complete the analysis by demonstrating that the fulfilment of the obligations of the BITs both affects the obligations of EU Member States under the EU Treaties and indeed undermines their object and purpose.*

183. Professor Kohen goes on to conclude that the EU regime offers investor protection at least equal to that provided by the BITs, with an international court, the CJEU, ultimately responsible for adjudication upon its scope; and he takes particular issue with the majority conclusion that the difference between recourse to an international investment tribunal and to a domestic or EU meant that the subject matters of the EU Treaties and the BIT were

[179] *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo G. Kohen, 3 February 2020 (**RL-0014**).

different. As to this, he stated at [34]: "The subject-matter includes dispute resolution in both, as recognised by the Decision".

184. In the light of the conclusion already expressed in paragraph 171 above, it is unnecessary for the Tribunal to form or express any definitive view on the difference in the caselaw discussed in paragraphs 178-183 above. The Tribunal does however note the nuanced approach taken by the ILC in this area in paragraphs 252 and 255 to 256 (quoted in paragraphs 176-177 above). That approach suggests that, even if the view taken by the majority of investment tribunals about the meaning of "same subject matter" is not accepted, it can still be relevant to consider whether the two treaties are part of the same regime or project. As the Study Group put it, the principle of lex posterior or lex specialis "seems clearly more powerful between treaties within a regime than between treaties in different regimes". Taking that approach, the Tribunal would conclude here that the BIT and the EU Treaties are not part of the same regime or project. In particular, the former operates at the international law level, whereas the latter operate at a European level on autonomous principles established by the CJEU diverging definitively from ordinary international legal principles.

185. Finally, in relation to Article 30, the Tribunal addresses the Respondent's submission that the Respondent and the French Republic have, by their Declarations of 15 and 16 January 2019 and/or by their Termination Agreement of May 2020, expressed their understanding and agreement that the BIT and the EU Treaties relate to the same subject matter and that Article 30 applies in a manner which is binding under Article 31 of the VCLT. Article 31 provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, and it continues:

> *3. There shall be taken into account, together with the context:*
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> *(c) any relevant rules of international law applicable in the relations between the parties.*

186. The Declarations are addressed in paragraphs 144-148 above and they and the Termination Agreement of May 2020 are also addressed in paragraphs 189 et seq. below. For present purposes, however, it is sufficient to say that the Tribunal rejects the Respondent's submission that they or either of them can determine the applicability of Article 30 of the VCLT. The reason why not is already indicated as regards the Declarations in what has been said in paragraphs 144 to 148 above. But as regards both the Declarations and the Termination Agreement, the Tribunal adopts what was said by the tribunal in *AS PNB Banka*[180]:

> *573. The first thing to note about the Declaration and the subsequent Termination Agreement is that these documents do not state that they are directed to interpretation or application of intra-EU bilateral investment treaties as international law. Moreover, there is no reference in either to Article 31(3)(a) or (b) of the VCLT.*
> *574. The Declaration and its subsequent implementation are directed to acknowledging the binding force of the CJEU decision in Achmea and establishing an agreed process for bringing Member States into compliance with that ruling. That includes the steps Member States will take with respect to any investment treaty proceedings and the termination of existing BITs. It also includes a commitment to extending protection of investments under EU law.*
> .....
> *578. The Tribunal accepts Professor Talmon's conclusion that the Declaration is a statement of the effect of EU law on Member States. It does not address the position of the BIT as a matter of international law.*

187. A similar conclusion was expressed by the tribunal in the *Micula*[181] case. On this basis, the Tribunal therefore rejects the Respondent's submission that the Declarations and/or the Termination Agreement mean that Article 30 must be regarded as applicable.

e. The Tribunal's conclusion: the Achmea principle is inapplicable

188. For these reasons, the Tribunal considers that the *Achmea* principle, as developed under EU law with regard to the EU's constitutional regime, does not prevail over the general international legal position which the Tribunal is charged with applying when considering its jurisdiction under the BIT. Subject to the further issues regarding events in 2020 and

[180] *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 May 2021, paras. 573, 574 and 578 (**CL-0087**).

[181] *Micula and others v Romania (II)*, ICSID Case No. ARB/14/29, Award, 5 March 2020, para. 286 **(CL-0140)**

subsequently, the position is therefore that the BIT contained a valid standing offer by the Respondent capable, on ordinary principles, of acceptance by the Claimant. Upon such acceptance occurring, there was under general international law and Article 25(1) of the ICSID Convention, a valid consent to arbitration before the Tribunal as now constituted. The most that can be said is that the principle in *Achmea* means that, under EU law, such consent should not have been allowed to come into existence, but that in no way determines the Tribunal's jurisdiction under international law.[182]

(2) The Declarations and the Termination Treaty

189. The Tribunal turns to the issues which arise on the basis that the *Achmea* principle did not and does not by itself invalidate the Respondent's standing offer to arbitrate or the Claimant's acceptance of that offer in August 2020, giving rise prima face to a valid consent to ICSID arbitration within the meaning of Article 25(1) of the ICSID Convention. The Respondent's submission, on that hypothesis, is that (a) the parties to the BIT (a) made clear, at latest by their Declarations of 15 and 16 January 2019, both that they understood the *Achmea* judgment to decide that intra-EU BIT arbitration clauses were precluded under EU law and that they intended as a result to terminate any intra-EU BITs by latest December 2019 and (b) they in fact terminated the BIT retrospectively by the Termination Treaty dated 29 May 2020, to which both France and the Respondent, Czechia, subscribed and which entered into force for France on 28 August 2021 and for the Respondent on 10 December 2021.

190. The Tribunal has summarized the nature and content of the Declarations earlier in the Decision.[183] As follows from what is there said, the operative part of the Declarations recognized that intra-EU BITS with their arbitration provisions continued in existence and that there was a need for a Termination Treaty to terminate them, as EU law required. The actual Termination Treaty, which was as a result made, only came into effect for France on 28 August 2021 and for Czechia on 10 December 2021. The "more important" issue, as

[182] See *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 May 2021 (**CL-0087**), para. 507.

[183] See paras. 144-147 above.

the Respondent described it in its submissions[184], thus concerns not the Declarations, but the Termination Treaty itself, and its suggested retroactive effect on the Claimant's claim to arbitrate. The Tribunal turns accordingly to that issue.

191. The Termination Agreement in its Annex A specifically listed the BIT between France and the Respondent as one of those which it covered. It provided:

> *Section 1*
> ***Definitions***
>
> *Article 1* ***Definitions***
> *For the purposes of this Agreement, the following definitions shall apply:*
> *(1) "Bilateral Investment Treaty" means any investment treaty listed in Annex A or B;*
>
> *(2) "Arbitration Proceedings" means any proceedings before an arbitral tribunal established to resolve a dispute between an investor from one Member State of the European Union and another Member State of the European Union in accordance with a Bilateral Investment Treaty;*
>
> *(3) "Arbitration Clause" means an investor-State arbitration clause laid down in a Bilateral Investment Treaty providing for Arbitration Proceedings;*
>
> *(4) "Concluded Arbitration Proceedings" means any Arbitration Proceedings which ended with a settlement agreement or with a final award issued prior to 6 March 2018 where:*
> *(a) the award was duly executed prior to 6 March 2018, even where a related claim for legal costs has not been executed or enforced, and no challenge, review, set-aside, annulment, enforcement, revision or other similar proceedings in relation to such final award was pending on 6 March 2018, or*
> *(b) the award was set aside or annulled before the date of entry into force of this Agreement;*
>
> *(5) "Pending Arbitration Proceedings" means any Arbitration Proceedings initiated prior to 6 March 2018 and not qualifying as Concluded Arbitration Proceedings, regardless of their stage on the date of the entry into force of this Agreement;*
>
> *(6) "New Arbitration Proceedings" means any Arbitration Proceedings initiated on or after 6 March 2018;*

[184] Request for Bifurcation, para. 167.

(7) "Sunset Clause" means any provision in a Bilateral Investment Treaty which extends the protection of investments made prior to the date of termination of that Treaty for a further period of time.

Section 2
Provisions regarding the termination of bilateral investment treaties

Article 2 ***Termination of Bilateral Investment Treaties***
(1) Bilateral Investment Treaties listed in Annex A are terminated according to the terms set out in this Agreement.

(2) For greater certainty, Sunset Clauses of Bilateral Investment Treaties listed in Annex A are terminated in accordance with paragraph 1 of this Article and shall not produce legal effects.

Article 3 ***Termination of possible effects of Sunset Clauses***
Sunset Clauses of Bilateral Investment Treaties listed in Annex B are terminated by this Agreement and shall not produce legal effects, in accordance with the terms set out in this Agreement.

Article 4 ***Common provisions***
(1) The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.

(2) The termination in accordance with Article 2 of Bilateral Investment Treaties listed in Annex A and the termination in accordance with Article 3 of Sunset Clauses of Bilateral Investment Treaties listed in Annex B shall take effect, for each such Treaty, as soon as this Agreement enters into force for the relevant Contracting Parties, in accordance with Article 16.

Section 3
Provisions regarding claims made under bilateral investment treaties

Article 5 ***New Arbitration Proceedings***
Arbitration Clauses shall not serve as legal basis for New Arbitration Proceedings.

Article 6 ***Concluded Arbitration Proceedings***
(1) Notwithstanding Article 4, this Agreement shall not affect Concluded Arbitration Proceedings. Those proceedings shall not be reopened.
(2) In addition, this Agreement shall not affect any agreement to settle amicably a dispute being the subject of Arbitration Proceedings initiated prior to 6 March 2018.

> *Article 7* ***Duties of the Contracting Parties concerning Pending Arbitration Proceedings and New Arbitration Proceedings***
> *Where the Contracting Parties are parties to Bilateral Investment Treaties on the basis of which Pending Arbitration Proceedings or New Arbitration Proceedings were initiated, they shall:*
>
> > *(a) inform, in cooperation with each other and on the basis of the statement in Annex C, arbitral tribunals about the legal consequences of the Achmea judgment as described in Article 4; and*
> >
> > *(b) where they are party to judicial proceedings concerning an arbitral award issued on the basis of a Bilateral Investment Treaty, ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it."*

Article 9 goes on to establish a "structured dialogue for pending arbitration proceedings".

192. As regards the present BIT, the Termination Agreement provides that, under EU law, not only is the arbitration "clause" that it contains "contrary to the EU Treaties and thus inapplicable" and incapable of serving "as a legal base for Arbitration Proceedings" (Article 4(1)) but that it "shall not serve as a basis for" the present arbitration proceedings as these constitute "New Arbitration Proceedings" since they were initiated on or after 6 March 2018 (Article 5).

193. The Claimant submits that the Termination Agreement addresses only arbitration "clauses" and does not address the perfected consent to ICSID arbitration constituted by the Claimant's Notice dated 26 August 2020. It further submits that the Treaty does not on its true construction operate retrospectively in relation to such a perfected consent. The Tribunal cannot accept either submission. The Termination Agreement was clearly drafted so as to purport to impact and, as the Tribunal reads it, to invalidate the present arbitration proceedings, by retrospective invalidation of the consensual basis on which they were and are based. It was, as its Preamble states at [4], designed to "draw the necessary consequences from Union law as interpreted in … *Achmea* …" The structured dialogue provided for by Article 9 was introduced precisely because of the Termination Agreement's retrospective operation under EU law. There is no doubt that it is open to

States under the principles in or reflected in the VCLT to agree retrospective amendments of their legal position inter se: see Articles 28, 39 and 70(1) VCLT.

194. The Tribunal therefore turns to consider whether the Termination Agreement has this intended effect under international law. In so far as it operated to terminate the BIT as between the two States party to it, no suggestion has been made that it was ineffective. The question is its effect on the consent to arbitrate, which must, for reasons already indicated, be taken to have existed between the Claimant (JCDecaux) and the Respondent (Czechia), not between France and Czechia.

a. The nature of BIT rights and claims

195. Both the Claimant and the Respondent having given their consent to ICSID arbitration, the last sentence of Article 25(1) of the ICSID Convention provides that neither could "withdraw its consent unilaterally". The Claimant submits that it was equally impossible for France, or for the Respondent and France together, to undermine a valid consent to which they were not both party. The Respondent submits that this misunderstands the nature of BIT arbitration; the Claimant is, it submits, simply exercising State rights, as a sort of proxy for France, which France is entitled to withdraw or qualify, even while they are being invoked. Leaving aside human rights conventions conferring an individual right of access to an international court or commission and the individual human responsibility which exists in e.g., the criminal law sphere, that is, the Respondent submits, still the general international legal position.

196. The Respondent points out that investor protection was, as originally developed, a matter to be resolved by representation, negotiation or, where agreed, more formal dispute resolution at a State-to-State level: see *Case of the Mavrommatis Palestine Concessions* (Greece v United Kingdom)[185], where the Permanent International Court of Justice said:

> *"In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State - i.e. between M. Mavrommatis and Great Britain. Subsequently, the Greek Government took up the case. The dispute then entered upon new phase; it entered the domain of international law, and became*

[185] *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3, Judgement, 30 August 1924, para. 12 (**RL-0113**).

> *a dispute between two States. Henceforward therefore it is a dispute which may or may not fa11 under the jurisdiction of the Permanent Court of International Justice.*
> *..... It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.*
>
> *The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant. The fact that Great Britain and Greece are the opposing Parties to the dispute arising out of the Mavrommatis concessions is sufficient to make it a dispute between two States within the meaning of Article 26 of the Palestine Mandate."*

197. The Respondent submits that BITs and BIT arbitration clauses represents no more than a convenient development of this home-State protection. It points out that the Preamble of the BIT states explicitly the two States' mutual interest in "Wishing to strengthen economic cooperation between the two States and create favourable conditions for …. Investments" in each other, which will also be "conducive to the stimulation of capital and technology transfers between the two countries in the interest of their economic development".

198. As regards caselaw it also relies on *The Loewen Group, Inc v United States of America*[186] and *HICEE Bv v Slovak Republic*[187]. *Loewen* was a case where a Canadian entity having commenced a NAFTA arbitration ceased to exist under a reorganisation plan which transferred its claim to a United States entity. The tribunal held that, under NAFTA, understood in the light of general principles of international law, the requirement that an investment claim be by an investor from one State party to NAFTA against another State party to NAFTA required to be satisfied, not only at the commencement, but also throughout the NAFTA arbitration, and that, if it ceased to be satisfied, the arbitration

[186] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (**RL-0114**).

[187] *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011 (**RL-0115**).

failed. Although a NAFTA arbitration has an "apparent resemblance" to a private international commercial arbitration, that was "misleading":

> *"The two forms of process, and the rights which they enforce, have nothing in common. There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states. If the effects of a change of ownership are to be ascertained we must do so, not by inapt analogies with private law rules, but from the words of Chapter Eleven, read in the context of the Treaty as a whole, and of the purpose which it sets out to achieve."*

The use of the structure provided by ICSID, to which Canada was not a party, was also irrelevant to the construction of NAFTA.

199. Secondly, in *HICEE* the tribunal held that the Netherlands and the Czechoslovak governments had, when concluding a BIT in 1991, agreed between themselves on an interpretation (set out in a Dutch Explanatory Note found in governmental files in Prague) of the nature of direct or indirect investment it covered. The claimant commenced a BIT arbitration in 2008 relying on a different interpretation, which it said followed from the wording of the BIT itself. One question was whether the meaning set out in the Explanatory Note was "opposable" to the claimant. The tribunal regarded the answer to be clear:

> *"a treaty can have only one authentic meaning, which cannot on grounds of basic principle vary according to who are the parties to a particular dispute. … [T]he present question of interpretation could have arisen in inter-State proceedings under Article 10. If it had done so, it would have attracted the consequence that the decision of the tribunal "shall be final and binding on both Contracting Parties". That cannot possibly mean that the arbitral decision would be binding on the States only, but without effect on an investor claiming derivatively through the rights procured for it by one of the States".*

200. In *Loewen* the investor, or its successor entity, was (unsurprisingly) held bound by the tribunal's interpretation of NAFTA in the light of its underlying aim to protect the investors of one State against mistreatment by another NAFTA State. The tribunal did not elaborate on its brief reference to "claimants [being] permitted for convenience to enforce what are in origin the rights of Party states". The phrase "in origin" does not necessarily mean that the tribunal regarded rights being enforced in a NAFTA arbitration as still belonging to or capable of abandonment or alteration by the investor's State. The reference to claimants

being permitted "for convenience" to enforce (direct) rights seems to the present Tribunal considerably to undervalue the characteristics and implications of the modern BIT arbitration mechanism, viewed objectively.

201. The Tribunal also agrees with what was said about this part of the decision in *Loewen* by the English Court of Appeal in in *Occidental Exploration & Production Company v. The Republic of Ecuador*[188]:

> *The award on this point in Loewen is controversial (cf The Hybrid Foundations of Investment Treaty Arbitrations (2003) BYIL 151, especially 175-6). But we do not, in any event, consider that its reasoning or decision affects the proper conclusion regarding the nature of the rights capable of pursuit by investors under the present Bilateral Investment Treaty. The provisions of NAFTA, although it is a trilateral investment treaty, appear for present purposes to be materially the same as those of the present Treaty, but even the tribunal in Loewen accepted that the claimant was pursuing claims "in its own right" and "on its own behalf". The statement that NAFTA "claimants are permitted for convenience to enforce what are in origin the rights of Party states" was said in a context where the tribunal was concerned to emphasise that the rights (to whomsoever they belonged) remained subject to international law principles governing continuity of nationality. It is reading too much into this compressed language to conclude that the tribunal meant that the rights enforced remained simply and solely the rights of the States, which claimants were being given some form of power to enforce, as third parties or attorneys. But, if the tribunal in Loewen meant to suggest that the rights conferred under a bilateral (or multilateral) investment treaty such as the present remain of the same character as the rights identified by the Permanent Court of International Justice in Case of the Mavrommatis Palestine Concessions or by the International Court of Justice in the Barcelona Traction case, we would respectfully disagree with its analysis.*

202. As to *HICEE*, what was decided was that an investor must accept the interpretation of a BIT which the parties to the treaty agreed when concluding it. The reference to "an investor claiming derivatively through the rights procured for it by one of the States" is again unelaborated, and does not indicate any view on the part of the tribunal in that case about the extent to which "the rights procured for [the investor]" remain, nonetheless, under the continuing control of the investor's State.

[188] *Occidental Exploration and Production Company v. Ecuador*, [2005] EWCA Civ. 1116, para. 22 (**CL-0100**).

203. In contrast with these citations, the Claimant is able to invoke extensive and more specific authority on the issue whether a BIT investor commencing a BIT arbitration is invoking its own right, or one which is derivative from and at the mercy of its investor State. A starting point is that non-State actors have acquired a generally increasing role in international law, and the Tribunal does not accept that this role is confined to any specific area, such as human rights or criminal law. As the English Court of Appeal stated in *Occidental*:[189]

> *19. That treaties may in modern international law give rise to direct rights in favour of individuals is well established, particularly where the treaty provides a dispute resolution mechanism capable of being operated by such individuals acting on their own behalf and without their national state's involvement or even consent. Oppenheim's International Law (9th Ed.), para. 375 put the matter in this way in 1992:*
>
> > *"States can, ... and occasionally do, confer upon individuals, whether their own subjects or aliens, international rights strictu sensu, i.e., rights which they can acquire without the intervention of municipal legislation and which they can enforce in their own name before international tribunals".*
>
> *See also Oppenheim, para. 7, as well as McCorquodale, The Individual and the International Legal System in Evans' International Law (OUP) (2003), pp. 304-6. Most frequently cited in this connection is the Permanent Court of International Justice's Advisory Opinion in the Jurisdiction of the Courts of Danzig Case (1928) PCIJ Rep Series B No. 15, p.1, considering the effect of a treaty (the Beamtenabkommen) made on 22 October 1921 between Poland and Danzig. The Beamtenabkommen regulated the employment conditions of Danzig railway employees who had, after the First World War, passed into the service of the Polish Railways Administration. Poland's contention that this treaty only created inter-State rights was rejected. The Court said that:*
>
> > *'It may be readily admitted that, according to a well established principle of international law, the Beamtenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the Beamtenabkommen. (pp.17-18)'*

[189] *Occidental Exploration and Production Company v. Ecuador*, [2005] EWCA Civ. 1116, para. 22 (**CL-0100**).

> *The Court thus looked at the intention of the States making the treaty and held, in that light, that the Beamtenabkommen "constitutes part of the provisions of the "contract of service", that is "the series of provisions which constitute the legal relationship between the Railways Administration and its employees"; and that the relevant officials could sue the Administration direct in the Danzig courts. In the more recent Case LaGrand (2001) 40 ILM 1069, the International Court of Justice held that article 36(1)(b) of the Vienna Convention on Consular Relations, requiring prison authorities to "inform the person concerned without delay of his rights under this subparagraph" creates "individual rights". By this we read the Court as meaning rights of the person concerned operating independently of and not derivative from any rights of such person's national state (even though that state, Germany, was invoking such rights under the compulsory jurisdiction article of the relevant Optional Protocol).*

204. Professor Zachary Douglas KC in *The International Law of Investment Claims*[190] notes that:

> *69. Hersch Lauterpacht interpreted this passage as clear authority to the effect that 'there is nothing in international law to prevent individuals from acquiring directly rights under a treaty provided that this is the intention of the contracting parties'. More recently, the International Court of Justice in the LaGrand case decided that Article 36(1)(b) of the Vienna Convention on Consular Relations 'creates individual rights', whether or not these fall to be classified as human rights.*

205. The "father" of the ICSID Convention, Aron Broches, related the ICSID Convention[191] to the same development, saying:

> *From the legal point of view the most striking feature of the Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law.*

206. Professor Douglas also says with regard to BIT protection and arbitration that [65]:

> *65. The foregoing analysis of the principal features of diplomatic protection under general international law and investment treaty arbitration reveals their essential divergence. Given that the raison d'être of the investment treaty mechanism for the presentation of international claims may well be a response to the inadequacies of diplomatic protection, this should come as no surprise. The*

[190] '*The juridical foundations of investment treaty arbitration' in The International Law of Investment Claims*, Zachary Douglas, CUP 2009 (**CL-0167**).

[191] *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Aaron Broches, (1972-II) 136 Recueil des Cours, p. 349 (**CL-0171**).

> *fundamental assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national state. In these circumstances it is untenable to superimpose the Mavrommatis formula of diplomatic protection over a triangular relationship between investor, its national state and the host state of the investment for a rationalisation of investment treaty arbitration.*

207. In support, Professor Douglas points to the way in which substantive BIT protection is commonly formulated, that is as the conferral by each State on investors from the other State of rights to fair and equitable treatment, to treatment no less favourable that accorded to its own investors, to full protection and security, etc. The present BIT is formulated in such terms. More importantly, however the substantive protection may be viewed, the inclusion of a BIT arbitration represents, on its face, a novel shift from the State-to-State discretionary protection, which a State may or may not chose to give, in the direction of a direct and unqualified right to invoke and enforce the substantive protection guaranteed in the BIT.[192]

208. That is also how the Court of Appeal in *Occidental* saw the matter, as well as a number of investment tribunals. A number of these tribunal decisions were cited in *Occidental*[193], as follows:

> *20….. in Enron Corporation v. The Argentine Republic (ICSID Case No. ARB/01/3; January 14. 2004) the tribunal said that the Barcelona Traction case 'has been held not to be controlling in investment claims such as the present, as it deals with the separate question of diplomatic protection in a particular setting' (para. 38) and that:*
>
> > *"…. what the State of nationality of the investor might argue in a given case to which it is a party cannot be held against the rights of the investor in a separate case to which the investor is party. This is precisely the merit of the ICSID Convention in that it overcame the deficiencies of diplomatic protection where the investor was subject to whatever political or legal*

[192] Professor Douglas notes that other writers share his view: "*Writers supporting the 'direct' theory, at least in relation to the procedural right of an investor to bring arbitration proceedings against the host state, include: Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant l'Etat, G. Burdeau,' (1995) Revue del'arbitrage 3, 12et seq.; Arbitration Without Privity , J. Paulsson, (1995) 10ICSID Rev–Foreign Investment LJ232, 256; Investment Arbitration under the Energy Charter Treaty, T. Wälde, (1996) Arbitration Int 429, 435–7.*" '*The juridical foundations of investment treaty arbitration' in The International Law of Investment Claims*, Zachary Douglas, CUP 2009 (**CL-0167**), footnote 150.

[193] *Occidental Exploration & Production Company v. Republic of Ecuador*, [2005] EWCA Civ. 1116, para. 20 (**CL-0100**)

> *determination the State of nationality would make in respect of its claim" (para. 48).*
>
> *Similar statements appear in LG&E Energy Corporation v. Argentine Republic ICSID Case No. ARB/02/1; April 30, 2004, para. 52, in GAMI Investments Inc. v. United Mexican States NAFTA Final Award 15 November 2004, para. 30, in Camuzzi International S.A. v. The Argentine Republic ICSID Case No. ARB/03/2; May 11, 2005, paras. 138-145, where the tribunal observed that diplomatic protection "cannot be considered the general rule in the system of international law presently governing the matter, but as a residual mechanism available when the affected individual has no direct channel in its own right", and in Camuzzi International S.A. v. The Republic of Argentina ICSID Case No. ARB/03/7, para. 44, where the tribunal said of the Barcelona Traction case that:*
>
> > *"…. this decision of the International Court of Justice referred particularly to the protection that could be expected by the shareholders in this case, but specifying that they can enjoy other protection, if there is a specific agreement in this regard. In this case, this is precisely the situation. There is an applicable international juridical agreement. This agreement is the Treaty and according to it, Camuzzi has the right to request, directly and immediately, the protection of its rights by accessing the Tribunal."*
>
> *Finally, we mention Gas Natural SDG S.A. v. The Argentine Republic ICSID Case No. ARB/03/10, where the tribunal stated:*
>
> > *"The scheme of both the ICSID Convention and the bilateral investment treaties is that in this circumstance, the foreign investor acquires rights under the Convention and Treaty, including in particular the standing to initiate international arbitration." (para. 34)"*

209. Since the decision in *Occidental*, there has been further caselaw in the same sense.

210. In *Corn Products International, Inc. v. Mexico*[194] an investor invoked the protection of Chapter XI of NAFTA by claiming to arbitrate. Mexico argued unsuccessfully that the investor's claim was derivative, and as such subject to countermeasures which Mexico had invoked against the investor's state. The tribunal (chaired by Professor Greenwood) rejected that submission robustly, saying:

> *"166. …. [C]ounsel for Mexico argued that Chapter XI of the NAFTA grants an investor only a procedural, and not a substantive, right…. However, Mexico argued, the substantive right which the investor was empowered to enforce was*

[194] *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, 15 January 2008 (**CL-0173**).

> *still the right of the State as a Party to NAFTA. Mexico maintained that this approach was supported by the fact that the substantive provisions of Chapter XI were not cast in terms of individual rights. It also relied upon the award of the Loewen Tribunal and what it claimed was the concordant subsequent practice of the three NAFTA Parties.*
>
> *167. The Tribunal has concluded that these arguments are not persuasive. In the Tribunal's view, the NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals.*
>
> *168. It is now clear that States are not the only entities which can hold rights under international law; individuals and corporations may also possess rights under international law. In the case of rights said to be derived from a treaty, the question will be whether the text of the treaty reveals an intention to confer rights not only upon the Parties thereto but also upon individuals and/or corporations.*
>
> *169. In the case of Chapter XI of the NAFTA, the Tribunal considers that the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them. The notion that Chapter XI conferred upon investors a right, in their own name and for their own benefit, to institute proceedings to enforce rights which were not theirs but were solely the property of the State of their nationality is counterintuitive."*

211. The tribunal went on to note in a footnote (no.72) the decision in *Occidental* in relation to a claim to arbitrate under a BIT.

212. To these decisions, one may also add that of the tribunal in *American-Israel Corp ('Ampal') v. Republic of Egypt*[195], where Egypt, after the commencement against it by an alleged investor of a BIT arbitration, claimed to invoke a "denial of benefits" clause in the BIT. The clause read:

> *"Each Party reserves the right to deny the benefits of this Treaty to any company of either Party, or its affiliates or subsidiaries, if nationals of any third country control such company, affiliate or subsidiary; provided that, whenever one Party concludes that the benefits of this Treaty should not be extended for this reason, it shall first consult with the other Party to seek a mutually satisfactory resolution of this matter.*

[195] *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 01 February 2016 (**RL-0105**).

213. The tribunal found that the denial of benefits clause had not been properly invoked according to the terms of the BIT in any event, but went on nonetheless to say this, on an opposite hypothesis:

> *164. The Respondent submits that by invoking the denial-of-benefits provision in the Protocol to the Treaty after Ampal had submitted its claim to ICSID arbitration, it did not withdraw its previously given consent to arbitration but rather exercised its right to deny benefits which was reserved within that consent.*
>
> *165. On the other hand, the central argument of the Claimants is that the jurisdiction of the Centre is to be assessed at the time that jurisdiction is invoked, to wit when the Request for Arbitration is registered and that, as clearly set out in Article 25(1) of the ICSID Convention, 'no Party may withdraw its consent unilaterally'. In short, say the Claimants, a denial of benefits such as the present one cannot have retroactive effect. It can only be effective prospectively.*
>
> *166. The Claimants' interpretation, says the Respondent, would give no "effet utile" to the denial of benefits provision in the Protocol.*
>
> *167. The Tribunal agrees with the Claimants that the jurisdiction of the Centre must be determined at the time that the Request for Arbitration is registered.*
>
> *168. Article 25(1) of the ICSID Convention is very clear. The jurisdiction of the Centre is to be assessed at the time that jurisdiction is invoked, which is when the investor's Request for Arbitration is registered by the Centre. When jurisdiction has crystallized, "no Party may withdraw its consent unilaterally", says plainly Article 25(1).*
>
> *169. As the Egypt-US Treaty and its Protocol must be read in the light of the ICSID Convention, the Tribunal finds that there cannot be an embedded conditionality in the Treaty which could be triggered after the submission of the dispute to arbitration.*

214. Although the present context is different, the focus in *Ampal* on the crystallisation of ICSID's jurisdiction at the date when BIT arbitration is validly invoked presupposes that, as at that date, the investor has also acquired direct and irrevocable rights against the respondent state, meaning that any joint right on the part of the States party to the BIT to revoke the protection of the BIT, in particular the right to ICSID arbitration under the BIT, cannot thereafter survive.

b. The BIT conferred on investors direct rights which, once validly invoked by a perfected submission to arbitration, cannot be unilaterally terminated

215. Having considered the parties' submissions and the material cited, the Tribunal concludes for the reasons given in paragraphs 195 to 214 above that the right view is that a BIT in the present form confers on the investor a direct (and not a derivative) right to the procedural and substantive protection guaranteed by the BIT. That right crystallises at latest when ICSID arbitration is requested; and the Tribunal's jurisdiction falls to be assessed by reference to the position as at the crystallisation, or perfection, of that right. It further concludes that such a direct right cannot, once validly invoked by a submission to arbitration, be unilaterally terminated. That follows as a matter of basic principle from the nature of the right, which would otherwise risk being illusory. It also follows directly from Article 25(1) of the ICSID Convention, providing that "Where the parties have given their consent, no party may withdraw its consent unilaterally". This follows directly a sentence referring to ICSID's jurisdiction in respect of "any legal dispute arising directly out of an investment … which the parties to the dispute consent in writing to submit to the Centre". It is therefore clear that Article 25(1) enshrines the principle that neither party to a valid submission to ICSID arbitration can withdraw its consent unilaterally. The same principle is, as has already been noted, reflected in the reasoning in *Ampal*, cited in paragraphs 212 to 214 above. The principle also means neither the consent to arbitrate, once given, nor the substantive protection invoked by the arbitration can be abrogated or qualified by any agreement made between the two States party to the BIT subsequently to the time when an investor validly invokes the right, or consents, to arbitrate.[196] This follows from the fact that the investor is in its own right invoking against the respondent state the substantive protection afforded by the BIT, and the right to do so cannot be removed the respondent and a third party without the investor's consent.

216. It follows in the present case that the Termination Agreement, although purportedly retrospective, cannot as such have had and did not have any effect on the arbitration or on

[196] *Principles of International Investment Law*, Rudolf Dolzer & Christoph Schreuer, 2nd Edition, Oxford 2012, p.367 (**CL-0024**) "*Once consent is perfected through the acceptance of the offer contained in the treaty, it remains in existence even if the States partis to the BIT agree to amend or terminate the treaty."*

the Claimant's right to pursue its claim in this arbitration for alleged breaches of the BIT by the Respondent State.

(3) Was the request for arbitration invalid because not made in good faith?

217. This is not however the end of the matter, because of the Respondent's submission that, even if the Termination Agreement does not operate retrospectively to invalidate the consensual basis of the arbitration, the request for arbitration was not made in good faith and cannot be relied upon accordingly. The Respondent started in this connection with a citation of Article 69 of the VCLT. That provides:

> *"1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.*
>
> *2. If acts have nevertheless been performed in reliance on such a treaty:*
>
> > *(a) each party may require any other party to establish as far as possible in their mutual relations the position tha.t would have existed if the acts had not been performed;*
> >
> > *(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty."*

218. Article 60 could have been directly relevant if the Tribunal had come to the conclusion that the BIT, or BIT arbitration clause, was invalid, either at the time when ICSID arbitration was invoked or retrospectively as at that time as a result of the Termination Agreement. That is the hypothetical situation in which the tribunal in *Eskosol S.p.A. v. Italy*[197] considered the potential application of Article 60(2) in circumstances where an ECT arbitration was begun under an intra-EU BIT before the judgment in *Achmea*. The tribunal went no further than to say that the delivery of the *Achmea* judgment was "the very earliest" date at which it might be said that "investors were placed on notice about the risks of relying on Member States' apparent consent to arbitration in Article 26 of the ECT". The tribunal had already made clear its primary position, namely that the *Achmea* judgment did invalidate the prior consent and was not concerned with or expressing any view about the

[197] *Eskosol S.p.A in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019 (**CL-0122**).

position with regard to consent to arbitrate invoked under an intra-EU BIT after the *Achmea* judgment. Still less was it expressing any view about the relevance of good faith if neither the *Achmea* judgment nor the Termination Agreement is held to invalidate the consent to arbitrate under an intra-EU BIT.

219. There is, however, no doubt about the existence in international law, including in the context of investment arbitration, of a general doctrine of good faith. As the tribunal said in *Phoenix Action Ltd v. Czech Republic* (albeit in the different context of investments not made in good faith)[198]:

> *The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties "to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage ..." This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused. This is stated for example by Hersch Lauterpacht:*
>
> > *"There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused."*
>
> *The idea that the international conventions granting protection to foreign investors through arbitration have to be applied in good faith was also underscored by the tribunal in Amco Asia Corporation et al v. Indonesia:*
>
> > *"... like any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties ... Moreover – and <u>this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith</u>, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged."*

[198] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (**RL-0109**).

220. *Philip Morris Asia Limited v. Commonwealth of Australia*[199] is an example of the application of this principle of good faith or abuse to declare an arbitration inadmissible. The claimant there was the product of corporate restructuring, the principal, if not the sole, purpose of which was for it, as a new parent company, to acquire ownership and control of various Philip Morris subsidiaries carrying on business in Australia and, thereby, gain protection under the Hong Kong-Australia BIT in respect of anticipated Australian legislation relating to the plain packaging of tobacco.

221. The Respondent submits that in the present case the Claimant was well aware, before and when it made its request for arbitration on 26 August 2020, what the attitude of EU law was towards the BIT arbitration clause as well as that the Termination Agreement had on 29 May 2020 been agreed, but not yet come into force and that, when it came into force it would purportedly operate retrospectively.

222. The Tribunal cannot accept the Respondent's submission that it was in these circumstances an act of bad faith or abusive for the Claimant to invoke arbitration. There is no suggestion that the claim was manipulated in any way analogous to what happened in *Philip Morris*. So far as appears, it arose in the ordinary course, and it was the subject, prior to the making of the Termination Agreement, of the Notice of Dispute dated 25 February 2020. Until the BIT was terminated, the Claimant was, on the face of it, entitled to initiate an arbitration, as it did on 26 August 2020. When the Termination Agreement came into force, it was, as the Tribunal has already held, too late for this to have any effect on the existing arbitration. The Claimant was entitled to proceed on that basis. It was not abusive to do so. It was simply taking legitimate advantage of the way in which, as a matter of interpretation and law, the BIT is structured and the period during which it was open for use by an investor wishing to pursue a claim.

[199] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 (**RL-0110**).

(4) Should the Tribunal decline jurisdiction for reasons of comity in relation to the CJEU?

223. The Tribunal turns to the Respondent's next submission, which is that the Tribunal should as a matter of comity defer to EU law or EU courts, which would have jurisdiction under EU law over any claim that the Claimant might pursue before them against the Respondent or others allegedly involved in the matters about which the Claimant complains.

224. Comity, or at least concepts of mutual respect and judgments as to appropriateness, are at the root of many jurisdictional rules, as well as relevant factors in the evaluative exercises involved in, for example, deciding whether a forum is a *forum conveniens*, whether to stay proceedings pending the resolution of other parallel proceedings and whether to recognise and enforce judgments of other courts. *Chevron Corp. v. Yaiguaje and others*[200], cited by the Respondent referred to them in such a sense. The existence of a general principle of comity was also recognised in *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany) v. The Czech Republic*[201] - albeit with considerable qualifications regarding its application in the present context.

225. Comity is relied on in the present case because it is said that "the Czech Republic would otherwise be bound by contradictory obligations stemming from the contradicting decisions of this Tribunal (requiring it to arbitrate) and the CJEU in *Achmea* (requiring it not to arbitrate). That may be the case, but, if so, it will arise because the Respondent has entered into, or been committed to, obligations which now prove to compete. It is not self-evident why this means that the *Achmea* principle should prevail, or why Claimant should suffer, by having to forego its preferred legal course of arbitration under the BIT.

226. This is not a case where one and the same issue is being or is likely to be considered by two different courts or tribunals, where one such court or tribunal might well see it as appropriate to stay its proceedings, at least pending the outcome of the other's proceedings – particularly if both sets of proceedings raised a difficult question of EU law regarding

[200] *Chevron Corp. v. Yaiguaje and others, Supreme Court of Canada*, 3 SCR 69, Judgment, 4 September 2015, p. 73 (**RL-0070**).
[201] *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, para. 407 (**CL-0115**).

UNCLOS on which the CJEU was likely to pronounce in the other set of proceedings, as in the case cited by the Respondent of *MOX Plant Case, Ireland v. United Kingdom*[202].

227. It is also not clear what, if any, relevant adverse consequences might befall the Respondent. It will have complied with its EU obligations under Article 7(a) of the Termination Agreement to inform the Tribunal about *Achmea*, and, should it find itself held liable in any award, it will no doubt do its best to comply with the provisions of the Termination Treaty.

228. Far from deferring to the *Achmea* principle, investment tribunals have, after affirming their jurisdiction, declared that it is their duty to exercise it: see e.g., *Eskosol* at [186] and *AS PNB* at [654]. In *A.M.F.*[203] the tribunal said this:

> *406. The Arbitral Tribunal does not deny the existence and the relevance of the principle of comity in international law. However, Respondent's position needs to be nuanced as to the circumstances under which it has been and can be applied in international (investment) law.*
>
> *407. First, it must be emphasised that the principle of comity has no binding force at the international level and that even domestic judges grant its application rarely and only in extreme cases (Filippo Fontanelli 'Comity' Overview of Topic Westlaw UK (2016), Exh RL-55, Introduction and paras 1 and 20).*
>
> *408. Second, it is true that comity can be a useful tool of coordination in the application of international obligations from different regimes in absence of a positive rule of conflict.*
>
> *409. However, comity remains a discretion-driven device, which cannot impose precise obligations on international courts and tribunals, which can always uphold and exercise their jurisdiction… In particular, comity is not a binding principle of international law …*
>
> *410.If one looks at the rare instances where comity was expressly exercised by international courts or tribunals, these latter never went as far as to decline their jurisdiction, but preferred instead to suspend their proceedings or grant comity at the level of applicable laws or remedies …... In other words, the Arbitral Tribunal is not aware of any other (investment arbitral) tribunal or international court*

[202] *MOX Plant Case, Ireland v. United Kingdom*, PCA Case No. 2002-01, Order No. 3 - Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, paras. 20, 28 (**RL-0073**).

[203] *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany) v. The Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020 (**CL- 115**).

> *having declined to exercise jurisdiction over a dispute due to considerations of comity when its jurisdiction was otherwise established.*
>
> *411.It is true that the International Court of Justice (hereinafter "ICJ") considered in the Cameroon v United Kingdom case that, "even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction" … Nonetheless, the ICJ made this statement obiter dictum. In addition, the ICJ when making this statement relied not on the principle of comity as such, but rather on the concept of administration of justice and the related need to maintain the ICJ's judicial character …*
>
> *412.The present Arbitral Tribunal's jurisdiction stems from the valid arbitration agreement that was concluded between the Parties and by which they entrusted the resolution of their dispute to the present Arbitral Tribunal. There exists no other forum that could adjudicate the Parties' dispute that arose under the Germany-Czech Republic BIT.*
>
> *413. Therefore, in absence of a specific provision contained in the Germany-Czech Republic BIT or a binding principle of international law, the present Arbitral Tribunal must exercise its jurisdiction once it has been established."*

229. The Tribunal considers the approach taken in *A.M.F.* to be both persuasive and correct. Having found that the present arbitration was properly instituted by valid mutual consent, and that neither the Termination Agreement nor considerations of good faith or abuse preclude the Claimant from pursuing this arbitration, the Tribunal fails to detect any reason why the arbitration instituted should not proceed.

(5) Should the Tribunal decline jurisdiction because of a duty to render an enforceable award?

230. This brings the Tribunal to the Respondent's final submission. This is that the Tribunal should decline to proceed with the arbitration, having regard to its duty to render an enforceable award. The submission is that, although, under Article 54 of the ICSID Convention, each ICSID Contracting State is obliged to recognize and enforce an ICSID award, it is only bound to do so "as if it were a final judgment of a court of that State". The Respondent cites a decision of a Swedish court which refused to enforce an ICSID award rendered in the pre-*Achmea* case of *Micula v. Romania*.[204] The District Court held that:

[204] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (**CL-0137**).

> *"[...] Sweden is obliged pursuant to Article 54 of the [ICSID] Convention to enforce the arbitral award as though it were a final Swedish judgment. A Swedish judgment of this type, whose enforcement was in violation of EU law, could not have been enforced either. There is no difference in this respect, therefore, between a Swedish final judgment and the arbitral award. Sweden's commitments pursuant to Article 4(3) TEU, therefore, entail that there are impediments to the enforcement sought. Application of Article 351 TFEU does not lead to a different view (C-241/91 P and C-242/91 P). The appeals should, therefore, be dismissed."*

231. Any award which the present Tribunal might make will, therefore, the Respondent submits, be unenforceable within the EU. Even if one were to follow that reasoning to this point, the present Tribunal sees no basis on which it could or would decline or stay its jurisdiction. There are States outside the EU where any award might be enforceable. There are sometimes even ways of putting pressure on States to meet voluntary or unenforceable obligations.

232. More importantly than any of these factors, references to a tribunal's duty to make an enforceable award do not mean that it is an arbitration tribunal's function, or within its competence, to undertake some form of prediction, still less investigation, as to where, when and how any award it makes may be enforced, before deciding whether or not to assume or continue to exercise jurisdiction. Such considerations may be relevant when a tribunal is making an award which a party tells the tribunal may need to be made in a certain form (or even place) in order to be recognised and enforced in a particular State where enforcement is envisaged. But that does not mean that it is a properly constituted tribunal's concern, when enforcement is likely to be resisted or to be difficult, to refrain from exercising its adjudicatory role, leaving a potential winning party without having the prospect of any award for enforcement anywhere.

233. The Tribunal therefore takes the same general approach as has been taken by all investment tribunals who have considered an objection to jurisdiction based on enforcement difficulties: see e.g., *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*[205]. It dismisses the objection.

[205] *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, para. 541 (**CL-0105**).

VII. THE TRIBUNAL'S DECISION ON JURISDICTION

234. In conclusion, the Tribunal therefore decides as follows:

a. The Respondent State's objections to the Tribunal's jurisdiction fail.

b. The Tribunal has jurisdiction to determine the Claimant's substantive claims for breach of the BIT.

VIII. COSTS

235. The Tribunal has received and considered submissions from both Parties with regard to the appropriate costs order in the event of the Tribunal concluding that the Respondent's objection to the Tribunal's jurisdiction fails. The Claimant submits that the Tribunal should in that event order the Respondent to pay the Claimant's costs, in the sum of "EUR 416,791.94 and USD 300,000, plus interest at a rate that is equivalent to the London Interbank Offered Rate (LIBOR) plus 2% as of the date of the award until full payment" as well as "such other relief as the Tribunal deems appropriate"[206] The Respondent has indicated that "if the Tribunal were to reject the preliminary objections (quod non), the Czech Republic reserves the right to claim these costs in the Award"[207].

236. The Tribunal considers that it is appropriate to make the following order at this stage regarding costs of the issue of jurisdiction, namely that the costs should be reserved to further order.

[206] Claimants' Costs Submission, para. 9.

[207] Respondent's Costs Submission, p. 2.

Professor Raúl E. Vinuesa
Arbitrator
Date: 28 July 2023

Professor Kaj Hobér
Arbitrator
Date: 28 July 2023

The Rt. Hon. Lord Jonathan Mance
President of the Tribunal
Date: 28 July 2023

IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

-between-

JCDECAUX SA

Claimant

and

THE CZECH REPUBLIC

Respondent

ICSID Case No. ARB/20/33

CONCURRING SEPARATE OPINION OF PROFESSOR RAÚL E. VINUESA

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28 July 2023

CONCURRING SEPARATE OPINION OF PROF. RAÚL EMILIO VINUESA

I agree with the Tribunal's Decisions on jurisdiction (Decision, VII) and on Costs (Decision, VIII). I am also in agreement with most of the considerations supporting the Decision.

Although I do agree with the Decision's conclusion in para. 188 considering that the so called *Achmea* principle is inapplicable, I should clarify that I arrive at the same conclusion but based on a different reasoning.

Basically, I disagree with the Decision's treatment of the question of successive treaties related to the same subject matter, especially in relation to the interpretation and application of Article 30.3 of the Vienna Convention on the Law of the Treaties (VCLT).

Even if I do agree that Article 30 of the VCLT is not applicable to the present case, I am opposed to the idea that the BIT and EU law do not share, to a certain degree, the same subject matter in dealing with intra-EU foreign investment. I am also against the Decision's Majority proposition that introduced the category of "different treaty regimes" as to justify a second chance to reinterpret Article 30 of the VCLT.

To my understanding, and in contrast to the Majority's reasonings, I consider that, Article 30 VCLT is not applicable to the present case as a mere result of its plain interpretation in accordance with Articles 31 and 32 of the CVLT.

In order to explain this Concurring Separate Opinion, I will first refer to the interpretation of Article 30.3 of the VCLT; second, I will deal with arbitral precedents cited by the Decision pretending to vindicate the existence of a *jurisprudence constante*; third, I will focus on the Decision's alternative interpretation based on the concept of "different separate regimes"; and finally, I will address the general legal framework within which this opinion was conceived.

I. INTERPRETATION OF ARTICLE 30 VCLT IN CONFORMITY TO ARTICLES 31 AND 32 VCLT

1. In interpreting Article 30 of the VCLT special consideration must be given to the General Rule of Interpterion that prescribes that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose (Article 31 of the VCLT).

2. The title and first paragraph of Article 30 of the VCLT refer to successive treaties relating to the same subject matter. The ordinary meaning of the expression "related to" does not suggest that both treaties must have the same object and purpose but simply refers to successive treaties that "are related", in the sense of being at some point linked or associated to the same subject matter. The expression "related to" does not imply that treaties "with the very same subject matter" are the only object of that clause.

3. The above interpretation based on the ordinary meaning of the expression "related to" is also online within the context of Article 30.3 that deals with the compatibility of "treaty provisions" and not with a full and complete compatibility of both treaties' common objectives.

4. Article 30.3 states that: "When all the parties to the early treaty are parties also to the later treaty but the early treaty is not terminated or suspended in operation under Article 59, the early treaty applies only to the extent that its provisions are compatible with those of the later treaty". Consequently, this Article recognizes the possibility of applying early treaty provisions that are compatible with the later treaty.

5. Within the context of the VCLT in dealing with termination of a treaty because of the celebration of posterior one, Article 59.1 states "A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: …b) the provisions of the later treaty are so far incompatible with those of the early one that the two treaties are not capable of being applied at the same time." Thus, Article 59 applies to all successive treaties relating to the same subject-matter, independently that they share the very same object and purpose: Article 59 expressly refers to "treaty provisions" within the same context than that expression was incorporated in Article 30.3 of the VCLT.

6. Then, the expression "relating to" does not prejudge on the scope of the concept of "same subject matter" as to only include each and all the clauses of the "successive treaties".

7. On that context, the ILC 2006 Report on Fragmentation of International Law, when dealing with the question on "same subject" as expressed in Article 30 VCLT, affirmed that, "As pointed out above, the test of whether two treatises deal with "the same subject matter" is resolved by assessing whether fulfilment of an obligation under one treaty affects the fulfilment of obligations under the other. This "affecting" might then take the form either of strictly preventing the fulfillment of the other obligation or of undermining its object and purpose".[1]

8. The above statement is a clear ILC recognition that the meaning of "same subject matter" refers to any particular provision (obligation) and not necessary to all the provisions of both treaties.[2]

9. ILC Report on Fragmentation also recognized that "...One of the problems is that the title of the Article (and paragraph 1) seems to limit it to a conflict between treaties "relating to the same subject-matter". If that interpretation is interpreted strictly, then it seems to lift most of the important cases outside its scope. However, as pointed out in Section B above,[3] this is neither a necessary nor a reasonable interpretation of the expression 'same subject matter'".[4] Therefore, "...If an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results, it can safely be assumed that the test of sameness is satisfied."[5]

10. In our present case, the BIT and EU law rules on settlement of disputes are incompatible

[1] ILC Report on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Doc A/CN.4/l. 682 and Add.1., para 254 *in fine*.
[2] On the same line of reasoning the ILC Report on Fragmentation stated that "It must be assumed, as Fitzmaurice does, that *lex specialis* 'can only apply where both the specific and the general provision concern deal with the same substantive matter.' Moreover, the commentary to Article 55 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts requires that, "for *lex specialis* to apply, the rules must deal with the same subject matter." The ILC refers to any treaty rule and not to the object or purpose of successive treaties: ILC Report on Fragmentation of International Law, para. 116: Citing paras. (4) and (5) of the ILC Draft Articles on International Responsibility of States for International Wrongful Acts, Yearbook ILC, 2001, vol. II (Part II) and corrigendum, pp.140-141.
[3] Section B: The Function and Scope of the *lex specialis* maxim, ¶¶ 56-122.
[4] ILC Report on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Doc A/CN.4/l. 682 and Add.1., para 253.
[5] *Ibid.*, para. 167.

and the Tribunal must determine which rule prevails. Thus, considering that the early treaty (the BIT) was not terminated or suspended by the latter treaties (EU law), it should be assumed that both treaties are still in force. Article 30.3 states that if provisions of both treaties that remains in force are not compatible - in our case the ones dealing with settlement of disputes - the provision of the latter treaty must apply.

11. But to accept that the BIT and the EU law relates to the same subject matter, does not make Article 30 applicable to the present case, because its paragraph (3) establishes a presumption in favor of the *lex posteriori* that could not overrule an already generated "acquire right" under international law in favor of Claimant.

12. The literal application of the *lex posteriori* principle prescribed by Article 30.3 will produce an absurd or unreasonable result by ignoring the *lex specialis* status bestowed by the Contracting Parties to the BIT.

13. Within that particular context, Article 30.3 contains a *lacuna*, because it was drafted on a presumption that the parties to both successive treaties understood, and so they agreed, that any incompatibility between both treaty clauses, must result in the derogation of the provision of the early treaty. Its application would endorse a legal presumption that the present case, is not in conformity with the expressed or implied will of the parties involved.

14. This position is confirmed by recourse to the preparatory work of the treaty and the circumstances of its conclusion as a supplementary means of interpretation as provided by Article 32 of the VCLT.

15. Article 32.2 of the VCLT allows recourse to preparatory work of a treaty and the circumstances of its conclusion, "…in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31...(b) leads to a result that is manifestly absurd or unreasonable".

16. In that sense, the object of Article 30.3 of the VCLT reflects the common predisposition of the ILC Special Rapporteur (Sir H. Waldock, 5th and 6th Reports)[6] that, when drafting

[6] Special Rapporteur Sir Humphrey Waldock since 1961. Yearbook of the International Law Commission, 1962, vol. II, p.160.

rules dealing with the application of successive treaties, he only referred to the principle of *lex posteriori*. Article 30 does not expressly deal with the principle of *lex specialis*, nor with its relation to the principle of *lex posteriori*. Therefore, Article 30.3 of the VCLT application to the present circumstances, generates an absurd and unreasonable result provoking a *lacuna*. That *lacuna* must be solved by referring to the proper articulation of general principles of law. There is no evidence that Article 30.3 was a consequence of a customary international law codification process which was the main object and purpose of the VCLT drafting.

17. The ILC Comments on the Draft Articles on the Law of Treaties, confirmed this.[7] The ILC admitted that paragraph 3 of Article 30 was "…in conformity with the general rule that later expression of intention is to be presumed to prevail over an early one…"[8] (the underline is mine). Consequently, the ILC recognized that it has presumed the application of the principle of *lex posteriori*, overlooking the effects of the principle of *lex specialis* in drafting paragraph 3 of Article 30.

18. The referred presumption contained in Article 30.3 is manifestly unreasonable and so inapplicable to the present case. There is no evidence that in ratifying the EU treaties, the parties to a previous BIT understood that they were derogating one of the most relevant innovations introduced by such early treaty: the right of foreign investors to settle investment disputes by recourse to international arbitration.

19. Inconsistences on the content of Article 30.3 leads to the formation of a *lacuna* that needs to be fulfilled by recourse to Article 31.3.(c) of the VCLT. Article 31.3.(c) states that in interpreting a treaty text, it shall be considering together with the context "…any relevant rules of international law applicable in the relations between the parties." Therefore, general principles of law, as recognized by Article 38.1.c) of the Statute of the International Court of Justice must then apply. The principle of *lex specialis* and *lex posteriori* must be considered among the general principle of law recognized by

[7] Draft Articles on the Law of Treaties, Yearbook of the International Law Commission, 1966, Vol. II, A/CN/SER.A/1966/Add.1., p. 216.
[8] *Ibid*., "The present Article applies only when both treaties are in force and in operation: in other words when the termination or suspension of the operation of the treaty has not occurred under Article 56. Paragraph 3, in conformity with the general rule that later expression of intention is to be presumed to prevail over an early one, then states that "the early treaty applies only to the extent that its provisions are compatible with those of the later treaty".

civilized nations. Customary international law has determined the prevailing role of *lex specialis* principle over the *lex posteriori* principle within special circumstances.[9]

20. Within customary international law, the idea that a special rule enjoys priority over a general or even a posterior rule, has a long pedigree in international jurisprudence.[10]

21. The ILC Report on Fragmentation of International Law outlines the role and nature of *lex specialis* rule as a pragmatic mechanism for dealing with situations in which two rules of international law that are both valid and applicable deal with the same subject matter differently.[11]

22. The ILC Report affirmed that "The principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technic for the resolution of normative conflicts […] Sometimes *lex specialis* is, however, understood to cover the case where two legal provisions, both of which are valid and applicable, are in no express hierarchical relationship and provide incompatible directions on how to deal with the same set of facts. In such case, *lex specialis* appears as a conflict resolution technic. It suggests that, instead of the (general) rule, one should apply the (specific) exception. In both cases, however, priority falls on the provision that is "special", i.e., the rule of a more precisely delimited scope of application" [12]

23. The ILC also outlined the application of the *lex specialis* principle in its Commentary to Article 55 of the Draft Articles on Responsibility of States for International Wrongful Acts. The Commission sustained that "For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some

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[9] "As a *lex specialis* in the relations between two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant case. On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions": Amoco International Finance Corporation v. The Government of Islamic Republic of Iran et al., Iran-United States Claims Tribunal, case 56. 14 July 1987 15 IRAN-U.S. C.T.R., p. 189 at p. 222.

[10] *Conf.; Beagle Channel Arbitration*, Reports of International Awards, vol. XXI, ¶30, p. 100. *Mavrommatis Palestine Concessions*,1924, PCIJ, Series A, No. 2, pp 29-33; *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, p. Judgment of 27 June 1986, ¶ 274; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* Judgment ICR Reports 1982, ¶ 24; *Case concerning Right of Passage over Indian Territory*, ICJ Reports 1960, ¶ 44; *Case concerning Gabcikovo-Nagymaros Project*, ICJ Reposts 1997,¶ 132; *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, ¶ 25.

[11] ILC Report on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Doc A/CN.4/l. 682 and Add.1., Chapter II, para 46.

[12] *Ibid.*, paras 56-57.

actual inconsistency between them, or else a discernible intention that one provision is to exclude the other"[13]

24. Although the principle of *lex specialis* did not find its way into the text of the VCLT, it was observed during the drafting process that, among the technics for resolving conflicts between treaties, it was useful to pay attention to the extent to which treaty might be special in relation to other treaty.[14]

25. Finally, the absurd and unreasonable result of a literal interpretation of Article 30.3 would contradict the ILC affirmation that "…the lex posteriori will not abrogate a prior treaty obligation if the specialty of the prior obligation may be taken as an indication that the parties did not envisage this outcome".[15]

II. NON-RELIABLE ARBITRAL PRECEDENTS

26. In reference to arbitral precedents quoted by the Decision,[16] I could not agree with its para. 180, that based on "a strong body of authority", concludes that the BIT and the EU Treaties differ in nature and in subject-matter and so, "no question of inconsistency can arise under Article 30". This affirmation is grounded in several arbitral precedents dealing with the concept of successive treaties related to same subject matter.

27. From the analysis of the arbitral awards dealing with Article 30.3, as cited by the Decision, there is abundant evidence that those precedents did not base their conclusions in conformity with the VCLT General Rule of Interpretation. Consequently, and as stated above, the expression "relating to the same subject matter" not necessarily involves an overall comparison of the two treaties object and purposes, but also refers to the compatibility of provisions within successive treaties relating to the same subject matter: In the present case, the BIT and EU laws have different settlement of disputes systems.

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[13] *The International Law Commission's Articles on State Responsibility*, Crawford, J. Commentary to article 55. para 4, at p. 307.
[14] *Ibid.*, para 65.
[15] ILC Report on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Doc A/CN.4/l. 682 and Add.1, para. 114.
[16] Decision, paras. 178 *et ss*.

28. The Decision's reference to arbitral precedents dealing with Article 30 of the VCLT, are misleading. They have taken for granted that successive treaties related to the same subject matter must share the same purpose and objectives. As already stated, this is a false construction because it is not supported by a legal interpretation of Article 30.3 of the VCLT in conformity with Articles 31 and 32 of the same Convention.

29. As an example, the tribunal in *Marfin Investment v. Republic of Cyprus*, agrees with the *EURAM v. Slovakia* tribunal that the subject-matter of a treaty refers to the issues with which its constituent provisions deal, its topic and substance. The tribunal considers that "… a good faith interpretation of Articles 59 and 30 of the VCLT, in accordance with the ordinary meaning of the terms employed, seen in their context and in light of the object and purpose of the VCLT does not support the conclusion that two successive treaties deal with the same subject-matter if they may apply simultaneously to the same set of facts".[17]

30. Despite such introduction, the tribunal in *Marfin* failed to back its conclusion on the interpretation of Articles 30 and 59 of the VCLT. The tribunal merely assumed, with no further explanation[18], previous case law conclusions. However, from the mere reading of the cited precedents, it could be established that none of these precedents has sustained their own interpretation process in conformity with Articles 31 and 32 of the VCLT. [19] Therefore, the above arbitral cases, by ignoring recourse to the VCLT General Rule of Interpretation, as crystalized by Article 31, could not be considered as relevant precedents to evidence or to confirm the authentic interpretation of an applicable treaty rule.

31. As other relevant examples, in *Muszynianka Spolka Z Ograniczona v. The Slovak*

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[17] *Marfin Investment Group Holdings S.A. et Al. v. Republic of Cyprus*', ICSID Case No. ARB/13/27, Award 26 July 2018, ¶. 587.
[18] *Ibid., "…the tribunal sees no reason to depart from consistent case law finding that intra-EU BIT and EU treaties deal with different subject-matter."*, ¶ 588.
[19] *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶¶ 247-263; *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 ¶¶ 159-164; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, ¶¶ 70-79; and *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, Award on Jurisdiction, 28 October 2012; ¶¶ 178-184; *Marfin Investment Group Holdings S.A. et Al. v. Republic of Cyprus*', ICSID Case No. ARB/13/27, Award 26 July 2018, ¶ 584 *et ss*.

Republic[20] as well in *Magyar Farming Company v. Hungary*[21], it has been expressed that investment treaty tribunals have understood that the subject-matter of a treaty is defined by the matters with which the treaty's constituent provisions deal. To back its affirmation both tribunals reproduced the words of the *Oostergetel* tribunal: "The requirement […] that the two treaties relate to the "same subject matter" has to be construed in line with the dominant view expressed in scholarly writings to the effect that two treaties can be considered to relate to the "same subject matter" only if the overall objective of these treaties is identical and they share a degree of general compatibility"[22] (the underline is mine).

32. Surprisingly, both tribunals reduced the interpretation process of Article 30 of the VCLT to accept a dominant view of scholars with no further reference to the General Rule of Interpretation as required by the VCLT.

33. The precedents cited could not reflect a *jurisprudence constante* rooted in an incomplete interpretation process of the rules that they should have applied; they did not only ignore the application of Articles 31 and 32 VCLT, but they also did not take into account the relevance of the basic investor's rights granted by the BIT that are in accordance with the general principles of law incorporated as part of the EU law.

34. For all the above reasons I disagree with *Muszynianka* conclusion at para. 236, reproduced in the Decision.[23] Of course, I do agree that there is no doubt that the BIT and the EU Treaties do not share the same subject matter in reference to their main objects and purposes. However, there is also enough evidence to confirm that the BIT and EU Treaties share the same subject matter concerning investors' substantial rights and protections. The main exception is the exceptional right granted by the BIT to investors to settle their investment disputes through recourse to international arbitration.[24]

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[20] *Muszynianka Spolka Z Ograniczona v. The Slovak Republic*, PCA Case No. 2017-08, ¶ 233.
[21] *Magyar Farming Company Ltd, et al. v. Hungary*, ICSID Case No. ARB/17/27, Award 13 November 2019 ¶ 230.
[22] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, ¶ 70.
[23] Decision, para. 179.
[24] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, ¶ 160-165.

35. The overlap of substantial rules concerning the treatment of investors of one Member State investing in another Member State, does not generate contradictions because both set of rules – BIT and EU treaties- are rooted on the same legal matrix based on general principles of law adopted by Member States' domestic legal systems, and reflected in their mutual international law commitments.

36. In this context, settlement of disputes rules is an exception. The BIT recognizes to investors of one Member State that invest in another Member State, the right to settle investment disputes, through recourse to international arbitration. That specific investor right constitutes a departure from applicable general rules for the settlement of disputes. In that sense, the exceptional nature of the settlement of dispute system implemented by the BIT confirms its *lex specialis* nature.

37. In conclusion, Article 30.3 is not applicable to the present case because there is no need to test the compatibility of a rule that was created as a *lex specialis*, *vis a vis* a posterior rule of a general character that was agreed upon by the Contracting Parties involved, without the intention, expressed or implied, to modify or derogate the previous *lex specialis* as recognized by Article 10 of the BIT.

III. THE DECISION ALTERNATIVE INTERPRETATION BASED ON SEPARATE TREATY REGIMES

38. I could not agree with the Majority's reasoning expressed at para. 184 of the Decision that, as suggested by the ILC on its Study Group Report, "…it can still be relevant to consider whether the two treaties are part of the same regime or project…". The Majority then affirmed that "Taking that approach…it would conclude that the BIT and the EU Treaties are not part of the same regime or project"[25], implying that even if the two regimes otherwise address the same subject-matter, they have separated definitively on the relevant issue to which each must apply its own principles and approach.

39. But even assuming that the BIT and the EU Treaties "are not part of the same regime

[25] Decision, para. 184.

or project", it does not affect the application of Article 30 of the VCLT just because it is a fact that both set of rules are expressed in treaties that, being part of international law, are subordinated to its general principles of law.

40. The reference made by the Majority to back its conclusion on a suggestion proposed on the ILC Report on Fragmentation, is misrepresenting the overall Commission's analysis concerning "separated treaty regimes".

41. The ILC statement "that the principle of *lex posterior* or *lex specialis* 'seems clearly more powerful between treaties within a regime than between treaties in different regimes'", does not help to justify the legal bases of the Majority's alternative conclusion. Even more, the precedent sentence to the cited by the Majority clearly recognized the limited relevance of identifying "treaty regimes" stating that: "The significance of identifying such "treaty regimes" lies in the way it seems relatively less complicated to establish a relationship between two instruments within one such regime than between two instruments across different regimes."[26]

42. The Commission further confirmed the limited relevance of the "treaty regimes" concept as differentiated from the concept of "successive treaties related to the same subject" by expressing that: "Treaties may of course end up in conflict both within and across regimes. To make that distinction is merely to point out that the task of settling the conflict […] may be much easier or more straightforward in the former [same treaty regime] than in the later situation, [same subject matter] where a conflict of wider objectives or values underlying the very regimes themselves is often at issue".[27] (In between brackets is mine)

43. The concept of "different treaty regimes", as expressed in the ILC Report on Fragmentation[28], seems to be the result of an academic exercise, with no reference to the applicable law. The above concept could not even be implied as part of a valid interpretation of Article 30 of the VCLT. As previously stated, Article 30 must be

[26] ILC Report on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Doc A/CN.4/l. 682 and Add.1., para. 255.
[27] *Ibid.,* para 256.
[28] *Ibid.,* "252. Article 30 deals with the issue of conflict between prior and subsequent treaties. As many commentators have noted, however, it does not appear to do so very successfully […] 256. The distinction between treaties dealing with "same subject matter" and treaties within the same "regime" may appear slight, but it constitutes an important practical shift of perspective…"

interpreted in conformity with Article 31 of the VCLT. Nothing on the text of Article 30, its context, or on the object and purpose of the VCLT, suggest that the application of successive treaties relating to the same subject matter is conditioned to the existence of "different treaty regimes". The aspirational legal status of such academic exercise sounds ingenious but not sufficient to justify the necessary existence of "two regimes" to determine the compatibility or not of successive treaty rules relating to the same subject matter.

44. The ILC Report also recognized that "The rationale for special regimes is the same for *lex specialis.* They take better account of the particularities of the subject matter to which they relate: They regulate it more effectively the general law and follow closely the preferences of their members..."[29]

45. The above conclusion seems to be online with the role of *lex specialis* in interpreting Article 30.3 of the VCLT. On that line, the ILC Report at para. 256, recognized the speculative character of the relationship between the expressions "same subject" and "special regimes", stating: "The distinction between treaties dealing with "same subject matter" and treaties within the same regime may appear light, but it constitutes an important practical shift of perspective..."[30]

46. In my view, that practical shift of perspective is not based on an authentic interpretation process in conformity with VCLT. At the same time, the ILC Report on Fragmentation recognized its *lege ferenda* approach by expressing that "Owing to the inconclusive nature of the general law on conflicts between successive norms, as well as the generally open-ended formulations of Article 30 of the 1969 Vienna Convention, it seems important that States include some directions..."[31] Thus, the Commission is encouraging States to generate new rules, recognizing that its suggestions are not based on an interpretation, neither in the application of an actual rule of law.

47. Consequently, I found no legal bases backing the Majority's alternative approach as expressed in para 184 of the Decision. The cited paragraphs in the ILC Draft on

[29] *Ibid.*, para 191.
[30] *Ibid.*, para. 256.
[31] *Ibid.*, para. 267.

Fragmentation could not support such founding.

48. Finally, even if I do agree with para. 186 of the Decision, I could not endorse its very last sentence by which the Majority "…adopts what was sustained by the tribunal in *AS PNB Banka*" at paras. 573, 574 and 578. In our present case, Respondent has argued that the BIT and the Termination Treaty must be interpreted in conformity with Article 31 of the VCLT[32]. Respondent has not argued that the Declarations or the Termination Treaty have the object to interpret the BIT, thus reference to *AS PNB Banka* is irrelevant.

IV. GENERAL LEGAL FRAMEWORK

49. Considering that the jurisdiction of the Tribunal should be determined in compliance with the BIT, the correct application of its Article 10 is seminal. Accordingly, in interpreting that Article in conformity with VCLT, it is reasonable to conclude that the right of an investor to recourse to international arbitration for the settlement of investment disputes, has been formulated as an exception to the applicable general rules concerning settlement of disputes.

50. The exceptional nature of the settlement of investment disputes system, as expressed by Article 10 of the BIT, must be considered as a recognition of the principle *lex specialis* derogate *lex generalis*, and as such it could not be modified or terminated by a latter international rule, except if that latter international rule expressly contemplates its derogation (aside from the special situation for international peremptory norms).

51. This understanding has been recognized by the Contracting Parties to the Termination Agreement. Article 4.2 of the Termination Agreement provides that "The termination in accordance with Article 2 of Bilateral Investment Treaties listed in the Annex A, and the termination in accordance with Article 3 of Sunset Clauses on Bilateral Investment Treaties listed in Annex B shall take effect, for each such treaty, as soon as this Agreement enters into force for the relevant Contracting Parties…".

52. Consequently, Article 4 of the Termination Agreement recognized that BITs

[32] Respondent's Request for Bifurcation, 30 November 2021, para 181 et ss.

enumerated in Annex A will continue to be valid until the time the Termination Treaty enters into force for the relevant Contracting Party.

53. Therefore, even if the Contracting Parties to the Termination Treaty could impose retroactive effects to their agreement, such retroactivity could not affect investors "acquire rights" to settle a dispute through international arbitration. Once an investor of a Contracting Party, which has invested in the other Contracting Party, has consented to arbitration under the BIT, an acquired right under international law has been duly established.

54. The above conclusion is independent from the understanding that the *Achmea* principle is part of international law. The *Achmea* principle derived from a ruling of the CJEU that applies EU law, and EU law have its source in treaty law. But the mere recognition that EU Law is part of international law does not prejudge the primacy of EU Law over other rules of international law expressed on treaties as well as on customary international law. Thus, it is not relevant to consider EU Law as a sub-branch of international law[33] to justify the non-binding effect of a CJEU precedent (the *Achmea* principle) over an arbitral tribunal's own jurisdiction. In that context, an arbitral tribunal is not bound by a judicial or arbitral precedent that ignores the *lex specialis* character of a specific treaty (in the present case, the applicable BIT) which confers the arbitral tribunal with its own jurisdiction.

55. On the same line of reasoning, the fact that EU Law and BITs dealt with same subject matters, at least concerning certain investors rights, could not be construed as the basis to consider that EU law, being posterior, prevails over the BIT.

56. Whereas Article 10 of the BIT, is a *lex specialis*, prevails over any other general international rule contained in any subsequent treaty that has not expressly modified or derogated the exceptional character of such *lex specialis* (excluding peremptory international norms).

57. In conclusion, the BIT recognizes to investors of one Member State that invest in another Member State, the right to settle investment disputes, through recourse to

[33] See *Cavalum, As PNB* and *Renergy* cases, mentioned at para. 154 of the Decision.

international arbitration. That specific investor right constitutes a departure from applicable general rules for the settlement of disputes. In that sense, the exceptional nature of the settlement of dispute system implemented by the BIT, constitutes a *lex specialis.*

58. In reference to the present case and in conformity with the applicable BIT, Claimant, having accepted the offer made by Respondent to settle a dispute through international arbitration, has crystalized the generation of an "acquire right" under international law that could not be affected by a latter agreement of the Contracting Parties to the BIT.

59. Therefore, I agree with the reasoning restricting the retroactive effect of the Termination Treaty in relation to Claimant's "acquire rights" to recourse to international arbitration to settle an investment dispute.

Professor Raúl E. Vinuesa

Co-arbitrator

Date: 28 July 2023