

**PCA CASE N° 2014-34**

**IN THE MATTER OF AN ARBITRATION**

**-pursuant to-**

**THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF  
GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE CZECH  
AND SLOVAK FEDERAL REPUBLIC FOR THE PROMOTION AND PROTECTION OF  
INVESTMENTS SIGNED ON 10 JULY 1990**

**-between-**

**WNC FACTORING LTD  
(UNITED KINGDOM)**

**The Claimant**

**-and-**

**THE CZECH REPUBLIC**

**The Respondent**

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**AWARD**

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**ARBITRAL TRIBUNAL:**

**Dr Gavan Griffith QC (President)  
Professor Robert Volterra  
Judge James Crawford**

**REGISTRY:**

**The Permanent Court of Arbitration**

**22 February 2017**

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## I. INTRODUCTION

1. The Claimant is WNC Factoring Limited (“**WNC**” or the “**Claimant**”) a company organized under the laws of England and Wales. It is represented in this arbitration by Messrs Stephen Jagusch, Anthony Sinclair, Epaminontas Triantafilou and Philip Devenish of Quinn Emanuel Urquhart & Sullivan, LLP, and Messrs Robert Nemeč and Michal Sylla of PRK Partners S.R.O. Advokátní Kancelář.
2. The Respondent is the Government of the Czech Republic (the “**Czech Republic**” or the “**Respondent**”, and together with the Claimant, the “**Parties**”). It is represented in this arbitration by Ms Karolína Horáková and Messrs Libor Moravec, Ivan Císár and Pavel Kinnert of Weil Gotshal & Manges, Ms Erica Stein and Messrs Arif Ali and David Attanasiou of Dechert LLP, and Ms Maria Talašová of the Ministry of Finance of the Czech Republic.
3. The dispute between the Parties concerns WNC’s investment in the acquisition of the company ŠKODAEXPORT, a.s., (“**Škoda Export**”), a Czech state-owned supplier of turnkey capital equipment in the energy sector. The Claimant claims that the Czech Republic “provided bidders for Škoda Export with misleading and inaccurate information during the company’s privatisation,” obstructed WNC’s attempts to restore the company to profitability, and eventually “forced Škoda Export into insolvency and caused the complete devaluation of WNC’s investment in the Czech Republic.”<sup>1</sup> According to the Claimant, “the Czech Republic is responsible as a matter of international law for the wrongful treatment to which WNC was subjected” under the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Republic for the Promotion and Protection of Investments*, signed on 10 July 1990, with Protocol, as amended by Exchange of Notes on 23 August 1991 and 24 October 1991 (the “**BIT**”).<sup>2</sup>

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<sup>1</sup> Statement of Claim, ¶ 19.

<sup>2</sup> Statement of Claim, ¶ 15. The Exchange of Notes entered into force on 24 October 1991 and the Agreement entered into force on 26 October 1992, CLA-1.

## II. PROCEDURAL HISTORY

### A. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

4. The Claimant commenced these proceedings by Notice of Arbitration dated 26 September 2014 pursuant to Article 8(2)(a) of the BIT and the Arbitration Rules of the United Nations Commission on International Trade Law as adopted in 1976 (“**UNCITRAL Rules**”).<sup>3</sup>
5. The Claimant appointed Professor Robert Volterra as arbitrator on 26 September 2014. The Respondent appointed Professor James Crawford as arbitrator on 27 October 2014. The co-arbitrators appointed Dr Gavan Griffith QC as presiding arbitrator on 6 January 2015. Professor Crawford was subsequently elected to the International Court of Justice but continued to serve as arbitrator in the present case.
6. On 9 February 2015, the Tribunal and the Parties signed Terms of Appointment, which, *inter alia*, designated the Permanent Court of Arbitration (“**PCA**”) as registry for the proceedings.
7. Following a procedural hearing held at The Hague on 9 February 2015 and the circulation of a draft for the Parties’ comments, the Tribunal issued its Procedural Order No. 1 dated 20 March 2015, which *inter alia* established a calendar for the proceedings, including the hearing on the merits (“**Hearing**”).

### B. EXCHANGE OF WRITTEN PLEADINGS

8. On 2 April 2015, the Claimant filed its Statement of Claim (“**Statement of Claim**”).
9. On 3 August 2015, the Respondent filed its Statement of Defence (“**Statement of Defence**”).
10. On 3 and 4 September 2015, the Respondent and Claimant respectively each filed its request for document production for the Tribunal’s determination in the form of a Redfern Schedule.
11. On 26 September 2015, the Tribunal issued its Procedural Order No. 2, in which it ruled on the Parties’ requests for document production.

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<sup>3</sup> Notice of Arbitration dated 26 September 2014, ¶¶ 12-15.

12. On 9 October 2015, the Claimant requested a two-month extension for the filing of its Reply and a corresponding adjustment to the procedural calendar, including the dates of the Hearing. By letter dated 12 October 2015, the Respondent objected to the Claimant's request.
13. On 23 November 2015, following several exchanges of written submissions by the Parties, the Tribunal issued its Procedural Order No. 3 in which it granted the Claimant's request for an extension of time for the submission of its Reply and adjusted the procedural calendar accordingly.
14. On 12 January 2016, the Claimant filed its Reply Submission ("**Reply**").
15. On 1 April 2016, the Respondent requested that the Tribunal order the Claimant to disclose the identity of its ultimate beneficial owner and provide evidence of its ability to pay an eventual order for costs.
16. On 7 June 2016, after receiving comments from the Parties, the Tribunal issued its Procedural Order No. 4, in which it denied the Respondent's request.
17. On 11 June 2016, the Respondent filed its Rejoinder ("**Rejoinder**").
18. By letters dated 14 and 16 June 2016, the Respondent and the Claimant respectively notified the Tribunal of the witnesses they wished to call for cross-examination at the Hearing.
19. On 21 June 2016, the Tribunal issued further procedural directions for the conduct of the hearing.
20. By letters dated 5 and 9 July 2016, the Claimant sought the admission of certain new documents in the record on grounds of exceptional circumstances.
21. On 7 July 2016, the Parties filed their respective skeleton arguments ("**Claimant's Skeleton Argument**" and "**Respondent's Skeleton Argument**"). The Experts filed their joint statement of matters agreed and not agreed.

**C. HEARING**

22. The Hearing was held at the Peace Palace in The Hague from 11 to 16 July 2016. The following persons were present:



**The Tribunal**

Dr Gavan Griffith QC (Presiding Arbitrator)  
Professor Robert Volterra  
Judge James Crawford

**For the Claimant**

Dr Anthony Sinclair  
Mr Epaminontas Triantafilou  
Mr Philip Devenish  
*Quinn Emanuel Urquhart & Sullivan*  
*LLP*

Mr Robert Nemeč  
Mr Michal Sylla  
*PRK Partners*

Witnesses

Expert

Neal Mizrahi  
*FTI Consulting Inc.*

**For the Respondent**

Ms Karolína Horáková  
Mr Libor Morávek  
Mr Ivan Cisár  
Mr Pavel Kinnert  
*Weil, Gotshal & Manges s.r.o.*

Mr Arif H. Ali  
Ms Erica Stein  
Mr David Attanasiou  
*Dechert LLP*

Ms Marie Talašová  
Ms Anna Bilanová  
Mr Tomáš Munzar  
*Ministry of Finance of the Czech*  
*Republic*

Witnesses

Michal Bakajsa  
Tomas Uvíra

Expert

David Dearman  
*Mazars LLP*

**Tribunal Secretary**

Fedelma Claire Smith

**Court Reporter**

Trevor McGowan

23. By letters dated 5 and 7 July 2016, the Claimant informed the Tribunal that . . . . . would be unable to attend the Hearing due to illness and provided a doctor's note confirming ill health. Prior to the hearing, the Tribunal enquired whether . . . . . would be available to

attend by video link.<sup>4</sup> The Claimant indicated by e-mail on 10 July that [redacted] would not be able to give evidence “by video link or otherwise” due to her ill health.<sup>5</sup>

24. By letter sent on 8 July 2016, former Minister Kalousek informed the Tribunal that he would be unable to attend the Hearing because the Czech Parliament was sitting during the same week and he was required to attend as the leader of one of the two major opposition parties. The Tribunal enquired as to the availability of Mr Kalousek to give evidence by video-link “at any time during next week (11 through 16 July 2016).”<sup>6</sup>
25. During the hearing, the Tribunal heard submissions from the Parties concerning the circumstances of [redacted] and Mr Kalousek not being produced for examination upon their statements.
26. The Tribunal confirmed that as a valid reason had been provided for [redacted] failure to appear, falling within the exception in paragraph 7.8 of Procedural Order No. 1, her statement would not be excluded.<sup>7</sup>
27. Following the Respondent informing the Tribunal that Mr Kalousek would not be produced for examination in person or by video link,<sup>8</sup> the Tribunal ruled to exclude his statement as not falling within the exception of paragraph 7.8 for non-appearance.
28. During the hearing, the Tribunal also ruled not to admit the new documents referenced in the Claimant’s letter of 5 July 2016.<sup>9</sup>
29. On 30 September 2016, each Party filed its submissions on costs (“**Claimant’s Costs Submission**” and “**Respondent’s Costs Submission**”). On 14 October 2016, the Respondent filed its Reply Submission on Costs.

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<sup>4</sup> E-mail from Tribunal Secretary, 8 July 2016.

<sup>5</sup> E-mail from Claimant, 10 July 2016.

<sup>6</sup> E-mail from Tribunal Secretary, 8 July 2016.

<sup>7</sup> Transcript, Day 1, p. 36; pp. 196-197.

<sup>8</sup> Including during extended sitting hours offered until 10pm on any day during the hearing, or on Saturday 17 or Sunday 18 July, or during the following week (19 through 23 July 2016). Transcript, Day 2, pp. 3-4; Transcript, Day 3, p. 1.

<sup>9</sup> Transcript, Day 1, p. 33.

30. By letter dated 18 January 2017, the Tribunal invited each of the Parties to make a final supplementary deposit on costs, with the final amounts for fees and expenses of the Tribunal to be limited to the balance of the final deposit.
31. On 7 February 2017, the Respondent submitted a Supplemented and Updated Summary of Costs and Expenses Incurred by the Czech Republic (the “Supplemented Summary of Costs”) in which it claimed additional expenses resulting “*mainly from invoices which Respondent received and processed after 30 September 2016 for work performed prior to that date by Mazars LLP, Weil Gotshal & Manges and Dechert LLP.*” By letter dated 9 February 2017, the Claimant objected to the additional expenses claimed in the Supplemented Summary of Costs. On 11 February 2017, the Tribunal declined to allow the Respondent’s claim.
32. By agreement of the Parties’ positions the issues of the Respondent’s Objections to Admissibility and Jurisdiction, as pleaded and summarized in Part V, were not bifurcated for preliminary determination. Nonetheless, the Tribunal will consider these as matters pleaded in defence at paragraphs 293 to 364 below, and then engage the continuing live merits issue in Part VI.B., at paragraphs 365 to 403.
33. It follows that it suffices for the factual background to be briefly summarized in short following Part III, with relevant detail being picked up under the following Parts of the Award. As will become apparent in these reasons, in the result many of the factual issues raised and on which the Parties joined issue do not fall for determination as they are not material to the sole continuing live merits issue of expropriation. In the same way, given the dispositive Award dismissing the entire claim, as set out on page 135 below, the entire issues of Damages and Quantum, summarized in Part V.D below, also cease to be relevant for determination.

### III. SUMMARY OF FACTUAL BACKGROUND

34. The Respondent's decision in May 2007 to privatize its ownership interest of Škoda Export in August 2007 was followed by public tender process for the sale of its shares ("**Tender Procedure**").<sup>10</sup>
35. WNC participated in the Tender Procedure through its subsidiary, the Czech company ČEX, a.s., incorporated on 28 December 2005, renamed FITE Export, a.s. ("**FITE**") on 12 August 2008.<sup>11</sup> At the time of the privatisation of Škoda Export, FITE formed part of a wider group of WNC subsidiaries in the Czech Republic known as ČKD Group ("**ČKD**"),<sup>12</sup> engaged in the Energy, Power and Construction ("**EPC**") business.<sup>13</sup>
- 14
36. The Tender Procedure comprised a qualification round followed by an information process and tender for price.<sup>15</sup> FITE was successful in the first round as a qualifying participant and therefore was provided with an Information Memorandum ("**Information Memorandum**")<sup>16</sup> and access to a due diligence process within the "data room" at Škoda Export's registered offices (the "**Data Room**").<sup>17</sup>

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<sup>10</sup> Ministry of Finance, Press Release, 27 August 2008, with English translation ("**Tender Announcement**"), **C-29**; Tender Rules – Sale of 100% of the shares of ŠKODAEXPORT, a.s., 28 August 2007, with English translation ("**Tender Rules**"), **C-31**.

<sup>11</sup> Statement of Claim, fn. 7; Full Extract of the Czech Commercial Register regarding BA MU EXPORT, a.s., 23 September 2014, with English translation, **C-1**.

<sup>12</sup> Statement of Claim, ¶ 32; Full Extract from the Czech Commercial Register regarding BA MU EXPORT, a.s., **C-1**; Witness Statement of (CWS-2), ¶ 3.

<sup>13</sup> Witness Statement of (CWS-2), ¶ 3.

<sup>14</sup> First Witness Statement of (CWS-4), ¶ 1. (As for share ownership of WNC, according to Annual Returns filed at Companies House for WNC for the years 2008, 2009, 2014 and 2015, the owner of 100% of shares in WNC is Woodward & Bradley Corporation: Annual Return of WNC Factoring Ltd. filed with the Companies House as at 25 October 2009, **R-79**; Annual Return of WNC Factoring Ltd. filed with the Companies House as at 25 October 2008, **R-80**; Annual Return of WNC Factoring Ltd. filed with the Companies House as at 25 October 2014, **R-81**; Annual Return of WNC Factoring Ltd. filed with the Companies House as at 25 October 2015, **R-292**.)

<sup>15</sup> Extract from the resolution of the Government of the Czech Republic No. 575 on the procedure of the privatisation of the state's ownership interest in the business of ŠKODAEXPORT, a.s., 30 May 2007, **C-26**.

<sup>16</sup> Tender Announcement, **C-29**; Information Memorandum, **C-28**.

<sup>17</sup> Tender Announcement, **C-29**.

37. The team which carried out the due diligence on behalf of FITE at the Data Room was led by \_\_\_\_\_ between 23 October and 28 November 2008.<sup>18</sup> Some of the available information and documents were redacted. Further information requested by \_\_\_\_\_ and other qualifying participants and other additional information was added to the Data Room from time to time.<sup>19</sup>
38. FITE submitted its tender application on 12 September 2007 for the price of CZK 210,016,800.<sup>20</sup>
39. Thereafter, the management of Škoda Export delivered presentations to each of the qualifying participants in the Tender Procedure, including to FITE on 6 November 2007.<sup>21</sup> The minutes of each management meeting were made available to other participants.
40. On 2 January 2008, FITE was informed that its bid was successful.<sup>22</sup> On 25 February 2008, the Respondent formally approved the sale of its shares in Škoda Export to FITE.<sup>23</sup> The sale of the shares was settled on 26 May 2008.
41. On 7 December 2007 and 29 February 2008, respectively, FITE and the Ministry of Finance of the Czech Republic (“MoF”) signed the Agreement for the sale and purchase of all shares in Škoda Export (the “SPA”).<sup>24</sup> The purchase price of the shares under the SPA was CZK 210,016,800.<sup>25</sup>
42. On 27 May 2008, Škoda Export concluded an agreement with ČKD for the use of the established ČKD name for a monthly fee of CZK 4 million.<sup>26</sup> The Board of Directors was changed to comprise \_\_\_\_\_ and \_\_\_\_\_ and \_\_\_\_\_, with \_\_\_\_\_ as Chairman.<sup>27</sup> Škoda

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<sup>18</sup> WS \_\_\_\_\_ ¶¶ 15-16.

<sup>19</sup> WS \_\_\_\_\_ ¶ 18; Project Cards of Škoda Export a.s., C-86.

<sup>20</sup> WNC Tender Application, 12 September 2007, C-32.

<sup>21</sup> Meeting Minutes of Management Presentation held for FITE, 6 November 2007, C-36.

<sup>22</sup> Letter from Ernst & Young to FITE, 2 January 2008, C-33.

<sup>23</sup> Resolution of the Czech Government No. 168, 25 February 2008, C-34. Statement of Claim ¶ 88; Letter from the Ministry of Finance to FITE, 26 May 2008, C-39.

<sup>24</sup> SPA, C-13.

<sup>25</sup> SPA, Clause 31, C-13.

<sup>26</sup> Reply, ¶123; Second Witness Statement of \_\_\_\_\_ (CWS-9), ¶ 31. In May 2008, the CZK/USD rate was approx. 0.061. It fell to a low of 0.045 in February 2009 and thereafter fluctuated between those two rates until November 2014. Thus in May 2008, CZK 4m was worth around USD 244,000.

<sup>27</sup> Full Extract of the Czech Commercial Register regarding Škoda Export, 28 May 2013, C-21.

Export was renamed ČKD Export, a.s. on 9 June 2008 and was further renamed as PA Export, a.s. on 14 May 2009.<sup>28</sup> (For ease of reference, the Tribunal will continue to refer to the company as **Škoda Export**.)

43. By letter to FITE dated 26 May 2008, the First Deputy Minister of Finance, Ing. Ivan Fuksa, confirmed that “all the statements of the Seller are on the Date of the settlement in all substantial aspects truthful, complete and correct.”<sup>29</sup> Commencing in May 2008, FITE carried out an internal post-acquisition audit of Škoda Export<sup>30</sup> and concluded that the forecasted profits fell materially short of the levels it had expected from the information made available during the Tender Procedure.<sup>31</sup>
44. Some months later, by letter dated 22 September 2008, . informed Mr Kalousek, the Minister of Finance, that “we found that the [acquired] projects show significantly worse economic results than those presented during the Due Diligence, namely in terms of absolute value CZK 860 million worse than the officially confirmed data presented by the former management of [Škoda Export] in the Data room.”<sup>32</sup> warned of the risk of “a significant loss by [Škoda Export] and its inability to perform its liabilities towards all national and in particular foreign contractual partners, including the state.”<sup>33</sup>
45. By letter in reply dated 10 October 2008 on behalf of the Respondent, Ing. Tomáš Uvára stated: “I would like to assure you that the Ministry of Finance is ready to provide cooperation [in resolving the situation]” and requested “a list of those projects including a specification of the disproportion as compared to the Due Diligence for each project and the demonstration of such facts through the relevant documentation.”<sup>34</sup>

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<sup>28</sup> Statement of Claim, fn. 8; Reply, ¶ 122; Full Extract of the Czech Commercial Register regarding Škoda Export, 28 May 2013, C-21.

<sup>29</sup> Letter from the Ministry of Finance to FITE, 26 May 2008, C-39.

<sup>30</sup> Witness Statement of (CWS-5), ¶ 8; First Witness Statement of (CWS-6), ¶ 27.

<sup>31</sup> First Witness Statement of (CWS-6), ¶ 28.

<sup>32</sup> Letter from FITE to the Ministry of Finance, 22 September 2008, C-40.

<sup>33</sup> Letter from FITE to the Ministry of Finance, 22 September 2008, C-40.

<sup>34</sup> Letter from the Ministry of Finance to FITE, 10 October 2008, C-48.

46. By letter dated 4 November 2008, [redacted] proposed the provision of substantial state guarantees to the benefit of the Czech Export Bank, a.s. (“**CEB**”) and requested operational financing to Škoda Export for the duration of the implementation of loss-making projects.<sup>35</sup>
47. On 22 December 2008, Minister Kalousek stated that it would be “difficult” for the MoF to provide state guarantees and recommended “that you directly contact the [CEB], and potentially also the Export Guarantee and Insurance Corporation” (“**EGAP**”).<sup>36</sup>
48. On 2 December 2008, Škoda Export submitted to **CEB** an application for credit in the amount of CZK 1 to 1.3 billion, credit maturity 2 years, at Commercial Interest Reference Rates (“**CIRR**”), for the purpose of pre-export financing of two projects for the delivery of the Balloki and Muridke gas/steam power plants in Pakistan and the hydroelectric power stations in Uganda and Thailand.<sup>37</sup>
49. By further letter dated 16 January 2009, [redacted] sought the cooperation of Ing. Ivan Fuksa, the First Deputy Minister of Finance and Chairman of the Supervisory Board of the CEB, requesting his opinion of the submitted credit application, the assignment of a responsible individual at the bank to work on the application, and an independent audit to verify ČKD’s findings about the actual state of the projects accepted by the company.<sup>38</sup> By letter in reply dated 16 February 2009, Ing. Fuksa stated that the request for support had been assigned to the general manager of CEB and stated “I envisage that your requests will be complied with by [CEB] and [EGAP].”<sup>39</sup>
50. On 15 December 2008, FITE filed a petition with the Municipal Court in Prague for the payment of CZK 1,080,333,000 “with appurtenances”, against the MoF of the Czech Republic, for repayment of the purchase price paid for the shares in Škoda Export on grounds of the Respondent’s breach of the “duty stipulated in Section 596 of Act No. 40/1964 Coli., the Civil Code, as amended, which

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<sup>35</sup> Letter from the Minister of Finance to FITE, 22 December 2008, **C-41**.

<sup>36</sup> Letter from the Minister of Finance to FITE, 22 December 2008, **C-41**.

<sup>37</sup> Letter from FITE to I. Fuksa, 16 January 2009, **C-42**.

<sup>38</sup> Letter from FITE to I. Fuksa, 16 January 2009, **C-42**.

<sup>39</sup> Letter from I. Fuksa to FITE, 16 February 2009, **C-43**.

stipulates that if a thing as any defects that are known to the seller, the seller is obliged to notify the buyer of such defects during negotiations of the purchase price”.<sup>40</sup>

51. On 23 April 2009, the Chairman of the Board of Directors of CEB, Mr Lubomír Pokorný, convened an extraordinary meeting of the Board of Directors, “to discuss and approve further steps in relation to the Balloki project.”<sup>41</sup> The Board unanimously approved a resolution, *inter alia*, taking steps: (i) “to prepare an agreement on termination of the project, so the project is protected against the potential insolvency of Škoda Export”; (ii) “to complete negotiations with Škoda Export, a.s. regarding an agreement on terms of the extension of guarantees”; and (iii) “to prepare documents and initiate cooperation with the Czech Ministry of Finance in the preparation of interim measures that will block the removal of assets and the possible damage to creditors by Škoda Export, a.s. – this includes blocking the CEB account, preventing disposal of assets, blocking other accounts and securing other assets.”<sup>42</sup>
52. By letter dated 24 April 2009 to Mr Uvíra, FITE and \_\_\_\_\_ gave notice of its “withdrawal” from the SPA and requested repayment of the purchase price within the period stipulated in Article 12.3 of the SPA; and stated that it was prepared to take care of the operation of Škoda Export during that period.<sup>43</sup> By separate letter of 24 April 2009, \_\_\_\_\_ informed CEB of the resignation of the entire board of Škoda Export on 22 April 2009 and of FITE’s rescission of the SPA on 24 April 2009.<sup>44</sup>

#### *Banking Transactions*

53. Following the implementation by Škoda Export of certain banking transactions, on 24 April 2009, the Tax and Money Laundering Section of the Money Laundering Department of the Police of the Czech Republic issued a resolution seizing the funds of Škoda Export on suspicion that “the funds

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<sup>40</sup> Petition submitted by FITE to the Municipal Court in Prague, 15 December 2008, C-49, p. 21.

<sup>41</sup> Minutes from the extraordinary meeting of the Board of Directors of Česká Exportní Banka, a.s. (Minutes no. M/2/2009), 23 April 2009, Ref. No. 9891/09/O0101, C-47.

<sup>42</sup> Minutes from the extraordinary meeting of the Board of Directors of Česká Exportní Banka, a.s. (Minutes no. M/2/2009), 23 April 2009, Ref. No. 9891/09/O0101, C-47.

<sup>43</sup> Letter from FITE to the Ministry of Finance, 24 April 2009, C-51.

<sup>44</sup> Letter from FITE to CEB, 24 April 2009, C-50.



on the above accounts are intended for the commission of a crime”, which had the effect of freezing its bank accounts.<sup>45</sup>

54. By letters dated 18 and 22 May 2009 from [redacted] to Mr Lubomir Pokorný, Škoda Export, appealed to Mr Pokorný to cooperate with the police so that the investigation could be completed and the accounts unfrozen.<sup>46</sup> Mr Pokorný responded by letter dated 29 May 2009, stating: “The actions of state authorities, which at their own discretion not only commenced criminal proceedings and, within the framework of the criminal proceedings, decided on the seizure of the funds on the accounts, already took place outside the competency of the creditor banks and fully confirmed the legitimacy of these concerns.”<sup>47</sup>
55. On 5 June 2009, the attachment of the cash funds of Škoda Export was lifted by a ruling of the District State Attorney’s Office for Prague.<sup>48</sup>

*Insolvency*

56. On 17 June 2009, Siemens Engineering, a.s. (“**Siemens Engineering**”) commenced insolvency proceedings against Škoda Export for payments due under contracts for work on the Balloki 200 MW project with a contract price of USD 11,581,000 and work on the Muridke 234 MW project with a contract price of CZK 277,950,000.<sup>49</sup> The petition referred to failure to pay individual invoices and “uncertainty as regards the main shareholder of the debtor’s company”.<sup>50</sup>
57. By resolution of the Insolvency Court on 14 September 2009, [redacted].<sup>51</sup> On 16 November 2009, the bankruptcy of Škoda Export was

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<sup>45</sup> Police Authority Resolutions, 24 April 2009, C-53.

<sup>46</sup> Letter from Škoda Export to CEB, 18 May 2009, C-55; Letter from Škoda Export to CEB, 22 May 2009, C-56.

<sup>47</sup> Letter from CEB to Škoda Export, 29 May 2009, C-57.

<sup>48</sup> Ruling of the District State Attorney’s Office for Prague 1, 5 June 2009, C-58.

<sup>49</sup> Insolvency Petition of Siemens Engineering, a.s., 17 June 2009, C-54.

<sup>50</sup> Insolvency Petition of Siemens Engineering, a.s., 17 June 2009, C-54.

<sup>51</sup> Resolution of the Insolvency Court, 14 September 2009, C-199.

declared.<sup>52</sup> On 21 February 2011, the Municipal Court in Prague approved the sale of the business of Škoda Export to ROAD Investments, a.s.<sup>53</sup>

#### **IV. THE PARTIES' REQUESTS FOR RELIEF**

58. The Claimant's Statement of Claim requested an Award:

- (1) Confirming the Tribunal's jurisdiction to determine the present dispute;
- (2) Declaring that the Czech Republic has breached the BIT and international law, and in particular Articles 2(3) and 5 of the BIT;
- (3) Ordering the Czech Republic to pay monetary compensation or damages in a total amount of USD 90,000,000 or, in the alternative, USD 45,971,927, on the basis of the value that the Claimant expected to derive from its investment in Škoda Export;
- (4) Alternatively, ordering the Czech Republic to pay monetary compensation or damages in a total amount of USD 65,000,000 on the basis of the purchase price the Claimant paid plus the additional value injected into Škoda Export after its acquisition, including the Tashkent project; or USD 30,176,737 if the Tashkent project is excluded;
- (5) Alternatively, ordering the Czech Republic to pay interest on any amount awarded, at the Czech statutory rate or a reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of the Award until payment in full;
- (6) Under (3), (4) and (5), ordering the Czech Republic to pay interest on any amount awarded, at the Czech statutory rate or a reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of the Award until payment in full;

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<sup>52</sup> Resolution of the Insolvency Court, 16 November 2009, **C-198**.

<sup>53</sup> Resolution of Municipal Court in Prague, 21 February 2011, **C-62**.

- (7) Ordering the Czech Republic to pay all costs incurred in connection with the arbitration proceedings, including the costs of the arbitrators as well as legal and other expenses incurred by the Claimant on a full indemnity basis, plus interest thereon at a reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of the Award until payment in full; and
  - (8) Granting any other relief as the Tribunal may deem just and proper in the circumstances.<sup>54</sup>
59. In its Reply, the Claimant amended its alternative claims for monetary compensation to “USD 71,581,414 or, in the alternative, USD 62,269,398, on the basis of the value that the Claimant expected to derive from its investment in Škoda Export” or “USD 46,898,664 on the basis of the purchase price the Claimant paid plus the additional value injected into Škoda Export after its acquisition.”<sup>55</sup>
60. The Respondent’s Requests for Relief are that the Tribunal:
- (1) Declare that the Tribunal does not have jurisdiction over any of the alleged breaches of the BIT, or alternatively declare that the Tribunal does not have jurisdiction over alleged breaches of Articles 2(2) and 2(3) of the BIT;
  - (2) Declare that the Czech Republic has not breached the BIT;
  - (3) Dismiss all of the Claimant’s claims in their entirety;
  - (4) Order the Claimant to pay the costs of these arbitral proceedings, including the cost of the Tribunal and the legal and other costs incurred by the Czech Republic, on a full indemnity basis; and

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<sup>54</sup> Statement of Claim, ¶ 273.

<sup>55</sup> Reply, ¶ 417.

- (5) order the Claimant to pay interest on any costs awarded to the Czech Republic, in an amount to be determined by the Tribunal.<sup>56</sup>

## V. THE PARTIES' ARGUMENTS

61. The Claimant's case is that the actions and inactions attributable to the Czech Republic in relation to Škoda Export during the privatization tender and after its acquisition by the Claimant, caused significant loss to the business of Škoda Export, which obliged the Claimant to withdraw from the SPA, and thereby deprived the Claimant of the entire benefit of its investment in the Czech Republic.
62. The impleaded actions and inactions of the Czech Republic are claimed to constitute separate breaches of its obligations under the BIT:
- (1) To observe the provisions of the "specific agreements" concluded by the Czech Republic with respect to the Claimant's investment (the "**Umbrella Clause**") (Article 2(3));
  - (2) To accord "fair and equitable treatment" and to refrain from "unreasonable or discriminatory measures" ("**FET**") (Article 2(2)); and
  - (3) Not to expropriate the Claimant's investment or subject its investment to measures having effect equivalent to expropriation, except "for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation" (Article 5).<sup>57</sup>
63. The Respondent's answering position is that:
- (1) The Tribunal has no jurisdiction over any of the Claimant's claims or alternatively, has no jurisdiction over any of the Claimant's claims save for the expropriation claim under Article 5 of the BIT (the "**Jurisdiction and Admissibility Objections**");

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<sup>56</sup> Statement of Defence, ¶ 658; Rejoinder, ¶ 699.

<sup>57</sup> Statement of Claim, ¶¶ 171-; Reply, ¶¶ 335-384.

- (2) The information provided to the Claimant during the privatization process was accurate and sufficient, and the Claimant failed to carry out due diligence properly;
- (3) The economic loss caused to Škoda Export after acquisition by the Claimant resulted from the Claimant's mismanagement of the company;
- (4) The terms on which the Claimant sought operational financing from the financing institutions were unreasonable;
- (5) The financing institutions operated on commercial terms and did not exercise governmental authority such as to engage the responsibility of the Czech Republic;
- (6) In any event, the Czech Republic took appropriate steps in response to the financial situation of Škoda Export; and
- (7) Accordingly, the Czech Republic has complied with all of its obligations under the BIT.

**A. THE RESPONDENT'S OBJECTIONS**

64. The Respondent contends that the Tribunal lacks jurisdiction to hear any of WNC's BIT claims on the grounds that:

- (1) The arbitration clause of the BIT has been superseded by European Union ("EU") law; and
- (2) Alternatively, the Tribunal lacks jurisdiction under the terms of the BIT save for the expropriation claim under Article 5 of the BIT.

**1. Admissibility: The intra-EU BIT jurisdictional objection**

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

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

**(1) The Respondent's position**

66. The Respondent contends that Article 8(1) has been superseded by EU law,<sup>58</sup> on the grounds that:

- (1) The single market provides complete protection to investors from one Member State investing in another Member State,<sup>59</sup> hence the later treaties on which the EU is founded have superseded and terminated the BIT, as the earlier agreement; and
- (2) The BIT establishes discrimination on grounds of nationality against investors from other EU Member States who do not benefit from the BIT. It is incompatible with EU law.<sup>60</sup>

67. The Respondent invokes the recent decisions of the European Commission (“EC”) both to investigate the award rendered by the tribunal in the *Micula* case and to initiate formal and informal procedures with EU Member States on the grounds that maintaining intra-EU BITs contravenes EU law.<sup>61</sup> On 18 June 2015, the EC confirmed its position that intra-EU BITs are incompatible with EU law.<sup>62</sup> Member States of the EU are asserted to “have fallen in line behind the Commission in this regard”.<sup>63</sup>

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<sup>58</sup> Statement of Defence, ¶¶ 510-514; Rejoinder, ¶¶ 398-413; Transcript, Day 2 at pp. 75-78 (Respondent's Opening Statement, Mr Ali).

<sup>59</sup> Statement of Defence, ¶ 512.

<sup>60</sup> Statement of Defence, ¶ 512.

<sup>61</sup> Statement of Defence, ¶ 511; Letter of European Commission re State aid SA.38517(2014/C) (ex 2014/NN) – Romania – Implementation of Arbitral award *Micula v Romania* of 11 December 2013, dated 1 October 2014, **R-186**; European Commission – Press Release, State aid: Commission orders Romania to recover incompatible state aid granted in compensation for abolished investment aid scheme, 30 March 2015, **R-187**; European Commission – Press Release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, 18 June 2015, **R-188**; Letter from commissioner Lord Hill to Ministry of Finance (minister Babiš) re infringement procedure and EU Pilot concerning intra-EU BIT, dated 17 June 2015, **R-189**.

<sup>62</sup> Statement of Defence, ¶ 513; European Commission – Press Release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, 18 June 2015, **R-188**.

<sup>63</sup> Rejoinder, ¶ 406, citing Decision of the Court of First Instance of Brussels, Case No. R.G. 15/7242/A, dated 25 January 2016, **RLA-138**, Section 6.1.

68. For these reasons, the Tribunal must give primacy to EU law, firstly because this is part of international law applicable between the Contracting Parties to the BIT,<sup>64</sup> and secondly because the BIT is incompatible with EU law as both cover the same subject matter.<sup>65</sup>

## (2) The Claimant's position

69. The Claimant argues that EU law has not superseded the arbitration clause of the BIT because the EC Treaty and the BIT do not cover the same subject-matter.<sup>66</sup> A treaty is only to be considered as terminated by the conclusion of a later treaty if both relate to the same subject matter, according to Articles 59(1) and 30(3) of the Vienna Convention on the Law of Treaties.<sup>67</sup> The later EU law does not provide for the type of investor protections embodied in the BIT.<sup>68</sup>
70. The arbitral tribunals in *Eastern Sugar v. Czech Republic*, *Eureko v. Slovakia*, and *EURAM v. Slovakia* accepted that the EU treaties and the EU law adopted under those treaties do not relate to the same subject matter as BITs or multilateral treaties for the protection of foreign investment.<sup>69</sup>

## 2. Jurisdictional objections

### (1) Umbrella Clause and "specific agreement" – Article 2(3)

71. Article 2(3) provides that:

Investors of one Contracting Party may conclude with the other Contracting Party specific agreements, the provision and effect of which, unless more beneficial to the investor, shall not be at variance with this Agreement. Each Contracting Party shall,

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<sup>64</sup> Rejoinder, ¶¶ 401-404.

<sup>65</sup> Rejoinder, ¶ 405-413.

<sup>66</sup> Reply, ¶¶ 230-239; Transcript, Day 1 at pp. 108-110 (Claimant's Opening Statement, Dr Sinclair).

<sup>67</sup> Reply, ¶ 233; Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, **CLA-15**, Articles 59(1), 30(3).

<sup>68</sup> Reply, ¶ 234.

<sup>69</sup> Reply, ¶¶ 235-239; *Eastern Sugar B.V. (Netherlands) v. Czech Republic*, Partial Award, 27 March 2007, **CLA-69**, ¶¶ 159-160, 165; *Eureko B.V. v. Slovakia*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CLA-70**, ¶¶ 262-263; *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, Award on Jurisdiction, 22 October 2012, **RLA-24**, ¶¶ 178, 184.

with regard the investments of investors of the other Contracting Party, observe the provisions of these specific agreements, as well as the provisions of this Agreement.

(a) The Respondent's position

72. The Respondent's second jurisdictional objection is that the Umbrella Clause in Article 2(3) of the BIT does not apply to the SPA because this is not an agreement between the Czech Republic and the Claimant, but is an agreement between the Czech Republic and FITE.<sup>70</sup> The ordinary meaning of "specific agreement" under Article 2(3) would be an agreement between the Czech Republic and WNC.<sup>71</sup> As an agreement between the Czech Republic and FITE, the SPA is not a "specific agreement" between the Claimant and the Czech Republic.<sup>72</sup>
73. The Respondent further contends that Article 2(3) of the BIT does not concern provisions of general legislation addressed to the general public.<sup>73</sup> Accordingly, the Tribunal does not have jurisdiction over the alleged breach of Article 2(3) in respect of alleged violations of applicable Czech legislation.<sup>74</sup> In any event, to be covered by Article 2(3), a legislative obligation must be specific and directed at the investment and the investor at issue.<sup>75</sup> Here, the Claimant has not invoked any legislative or regulatory provision specifically addressed to itself or its investment in Škoda Export but rather, "invokes only general statutory and regulatory duties imposed by Czech commercial law on any seller/owner of the shares".<sup>76</sup>

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<sup>70</sup> Statement of Defence, ¶¶ 497-509; Rejoinder, ¶¶ 418-458; Transcript, Day 2 at pp. 60-63, 66-75 (Respondent's Opening Statement, Mr Ali).

<sup>71</sup> Rejoinder, ¶¶ 418-435.

<sup>72</sup> Rejoinder, ¶¶ 418-448.

<sup>73</sup> Statement of Defence, ¶ 483.

<sup>74</sup> Statement of Defence, ¶¶ 484-496.

<sup>75</sup> Statement of Defence, ¶ 494.

<sup>76</sup> Statement of Defence, ¶ 496. See also Rejoinder, ¶ 454.



74. The Respondent adds that the Claimant has not identified any contractual breaches elevated to the BIT level,<sup>77</sup> and asserts that there are no “obligations” under the SPA or Czech law that are capable of being elevated to the BIT level through Article 2(3).<sup>78</sup>

(b) The Claimant’s position

75. The Claimant argues that there is no privity of contract requirement in Article 2(3) and it is immaterial for purposes of Article 2(3) whether the investor concludes the specific agreement with the State directly, or through an investment vehicle.<sup>79</sup> Whereas the Respondent’s interpretation would permit it to circumvent the BIT by requiring domestic incorporation as a precondition of investment – as it did in the present case through Clause 6.1(a) of the SPA<sup>80</sup> – the object and purpose of the BIT and the principle of resolving uncertainties in favour of the investor militate in favour of a broad reading of Article 2(3) and of qualifying the SPA as a “specific agreement”.<sup>81</sup>

76. The SPA includes multiple warranties applying to FITE and its “Affiliates” as defined in Clause 6.1(h) of the SPA, including WNC.<sup>82</sup> The non-compliance of FITE’s shareholders with the requirements stipulated in the SPA would have triggered the liability of FITE towards the Respondent.<sup>83</sup> Further, the Respondent itself treated WNC’s investment “as a unity”.<sup>84</sup>

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<sup>77</sup> Rejoinder, ¶¶ 449-452.

<sup>78</sup> Rejoinder, ¶¶ 453-458.

<sup>79</sup> Reply, ¶ 198; Transcript, Day 1 at pp. 110-111, 114-123 (Claimant’s Opening Statement, Mr Triantafilou), pp. 125-130, 131-133 (Claimant’s Opening Statement, Dr Sinclair).

<sup>80</sup> Reply, ¶¶ 199-200.

<sup>81</sup> Reply, ¶ 201.

<sup>82</sup> Reply, ¶ 202.

<sup>83</sup> Reply, ¶ 202.

<sup>84</sup> Reply, ¶ 203.

**(2) Articles 2(3) and Article 3(1)**

(a) The Respondent's position

77. There must be privity between the investor and the host state of the investment in respect of the specific obligation in order for the claim to fall under the scope of any of the umbrella clauses which the Claimant seeks to import under the most favoured nation (“MFN”) clause of the BIT.<sup>85</sup> Hence the BIT’s MFN clause in Article 3 cannot remedy the fact that there is no privity between WNC and the Czech Republic under the BIT.<sup>86</sup>
78. Consequently, any alleged failure to observe Czech legislation is not a ground to invoke Article 2(3) of the BIT.<sup>87</sup>

(b) The Claimant's position

79. For the reasons set forth in the foregoing section, the Claimant asserts that the SPA qualifies as a “specific agreement” under Article 2(3).<sup>88</sup>
80. In the alternative, the Claimant invokes the MFN clause in Article 3(1) of the BIT to rely on more favourable umbrella clauses in other treaties concluded by the Czech Republic, which dispense with any privity requirement.<sup>89</sup>
81. The Claimant relies on investment treaties concluded by the Respondent containing clauses which cover “any obligation” with regard to or in connection with investments, namely, Article 11(1) of the Czech Republic-Paraguay BIT, Article 10(2) of the Czech Republic-Lebanon BIT, and Article 15(2)

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<sup>85</sup> Rejoinder, ¶ 457.

<sup>86</sup> Rejoinder, ¶¶ 436-448. Respondent then argues that there are no contractual obligations that can be elevated to BIT level under Article 2(3), see ¶¶ 449-448.

<sup>87</sup> Statement of Defence, ¶ 493.

<sup>88</sup> Reply, ¶¶ 197-203; Transcript, Day 1 at pp. 128-130 (Claimant’s Opening Statement, Dr Sinclair).

<sup>89</sup> Reply, ¶¶ 204-213.

of the Czech Republic-Singapore BIT.<sup>90</sup> None of the aforementioned provisions require that the State's "obligation" or "commitment" is owed directly to the foreign investor.<sup>91</sup>

82. The Claimant refers to the decisions in *EDF v. Argentina* and *Continental Casualty v. Argentina* in support of the proposition that umbrella clauses may apply to obligations in force between the State and a subsidiary of the claimant.<sup>92</sup> Accordingly, Article 2(3) of the BIT, read in conjunction with the MFN clause in Article 3(1), requires that the Respondent observe its obligations under the SPA and Czech law, and the Tribunal has jurisdiction to hear disputes concerning obligations under the SPA and Czech law.<sup>93</sup>

### **(3) Courts' exclusive jurisdiction under Clause XIV of the SPA**

83. Clause XIV of the SPA provides: "Any dispute that arises between the Parties based on or in connection with this Agreement shall be decided by the court in Prague having subject-matter jurisdiction, unless exclusive jurisdiction of a court is stipulated."

(a) The Respondent's position

84. Even if the SPA were held to be a "specific agreement" within the meaning of Article 2(3), the claims are inadmissible because the parties to the SPA agreed that all such claims would be heard by the Czech courts.<sup>94</sup>

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<sup>90</sup> Reply, ¶ 208; Agreement between the Czech Republic and the Republic of Paraguay on the Promotion and Reciprocal Protection of Investments, 21 October 1998, **CLA-64**; Agreement between the Lebanese Republic and the Czech Republic on the Promotion and Reciprocal Protection of Investments, 19 September 1997, **CLA-65**; Protocol between the Czech Republic and the Lebanese Republic Amending the Agreement between the Czech Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments, 20 March 2010, **CLA-66**; Agreement between the Government of the Czech Republic and the Government of the Republic of Singapore on the Promotion and Protection of Investments, 8 April 1995, **CLA-67**.

<sup>91</sup> Reply, ¶ 209.

<sup>92</sup> Reply, ¶ 210; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentina*, Award, 11 June 2012, **CLA-61**, ¶¶ 938-939; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award 5 September 2008, **RLA-65**, ¶ 297.

<sup>93</sup> Reply, ¶ 213.

<sup>94</sup> Statement of Defence, ¶¶ 530-536; Rejoinder, ¶¶ 459-472.

85. Clause XIV of the SPA tracks Section 89a of the Czech Code of Civil Procedure, which at the time the SPA was concluded allowed parties to choose territorial jurisdiction in selected commercial matters.<sup>95</sup> Hence, once territorial jurisdiction is agreed, it is exclusive. FITE accepted this position on filing its SPA claims against the Respondent before the courts in Prague.<sup>96</sup>
86. Other investment arbitration tribunals have recognized similarly formulated choice-of-court clauses as exclusive jurisdiction clauses.<sup>97</sup> The court decisions cited by the Claimant concern courts whose jurisdiction was not subject to waiver, agreement or option.<sup>98</sup>
- (b) The Claimant's position
87. The Claimant denies that Clause XIV of the SPA is an "exclusive" jurisdiction clause.<sup>99</sup> Clause XIV, according to the Claimant, is a "residual" jurisdiction clause. The function of Clause XIV is not to provide exclusive jurisdiction, but only to indicate that the default rules of the Czech Civil Procedure remain applicable unless another forum is selected. Since by submitting its claim WNC perfected its arbitration agreement with the Respondent, the residual jurisdiction clause under Clause XIV is no longer applicable.<sup>100</sup>
88. Even assuming that Clause XIV is an exclusive jurisdiction clause, the Claimant contends that in any event, its BIT claim under Article 2(3) is not subject to Clause XIV of the SPA because it is not a contractual claim.<sup>101</sup> The function of Article 2(3) is to guarantee compliance with an underlying

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<sup>95</sup> Rejoinder, ¶ 463.

<sup>96</sup> Rejoinder, ¶ 465.

<sup>97</sup> Rejoinder, ¶¶ 466-468, citing *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, **RLA-43**, ¶¶ 137-138; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, **RLA-54**, ¶¶ 144-145; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, **RLA-49**, ¶¶ 255-257.

<sup>98</sup> Rejoinder, ¶ 469, referring to *Lanco International Inc. v. Argentina*, Preliminary Decision on Jurisdiction of the Arbitral Tribunal, 8 December 1998, **CLA-73**, ¶ 26; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, **CLA-74**, ¶ 27.

<sup>99</sup> Reply, ¶¶ 241-245; Transcript, Day 1 at pp. 130-131 (Claimant's Opening Statement, Dr Sinclair).

<sup>100</sup> Reply, ¶ 245.

<sup>101</sup> Reply, ¶¶ 246-255.

contractual agreement as well as with the provisions of the BIT itself.<sup>102</sup> Article 2(3) allows the investor to invoke the SPA and the BIT in parallel and enjoy the combined protection of both instruments.<sup>103</sup>

89. The Claimant relies on the practice of the investment arbitration tribunals in *Camuzzi International v. Argentina*, *Bayindir v. Pakistan*, *SGS v. Paraguay* and *Eureko v. Poland* and the *ad hoc* committees in *Vivendi v. Argentina* and *Enron v. Argentina*, in support of the proposition that the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state cannot operate as a bar to the application of the BIT standard.<sup>104</sup>

#### **(4) *Res judicata* and estoppel arising from Czech Court decisions**

(a) The Respondent's position

90. The principles of issue estoppel and *res judicata* preclude these claims in so far as they concern matters finally determined in proceedings before Czech Courts.<sup>105</sup>
91. The decision by the City Court of Prague in 2011 made a number of factual findings and reached legal conclusions regarding the obligations of the Respondent under the SPA and Czech law with respect to the sale of Škoda Export, holding that “the Czech Republic did not breach its contractual obligations nor violate Czech law”.<sup>106</sup> This decision is now final, having been confirmed on appeal before the High Court in Prague and the Supreme Court of the Czech Republic.<sup>107</sup>

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<sup>102</sup> Reply, ¶ 246.

<sup>103</sup> Reply, ¶ 247.

<sup>104</sup> Reply, ¶¶ 248-254; *Camuzzi International S.A. v. Argentina*, Decision on Objections to Jurisdiction, 11 May 2005, **CLA-75**, ¶ 112; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, Decision on Jurisdiction, 14 November 2005, **CLA-76**, ¶ 148; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, Decision on Annulment, 3 July 2002, **CLA-77**, ¶ 101; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, **CLA-78**, ¶ 136; *SGS Société Générale de Surveillance S.A. v. Paraguay*, Decision on Jurisdiction, 12 February 2010, **CLA-79**, ¶ 128; *Eureko B.V. v. Poland*, Partial Award, 19 August 2005, **CLA-28**, ¶¶ 112-113.

<sup>105</sup> Respondent's Post-Hearing Brief, ¶¶ 20-48.

<sup>106</sup> Respondent's Post-Hearing Brief, ¶ 25.

<sup>107</sup> Respondent's Post-Hearing Brief, ¶ 28.

92. The Tribunal must recognise the *res judicata* effect of these decisions of the Czech Courts and is therefore estopped from considering the Claimant's claims under Article 2, paragraph 2 (the FET claim) and paragraph 3 (the Umbrella Clause claim).<sup>108</sup>

(b) The Claimant's position

93. The litigation before the Czech courts concerned different claims to those made in this case. It says that the decisions of the Czech courts "do not address the legal arguments presented before this Tribunal, including the Respondent's breaches of its warranties and obligations under the SPA, or violations of Czech law in conducting the Tender".<sup>109</sup> The Claimant submits that the courts merely concluded that the SPA could not be invalidated on the basis that FITE had entered the agreement as a result of an error induced by the Respondent.<sup>110</sup>

**(5) Relationship of Article 8(1) limitations with Article 2(3)**

(a) The Respondent's position

94. The Respondent argues that the BIT provisions listed in Article 8(1) are exhaustive: if Article 2(3) is activated by the existence of a "specific agreement", the words "*as well as the provisions of this Agreement*" at the end of Article 2(3) cannot have the effect of extending the Tribunal's jurisdiction to all substantive obligations in the BIT.<sup>111</sup> It would be nonsensical, and would violate the principle of *effet utile* to interpret Article 2(3) to permit the arbitration of all claims under all of the provisions of the BIT when the dispute resolution clause in Article 8(1) expressly limits each Contracting Party's consent to specifically enumerated provisions.<sup>112</sup>

95. The meaning of Article 2(3) is that in the ordinary forum for disputes relating to "specific agreements" – which would either be the national courts designated by agreement or the applicable private international law rules – "all applicable laws, including the BIT, will be taken into

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<sup>108</sup> Respondent's Post-Hearing Brief, ¶ 31.

<sup>109</sup> Reply, ¶ 333.

<sup>110</sup> Reply, ¶ 334.

<sup>111</sup> Rejoinder, ¶¶ 473-480.

<sup>112</sup> Rejoinder, ¶ 475.

account”.<sup>113</sup> The *travaux* to the BIT explicitly confirm this interpretation,<sup>114</sup> as does the arbitral jurisprudence.<sup>115</sup>

96. Article 8(1) of the BIT does not allow claims under Article 2(2) to be arbitrated, and the Tribunal “cannot allow Claimant to introduce those claims by sneaking in, abusively, through the back door of Article 2(3)”.<sup>116</sup>

(b) The Claimant’s position

97. According to the Claimant, the Tribunal has jurisdiction over all of the Claimant’s BIT claims because Article 8(1) establishes arbitral jurisdiction over disputes “concerning an obligation of the [Respondent] under Article 2(3)” and Article 2(3) provides that “[e]ach Contracting Party shall, with regard to the investments of investors of the other Contracting Party, observe the provisions of these specific agreements as well as the provisions of this Agreement.”<sup>117</sup>

98. In response to the counterargument that the last sentence of Article 2(3) of the BIT cannot “extend” the jurisdiction of the Tribunal to other BIT standards, it is the plain text of the BIT which confers jurisdiction on the Tribunal over claims arising under Article 2(3) and the Claimant does not request any relief beyond the scope of Article 2(3).<sup>118</sup> The Respondent’s proposed interpretation of Article 2(3) would render inoperative the term “as well as the provisions of this Agreement” in violation of the principle of *effet utile*.<sup>119</sup>

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<sup>113</sup> Rejoinder, ¶ 477.

<sup>114</sup> Rejoinder, ¶ 477, referring to **R-185**, ¶ III.

<sup>115</sup> Rejoinder, ¶¶ 478-479, citing *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009, **CLA-63**, ¶ 106; *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, **RLA-143**, ¶ 361.

<sup>116</sup> Rejoinder, ¶ 480.

<sup>117</sup> Reply, ¶¶ 214-229. See also Transcript, Day 1 at pp. 110-114, 120-123 (Claimant’s Opening Statement, Mr Triantafyllou).

<sup>118</sup> Reply, ¶ 215.

<sup>119</sup> Reply, ¶ 221.

99. The cases cited by the Respondent were concerned with applicable law clauses, whereas Article 2(3) is a clause setting out substantive obligations under the BIT.<sup>120</sup> The cases cited by the Respondent included claims running contrary to the plain text of the applicable treaties, which invoked provisions of the applicable treaties “to which the respective dispute settlement provisions made no reference at all”, whereas the Claimant “invokes nothing more than the simple words of Article 8(1) of the BIT, conferring jurisdiction on the Tribunal for disputes concerning obligations under Article 2(3), including the obligation to observe the BIT in addition to the specific agreement in force”.<sup>121</sup>
100. The Tribunal first considers these Admissibility and Jurisdictional Objections in Part VI.A commencing at paragraph 293 below.

## B. FACTUAL ISSUES

### 1. The pre-acquisition information process

#### (1) The Claimant’s position

101. The Czech Republic provided misleading and inaccurate information about Škoda Export<sup>122</sup> by means of the following:
- (1) **The Information Memorandum dated 25 September 2007**, prepared by Ernst & Young, which provided reasons for a prospective purchaser to acquire Škoda Export. The Information Memorandum stated that Škoda Export had 23 projects as of 30 June 2007 including three projects (the “**Key Projects**”) which were “of considerably greater scale and importance in terms of the company’s role and projected profits”.<sup>123</sup> These were: (i) construction of the Balloki Power Plant, Pakistan, contract value CZK 3.42 billion; (ii)

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<sup>120</sup> Reply, ¶ 227.

<sup>121</sup> Reply, ¶ 229.

<sup>122</sup> Statement of Claim, ¶¶ 52-82, ¶¶ 88-100; Reply, ¶¶ 15-88; Transcript, Day 1 at 42-43, 48-68 (Claimant’s Opening Statement, Dr Sinclair) 75-78 (Claimant’s Opening Statement, Mr Triantafilou); Transcript, Day 3 at pp. 142-182 (Cross-examination of Mr Uvira); Transcript, Day 4 at pp. 27-36, 42-47 (Cross-examination of Mr Uvira).

<sup>123</sup> Statement of Claim, ¶ 57.



construction of the Muridke Power Plant, Pakistan, contract value CZK 2.74 billion; and (iii) construction of the Bhikki Power Plant, contract value CZK 3.11 billion.<sup>124</sup>

- (2) **The Data Room:** The Data Room contained redacted copies of the original agreements under which the Key Projects were being carried out and contained expert valuations which placed the company's full share value at approximately CZK 375 million and CZK 417 million respectively.<sup>125</sup> Further information was added to the data room in response to detailed questions from the FITE due diligence team,<sup>126</sup> which included a series of short summary documents setting out "basic information on the contracting parties, the contract values, the place of the projects, and the company's expected profits" (the "**Project Cards**").<sup>127</sup> The Project Cards "presented Škoda Export as a well-managed company with a portfolio of projects with total projected profits of approximately CZK 400 million".<sup>128</sup>
- (3) **Managerial presentations:** The information in the Project Cards was "confirmed" by Škoda Export's management in the management presentations on 29 October and 6 November 2007.<sup>129</sup> During the presentation on 6 November 2007, Škoda Export's management made statements concerning the expected profits of the company and of the Key Projects, which failed to disclose "substantial problems" already known to Škoda Export at the time, including in particular that the Bhikki Project would be abandoned<sup>130</sup> and that the Balloki and Muridke Projects were "slated to produce substantial deficits".<sup>131</sup>

102. The Claimant contends that it conducted a thorough due diligence on Škoda Export.<sup>132</sup>

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<sup>124</sup> Statement of Claim, ¶ 57, referring to Information Memorandum, C-28, pp. 25-26.

<sup>125</sup> Statement of Claim, ¶ 60, referring to Data Room Index, C-83; Expert Report of Ernst & Young No. 1/14345632/06, and accompanying documents, February 2006, C-88, p.4; Expert Report on the Assessment of Equitability of Compensation for Shareholders of ŠKODAEXPORT, A.S., 31 May 2005, C-87, p. 8.

<sup>126</sup> Statement of Claim, ¶ 61, referring to First Witness Statement of (CWS-6), ¶ 17.

<sup>127</sup> Project Cards of Škoda Export a.s., C-86

<sup>128</sup> Statement of Claim, ¶ 62.

<sup>129</sup> Statement of Claim, ¶ 63.

<sup>130</sup> Statement of Claim, ¶ 64.

<sup>131</sup> Statement of Claim, ¶¶ 65-66.

<sup>132</sup> Statement of Claim, ¶¶ 61, 71; Reply, ¶¶ 19-25.

103. The Respondent failed to ensure that Škoda Export was properly managed during the due diligence process. The MoF failed to take steps in response to issues with the situation of the company and the conduct of \_\_\_\_\_, reported by \_\_\_\_\_, to Mr Tomáš Uvíra, Director of the Asset Administration Department of the MoF, in October 2007.<sup>133</sup> Instead of taking action to remove \_\_\_\_\_ from his position as \_\_\_\_\_ the MoF referred \_\_\_\_\_, concerns to the Board of Directors, which could not have taken the necessary remedial action, and allowed \_\_\_\_\_ and his deputy, \_\_\_\_\_ to take actions which harmed Škoda Export irreparably.<sup>134</sup> Škoda Export's Insolvency Administrator on 8 December 2009 claimed the sum of CZK 674 million for misconduct in relation to the Key Projects.<sup>135</sup>

## (2) The Respondent's position

104. Sufficient information was provided during the due diligence process.<sup>136</sup>

(1) **The Information Memorandum:** The Respondent asserts that the Information Memorandum provided a balanced high-level overview of the business of Škoda Export and described risks which were overlooked by the Claimant, including (i) that the company operated in a specific market segment "characterized by unevenness over time and by long delivery times", meaning that "in individual years the financial results of the Company [could] be volatile and the profitability is influenced by contracts made in previous years";<sup>137</sup> (ii) that the prevailing market conditions at the time of tender represented an independent risk;<sup>138</sup> (iii) that as an EPC contractor the company was dependent on the suppliers of key components of the projects in which it was engaged by its subcontractors,

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<sup>133</sup> Statement of Claim, ¶¶72-79.

<sup>134</sup> Statement of Claim, ¶¶ 72-79.

<sup>135</sup> Statement of Claim, ¶ 80.

<sup>136</sup> Statement of Defence, ¶¶ 55-132, ¶¶168-174; Rejoinder, ¶¶ 42-91 (sufficient information disclosed), ¶¶ 120-131 (no failure to correct financial statements of Škoda Export); Transcript, Day 1 at pp. 157-174, 177-184 198-211 (Respondent's Opening Statement, Ms. Horakova); Transcript, Day 2 at pp. 101-121, 133-141 (Cross-examination of \_\_\_\_\_, Transcript, Day 2 at pp. 149-157, 162-165, 183-194 (Cross-examination of \_\_\_\_\_ Transcript, Day 4 at pp. 48-56 (Re-examination of Mr Uvira).

<sup>137</sup> Statement of Defence, ¶ 55, Information Memorandum, C-28, Sec. 2.1.3.

<sup>138</sup> Statement of Defence, ¶ 55, Information Memorandum, C-28, Sec. 4.1.1.

in particular Siemens Engineering and General Electric;<sup>139</sup> (iv) that the Company's dependence on outsourcing the technical design work on all of its projects to external providers was a specific risk potentially leading to "existential endangering of the Company".<sup>140</sup> The Information Memorandum further alerted bidders to the impact of exchange rate fluctuations on the business results of the company and presented financial data showing exchange rate losses ranging from hundreds of millions to tens of millions of CZK.<sup>141</sup>

- (2) **The Data Room:** The Respondent emphasizes that the Data Room was open for at least 9 hours on each business day from 16 October 2007 to 12 November 2007 and from 26 to 29 November 2007.<sup>142</sup> Referring to the complete Data Room index,<sup>143</sup> the Respondent contends that the documents presented in the Data Room included a full set of contractual documentation entered into by the company in respect to each project,<sup>144</sup> subject to the redaction of commercially sensitive information and the consent of the counterparty to the relevant agreement.<sup>145</sup> In respect of the Balloki and Muridke projects, the contractual documents available in the Data Room showed that the prices contracted with customers "were lump sum fixed prices denominated in USD which could not be increased either as a result of foreign exchange fluctuations during the life of the projects, or based on future increases in the costs of inputs in the realization phase of the projects".<sup>146</sup> Accordingly, it was "fully disclosed to bidders" that the economic performance of those projects "was fully dependent on Škoda Export's ability to enter into back-to-back price-fixed contracts ... at or below the agreed EPC purchase price and to appropriately hedge any open foreign exchange exposure".<sup>147</sup>

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<sup>139</sup> Statement of Defence, ¶ 55, Information Memorandum, C-28, Sec. 4.3, Sec. 4.2.

<sup>140</sup> Statement of Defence, ¶ 55, Information Memorandum, C-28, Sec. 2.1.1.

<sup>141</sup> Statement of Defence, ¶ 56, Information Memorandum, C-28, Sec. 8.1.3.

<sup>142</sup> Statement of Defence, ¶60.

<sup>143</sup> Incremental Data Room Indices, R-36.

<sup>144</sup> Item 6 of C-83 and Items 334.16, 334.17 of Incremental Data Room Indices, R-36.

<sup>145</sup> Statement of Defence, ¶ 65.

<sup>146</sup> Statement of Defence, ¶ 67.

<sup>147</sup> Statement of Defence, ¶ 68.

(3) **Managerial presentations:** The Respondent notes that the summary information provided in the Project Cards “contained only a small fraction” of the information provided about the projects.<sup>148</sup> With respect to the Balloki project, the response to a question asked by the bidder Škoda Holding during its management presentation “revealed that there were serious cost overruns in the assembly and construction part of that project and that these additional costs would burden the company, because they could not be passed on to the customer through a price increase”.<sup>149</sup> Accordingly, a potential investor could conclude that the minimum cost overrun on the on-shore part could be estimated at USD 11,482,438.<sup>150</sup> The management of Škoda Export disclosed that finishing the Balloki and Muridke projects on their original schedule was a problem.<sup>151</sup> The company’s strict financial liability under its EPC contracts was not matched by the liability of the subcontractor, Energoprojekt.<sup>152</sup> Concerning other projects, the management presentations identified a number of small projects, including the Haripur project and the project in Uganda, which despite being originally planned as profitable were not expected to generate any profit.<sup>153</sup>

105. In light of the information provided during and after the management presentations, the Respondent contests the Claimant’s reliance on the “margin” disclosed in the Project Cards made available to FITE.<sup>154</sup> According to the Respondent, FITE was put on notice that to the extent any of the disclosed risks materialized, they would negatively affect financial performance of the Balloki and Muridke projects.<sup>155</sup> In relation to the Balloki project, FITE was in possession of a presentation dated 25 April 2008 which described the status of the Balloki project and precisely quantified the forecasted loss from the project at between USD 13.5 and 18.5 million.<sup>156</sup>

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<sup>148</sup> Statement of Defence, ¶ 74.

<sup>149</sup> Statement of Defence, ¶ 75.

<sup>150</sup> Statement of Defence, ¶ 76.

<sup>151</sup> Statement of Defence, ¶ 84.

<sup>152</sup> Statement of Defence, ¶ 85.

<sup>153</sup> Statement of Defence, ¶ 87.

<sup>154</sup> Statement of Defence, ¶¶ 95-109.

<sup>155</sup> Statement of Defence, ¶ 95.

<sup>156</sup> Statement of Defence, ¶ 108.

106. The true status of the Bhikki, NIPCCO and Rio Turbio projects was disclosed to the Claimant during the due diligence process. Concerning the Bhikki project, the written replies to bidders indicated that progress of this project into the realization phase was “extremely unlikely”; there was no final calculation for the project and Škoda Export had not entered into any subcontracts.<sup>157</sup> The contract was only legally terminated on 24 March 2008, after the signature of the SPA.<sup>158</sup> The fact that the NIPCCO project had been terminated by the potential customer was made clear in the Project Card which indicated that the Termination Notice had been served on 27 September 2007,<sup>159</sup> and it was thus clear that the fate of the project was highly uncertain.<sup>160</sup> Concerning the Rio Turbio project, the Project Card revealed that Škoda Export had been outbid by another bidder, ISOLUX ESUCO, and that Škoda Export was unlikely to win this project.<sup>161</sup>

**2. The pre-acquisition warranties and legal requirements in respect of information provided**

**(1) The Claimant’s position**

107. The MoF undertook a number of warranties and obligations in the SPA signed by FITE,<sup>162</sup> including most importantly the following:

- (1) Under Clause 5.1(c) of the SPA, the MoF warranted that by entering into and performing its obligations under the SPA, it would not be acting in breach of any contractual or other obligation or duty to which it was subject.<sup>163</sup>
- (2) Under Clauses 5.2(h), 8.2(h), 8.3, 10.1(c), 10.2, and 10.6 of the SPA, the MoF was obliged to ensure that no sale, transfer, lease or other disposal of any material party of Škoda

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<sup>157</sup> Statement of Defence, ¶¶ 114-118.

<sup>158</sup> Statement of Defence, ¶ 120.

<sup>159</sup> Statement of Defence, ¶ 126.

<sup>160</sup> Statement of Defence, ¶ 129.

<sup>161</sup> Statement of Defence, ¶ 132; Rio Turbio II Project Evidential Card (24 October 2007), **FTI-087**.

<sup>162</sup> Statement of Claim, ¶¶ 83-87; Reply, ¶¶ 89-105 (warranties); ¶¶ 106-108 (Czech law); Transcript, Day 1 at pp. 68-75 (Claimant’s Opening Statement, Mr Triantafilou); Transcript, Day 4 at pp. 3-27 (Cross-examination of Mr Uvira); Transcript, Day 1 at pp. 53-55 (Claimant’s Opening Statement, Mr Triantafilou).

<sup>163</sup> Statement of Claim, ¶ 84(i); SPA, **C-13**.

Export's assets or shareholdings occurred during the warranty period, i.e. from 31 August 2007 until 26 May 2008, subject to an exception for transactions in the ordinary course of business, such as the payment of debts to third parties as they fell due.<sup>164</sup>

- (3) Under Appendix No. 2 to the SPA, the MoF "impliedly represented" to FITE that the projects listed in Appendix 2 to the SPA "were in fact ongoing projects that Škoda Export had been retained to implement."<sup>165</sup>
- (4) The MoF gave FITE an "implied representation that the materials it had provided in the data room (including in particular the Project Cards) were true and accurate in all material aspects and presented a fair view of Škoda Export's business, project pipeline, status, management, and affairs."<sup>166</sup>
- (5) Under Clause 8.3 of the SPA, the MoF undertook to give FITE immediate written notice of any fact that would place the MoF in breach of warranty.<sup>167</sup>
- (6) Under Clause 10.1(c) of the SPA, the truth, completeness and accuracy of the warranties given at Clauses 5.1 and 5.2 of the SPA was made a "Condition Precedent" to completion of FITE's purchase of Škoda Export and under Clause 10.2 of the SPA, the MoF was required to notify FITE in writing that this Condition Precedent had been met.<sup>168</sup>
- (7) Under Clause 10.6 of the SPA, each Party was obliged immediately to inform the other Party of the occurrence or existence of any fact that would make impossible the meeting of any Condition Precedent or the execution of a transaction contemplated by the SPA, or that could affect the validity or effectiveness of the SPA.<sup>169</sup>

108. FITE's decision to purchase Škoda Export "was explicitly taken in reliance on a legitimate expectation" that the MoF had complied with its obligations under legislation and regulations "to ensure it was fully informed and apprised of Škoda Export's financial position and prospects, and

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<sup>164</sup> Statement of Claim, ¶ 84(ii); SPA, C-13.

<sup>165</sup> Statement of Claim, ¶ 84(iii); SPA, C-13.

<sup>166</sup> Statement of Claim, ¶ 84(iv); SPA, C-13.

<sup>167</sup> Statement of Claim, ¶ 85; SPA, C-13.

<sup>168</sup> Statement of Claim, ¶ 85; SPA, C-13.

<sup>169</sup> Statement of Claim, ¶ 86; SPA, C-13.

that any decision to privatize the company had been taken on the basis of a reasonable belief that the company was ready to be transferred to the private sector”.<sup>170</sup>

**(2) The Respondent’s position**

109. The Respondent draws attention to the terms of the tender and of the SPA in respect of the information provided during the tender process.
110. The Non-Disclosure Agreement to be signed by potential investors required each investor (i) to acknowledge that Škoda Export was not responsible for the correctness, accuracy and completeness of any information provided to them in connection with the tender;<sup>171</sup> (ii) to agree that neither Škoda Export nor its employees, advisors or representatives were liable for the use of information made available to them;<sup>172</sup> and (iii) to acknowledge that neither Škoda Export nor its employees, advisors, or representatives were liable for the correctness, accuracy or completeness of any business plans, estimates or prognoses or for any mistakes, omissions or inaccurate statements made by any of them; Škoda Export was not obliged to provide further information or update previously provided information or correct its possible inaccuracies.<sup>173</sup>
111. The Information Memorandum “stressed that the decision about acquiring the shares in Škoda Export had to be made by each bidder independently, based on its own evaluation of risks associated with Škoda Export’s business”.<sup>174</sup> The financial projections contained therein were based on “the Seller’s estimates and assumptions and relate to circumstances and events which have not yet occurred”;<sup>175</sup> “no representations or warranties as regards to the feasibility and attainability of the projections included in the Memorandum or to the bases and assumptions on which the projections are based” were provided.<sup>176</sup>

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<sup>170</sup> Statement of Claim, ¶ 87.

<sup>171</sup> Statement of Defence, ¶ 52; Non-Disclosure Agreement dated 26 September 2007, **R-33**, Art. 7.1.

<sup>172</sup> Statement of Defence, ¶ 52; Non-Disclosure Agreement dated 26 September 2007, **R-33**, Art. 7.2.

<sup>173</sup> Statement of Defence, ¶ 52; Non-Disclosure Agreement dated 26 September 2007, **R-33**, Art. 7.3.

<sup>174</sup> Statement of Defence, ¶ 55; Information Memorandum, part 3 of disclaimer, **C-28**, p. 2.

<sup>175</sup> Statement of Defence, ¶ 56; Information Memorandum, part 3 of disclaimer, **C-28**, p. 2.

<sup>176</sup> Statement of Defence, ¶ 56; Information Memorandum, part 3 of disclaimer, **C-28**, p. 2.

112. Clauses 5 and 6 of the SPA are an exhaustive list of warranties, which were explicitly agreed to be the sole warranties made by the Czech Republic and the purchaser to each other.<sup>177</sup> The purchaser of the shares explicitly warranted to the seller that in purchasing the shares it had not relied on any warranties given by the seller except for those explicitly made by the seller in the SPA.<sup>178</sup> At Clause 5.1 of the SPA, the seller warranted that certain information relating to the shares of Škoda Export had not changed between 31 August 2007 and the closing date of the transaction, which was 26 May 2008.<sup>179</sup> In Clause 5.2, the seller warranted that certain precisely defined events had not occurred.<sup>180</sup> None of the warranties provided in the SPA guaranteed future economic or social performances of Škoda Export or required the Czech Republic to update potential purchasers on any developments of particular business cases between 31 August 2007 and the date of signing of the SPA.<sup>181</sup>
113. Clause 8.1 of the SPA amounted to acceptance by the purchaser of all changes to the business of Škoda Export between the Signing Date and the Closing Date on the condition that they were the result of actions by the company “in the usual manner in accordance with its past business practice”.<sup>182</sup>
114. The SPA further provided for liability for damages arising out of or in connection with any breach of the SPA, including any breach of warranties, and limited maximum claimable damage to the amount of the purchase price paid for the shares.<sup>183</sup>
115. In its comments on the draft SPA submitted on 19 November 2007, FITE *inter alia* requested that the Czech Republic provide explicit representations as to the accuracy, completeness and correctness

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<sup>177</sup> Statement of Defence, ¶ 134, SPA (Respondent’s Translation), **R-32**, Clauses 5.3 and 6.2.

<sup>178</sup> Statement of Defence, ¶ 134, SPA (Respondent’s Translation), **R-32**, Clause 6.1(n).

<sup>179</sup> Statement of Defence, ¶ 136, SPA (Respondent’s Translation), **R-32**, Clause 5.1; Letter from the Ministry of Finance to FITE, 26 May 2008, **C-39**.

<sup>180</sup> Statement of Defence, ¶ 137, SPA (Respondent’s Translation), **R-32**, Clause 5.2.

<sup>181</sup> Statement of Defence, ¶ 138, SPA (Respondent’s Translation), **R-32**, Clause 5.2.

<sup>182</sup> Statement of Defence, ¶ 140.

<sup>183</sup> Statement of Defence, ¶ 146.



of information provided about the company in the Data Room and during the management presentations.<sup>184</sup> The Czech Republic rejected FITE's request.<sup>185</sup>

### 3. The post-acquisition management of Škoda Export

#### (1) The Claimant's position

116. The acquisition of Škoda Export by FITE was completed on 26 May 2008.<sup>186</sup> After FITE acquired Škoda Export it changed the company's name to CKD Export, a.s.<sup>187</sup> and sold the Škoda Export trademark to a company called REINTINDEN s.r.o. ("**Reintinden**") for CZK 5,000.<sup>188</sup> Under a licensing agreement with ČKD, Škoda Export was required to pay CZK 4 million per month to FITE for use of the ČKD name and trademark.<sup>189</sup> The ČKD licensing fee was calculated in 2008 as "one percent of the anticipated annual revenues from Škoda Export"<sup>190</sup> which was "unusually low by ČKD standards".<sup>191</sup> In response to allegations made by the Respondent, the Claimant denies that the licensing fee for use of the ČKD name was a means by which Škoda Export was "saddled with FITE's acquisition debt"<sup>192</sup> or that the sale of the Škoda Export trademark was ill-advised.<sup>193</sup>
117. The Claimant particularizes certain other transactions which are alleged by the Respondent to have been undertaken in mismanagement of Škoda Export.

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<sup>184</sup> Statement of Defence, ¶ 150, Draft of the Agreement on Purchase of Shares dated 19 November 2007, comments on Clauses 5.1, 5.2, **R-53**.

<sup>185</sup> Statement of Defence, ¶ 150, SPA (Respondent's Translation), **R-32**; Letter from ČEX, a.s. to Ernst & Young re comments to the Agreement on Purchase of Shares, dated 19 November 2007, **R-52**.

<sup>186</sup> Statement of Claim, ¶ 88.

<sup>187</sup> Reply, ¶ 122.

<sup>188</sup> Reply, ¶ 125.

<sup>189</sup> Reply, ¶ 123.

<sup>190</sup> Reply, ¶ 124.

<sup>191</sup> Second Witness Statement of (CWS-9), ¶ 32.

<sup>192</sup> Reply, ¶ 124.

<sup>193</sup> Reply, ¶ 125.

118. In mid-2008, Škoda Export transferred CZK 120 million to Rostrakoff Jewellery Ltd (“**Rostrakoff**”), the UK-registered parent company of a Czech jewellery company.<sup>194</sup> According to the Claimant, this transaction was a commercial loan that was repaid in full and with interest in late 2008, and was an arm’s length transaction from which Škoda Export benefitted financially.<sup>195</sup>
119. In connection with its EPC contracts, in accordance with “standard practice” in the EPC industry, Škoda Export commissioned a range of contractors and consultants to provide services, including *inter alia* Sky Invest Technology Ltd (“**Sky Invest**”), engaged to assist in securing the project to modernise the Tashkent Thermal Power Plant in Uzbekistan (“**Tashkent Project**”);<sup>196</sup> and Europe Technical Associates Limited (“**ETAL**”) and Ashfield Financial Investment Limited (“**Ashfield**”), which provided consulting services in connection with the company’s Pakistani, Uganda and Thailand projects.<sup>197</sup> The hiring of these consultants was standard EPC practice, was beneficial to Škoda Export’s operations, and was duly disclosed to the Czech Republic and CEB.<sup>198</sup>
120. Once FITE gained access to the company’s books and records, FITE began an internal review of the company’s finance and projects, including reports on the key parameters and status of each project,<sup>199</sup> and one-on-one meetings between \_\_\_\_\_, and the majority of the company’s 250 employees.<sup>200</sup> According to the Claimant, FITE soon discovered “a lack of adequate planning and control mechanisms, poor technical implementation, disregard for cost

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<sup>194</sup> Reply, ¶ 127.

<sup>195</sup> Reply, ¶¶ 128-129, referring to Second Witness Statement of \_\_\_\_\_ (CWS-9), ¶¶ 21-23; Československá obchodní banka, a. s. bank statement regarding the account No. 126009/0300, R-68; Agreement on Mutual Set Off of Receivables and Obligations between ČKD Export, a.s. and Rostrakoff Jewellery Limited, 3 November 2008, C-205.

<sup>196</sup> Reply, ¶ 132.

<sup>197</sup> Reply, ¶¶ 130-131.

<sup>198</sup> Reply, ¶¶ 134-135.

<sup>199</sup> Statement of Claim, ¶ 88, referring to First Witness Statement of \_\_\_\_\_ (CWS-5), ¶ 9; Balloki Project Status Report, 9 July 2008, C-64; Muridke Project Status Report, 4 June 2008, C-65; Nyagak Hydropower Plant Project Status Report, 30 June 2008, C-66; Chulabhorn Hydro Power Plant Renovation Project Status Report, 30 June 2008, C-67; Nampung Hydro Power Plant Renovation Project Status Report, 30 June 2008, C-68; Sirindhorn Hydro Power Plant Renovation Project Status Report, 30 June 2008, C-69; Ubolratana Hydro Power Plant Renovation Project Status Report, 30 June 2008, C-70.

<sup>200</sup> Statement of Claim, ¶ 88, referring to First Witness Statement of \_\_\_\_\_ (CWS-5), ¶ 9.

overruns, and no focus on profitability”.<sup>201</sup> FITE discovered that the company was in a “far worse financial position” than represented during the privatisation process; that the Key Projects were slated to generate losses of approximately CZK 860 million, and that one of them, Project Bhikki, had been abandoned.<sup>202</sup> Further, the MoF had failed to provide written notice of the termination of other projects, namely, Project NIPCCO in Nizampatnam, India,<sup>203</sup> and the Rio Turbio project in Argentina.<sup>204</sup>

## (2) The Respondent’s Position

121. With regard to the post-acquisition management of Škoda Export, the Respondent draws attention to certain transactions which are not mentioned in the Statement of Claim.<sup>205</sup>
122. In relation to the sublicensing agreement concluded by Škoda Export on 3 June 2008 with FITE regarding use of the name Škoda Export, the Respondent alleges that the reason for the sublicensing transaction and the amount of the sublicensing fee was the repayment of acquisition financing which FITE had arranged to finance the purchase of the shares.<sup>206</sup> It was a condition of the relevant loan agreement with PPF Banka, a.s. (“**PPF Bank**”) that FITE would obtain the cash for the quarterly repayments on the basis of the sublicensing agreement.<sup>207</sup> In this way, Škoda Export “was saddled with FITE’s acquisition debt”.<sup>208</sup> The sale of the Škoda Export trademark for CZK 5,000 was “at a

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<sup>201</sup> Statement of Claim, ¶ 89, referring to First Witness Statement of (CWS-5), ¶¶ 13-18.

<sup>202</sup> Statement of Claim, ¶ 90, referring to First Witness Statement of (CWS-5), ¶¶ 10, 13, 26; First Witness Statement of (CWS-6), ¶ 28; Email from Škoda Export to CEB and HSBC, 30 October 2007, C-154; Statement of Claim, ¶ 93(ii), referring to Email correspondence between Škoda Export and Halmore Power Generation Company (Private) Limited, 28 November 2007 to 11 December 2007, C-184; Minutes from Meeting of Board of Directors and Supervisory Board of Škoda Export, 18 December 2007, C-185; Annex No. 2 to the SPA, 7 December 2007, C-183.

<sup>203</sup> Statement of Claim, ¶ 93(i).

<sup>204</sup> Statement of Claim, ¶ 93(iii).

<sup>205</sup> Statement of Defence, ¶¶ 175-214; Transcript, Day 1 at pp. 222-228, Day 2 at pp. 11-26 (Respondent’s Opening Statement, Ms. Horakova).

<sup>206</sup> Statement of Defence, ¶ 178.

<sup>207</sup> Statement of Defence, ¶ 179, Loan Agreement between PPF Bank and CEX dated 24 April 2008, R-64, Articles II(1)(g) and (h), and VIII.

<sup>208</sup> Statement of Defence, ¶ 179.

minimum, questionable” considering that the Škoda Export had in 2005 been independently valued at CZK 339,552,969.<sup>209</sup>

123. In relation to the transfer of funds to Rostrakoff, the Respondent notes that this company at the time of the transactions was a dormant company whose [redacted] was publicly reported to simultaneously hold nominee directorships in at least 553 other companies around the world.<sup>210</sup> The [redacted] the Czech subsidiary of Rostrakoff was [redacted] who is currently registered as [redacted].<sup>211</sup> The Respondent contends that Rostrakoff is connected to ČKD, and that the transfer of funds appears to lack any apparent purpose.<sup>212</sup>
124. The Respondent also questions the purpose of agreements entered into by Škoda Export with Sky Invest Technology Ltd, Europe Technical Associates Limited and Ashfield Financial Investment Limited,<sup>213</sup> under which Škoda Export simultaneously paid USD 3,314,000 to Ashfield and an additional CZK 169 million in the aggregate to FITE, Sky Invest and ETAL.<sup>214</sup> The Respondent notes that none of those agreements was disclosed to the Czech Republic or to the CEB during the applications for additional financing of the Balloki and Muridke projects.<sup>215</sup> These transactions deprived Škoda Export of cash at a critical time.<sup>216</sup>

#### **4. The Claimant’s efforts to keep Škoda Export in business**

##### **(1) The Claimant’s position**

125. In its post-acquisition internal review of Škoda Export, FITE discovered that due to cost overruns and adverse currency movements “arising from poor technical decisions by the company’s prior

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<sup>209</sup> Statement of Defence, ¶¶ 180-181.

<sup>210</sup> Statement of Defence, ¶ 183.

<sup>211</sup> Statement of Defence, ¶ 184.

<sup>212</sup> Statement of Defence, ¶¶ 185-186.

<sup>213</sup> Statement of Defence, ¶¶ 187-211.

<sup>214</sup> Statement of Defence, ¶¶ 191, 194, 196, 202, 209, 211, 213.

<sup>215</sup> Statement of Defence, ¶ 212.

<sup>216</sup> Statement of Defence, ¶ 215.

management”, Škoda Export would require substantial additional financing to continue operations.<sup>217</sup> Once Škoda Export came under its control and the financial problems of Škoda Export became known, it took active steps to try to turn the company around and keep it in business.<sup>218</sup> According to the Claimant, the serious problems discovered by FITE after the privatisation had been known to the MoF for a long time.<sup>219</sup>

126. Following the post-acquisition internal review, FITE “immediately undertook diligent efforts to keep Škoda Export in business”.<sup>220</sup> To this end, FITE took the following operational steps: (i) implementing closer management of the company’s existing projects and strict cost-saving measures in the company’s daily operations; (ii) fixing the currency risks on the foreign projects by setting currency positions in accordance with ČKD protocol and the recommendations of the financing bank, HSBC Bank plc (“**HSBC**”); (iii) meeting with customers on the Balloki and Muridke Projects in Pakistan, explaining Škoda Export’s possible inability to finish the projects due to cost overruns; (iv) filing a request with the Pakistani National Electric Power Regulatory Authority (“**NEPRA**”) for the upward revision of power tariffs on the Balloki and Muridke plants; (v) entering negotiations with Pakistani customers for the possible extension of the Balloki and Muridke projects into second stages; (vi) negotiating a price increase on the hydropower plant project in Uganda; and (vii) referring or transferring additional projects to Škoda Export which were viable and profitable.<sup>221</sup>
127. The projects transferred to Škoda Export included an oxygen plant in Russia (“**Project MMK**”); a power plant in Russia (“**Project Tatarstan**”); a steel mill in Slovakia (“**Project SSM**”); and an energy plant in Uzbekistan (“**Project Tashkent**”). Together these projects had projected cash flows of USD 37.5 million.<sup>222</sup> According to the Claimant, these projects would not have been transferred

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<sup>217</sup> Statement of Claim, ¶ 91.

<sup>218</sup> Transcript, Day 1 at pp. 43-44 (Claimant’s Opening Statement, Dr Sinclair), 78-85, 93-95 (Claimant’s Opening Statement, Mr Triantafilou); Transcript, Day 3 at pp. 97-98 (Re-examination of

<sup>219</sup> Statement of Claim, ¶¶ 92.

<sup>220</sup> Statement of Claim, ¶ 101.

<sup>221</sup> Statement of Claim, ¶¶ 101-105.

<sup>222</sup> Statement of Claim, ¶ 105.

but for the financial problems caused by the nondisclosure of the true financial state of Škoda Export.<sup>223</sup>

128. FITE communicated the difficulties of Škoda Export to the MoF by: (i) a letter dated 22 September 2008, informing the MoF that it had discovered a difference of CZK 860 million between the projected profits from the Key Projects and the post-acquisition position, inviting the Ministry to appoint an auditor to verify its findings, and requesting the Ministry's assistance in enabling Škoda Export to remain in business;<sup>224</sup> (ii) a follow-up letter to the Ministry sent on 4 November 2008, providing a comprehensive report on Škoda Export's financial situation and repeating its earlier requests;<sup>225</sup> (iii) a letter to the Minister of Finance on 4 November 2008 stressing the real risk that bank guarantees would be called and that Škoda Export would be forced into insolvency if it failed to complete the projects it had contracted.<sup>226</sup>
129. In order to maintain Škoda Export's operations, ČKD decided to request financing from CEB. CEB held a number of Škoda Export's current accounts and had issued Škoda export with high-value export financing guarantees in respect of the Key Projects, which were insured by EGAP.<sup>227</sup> On 2 December 2008, ČKD applied to CEB on behalf of Škoda Export for a bridge loan of CZK 1 billion.<sup>228</sup>
130. On 19 December 2008, FITE commenced proceedings against the MoF in the Municipal Court in Prague.<sup>229</sup>

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<sup>223</sup> Statement of Claim, ¶ 106; Reply, ¶¶117-118.

<sup>224</sup> Statement of Claim, ¶ 113; Letter from FITE to the Ministry of Finance, 22 September 2008, **C-40**.

<sup>225</sup> Statement of Claim, ¶ 115; Letter from FITE to Ministry of Finance, 4 November 2008, **C-101**.

<sup>226</sup> Statement of Claim, ¶ 116; Letter from FITE to the Minister of Finance, 4 November 2008, **C-187**.

<sup>227</sup> Statement of Claim, ¶ 109.

<sup>228</sup> Statement of Claim, ¶ 110; Credit application submitted by ČKD EXPORT, a.s. (CKD Export) to CEB, 2 December 2008, **C-95**.

<sup>229</sup> Statement of Claim, ¶ 125; Petition submitted by FITE to the Municipal Court in Prague, 15 December 2008, **C-49**.

131. In January 2009, \_\_\_\_\_ and \_\_\_\_\_, the CEO of ČKD, made a joint presentation at the Supervisory Board meeting of CEB and EGAP on their action plan for restructuring Škoda Export.<sup>230</sup>
132. On 16 January 2009, Škoda Export sent a request for additional funding to Mr Ivan Fuksa, who was both the First Deputy Minister of Finance and the Chairman of CEB's Supervisory Board, and who redirected the request to the CEO of CEB, Mr Lubomir Pokorný.<sup>231</sup>
133. Škoda Export issued a detailed request to CEB for a bridge loan on 17 April 2009.<sup>232</sup>

## (2) The Respondent's position

134. As to the Claimant's "diligent efforts" to keep Škoda Export in business, the Respondent states that none of those steps had the capacity to turn Škoda Export around.<sup>233</sup> Indeed, financial disbursements were made from Škoda Export accounts to various third parties, which were not disclosed to the financial institutions when the Claimant was seeking assistance.<sup>234</sup>
135. The petitions to NEPRA of 26 January 2009 and 4 February 2009 for an increase in the tariffs for the Balloki and Muridke projects were only filed 8 months after FITE had acquired Škoda Export, although the problems were known from November 2007, and the Respondent notes that the outcome of the petitions was always uncertain.<sup>235</sup> The negotiation of future potential projects in Pakistan was "of no benefit to the company".<sup>236</sup> The arrangements negotiated in relation to the Uganda project were "a continuation of the efforts underway before the privatization".<sup>237</sup> The additional projects which were referred or transferred to Škoda Export, namely, Project MMK, the SSM Project and the Tashkent Project, were all in their initial phases, imposed immediate additional financing

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<sup>230</sup> Statement of Claim, ¶ 110; Letter from \_\_\_\_\_ to EGAP, attaching CKD Export Restructuring Action Plan Summary, 9/2008-12/2009, 6 April 2009, C-96.

<sup>231</sup> Statement of Claim, ¶¶ 111, 117.

<sup>232</sup> Statement of Claim, ¶ 118; First Witness Statement of \_\_\_\_\_ (CWS-6), ¶ 47.

<sup>233</sup> Statement of Defence, ¶ 217.

<sup>234</sup> Transcript, Day 1 at pp. 211-226, Day 2 at pp. 11-26 (Respondent's Opening Statement, Ms. Horakova); Transcript, Day 3 at pp. 76-96 (Cross-examination of \_\_\_\_\_).

<sup>235</sup> Statement of Defence, ¶ 218.

<sup>236</sup> Statement of Defence, ¶ 219.

<sup>237</sup> Statement of Defence, ¶ 221.

requirements on the company, and required dedicated teams of experts to run them, beyond the capacity of Škoda Export.<sup>238</sup> The financial contribution of those projects was purely speculative.<sup>239</sup> The Respondent contends that the SSM Project was not referred or transferred to Škoda Export by ČKD, but rather was internally generated by Škoda Export prior to the closing of the purchase of the shares.<sup>240</sup>

136. The terms on which the Claimant sought to secure additional financing for Škoda Export were unreasonable.
137. The basis on which FITE sought assistance in its communications of 22 September 2008 and 4 November 2008 to the MoF was FITE's calculation of the alleged loss on the individual projects based on a comparison of the estimated business margin contained in the Project Cards and the actual state of the projects estimated by Claimant as at August and October 2008.<sup>241</sup> In its request addressed directly to the Minister of Finance on 4 November 2008, FITE requested the Minister to issue a state guarantee to Škoda Export to secure a 3-year operating loan to be granted by CEB, to be repaid not by Škoda Export but by the Czech Republic.<sup>242</sup> On 2 December 2008, before the Ministry had responded, Škoda Export applied to the CEB for a loan of CZK 1 billion to be secured by and repayable through a state guarantee issued by the MoF.<sup>243</sup> On 19 December 2008, informed the Minister of Finance that FITE had filed a claim against the Czech Republic in the Czech courts for CZK 1.08 billion in damages and that FITE was open to an out-of-court settlement in the form of a loan of CZK 1 billion backed by a state guarantee.<sup>244</sup>

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<sup>238</sup> Statement of Defence, ¶ 223.

<sup>239</sup> Statement of Defence, ¶ 224-239.

<sup>240</sup> Statement of Defence, ¶ 239.

<sup>241</sup> Statement of Defence, ¶¶ 240, 242; Letter from FITE to the Ministry of Finance, 22 September 2008, **C-40**; Letter from FITE to Ministry of Finance, 4 November 2008, **C-101**; Letter from FITE to the Minister of Finance, 4 November 2008, **C-187**; Letter of FITE EXPORT to Ministry of Finance (minister Kalousek) dated 4 November 2008 with attachments, **R-198**.

<sup>242</sup> Statement of Defence, ¶ 243; Letter from FITE to the Minister of Finance, 4 November 2008, **C-187**; Letter of FITE EXPORT to Ministry of Finance (minister Kalousek) dated 4 November 2008 with attachments, **R-198**.

<sup>243</sup> Statement of Defence, ¶ 244.

<sup>244</sup> Statement of Defence, ¶ 248.



**5. The response of financial institutions to Claimant's financing requests**

**(1) The Claimant's position**

138. In response to the requests for assistance made by FITE, the Claimant submits that the MoF stated that it was willing to cooperate, and referred the Claimant to CEB and EGAP. Those financing institutions failed to respond appropriately to the Claimant's financing requests.<sup>245</sup>
139. According to the Claimant, throughout 2009, CEB "deliberately frustrated and obstructed" the Claimant's attempts to put Škoda Export on a more stable footing, by the following actions:<sup>246</sup>
- (1) setting up a "Steering Committee" with Škoda Export and the company's suppliers, ostensibly in order to assist with the management and oversight of the company and its projects, but instead used the confidential and commercially sensitive information acquired through the Committee to Škoda Export's disadvantage;
  - (2) attending a secret meeting with PPF Bank (which had partially financed FITE's acquisition of Škoda Export) in which CEB enquired as to a potential lien over Škoda Export's shares and whether CEB might be entitled to acquire Škoda Export from FITE on grounds the acquisition loan had not been repaid;
  - (3) imposing onerous and unjustified requirements of additional security and demanding a parent guarantee from ČKD in exchange for further financing;
  - (4) requiring a charge over Škoda Export's office building in central Prague in favour of CEB in exchange for extending its guarantees for one of the Key Projects, which would have prevented Škoda Export from securing the additional operating loans required to pay the company's suppliers;
  - (5) increasing its fees ten-fold for extending Škoda Export's bank guarantees, and offering only a two-month extension instead of granting the five-month extension that Škoda Export had requested;

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<sup>245</sup> Transcript, Day 1 at pp. 44-48 (Claimant's Opening Statement, Dr Sinclair), 87-107 (Claimant's Opening Statement, Mr Triantafilou); Transcript, Day 4 at pp. 61-80 (Cross-examination of Mr Bakajsa).

<sup>246</sup> Statement of Claim, ¶ 119.

- (6) adopting the unrealistic position that additional financing would be available only after NEPRA had issued its decision on Škoda Export's requested tariff increase, which was expected in late 2009, in circumstances where CEB was aware that the company could not survive that long without financial assistance;
  - (1) requiring a forensic audit of Škoda Export's affairs as a further condition of providing finance for the Key Projects;
  - (2) preferential treatment of a select number of companies that presumably had appropriate connections in the Czech Government;
  - (3) colluding with HSBC to instigate a police investigation of Škoda Export on 22 April 2009 based on false charges, which led directly to an unjustified freeze of Škoda Export's bank accounts by the Czech authorities;
  - (4) attempting at the beginning of June 2009 to purchase the debts owed by Škoda Export to one of its sub-contractors, ÚJV Řež, a. s. ("**UJV Rez**"), so as to expedite the enforcement of those debts against Škoda Export's assets;
  - (5) treating Škoda Export officials disrespectfully, for instance by directing verbal attacks at Škoda Export officials in the presence of the company's customers;
  - (6) making slanderous accusations to Škoda Export's suppliers as part of a concerted smear campaign;
  - (7) refusing to execute Škoda Export's payment orders in the ordinary course of the company's business; and
  - (8) attempting to divert the Key Projects to a third party, BTG Energy ("**BTG**").
140. Other alleged attempts to undermine Škoda Export included alleged harassment and intimidation of FITE and its staff, including harassment of Mr . personally.<sup>247</sup>

## **(2) The Respondent's Position**

141. The line of communication between FITE and Respondent "clearly shows that the Czech Republic promptly responded to FITE, explained why its proposed solution was legally impossible, and

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<sup>247</sup> Statement of Claim, ¶¶ 146-153; Reply, ¶¶ 185-187.

suggested that to the extent Škoda Export wanted export financing from CEB, it needed to enter into direct negotiations with CEB and EGAP.<sup>248</sup>

142. CEB and EGAP responded appropriately to the Claimant's financing requests by offering financing on terms that were commercially reasonable in the circumstances.<sup>249</sup>
143. The Respondent refers to the letter from FITE dated 22 September 2008; the information provided by FITE on 4 November 2008; the letter from FITE to the Minister of Finance dated 4 November 2008; the response by the Minister of Finance dated 22 December 2008; the letter from [redacted] dated 19 December 2008 regarding the commencement of legal proceedings; the reply by the MoF dated 15 January 2009; the letter from [redacted] dated 28 January 2009; the reply by the Minister of Finance dated 27 February 2009; the letter from [redacted] to the Deputy Minister of Finance dated 16 January 2009, and the reply of Mr Fuksa dated 16 February 2009.<sup>250</sup>
144. The MoF informed FITE that its request for a state guarantee was impractical because state guarantees needed parliamentary approval under Czech law, and also needed to be vetted by the EC according to EU law on state aid.<sup>251</sup> It advised FITE to approach the financial institutions directly.<sup>252</sup>
145. The CEB informed FITE of its position by letter dated 2 March 2009, in which it indicated *inter alia* that pending resolution of the requested electricity tariff increase from NEPRA which would permit

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<sup>248</sup> Statement of Defence, ¶ 251.

<sup>249</sup> Transcript, Day 2 at pp. 26-60 (Respondent's Opening Statement, Ms. Horakova).

<sup>250</sup> Statement of Defence, ¶¶240-251; Letter from FITE to the Ministry of Finance, 22 September 2008, **C-40**; Letter of Ministry of Finance (Uvira) to FITE [redacted] dated 10 October 2008, **R-101**; Letter from FITE to Ministry of Finance, 4 November 2008, **C-101**; Letter of FITE EXPORT [redacted] to Ministry of Finance (minister Kalousek) dated 4 November 2008 with attachments, **R-198**; Letter from FITE to the Minister of Finance, 4 November 2008, **C-187**; Letter from the Minister of Finance to FITE, 22 December 2008, **C-41**; Letter of FITE [redacted] to Ministry of Finance (minister Kalousek) dated 19 December 2008, **R-104**; Letter of Ministry of Finance (minister Kalousek) to FITE [redacted] dated 15 January 2009, **R-105**; Letter of CKD EXPORT [redacted] to Ministry of Finance (minister Kalousek), dated 28 January 2009, **R-106**; Letter of Ministry of Finance (minister Kalousek) to CKD EXPORT [redacted] dated 27 February 2009, **R-107**; Letter of FITE [redacted] to Škoda Export [redacted] dated 15 February 2008, **R-42**; Letter from I. Fuksa to FITE, 16 February 2009, **C-43**; Letter of Ministry of Finance (Fuksa) to FITE [redacted], dated 16 February 2009 (Respondent's translation; originally submitted as C-43), **R-108**.

<sup>251</sup> Statement of Defence, ¶ 245.

<sup>252</sup> Statement of Defence, ¶ 246.

increase of the EPC contracts price of the Balloki and Muridke projects, it was prepared to discuss some form of bridge financing against appropriate security.<sup>253</sup>

146. The CEB commissioned extraordinary audits of the Balloki and Muridke projects by SGS, an external specialist.<sup>254</sup> The Respondent asserts that SGS was unable to deliver its regular quarterly audits in 2008 because, after its acquisition by FITE, Škoda Export stopped providing SGS with access to information.<sup>255</sup> In February and March 2009, SGS completed its audit and confirmed that the Balloki and Muridke projects were only financially feasible if the accumulated cost overruns were reflected in the EPC contract price increases.<sup>256</sup> On 3 April 2009, after meetings of its Board of Directors and Supervisory Board, CEB informed Škoda Export of its internal decisions and the financing that it was prepared to make available.<sup>257</sup> The Respondent denies the Claimant's allegation that such terms were onerous or unjustified.<sup>258</sup> According to the Respondent, CEB already had significant exposure to Škoda Export, whilst ČKD had refused to provide any financial assistance to Škoda Export unless the requested financial aid was provided by the Czech Republic.<sup>259</sup>
147. The position taken by CEB, namely, that it was prepared to provide additional financing on condition of a guarantee by an acceptable entity from within the ČKD and a mortgage over Škoda Export's headquarters, was reasonable.<sup>260</sup> The Respondent notes that HSBC took the same position.<sup>261</sup>
148. On several occasions, Škoda Export informed CEB that the NEPRA decisions would be forthcoming.<sup>262</sup>

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<sup>253</sup> Statement of Defence, ¶ 259.

<sup>254</sup> Statement of Defence, ¶ 258.

<sup>255</sup> Statement of Defence, ¶ 261.

<sup>256</sup> Statement of Defence, ¶ 262.

<sup>257</sup> Statement of Defence, ¶ 267.

<sup>258</sup> Statement of Defence, ¶ 270.

<sup>259</sup> Statement of Defence, ¶¶ 271-275.

<sup>260</sup> Statement of Defence, ¶ 279.

<sup>261</sup> Statement of Defence, ¶ 281.

<sup>262</sup> Statement of Defence, ¶¶ 268, 282.

149. The Respondent denies that the proposed use of the main office building of Škoda Export in downtown Prague as security for the extended guarantees would have prevented Škoda Export from securing the additional operating loans required to pay the company's suppliers.<sup>263</sup> The Respondent points to Škoda Export's own offers to mortgage the building; to the participation of HSBC in communicating this requirement; and to the fact that the major part of the value of the building would still be left to secure the additional financing.<sup>264</sup>

#### The Freezing Orders

150. Concerns were raised when on Friday 17 April 2009, Škoda Export simultaneously filed payment orders seeking to withdraw a total of approximately USD 7 million from four accounts with CEB and USD 2.4 million from an account with HSBC.<sup>265</sup> Since the accounts with CEB were pledged as security for financing already provided, intended withdrawals would have deprived CEB of potential cash security at a time when the guarantees provided for the Balloki project could have been called at any time.<sup>266</sup> Given that Škoda Export had not informed CEB of the withdrawals notwithstanding its ongoing communications, CEB had "serious concerns".<sup>267</sup>
151. Because of the suspicious nature of the transactions, CEB and HSBC were under an obligation to report the transactions under the Anti-Money Laundering Act.<sup>268</sup>
152. The Respondent denies that it was unreasonable of the CEB and HSBC not to retract the reports of suspicious transactions when the criminal investigation was pending.<sup>269</sup> It points out that Škoda Export requested the cancellation or limitation of the freezing orders only on 29 May 2009, five weeks after the accounts were frozen and only a week before the freeze was lifted.<sup>270</sup> The Respondent

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<sup>263</sup> Statement of Defence, ¶ 287.

<sup>264</sup> Statement of Defence, ¶ 288-290.

<sup>265</sup> Statement of Defence, ¶ 293.

<sup>266</sup> Statement of Defence, ¶ 295.

<sup>267</sup> Statement of Defence, ¶ 297.

<sup>268</sup> Statement of Defence, ¶¶ 298-299.

<sup>269</sup> Statement of Defence, ¶ 302.

<sup>270</sup> Statement of Defence, ¶ 304.

denies that the three-month duration of the criminal investigation into the reported transfers was unreasonable in the circumstances.<sup>271</sup>

153. The responses of the financial institutions to the Claimant's financing requests, including discussion of finalisation of projects by a third party contractor, BTG, were not unreasonable and fell well within the scope of their commercial discretion.<sup>272</sup>
154. The Claimant's complaints of other alleged attempts to undermine Škoda Export – (i) debt collection proceedings by UJV Rez,<sup>273</sup> (ii) alleged failure to execute payment orders;<sup>274</sup> (iii) alleged preferential treatment of other credit applicants;<sup>275</sup> and (iv) alleged harassment and intimidation<sup>276</sup> – were unfounded and lacking in substance.

## **6. The Claimant's rescission of the SPA**

### **(1) The Claimant's position**

155. On 24 April 2009, FITE declared the SPA invalid by notice addressed to the MoF under Section 49a of Act No. 40/1964 Coll,<sup>277</sup> which provides as follows:

A legal act is invalid if the person acting performed it by mistake caused by a fact that was decisive for the performance of the legal act and the person to which the legal act was addressed caused the mistake, or must have been aware of it. A legal act is also invalid where the latter person caused the mistake intentionally. A mistaken intention does not render a legal act invalid.<sup>278</sup>

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<sup>271</sup> Statement of Defence, ¶ 306.

<sup>272</sup> Statement of Defence, ¶¶ 293-307 (the Freezing Orders), ¶¶ 337-369 (the final attempt by the financing institutions to find a solution); Rejoinder, ¶¶ 132-148 (CEB and EGAP were not unreasonable in negotiations), ¶¶ 190-234 (re the reasonableness of the freezing orders).

<sup>273</sup> Statement of Defence, ¶¶ 372-377.

<sup>274</sup> Statement of Defence, ¶¶ 379-381.

<sup>275</sup> Statement of Defence, ¶¶ 382-384.

<sup>276</sup> Rejoinder, ¶¶ 251-255.

<sup>277</sup> Statement of Claim, ¶126; Letter from FITE to CEB, 24 April 2009, C-50; Letter from FITE to the Ministry of Finance, 24 April 2009, C-51.

<sup>278</sup> Statement of Claim, ¶ 127, citing Act 40/1964 Coll., Section 49a, 26 February 1964, CLA-59.

156. According to the Claimant, in direct response to the rescission of the SPA, the Czech Republic “retaliated” by freezing Škoda Export’s bank accounts on various pretexts, as explained below.<sup>279</sup>
157. On 17 April 2009, for the purpose of improving the transparency and efficiency of its treasury and cash management operations, Škoda Export gave instructions for the balances on certain bank accounts held with CEB, HSBC and Československá obchodní banka, a.s. (“**CSOB**”) to be consolidated into proposed main accounts held with CEB and CSOB.<sup>280</sup>
158. Instead of giving effect to the transfers, on 22 April 2009, CEB and HSBC filed suspicious activity reports with the Financial Analytical Unit of the MoF (the “**Financial Analytical Unit**”),<sup>281</sup> stating that the bank transfers gave rise to a reasonable suspicion of asset stripping and money laundering, from which they stood to lose payments owed by Škoda Export.<sup>282</sup> On 24 April 2009, at the request of the Financial Analytical Unit, the Unit for Investigation of Corruption and Financial Crime of the Criminal Police and Investigation Service Taxes and Money Laundering Division (the “**Police Authority**”) commenced a criminal investigation into Škoda Export’s bank transfers, and issued two resolutions (the “**Freezing Orders**”) that froze seven of Škoda Export’s bank accounts containing a total of CZK 204 million.<sup>283</sup>
159. Škoda Export fully cooperated with the Police Authority in the six weeks that followed the imposition of the Freezing Orders, despite the severe disruption of its business.<sup>284</sup>
160. Škoda Export formally asked CEB on two occasions to notify the Financial Analytical Unit and Police Authority to retract the allegations made against Škoda Export.<sup>285</sup> CEB refused to take any steps to correct the false information.<sup>286</sup> On 29 May 2009, Škoda Export submitted a request to the

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<sup>279</sup> Statement of Claim, ¶ 130.

<sup>280</sup> Statement of Claim, ¶ 131.

<sup>281</sup> Statement of Claim, ¶ 132.

<sup>282</sup> Statement of Claim, ¶ 132.

<sup>283</sup> Statement of Claim, ¶ 135; Police Authority Resolutions, 24 April 2009, C-53.

<sup>284</sup> Statement of Claim, ¶ 136.

<sup>285</sup> Statement of Claim, ¶ 137.

<sup>286</sup> Statement of Claim, ¶ 137.

District Prosecuting Attorney for Prague 1 (the “**Prosecuting Authority**”) to lift the Freezing Orders. The Freezing Orders were lifted on 5 June 2009.<sup>287</sup>

161. The Freezing Orders had a severe negative impact on Škoda Export’s business<sup>288</sup> through the constraints on Škoda Export’s liquidity and the reputational harm caused by news that it was under criminal investigation.<sup>289</sup> According to the Claimant, the Freezing Orders were a direct cause of Škoda Export’s entry into insolvency.<sup>290</sup>
162. The Claimant also alleges that in early 2009, during negotiations over the future of Škoda Export, CEB attempted to divert Škoda Export’s key assets to an entity named BTG, which “*had no reputation or apparent experience in Škoda Export’s field of business, but had a close relationship with CEB and the Ministry of Finance*”.<sup>291</sup> The attempt to have BTG take over the Key Projects from Škoda Export continued after the insolvency proceedings had commenced, in breach of Section 111 of the Czech Insolvency Act, which prohibits transfers that have a substantial impact on the property or assets of the debtor.<sup>292</sup> This attempt was made by CEB and its controlling authority, the MoF, with the intention of bankrupting Škoda Export and transferring its key assets to favoured third parties.<sup>293</sup> The attempt was unsuccessful because Škoda Export’s suppliers refused to transfer their contracts to BTG due to BTG’s inexperience in the EPC sector.<sup>294</sup>
163. The Respondent allegedly engaged in a number of acts designed to undermine Škoda Export and harass and intimidate its employees, including a police search of \_\_\_\_\_ at Prague Airport in April 2009; statements published in press articles by the daily newspaper Mladá Fronta Dnes; certain e-mail communications by the CEB with Škoda Export and with third parties; and debt collection

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<sup>287</sup> Statement of Claim, ¶ 138.

<sup>288</sup> Statement of Claim, ¶ 154.

<sup>289</sup> Statement of Claim, ¶¶ 154-155.

<sup>290</sup> Statement of Claim, ¶ 157.

<sup>291</sup> Statement of Claim, ¶¶ 141-142.

<sup>292</sup> Statement of Claim, ¶ 144.

<sup>293</sup> Statement of Claim, ¶ 143.

<sup>294</sup> Statement of Claim, ¶ 145.



proceedings brought on 15 June 2009 by UJV Rez, a partly state-owned subcontractor of Škoda Export.<sup>295</sup>

## **(2) The Respondent's Position**

164. The Respondent alleges that the Claimant abandoned the investment through the actions it took up to 24 April 2009, while the negotiations on financing were ongoing. These actions included (i) the resignation on 10 April 2009 of the Supervisory Board and 3 of the 4 members of the Board of Directors of Škoda Export;<sup>296</sup> (ii) the attempt by Škoda Export to terminate the Balloki project on 22 April 2009;<sup>297</sup> (iii) the change of control over Škoda Export by which Škoda Export ceased to be a member of ČKD;<sup>298</sup> (iv) the rescission of the SPA by FITE;<sup>299</sup> and (v) the renaming of Škoda Export as ČKD Export, a.s.<sup>300</sup>
165. The Respondent denies that the Freezing Orders were imposed in retaliation for the rescission of the SPA. Suspicious transaction reports were filed by HSBC and CEB on 20 April 2009, whereas the letter from FITE rescinding the SPA was delivered subsequently, on 24 April 2009, which was on the same day the Freezing Orders were being written by the Police Authority.<sup>301</sup>
166. According to the Respondent, following the rescission of the SPA, the financing banks continued to attempt to find a solution that would enable the completion of the Balloki and Muridke projects. The Respondent refers to a renewed request for additional financing made by Škoda Export on 29 May 2009, the response of CEB on 3 June 2009, and a proposal sent by CEB on 10 and 16 June 2009 concerning alternative strategies for the finalisation of the two projects.<sup>302</sup> The proposals put forward by CEB counted on a third party finalising the projects.<sup>303</sup> In this context, BTG contacted

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<sup>295</sup> Statement of Claim, ¶¶ 146-153.

<sup>296</sup> Statement of Defence, ¶¶ 310-312.

<sup>297</sup> Statement of Defence, ¶¶ 313-315.

<sup>298</sup> Statement of Defence, ¶¶ 316-325.

<sup>299</sup> Statement of Defence, ¶¶ 326-335.

<sup>300</sup> Statement of Defence, ¶¶ 336.

<sup>301</sup> Statement of Defence, ¶¶ 332-334.

<sup>302</sup> Statement of Defence, ¶¶ 338-344.

<sup>303</sup> Statement of Defence, ¶ 344.

on 24 June 2009. The Respondent denies that BTG is an obscure company with no business record. According to the Respondent, BTG was a member of the BTG Group, a Slovak EPC contractor with significant experience and expertise.<sup>304</sup> In its view the strategy of transferring the Balloki and Muridke projects to a third party would “almost certainly have kept Škoda Export solvent”.<sup>305</sup>

## 7. Insolvency of Škoda Export

### (1) The Claimant’s Position

167. On 17 June 2009, Siemens Engineering filed a petition to place Škoda Export into insolvency proceedings (the **Insolvency Petition**), on the grounds that it was owed CZK 78,548,424.61 and USD 2,565,840 in respect of the Key Projects.<sup>306</sup> Further bankruptcy petitions were filed on 29 June 2009 by CEB, EnerSys, s.r.o. (“**EnerSys**”) AE&E CZ s.r.o. (“**AE&E**”) and Škoda Power.<sup>307</sup> According to the Claimant, it is clear that the creditors were colluding together.<sup>308</sup>
168. On 14 September 2009, the Insolvency Court  
<sup>309</sup> On 16 November 2009, the Insolvency Court declared Škoda Export to be insolvent.<sup>310</sup> The effect of this declaration was that Škoda Export’s business and assets would be sold and the proceeds of sale distributed to Škoda Export’s creditors.<sup>311</sup>
169. On 21 February 2011, the Insolvency Court gave approval for Škoda Export’s business and assets to be sold for CZK 274 million to ROAD, a privately owned Czech joint stock company with “obscure”

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<sup>304</sup> Statement of Defence, ¶ 348.

<sup>305</sup> Statement of Defence, ¶ 351.

<sup>306</sup> Statement of Claim, ¶ 158; Insolvency Petition of Siemens Engineering, a.s., 17 June 2009, C-54.

<sup>307</sup> Statement of Claim, ¶ 160; List of Škoda Export creditors’ claims filed with Czech Bankruptcy Registrar, C-151.

<sup>308</sup> Statement of Claim, ¶ 160; First Witness Statement of (CWS-3), ¶¶ 59, 61.

<sup>309</sup> Statement of Claim, ¶ 161; Resolution of the Insolvency Court, 14 September 2009, C-199.

<sup>310</sup> Statement of Claim, ¶ 161; Resolution of the Insolvency Court, 16 November 2009, C-198.

<sup>311</sup> Statement of Claim, ¶ 161.

ownership, leaving a substantial shortfall to Škoda Export's creditors.<sup>312</sup> The sale transaction was completed on 31 March 2011.<sup>313</sup>

## **(2) The Respondent's Position**

170. According to the Respondent, the filing of the Insolvency Petition by Siemens Engineering was "hardly a surprise" given the failure of Škoda Export to address its overdue debts.<sup>314</sup> The Respondent notes that Škoda Export had a substantial amount of "past due unpaid financial obligations to its suppliers on the Balloki and Muridke projects" and that since March 2009, before the Freezing Orders were in place, Škoda Export had stopped making payments to its suppliers.<sup>315</sup>
171. In response to the allegation of collusion between the creditors and the CEB, the Respondent states that the dates and times referred to by the Claimant are the times of publication on the internet of the relevant filings, and that the actual filings were made by Siemens, CEB, EnerSys, AE&E and Škoda Power between 18 June 2009 and 25 June 2009.<sup>316</sup>
172. In July 2009 the Respondent contends that "[n]o compromise looked achievable" since Škoda Export had rejected the provision of additional financing on terms deemed necessary by CEB to secure repayment and had refused to cede the projects to a third party.<sup>317</sup>
173. In August 2009, after the Orient Power Company Limited had terminated the EPC contract for the Balloki project, CEB paid the guarantees for both projects in the aggregate amount of USD 63,645,109.<sup>318</sup>

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<sup>312</sup> Statement of Claim, ¶ 162; First Witness Statement of Court in Prague, 21 February 2011, C-62.

(CWS-3), ¶ 63; Resolution of Municipal

<sup>313</sup> Statement of Claim, ¶ 162.

<sup>314</sup> Statement of Defence, ¶ 361.

<sup>315</sup> Statement of Defence, ¶ 362.

<sup>316</sup> Statement of Defence, ¶ 366.

<sup>317</sup> Statement of Defence, ¶ 367.

<sup>318</sup> Statement of Defence, ¶ 369.

**C. BIT BREACHES ALLEGED**

**1. Umbrella Clause**

**(1) The Claimant's position**

174. The Claimant contends that the Czech Republic breached a number of warranties, representations and undertakings made in the SPA and breached its implied contractual obligations of good faith under Czech law.<sup>319</sup>

(a) Alleged breaches of the SPA

175. According to the Claimant, by permitting Škoda Export to lose several valuable projects during the warranty period, the Respondent breached its obligations under the SPA.

176. **Asset Disposal without Disclosure:** Specifically, the Respondent breached its obligations under Clauses 5.2(h), 8(h), 8.3, 10.1(c) and 10.6 of the SPA to ensure that no sale, transfer, lease or other disposal of any other material part of Škoda Export's assets or shareholdings occurred during the relevant warranty period – i.e. from 31 August 2007 to 26 May 2008 – subject only to an exception for transactions occurring in the ordinary course of the company's business.<sup>320</sup> Specifically, the Respondent breached these obligations in relation to the Bhikki, Rio Turbio and NIPCCO projects, since these projects were abandoned without providing written information to FITE.<sup>321</sup>

177. The Claimant maintains that the Bhikki, Rio Turbio and NIPCCO projects were a "material part of" the assets and participation interests of Škoda Export and rejects the Respondent's contention that the obligations under Clauses 5.2(h), 8.2(h) and 8.3 of the SPA do not apply to Škoda Export's "business cases in progress".<sup>322</sup>

178. **Disclosure of issues affecting performance of obligations:** The Claimant further contends that by failing to disclose information to FITE potentially affecting the performance of obligations under the

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<sup>319</sup> Statement of Claim, ¶¶ 180-185; Reply, ¶¶ 336-441.

<sup>320</sup> Statement of Claim, ¶ 181(i); SPA, C-13.

<sup>321</sup> Reply, ¶¶ 323-329.

<sup>322</sup> Reply, ¶324.

SPA, the Respondent breached its obligation under Clause 10.6 of the SPA to inform FITE of the occurrence or existence of any fact that may make impossible or delay the execution of the SPA or that may affect the validity and/or effectiveness of the SPA.<sup>323</sup> One of FITE's core obligations under the SPA was to finish the "Business Cases in Progress".<sup>324</sup> The Respondent's failure to disclose updated and accurate information about ongoing "Business Cases in Progress" in relation to the Bhikki, NIPCCO and Rio Turbio projects, misinformed FITE about the actual scope, existence and possibility of performing its obligations under the SPA.<sup>325</sup> The Claimant asserts that the Respondent had an obligation to provide accurate and correct information on the final fate of these projects, which was not satisfied by disclosing the risks concerning these projects.<sup>326</sup>

179. **Undertaking to comply with Czech laws and regulations:** The Respondent breached its obligations under Clause 5.1(c) of the SPA to comply with its obligations and duties under applicable Czech laws and regulations, including under Acts Nos. 219/2000 Coll, 178/2005 Coll and Ministry of Finance Directive No. 1/2006.<sup>327</sup> Contrary to the representation in Clause 5.1(c), the Claimant maintains that the Respondent refused to make use of any available means to investigate allegations concerning mismanagement of Škoda Export, to take steps to remedy the situation at Škoda Export and to provide information to FITE about emerging concerns.<sup>328</sup>
180. **Implied representations:** According to the Claimant, the Czech Republic was obliged to abide by "the implied representations it gave to FITE, as a necessary corollary of the warranties and undertakings FITE gave to the MoF in relation to Škoda Export's projects, the price FITE had agreed to pay for Škoda Export's shares, and as to the extent of the due diligence it had conducted as part of the bidding process" under Recital (C) and Clauses 6.1(o), 6.1(v), 6.1(w), 9.9 and 9.10 of the SPA.<sup>329</sup>

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<sup>323</sup> Reply, ¶¶ 314-322.

<sup>324</sup> Reply, ¶ 315.

<sup>325</sup> Reply, ¶ 316.

<sup>326</sup> Reply, ¶ 318.

<sup>327</sup> Statement of Claim, ¶ 181(ii); SPA, C-13.

<sup>328</sup> Reply, ¶ 292.

<sup>329</sup> Statement of Claim, ¶ 181(iii).

181. **Rulings of the Czech Courts:** It is not in dispute that the Czech courts upheld the validity of the SPA.<sup>330</sup> According to the Claimant, while the Respondent asserts that the Czech courts have ruled that “there has been no breach of the SPA,” the issues raised in the proceedings before the Czech courts in respect of the SPA concerned different claims, based on different legal grounds, and hence the Czech courts have not considered the arguments raised by the Claimant in these proceedings.<sup>331</sup> Moreover, rather than finding that FITE was not misled by the Czech Republic, as alleged by the Respondent, the Czech courts merely concluded that the SPA could not be invalidated on account of an error induced by the Czech Republic.<sup>332</sup>

(b) Alleged breaches of Czech law

(i) *The Act on State Property, Act No. 219/2000 Coll.*

182. Under Section 14 of the *Act on State Property, No. 219/2000 Coll* (“**State Property Act**”), the State is required to exercise utmost diligence in preventing damages to State property and to make use of all available means in doing so.<sup>333</sup> The Respondent breached this obligation in failing to take appropriate action in response to the information provided by [redacted] on 23 November 2007 concerning the mismanagement of Škoda Export by [redacted].<sup>334</sup>

183. The Claimant argues that even if the Respondent could not have done more than exercising its rights as a shareholder under the Commercial Code, the Respondent “did not even attempt to use such rights”.<sup>335</sup>

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<sup>330</sup> Reply, ¶ 333.

<sup>331</sup> Reply, ¶ 333.

<sup>332</sup> Reply, ¶ 334.

<sup>333</sup> Reply, ¶¶ 294-303; Transcript, Day 1 at p. 53 (Claimant’s Opening Statement, Mr Triantafilou).

<sup>334</sup> Reply, ¶¶ 296-298.

<sup>335</sup> Reply, ¶ 303.

(ii) *Directive No. 1/2006 of the Ministry of Finance*

184. The Respondent did not comply with its duties under *Duties of Representatives of Ministry of Finance under Directive No. 1/2006*.<sup>336</sup> Under Article 5 of Directive 1/2006, Ministry representatives in corporate bodies are obliged to make sure that the business prospects, opportunities and risks are properly identified, scrutinised and evaluated.<sup>337</sup> According to Article 5(7) of the Directive, representatives of the Ministry in the Supervisory Board “could and should have initiated an independent examination of the situation of Škoda Export, instead of referring back the matter to the Board of Directors”.<sup>338</sup>

(iii) *Czech Commercial Code, Section 265*

185. The Claimant further refers to Section 265 of the *Czech Commercial Code, Act No. 513/1991 Coll.*,<sup>339</sup> pursuant to which the exercise of a right “that is at variance with the principles of fair business conduct shall not be granted legal protection”.<sup>340</sup> According to the Claimant, the decision to proceed with the privatisation without sharing accurate and updated information at its disposal concerning the actual financial status and prospects of Škoda Export “fell short of the threshold of fairness”.<sup>341</sup>

(iv) *Other legislation cited by Claimant*

186. In its Statement of Claim, the Claimant refers, further, to the obligations of the Czech Republic under Sections 6(1) and 9(1) of Act No. 92/1991 Coll. (the Law on the Transfer of State Assets, or

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<sup>336</sup> Reply, ¶¶ 304-312.

<sup>337</sup> Reply, ¶ 306.

<sup>338</sup> Reply, ¶ 309. See also Transcript, Day 1 at p. 53 (Claimant’s Opening Statement, Mr Triantafilou).

<sup>339</sup> Reply, ¶¶ 330-332.

<sup>340</sup> Reply, ¶ 330; Act No. 513/1991 Coll., Commercial Code, 5 November 1991, **CLA-89**, Section 265.

<sup>341</sup> Reply, ¶ 331.

**“Privatisation Act”**)<sup>342</sup> and Section 6(1)(b) of Act No. 178/2005 Coll. (the **“Act on Cancellation of the National Property Fund”**).<sup>343</sup>

(c) Application of Article 2(3) of the BIT to the alleged breaches of the SPA and of Czech law

187. The alleged breaches by the Respondent of its contractual obligations towards the Claimant amount to a violation of Article 2(3) of the BIT, according to which the Czech Republic is obliged to abide by the provisions of contracts into which it has entered with foreign investors in respect of investments.<sup>344</sup>
188. In particular, under the SPA and related contractual instruments, the Czech Republic was obliged to: (i) ensure that no sale, transfer, lease or other disposal of any material part of Škoda Export’s assets or shareholdings occurred during the warranty period from 31 August 2007 to 26 May 2008, except for transactions occurring in the ordinary course of the company’s business; and (ii) abide by “the implied representations it gave to FITE, as a necessary corollary of the warranties and undertakings FITE gave to the MoF in relation to Škoda Export’s projects, the price FITE had agreed to pay for Škoda Export’s shares, and as to the extent of the due diligence it had conducted as part of the bidding process.”<sup>345</sup> In breach of those obligations, the Respondent (i) permitted Škoda Export to lose several valuable projects during the warranty period and (ii) breached the implied representations it gave to FITE in relation to the truth and accuracy of the information it had provided to FITE, by virtue of misrepresentations in relation to the Key Projects and shortcomings in the information disclosed during the due diligence process.<sup>346</sup>
189. The Respondent breached its obligations under Czech law, including in particular its obligations under the State Property Act and Directive No. 1/2006. According to the Claimant, the Respondent breached: (i) its obligation under the State Property Act by remaining passive and refusing to conduct a proper audit in the face of warnings concerning financial problems at Škoda Export; (ii) its

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<sup>342</sup> Statement of Claim, ¶¶ 30(i); 201. See also Transcript, Day 1 at pp. 53 (Claimant’s Opening Statement, Mr Triantafilou).

<sup>343</sup> Statement of Claim, ¶ 30(iii).

<sup>344</sup> Statement of Claim, ¶ 180.

<sup>345</sup> Statement of Claim, ¶ 181.

<sup>346</sup> Statement of Claim, ¶¶ 182, 184.



obligations under Directive No. 1/2006 by failure of its officials delegated to the management of Škoda Export to supervise the management of Škoda Export and to prevent the mishandling of Škoda Export's assets; and (iii) its duty to act in good faith and in accordance with the requirements of fair business conduct by withholding the truth about Škoda Export's situation contrary to its best knowledge.<sup>347</sup>

190. The violation of Article 2(3) by the aforementioned breaches of the SPA and of Czech law “triggers the responsibility of the Czech Republic under the BIT and customary international law” and “elevates these breaches of the SPA and Czech law to the level of international law”.<sup>348</sup> As a result, the Respondent's responsibility “entails its duty to provide compensation for WNC's losses resulting from this breach, as a matter of public international law”.<sup>349</sup>

**(2) The Respondent's position**

191. The Respondent contends that its conduct did not breach the SPA or Czech law.

(a) Alleged breaches of the SPA

192. **Asset disposal without disclosure:** The Respondent denies that it breached Clauses 5.2(h), 8(h), 8.3, 10.1(c) or 10.6 of the SPA by the omission to notify FITE during the bidding or contracting process of the termination of the Rio Turbio, NIPCCO and Bhikki projects.<sup>350</sup>
193. Of the relevant projects, “Rio Turbio was in the bidding stage, and the project terminated because a competing bid was selected; NIPCCO was subject to a Memorandum of Understanding, and terminated because it did not proceed to the contracting phase; Bhikki was subject to a contract that was signed, but not effective, and terminated because agreement on amended price and time schedule could not be reached”.<sup>351</sup>

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<sup>347</sup> Reply, ¶ 339.

<sup>348</sup> Reply, ¶ 341.

<sup>349</sup> Reply, ¶ 341.

<sup>350</sup> Statement of Defence, ¶¶ 387-397.

<sup>351</sup> Statement of Defence, ¶ 389.

194. In particular, the Respondent maintains that Clause 5.2(h) of the SPA is inapposite because all of these projects were “merely unconsummated business prospects”. They “were not assets in any of the accounting sense, the legal sense under Czech law, or the general sense of the word”<sup>352</sup> and as such were not capable of disposition.<sup>353</sup> Further, the relevant events occurred “in the ordinary course of business” since the company’s business was to seek to win bids and to turn winning bids into effective contracts,<sup>354</sup> and the alleged “asset disposition” did not fulfil the materiality requirement of Clause 5.2(h) of the SPA.<sup>355</sup>
195. As regards its obligation under Clause 8.3 to inform FITE that the Bhikki, Rio Turbio and NIPCCO projects would not be consummated, the Respondent maintains that “sufficiently clear information about the fact that these projects were extremely unlikely to proceed beyond the bidding stage was made available to FITE during the due diligence process of the tender”.<sup>356</sup>
196. The Respondent notes that Clauses 10.1(c), 10.2 and 10.6 of the SPA are clauses regulating together the fulfilment of conditions precedent to the closing of the SPA, and require the Seller to confirm that all of the “Seller’s Warranties”, which are set out in Clause 5.1, are true, complete and correct in all material aspects. The Claimant “does not allege a breach by Respondent of any of the warranties contained in Clause 5.1 of the SPA”.<sup>357</sup>
197. **Disclosure of issues affecting performance of obligations:** Concerning its obligations under Clause 10.6 of the SPA, the Respondent considers that Clause 10.6 of the SPA is inapposite. First, the obligation of FITE under Clause 6.1(v) of the SPA is not a condition precedent for the transaction contemplated by the SPA, and does not have to do with the validity or effectiveness of the SPA as a contract, and is consequently unrelated to Clause 10.6 of the SPA.<sup>358</sup> Secondly, it was obvious that any number of the cases listed as “Business Cases in Progress” might not proceed to a final contract

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<sup>352</sup> Statement of Defence, ¶ 391.

<sup>353</sup> Statement of Defence, ¶ 392.

<sup>354</sup> Statement of Defence, ¶ 393.

<sup>355</sup> Statement of Defence, ¶ 394.

<sup>356</sup> Rejoinder, ¶ 561.

<sup>357</sup> Statement of Defence, ¶ 400.

<sup>358</sup> Rejoinder, ¶ 550.

and execution.<sup>359</sup> Thirdly, the Respondent contends that the Claimant had failed to abide by its “core obligations under the SPA”.<sup>360</sup>

198. **Undertaking to comply with Czech laws and regulations:** As regards the alleged breach of Clause 5.1(c) of the SPA, the Respondent first raises two defences *in limine*, namely, that (i) the temporal dimension of Clause 5.1(c) is limited to the period between the signing and settlement dates of the SPA; and (ii) whereas this warranty relates to the legality of Respondent having entered into the SPA and complying with the specific obligations under the SPA itself, the Claimant neither alleges that Respondent’s entering into the SPA would be illegal, nor that any one of Respondent’s obligations in the SPA, if observed, would be illegal.<sup>361</sup>
199. Even if Clause 5.1(c) did apply to the allegations regarding the MoF’s reaction to the letter from \_\_\_\_\_ concerning \_\_\_\_\_, the Respondent maintains that its response to that letter was entirely appropriate in the circumstances and that the Claimant does not explain how its own suggested approach would have been superior to the response of the MoF, in which himself was instrumental.<sup>362</sup>
200. **Implied representations:** Concerning the “implied representations” allegedly given to FITE, the Respondent points to the Parties’ agreement at Clause 5.3 of the SPA that the representations and warranties contained in the SPA are the sole representations and warranties made by the Czech Republic to FITE and the warranty by FITE at Clause 6.1(n) of the SPA that it had not relied on any other warranties except for those explicitly made by the Czech Republic in the SPA.<sup>363</sup> The Respondent asserts that the Claimant’s claims based on alleged additional “implied” warranties “amounts to nothing else than a retroactive attempt to change the terms of the transaction”.<sup>364</sup>

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<sup>359</sup> Rejoinder, ¶ 552.

<sup>360</sup> Rejoinder, ¶ 556.

<sup>361</sup> Rejoinder, ¶ 541.

<sup>362</sup> Rejoinder, ¶ ¶ 543-544.

<sup>363</sup> Statement of Defence, ¶¶ 426-427; SPA (Respondent’s Translation), **R-32**.

<sup>364</sup> Statement of Defence, ¶ 427.

201. **Rulings of the Czech Courts:** The Respondent contends that the Czech courts have already decided the Claimant's claims under the SPA in legal proceedings initiated by FITE.<sup>365</sup> According to the Respondent, FITE's claims, as submitted in December 2008 and reformulated on 22 November 2010, were based on the same allegations as are now advanced by the Claimant in this arbitration, and were supported by the same evidence.<sup>366</sup> On 27 May 2011, the first instance court issued its decision, concluding that in entering into the SPA, FITE was not intentionally or unintentionally misled by the Respondent.<sup>367</sup> The court also held that there was no breach of the Czech Republic's obligations under the SPA or applicable law.<sup>368</sup> On 9 April 2015, on appeal by FITE, the High Court in Prague confirmed the dismissal of FITE's claim.<sup>369</sup> FITE appealed the decision of the High Court on 10 July 2015.<sup>370</sup> The decision of the High Court "is final and executable"<sup>371</sup> and may only be reviewed on matters of law, not on the facts.<sup>372</sup> The Supreme Court of the Czech Republic issued its decision rejecting FITE's appeal on 26 November 2015.<sup>373</sup>

(b) Obligations under Czech law

(i) *The Act on State Property, Act No. 219/2000 Coll.*

202. Concerning the alleged breach of the obligation under the State Property Act to "consistently use all available legal means to enforce and defend the State's rights of ownership in Škoda Export", the Respondent notes that the only "legal means" were those prescribed by the Czech Commercial Code and the Articles of Association of Škoda Export adopted on the basis of the Commercial Code.<sup>374</sup> The Act on State Property neither imposed any additional obligations on the joint-stock company

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<sup>365</sup> Statement of Defence, ¶¶ 428-436.

<sup>366</sup> Statement of Defence, ¶ 432.

<sup>367</sup> Judgment of the City Court in Prague, 27 May 2011, **R-180**, pp 13-14, cited in Statement of Defence, ¶ 433.

<sup>368</sup> Judgment of the City Court in Prague, 27 May 2011, **R-180**, p 15, cited in Statement of Defence, ¶ 433.

<sup>369</sup> Judgment of the High Court in Prague, 9 April 2015, **R-181**, pp 7-9, cited in Statement of Defence, ¶ 435.

<sup>370</sup> Statement of Defence, ¶ 436, referring to Extraordinary appeal of BA MU Export dated 8 July 2015, **R-182**.

<sup>371</sup> Statement of Defence, ¶ 436, referring to Section 159 of the Civil Procedure Code, **RLA-11**.

<sup>372</sup> Statement of Defence, ¶ 436, referring to Section 236(1) of the Civil Procedure Code, **RLA-11**.

<sup>373</sup> Decision of the Supreme Court of the Czech Republic, 26 November 2015, **R-220**; Rejoinder, ¶ 460.

<sup>374</sup> Statement of Defence, ¶¶ 408-411.

towards the state as its shareholder or vice-versa, nor did it derogate from any of the provisions of the Commercial Code.<sup>375</sup>

203. Concerning the regulation of the corporate affairs of Škoda Export as a joint stock company, the Respondent emphasizes that the applicable law is found in the Commercial Code of the Czech Republic and the Articles of Association of Škoda Export. These exhaustively list the rights of the Czech Republic as a shareholder in Škoda Export, as well as the responsibilities of the members of the individual corporate bodies of the company in their dealings with the company and with third parties, including company shareholders.<sup>376</sup> The Commercial Code enumerates *inter alia* the limitations on the extent to which a shareholder is entitled to receive information about the business affairs of the company.<sup>377</sup>

*(ii) Directive No. 1/2006 of the Ministry of Finance*

204. Concerning MoF Directive No. 1/2006, the Respondent notes that this is an internal document of the MoF, which could not change the generally applicable legislation. The Respondent contends that there was no breach of Directive No. 1/2006.<sup>378</sup>
205. According to the Respondent, Directive No. 1/2006 provides that the MoF could unilaterally instruct corporate bodies where it exercised shareholder control, or their members, regarding matters of privatization only on the basis of a specific agreement on the exercise of corporate control entered into between the MoF and the relevant controlled company. No such agreement had been concluded between the Czech Republic and Škoda Export.<sup>379</sup>

*(iii) Other legislation cited by Claimant*

206. The Respondent notes that the Privatization Act required the Czech Republic to prepare a privatization project in connection with the privatization of Škoda Export, with the purpose of

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<sup>375</sup> Statement of Defence, ¶ 411.

<sup>376</sup> Statement of Defence, ¶¶ 412-416.

<sup>377</sup> Statement of Defence, ¶ 413.

<sup>378</sup> Statement of Defence, ¶¶ 417-423.

<sup>379</sup> Statement of Defence, ¶ 422.

identifying the property to be privatized. It contends that the privatization project which was prepared in respect of Škoda Export was consistent with the requirements of this Act.<sup>380</sup> The Respondent notes, further, that the Act on Cancellation of the National Property Fund, Act No. 178/2005 Coll, cited by the Claimant, does not impose any specific or additional obligations on the State.<sup>381</sup>

(c) Application of Article 2(3) of the BIT to the alleged breaches of the SPA and of Czech law

207. The Respondent objects that the alleged breaches of Czech law and of the SPA are not covered by Article 2(3) of the BIT, and that the Tribunal accordingly lacks jurisdiction over such alleged breaches.

208. But even if the Tribunal were to uphold its jurisdiction over the alleged breaches of the SPA or Czech law on the basis that the SPA was a “specific agreement” under Article 2(3) of the BIT, the Claimant “would still need to demonstrate that those obligations had been breached and would have to do so under the law that creates and sustains them, i.e. Czech law”.<sup>382</sup> According to the Respondent, as a matter of Czech law, the SPA has not been breached, nor is there any plausible basis for alleging it to have been breached.<sup>383</sup>

209. The Respondent contends, further, that the Claimant’s claims would not be admissible because the Parties to the SPA have explicitly agreed on the exclusive jurisdiction of the competent courts in Prague, and moreover those courts have determined that no commitments pursuant to the SPA were

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<sup>380</sup> Statement of Defence, ¶¶ 404-407.

<sup>381</sup> Statement of Defence, ¶¶ 424-425.

<sup>382</sup> Statement of Defence, ¶ 519, referring to *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, **RLA-38**, ¶ 418; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, **RLA-43**, ¶¶ 127-128; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, **RLA-46**, ¶ 214; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, **RLA-49**, ¶¶ 247, 252; *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, and *Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award 16 May 2012, **RLA-53**, ¶ 190; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, **RLA-54**, ¶ 142; *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, **RLA-55**, ¶ 202.

<sup>383</sup> Statement of Defence, ¶¶ 537-539.

breached.<sup>384</sup> In terms of admissibility, the Respondent emphasizes that a party cannot claim breach of contract on the one hand and on the other disregard the contractually agreed dispute resolution mechanism in the contract.<sup>385</sup> And in terms of substance, those decisions of the Czech courts are determinative in accordance with the principle of *res judicata*, both in Czech law and as a matter of international law.<sup>386</sup>

210. If the Tribunal were to find, irrespective of the foregoing arguments, that the SPA was breached, the Respondent contends that the amount of damages resulting from such breach of the SPA must be determined by the rules explicitly regulating this matter agreed in the SPA and in Czech law.<sup>387</sup> In this regard, the Respondent asserts that Clause 11.3 of the SPA, which limits damages for a breach of the SPA to the purchase price paid for Škoda Export's shares, is applicable in the instant case, being permissible under the Commercial Code in its present version and as applicable at the time of conclusion of the SPA, and as confirmed by the highest Czech courts.<sup>388</sup>

## 2. FET

### (1) The Claimant's position

211. According to the Claimant, the obligation to accord FET includes, in particular, the obligations:

- (1) To safeguard legitimate expectations;<sup>389</sup>

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<sup>384</sup> Statement of Defence, ¶¶ 537-539.

<sup>385</sup> Statement of Defence, ¶¶ 531-535, citing *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, **RLA-43**, ¶¶ 127, 154; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award 25 October 2012, **RLA-49**, ¶¶ 252, 259; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, **RLA-54**, ¶¶ 148, 159, in which the decision to stay the proceedings rendered later as Further Decision on Objections to Jurisdiction of 9 October 2012.

<sup>386</sup> Respondent's Post-Hearing Brief, ¶¶ 16-44 and authorities there cited.

<sup>387</sup> Statement of Defence, ¶ 540.

<sup>388</sup> Statement of Defence, ¶¶ 543-546.

<sup>389</sup> Statement of Claim, ¶ 190; Reply, ¶ 353.

- (2) To act in good faith;<sup>390</sup>
  - (3) To refrain from unreasonable and discriminatory measures;<sup>391</sup>
  - (4) To provide a stable legal and business framework;<sup>392</sup>
  - (5) To treat foreign investment in a manner that is consistent, predictable and transparent,<sup>393</sup>  
and
  - (6) To treat foreign investors and their investment with due process.<sup>394</sup>
212. As to (1), the Claimant had a legitimate expectation that the Czech government would act honestly and lawfully as the administrator of the tender process for Škoda Export; would comply with its statutory and regulatory duties and obligations; would ensure that it obtained accurate information about Škoda Export's financial position and prospects and would take decisions regarding Škoda Export with the interests of future shareholders in mind.<sup>395</sup> Contrary to those expectations, the Respondent presented Škoda Export as a viable and profitable company during the privatisation process, without providing bidders with warnings about the significant financial losses that were forecast in Škoda Export's project portfolio.<sup>396</sup>
213. In addition, the Claimant legitimately expected that the Respondent would abide by the specific warranties and undertakings that it gave to FITE in the SPA and the Respondent frustrated those expectations by misrepresenting the financial condition of Škoda Export during the privatisation process, in violation of the SPA.<sup>397</sup>

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<sup>390</sup> Statement of Claim, ¶¶ 195-199; Reply, ¶ 352.

<sup>391</sup> Statement of Claim, ¶ 194.

<sup>392</sup> Statement of Claim, ¶ 191.

<sup>393</sup> Statement of Claim, ¶ 192.

<sup>394</sup> Statement of Claim, ¶ 193.

<sup>395</sup> Reply, ¶ 350.

<sup>396</sup> Reply, ¶ 351; Transcript, Day 1 at p. 142 (Claimant's Opening Statement, Dr Sinclair).

<sup>397</sup> Reply, ¶ 353.



214. As to (2), the Claimant notes that State conduct that is carried out in demonstrable lack of good faith will, of itself, constitute a breach of the obligation to afford FET.<sup>398</sup> The Claimant alleges that contrary to the requirement of good faith the Respondent “deliberately concealed, withheld and distorted information concerning the actual financial condition of Škoda Export, thereby creating a false impression of the company”.<sup>399</sup> Having received and chosen to ignore “multiple explicit warnings” on impending losses on important projects, the Respondent provided information to bidders which it knew to be false.<sup>400</sup>
215. As to (3), the Claimant alleges that the destruction of Škoda Export was “triggered by the personal vendetta of high-ranking officials of the Respondent against \_\_\_\_\_, who orchestrated measures intended to inflict damage upon \_\_\_\_\_’s business interests in the Czech Republic, including Škoda Export and ČKD”.<sup>401</sup> Senior officials of the Respondent used “aggressive” and “bullying” tactics against \_\_\_\_\_. When \_\_\_\_\_ rejected those tactics, there was a verbal altercation with a senior official and “direct threats against \_\_\_\_\_ and his interests in the Czech Republic”.<sup>402</sup> The Freezing Orders on Škoda Export’s bank accounts were part of a “campaign of harassment and intimidation” by the Respondent.<sup>403</sup> Such behaviour was unreasonable and discriminatory and violates the FET standard under the BIT.<sup>404</sup>
216. As to (4), (5), and (6), by violating its own laws and regulations, the Czech Republic failed to ensure a stable legal and business framework in which to operate.<sup>405</sup> By knowingly concealing or distorting material information, the Respondent breached the requirement to treat foreign investment in a manner that is consistent, predictable, and transparent.<sup>406</sup> By the failure of the Czech Republic “and

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<sup>398</sup> Reply, ¶ 352, referring to *Frontier Petroleum Services Ltd v Czech Republic*, Final Award, 12 November 2010, **CLA-42**, ¶ 301.

<sup>399</sup> Reply, ¶ 352. See also Transcript, Day 1 at pp. 143-144 (Claimant’s Opening Statement, Dr Sinclair).

<sup>400</sup> Reply, ¶ 352.

<sup>401</sup> Reply, ¶ 354.

<sup>402</sup> Reply, ¶ 355.

<sup>403</sup> Reply, ¶ 355.

<sup>404</sup> Reply, ¶ 355; Transcript, Day 1 at pp. 95-100 (Claimant’s Opening Statement, Mr Triantafilou), 146-150 (Claimant’s Opening Statement, Dr Sinclair); Transcript, Day 3 at pp. 65-70 (Re-examination of

<sup>405</sup> Statement of Claim, ¶ 201; Transcript, Day 1 at 142-143 (Claimant’s Opening Statement, Dr Sinclair).

<sup>406</sup> Statement of Claim, ¶ 201.

its instrumentalities, including CEB” to abide with their legal and regulatory obligations, combined with the “concerted efforts of the Ministry of Finance and CEB to bankrupt Škoda Export and distribute its assets” the State violated its obligation to treat WNC and its investment with due process.<sup>407</sup>

**(2) The Respondent’s position**

217. The Respondent contends that it did not breach any of its obligations:

- (1) To safeguard legitimate expectations;<sup>408</sup>
- (2) To act in good faith;<sup>409</sup>
- (3) To refrain from unreasonable and discriminatory measures;<sup>410</sup> or
- (4) To provide a stable legal and business framework,<sup>411</sup> treat foreign investment in a manner that is consistent, predictable and transparent,<sup>412</sup> and treat foreign investors and their investment with due process.<sup>413</sup>

218. As to (1), the expectations protected by the FET requirement are “the basic expectations that were taken into account by the foreign investor to make the investment, as long as these expectations are reasonable and legitimate and have been reasonably relied upon by the investor to make the investment”.<sup>414</sup> The alleged expectation that the Respondent “would ensure that [the Claimant] obtained information about Škoda Export’s financial position and prospects and took decisions regarding Škoda Export with the interests of future shareholders in mind” is not basic but “outlandish” and could not have been reasonably relied upon by a prudent investor. An investor is

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<sup>407</sup> Statement of Claim, ¶ 202.

<sup>408</sup> Statement of Defence, ¶¶ 550-561; Rejoinder, ¶¶ 573-575.

<sup>409</sup> Statement of Defence, ¶¶ 572-573; Rejoinder ¶¶ 581-583.

<sup>410</sup> Statement of Defence, ¶¶ 570-571; Rejoinder, ¶¶ 585-593.

<sup>411</sup> Statement of Defence, ¶¶ 562-563.

<sup>412</sup> Statement of Defence, ¶¶ 564-567; Rejoinder, ¶¶ 576-580.

<sup>413</sup> Statement of Defence, ¶¶ 568-569.

<sup>414</sup> Rejoinder, ¶ 573, citing *Biwater Gauff (Tanzania) Ltd v Tanzania, Award, 24 July 2008, CLA-41, ¶ 602.*

obliged to conduct full and proper due diligence.<sup>415</sup> The Respondent provided “fulsome information” regarding Škoda Export’s financial position and prospects and cannot be responsible for the lack of proper evaluation or due diligence by FITE.<sup>416</sup>

219. The SPA and the information provided to the investor beforehand made it clear that no representation was being provided concerning the future performance of Škoda Export.<sup>417</sup>
220. As to (2), the Respondent denies that it provided information which it “already knew to be false”.<sup>418</sup> The Respondent “acted in good faith to sell the shares in Škoda Export in a transparent tender where every interested qualifying investor had the same chance to investigate the business opportunity and to decide whether or not to bid on the offered terms”.<sup>419</sup> The Tender Rules and Data Room Rules provided that it was the management of Škoda Export that would provide relevant information to potential bidders and bidders were transparently advised that the information was being provided directly by the company without independent vetting or checking by the seller.<sup>420</sup> The Respondent denies the allegation that its conduct in general violated the obligation of good faith.<sup>421</sup>
221. As to (3), the obligation to refrain from unreasonable or discriminatory measures must be treated separately from the requirement of FET, since the BIT contains a separate, express provision in this respect in the second sentence of Article 2(2),<sup>422</sup> which provides: “Neither Contracting Party shall in

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<sup>415</sup> Statement of Defence, ¶ 561, citing *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision of Jurisdiction and Liability, 14 January 2010, **CLA-22**, ¶ 285; UNCTAD, Fair and Equitable Treatment, United Nations and Geneva, 2012, **RLA-67**, p. 78; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, **RLA-60**, ¶ 158; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **CLA-19**, ¶ 304; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, **RLA-68**, ¶ 333. Rejoinder, ¶ 574.

<sup>416</sup> Rejoinder, ¶ 574.

<sup>417</sup> Statement of Defence, ¶ 555; Rejoinder, ¶ 574.

<sup>418</sup> Rejoinder, ¶ 581.

<sup>419</sup> Statement of Defence, ¶¶ 573; Rejoinder, ¶ 582.

<sup>420</sup> Rejoinder, ¶ 582; RWS-1, ¶¶ 9, 11.

<sup>421</sup> Rejoinder, ¶ 583.

<sup>422</sup> Rejoinder, ¶ 569.

any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.”

222. The Respondent treated the Claimant’s investment reasonably and in a non-discriminatory manner.<sup>423</sup> Specifically, in response to the allegation that high-ranking officials conducted a “personal vendetta” against \_\_\_\_\_, the Respondent considers that this is a “conspiracy theory” which is implausible and has nothing to do with the rule of law or with any wilful disregard of due process.<sup>424</sup>
223. Noting that discrimination may be measured generally when similarly situated foreign investors in the same economic sector are treated differently without reasonable justification, the Respondent contends that the only discrimination allegations made by the Claimant in this case, namely, that CEB’s treatment of Škoda Export’s requests for the extension of guarantees and additional credit for the Balloki and Muridke projects in 2009 differed sharply from its treatment of other credit applicants, “has not been pleaded with respect to this claim” and is unrelated to it.<sup>425</sup>
224. The Respondent contends that it has not “impair[ed] the management, maintenance, use, enjoyment or disposal” of the Claimant’s investment, and that the Claimant has not made any specific assertions in this regard.<sup>426</sup> The Claimant has not made out a claim under the specific terms of Article 2(2) of the BIT on discriminatory treatment, and since the BIT makes specific provision in this regard, such a claim cannot be made under the general requirement of FET.<sup>427</sup>
225. As to (4), the Respondent maintains that it treated the Claimant’s investment in a consistent, predictable, and transparent manner.<sup>428</sup> Specifically, as well as denying the factual basis for the assertion that it “deliberately concealed information” relating to the actual financial condition of Škoda Export, creating a false impression of the company, and that it ignored warnings concerning

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<sup>423</sup> Statement of Defence, ¶¶ 570-571; Rejoinder, ¶¶ 585-593; Transcript, Day 3 at pp. 2-54 (Cross-examination of \_\_\_\_\_).

<sup>424</sup> Rejoinder, ¶ 590.

<sup>425</sup> Rejoinder, ¶ 591, referring to Reply, ¶ 155.

<sup>426</sup> Rejoinder, ¶ 592.

<sup>427</sup> Rejoinder, ¶ 592.

<sup>428</sup> Rejoinder, ¶ 576-580.

the company's impending losses on important projects,<sup>429</sup> the Respondent adds that the Claimant "has not pleaded this claim with any particularity".<sup>430</sup> The only legal authority proffered by the Claimant in relation to the requirements of consistency, predictability and transparency is the award in *Tecmed*, which relates to the transparency of the legal procedures and framework of the State.<sup>431</sup> The Claimant makes the allegation not that the legal framework in the Czech Republic lacked transparency, but rather that the behaviour of the Respondent was outside the scope of this framework, and its allegation in this respect is unfounded.<sup>432</sup>

### 3. Expropriation

#### (1) The Claimant's position

226. The Claimant alleges that the Respondent unlawfully expropriated its investment in breach of Article 5 of the BIT because (i) CEB and EGAP failed to provide critically needed financing for Škoda Export's projects,<sup>433</sup> (ii) CEB and EGAP attempted to divert Škoda Export's projects to a third party contractor,<sup>434</sup> and (iii) CEB acted to freeze Škoda Export's bank accounts on false and unsubstantiated charges.<sup>435</sup> On the basis of these acts and omissions, the Claimant contends that the Czech Republic's unlawful expropriation engages its responsibility at international law.<sup>436</sup>
227. The expropriation was unlawful because it did not meet the requirements of (i) just compensation, (ii) due process and observance of law, (iii) non-discrimination, and (iv) public interest.<sup>437</sup> The measures taken by the Czech Republic, including the Freezing Orders, were unlawful, were targeted

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<sup>429</sup> Rejoinder, ¶ 577.

<sup>430</sup> Rejoinder, ¶ 578.

<sup>431</sup> Rejoinder, ¶¶ 579-580, referring to Statement of Claim, ¶ 192, and citing *Técnicas Medioambientales Tecmed S.A. v. Mexico*, Award, 29 May 2003, **CLA-26**, ¶ 154.

<sup>432</sup> Rejoinder, ¶ 580.

<sup>433</sup> Statement of Claim, ¶¶ 215-219; Reply, ¶¶ 361-364.

<sup>434</sup> Statement of Claim, ¶¶ 220-221; Reply, ¶¶ 365-366.

<sup>435</sup> Statement of Claim, ¶¶ 222-223; Reply, ¶¶ 367-368.

<sup>436</sup> Statement of Claim, ¶ 224; Reply, ¶¶ 369.

<sup>437</sup> Statement of Claim, ¶ 225; Reply, ¶ 369.

specifically at Škoda Export, and lacked any public interest justification.<sup>438</sup> Further, the expropriation was rendered unlawful by the failure to pay compensation.<sup>439</sup>

228. Additionally, in the alternative to its claim under Article 2(3) of the BIT, the Claimant contends that “the entirety of the Czech Republic’s acts in this case substantiate a case for expropriation under Article 5 of the BIT”.<sup>440</sup>

229. The Claimant responds as follows to the defences raised by the Respondent.

(a) Attribution of responsibility to the Czech Republic for the conduct of CEB and EGAP

230. The Claimant maintains that the conduct of the CEB and EGAP is attributable to the Respondent under international law, pursuant to Article 5 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”), since CEB and EGAP are instruments of the state charged with performing governmental functions.<sup>441</sup>

231. The Claimant asserts that CEB and EGAP have a primary role in implementing governmental export policies; perform state functions conferred on them by legislation; are publicly accountable for their conduct; conceive themselves as being State entities charged with providing State support; are owned and controlled by the State, with supervisory bodies consisting of State officials; and receive extensive support from the State budget and have their losses covered by fiscal resources.<sup>442</sup>

232. The Claimant points out that the mission of the CEB is conferred on it by Czech law under the Financing of Exports Act; that the Act requires the State to retain its majority ownership in CEB and exclusive control of CEB.<sup>443</sup> The governmental function of the CEB is confirmed by the fact that it is subject to the scrutiny of the State Audit Office and that it is designated as an instrumentality in

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<sup>438</sup> Statement of Claim, ¶ 226; Reply, ¶ 370.

<sup>439</sup> Statement of Claim, ¶ 227.

<sup>440</sup> Statement of Claim, ¶ 229.

<sup>441</sup> Reply, ¶¶ 256-289; Transcript, Day 1 at pp. 133-141, 144-145 (Claimant’s Opening Statement, Dr Sinclair).

<sup>442</sup> Reply, ¶ 262.

<sup>443</sup> Reply, ¶¶ 265-266.

charge of implementing the State's export strategy by the official "Export Policy" of the Czech Republic between 2006 and 2010 (the "Export Policy").<sup>444</sup>

233. The Claimant contends that EGAP, alongside CEB, is empowered by Czech law to exercise elements of governmental authority in the implementation of the foreign trade policy of the Czech Republic and is subject to the audit of the State Audit Office.<sup>445</sup> Its funds for export credit risk are subsidized from the State budget.<sup>446</sup>
234. The implementation of State policy by State entities qualifies as the exercise of governmental policy under the first element of Article 5 of the ILC Articles, citing numerous arbitral decisions to this effect.<sup>447</sup>
235. The Claimant maintains that CEB and EGAP acted within the scope of their governmental authority in their conduct towards the Claimant's investment in violation of the BIT.<sup>448</sup> The support received by Škoda Export from CEB and EGAP prior to its privatization was a "dominant factor" in its decision to turn to CEB and EGAP for financial assistance once the post-acquisition audit revealed the poor condition of the company.<sup>449</sup> The letters from the Minister and Deputy Minister of Finance confirm that Škoda Export's relationship with CEB and EGAP fell within the ambit of their governmental mandate because when FITE approached the Ministry for assistance, the Ministry directed FITE to approach CEB and EGAP.<sup>450</sup> According to the Claimant, the fact that FITE also submitted credit applications to other institutions is irrelevant, since those entities did not provide Škoda Export with the requisite financial support.<sup>451</sup>

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<sup>444</sup> Reply, ¶¶ 267-269.

<sup>445</sup> Reply, ¶¶ 272-273.

<sup>446</sup> Reply, ¶ 273.

<sup>447</sup> Reply, ¶¶ 274-281.

<sup>448</sup> Reply, ¶¶ 282-289.

<sup>449</sup> Reply, ¶¶ 282-283.

<sup>450</sup> Reply, ¶¶ 284-287; Letter of Ministry of Finance (minister Kalousek) to FITE dated 15 January 2009, **R-105**; Letter from FITE to I. Fuksa, 16 January 2009, **C-42**; Letter from FITE to the Minister of Finance, 4 November 2008, **C-187**; Letter from I. Fuksa to FITE, 16 February 2009, **C-43**.

<sup>451</sup> Reply, ¶ 287.

236. The Claimant asserts that CEB's support for BTG fell within the scope of its public functions since the Balloki project was a top priority of CEB, and was discriminatory *vis-à-vis* Škoda Export.<sup>452</sup>

(b) Whether the Freezing Orders constituted a legitimate exercise of police powers

237. In response to the defence raised by Respondent, the Claimant denies that the Freezing Orders constituted a legitimate exercise of police powers under international law.<sup>453</sup> The Claimant acknowledges the Respondent's right to regulate and exercise its police power in the interests of public welfare.<sup>454</sup> It contends that "the record shows that CEB acted to freeze Škoda Export's bank accounts on false and unsubstantiated charges" as evidenced by the finding of the Prosecuting Authority that the suspicious transaction reports were baseless and unwarranted and that CEB was aware of the negative impact that the Freezing Orders would have.<sup>455</sup>

238. The Claimant maintains that the Respondent, through CEB, exercised its regulatory powers in bad faith, for a non-public purpose, and in a fashion that was both discriminatory and lacking in proportionality between the public purpose and the actions taken.<sup>456</sup>

(c) Whether the alleged conduct of the Respondent was the cause of Škoda Export's insolvency

239. According to the Claimant, Škoda Export's insolvency was a direct and proximate cause of the Respondent's unlawful conduct.<sup>457</sup>

240. The Claimant denies that its own conduct in managing the business of Škoda Export was the cause of the company's financial difficulties, referring to its own "diligent" efforts to keep Škoda Export in business.<sup>458</sup>

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<sup>452</sup> Reply, ¶ 288.

<sup>453</sup> Reply, ¶¶ 374-379.

<sup>454</sup> Reply, ¶ 376.

<sup>455</sup> Reply, ¶ 377, referring to Ruling of the District State Attorney's Office for Prague 1, 5 June 2009, C-58, at 4-5.

<sup>456</sup> Reply, ¶ 379.

<sup>457</sup> Reply, ¶¶ 380-384; Transcript, Day 1 at p. 47 (Claimant's Opening Statement, Dr Sinclair).

<sup>458</sup> Reply, ¶¶ 381, 109-136.



241. The Claimant maintains that the terms on which CEB offered financing to Škoda Export were commercially unreasonable; CEB treated Škoda Export's management disparagingly during meetings with customers on the Key Projects; and CEB gave preferential treatment to other credit applicants that presumably had connections with the Czech government.<sup>459</sup>
242. The Claimant denies that CEB "proposed" the transfer of the problematic projects in a *bona fide* attempt to avert the insolvency of Škoda Export. Rather, Mr Pokorný "demanded" the transfer of the Key Projects to BTG, an "untrustworthy" operator which lacked the necessary experience to complete the projects.<sup>460</sup> CEB conducted meetings with customers and suppliers in a "surreptitious and underhanded" manner, and attempted to "strong-arm" Škoda Export's management into transferring the projects in a short period of time and under threat of death.<sup>461</sup>

## (2) The Respondent's position

243. The Respondent denies that it has breached Article 5 of the BIT on the grounds that (i) the conduct of the CEB and EGAP is not attributable to the Respondent under international law; (ii) even if such conduct were attributable to the Respondent, the challenged conduct constituted a legitimate exercise of police powers under international law; and (iii) Škoda Export's insolvency was not caused by the Czech Republic.<sup>462</sup>

### (a) Attribution of responsibility to the Czech Republic for the conduct of CEB and EGAP

244. According to the Respondent, none of the alleged conduct of CEB and EGAP is attributable to the Czech Republic, on the basis of Articles 4, 5, or 8 of the ILC Articles or otherwise.<sup>463</sup>
245. The Respondent notes *inter alia* that CEB operates as a bank subject to standard banking rules, while the state support of its activities is provided in the form of conditional subsidies of its income in the

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<sup>459</sup> Reply, ¶ 382.

<sup>460</sup> Reply, ¶¶ 383-384.

<sup>461</sup> Reply, ¶ 384; First Witness Statement of (CWS-3), ¶ 48.

<sup>462</sup> Statement of Defence, ¶ 575; Rejoinder, ¶ 596.

<sup>463</sup> Statement of Defence, ¶¶ 576-620; Rejoinder, ¶¶ 481-533; Transcript, Day 2 at pp. 75-84 (Respondent's Opening Statement, Mr Ali).

event that its commercial income is insufficient to cover expenses incurred in connection with the provision of export financing and in the form of guarantee of its financial obligations.<sup>464</sup> CEB and EGAP operate closely in the provision of export financing.<sup>465</sup> The business management of CEB is entrusted to its Board of Directors, and shareholders are not entitled to give instructions to the Board of Directors.<sup>466</sup> Similarly, the business management of EGAP is entrusted to its Board of Directors, and as a matter of Czech law, shareholders cannot instruct the Board of Directors on matters concerning the business management of the insurer.<sup>467</sup>

246. The Respondent argues that none of the actions of CEB and EGAP complained of by the Claimant, even if they could be established as wrongful, can be attributed to the Czech Republic, on the grounds *inter alia* that neither CEB nor EGAP exercised governmental authority towards Škoda Export or the Claimant in connection with the alleged misconduct.<sup>468</sup>
247. Concerning responsibility for the acts and omissions of entities or persons exercising elements of delegated governmental authority, under Article 5 of the ILC Articles, the Respondent contends that there is a two-pronged test to be satisfied under this Article, which is confirmed by consistent BIT jurisprudence.<sup>469</sup> The allegedly unlawful act must, first, be performed by an entity specifically

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<sup>464</sup> Statement of Defence, ¶ 586.

<sup>465</sup> Statement of Defence, ¶ 592.

<sup>466</sup> Statement of Defence, ¶¶ 588-589, citing Articles of Association of CEB, **R-196**, Section 14(6); Commercial Code, **RLA-6**, Section 194(4).

<sup>467</sup> Statement of Defence, ¶ 594, citing Commercial Code, **RLA-6**, Section 194(4).

<sup>468</sup> Statement of Defence, ¶ 596. It is common ground between the Parties that neither CEB nor EGAP is an organ of the Czech Republic (Art. 4 ILC Articles) and neither CEB nor EGAP acted towards the Claimant under the direction or control of the Czech Republic (Art. 8 ILC Articles): Reply, ¶¶ 257-258.

<sup>469</sup> Statement of Defence, ¶ 602, citing *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, **RLA-79**, ¶ 292; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **RLA-80**, ¶¶ 121, 123; *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, **RLA-81**, ¶¶ 163-166, 169, 170. See also *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, **RLA-93**, ¶ 52; *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, **RLA-50**, ¶¶ 190, 192, 193, 197.

empowered to exercise elements of governmental authority and, secondly, must itself be performed in the exercise of such governmental authority.<sup>470</sup>

248. In relation to the “elements of governmental authority” under Article 5 of the ILC Articles, of which examples include the ability to regulate, license, and impose penalties, the Respondent contends that “mere ownership of shares in a corporation plays no role in the determination of whether an entity exercises elements of governmental authority or not”.<sup>471</sup> Neither CEB nor EGAP regulates the financing of export, provides their clients with any special prerogatives, licenses or permits, or imposes penalties except for contractual penalties.<sup>472</sup> The activities of export financing and the insurance of export risks are business activities which may be performed by commercial entities.<sup>473</sup> The only public element of CEB and EGAP is their entitlement to receive state support in connection with the provision of their financial and insurance services.<sup>474</sup>
249. Neither the alleged failure to provide financing, the alleged attempt to divert Škoda Export projects to a third party, nor the actions taken to freeze Škoda Export’s bank accounts carried “even a trace” of governmental authority.<sup>475</sup> Any bank would have been in a position to take such actions in such a situation, as in fact HSBC did in relation to the financing decisions and reporting of suspicious transactions.<sup>476</sup> According to the Respondent, the allegedly wrongful conduct is therefore not attributable to the Czech Republic.<sup>477</sup>
250. The Respondent rejects the contention by the Claimant that CEB and EGAP are empowered to exercise governmental authority because they “perform state functions conferred on them by legislation”.<sup>478</sup> The Respondent emphasizes that CEB and EGAP perform the commercial functions of providing export credit and insurance, and invokes the “bright line rule” of international law that

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<sup>470</sup> Statement of Defence, ¶ 602.

<sup>471</sup> Statement of Defence, ¶ 603.

<sup>472</sup> Statement of Defence, ¶ 604.

<sup>473</sup> Statement of Defence, ¶ 605.

<sup>474</sup> Statement of Defence, ¶ 606.

<sup>475</sup> Statement of Defence, ¶ 608.

<sup>476</sup> Statement of Defence, ¶¶ 609-611.

<sup>477</sup> Statement of Defence, ¶ 602.

<sup>478</sup> Rejoinder, ¶¶ 485-505.

activity of a commercial nature that is typically engaged in by a private or commercial entity “can never be considered an exercise of governmental authority”.<sup>479</sup> Neither CEB nor EGAP holds any special authority to provide export financing or insurance that is unavailable to any other commercial bank or insurer.<sup>480</sup> According to the Respondent, the Claimant “has not identified the governmental activities that CEB and EGAP purportedly carry out”.<sup>481</sup>

251. The Respondent further denies that CEB or EGAP are empowered to exercise governmental authority on the ground that each is charged with implementing State policy under the Financing of Exports Act.<sup>482</sup> The fact that commercial activities further State policy goals does not change their fundamentally private character.<sup>483</sup> In addition to citing jurisprudence in support of its position, the Respondent considers that “the cases cited by Claimant confirm that governmental authority must, in fact, be distinctly governmental – not private or commercial – even when carried out in furtherance of State policy”.<sup>484</sup> The fact that there are references to CEB and EGAP in the policy document titled Export Strategy of the Czech Republic for 2006-2010 (“**Export Policy**”) does not affect this position.<sup>485</sup>
252. The Respondent maintains that CEB and EGAP are not empowered to exercise governmental authority simply on the basis that they receive State financial support and are held accountable to the

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<sup>479</sup> Rejoinder, ¶ 488, citing *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, **RLA-49**, ¶ 176; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, **RLA-93**, ¶ 52; *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, **RLA-81**, ¶¶ 169-170; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, **RLA-158**, ¶ 195; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, **RLA-50**, ¶ 193; *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, PCA Case No. 2009-12, Final Award, 29 May 2012, **RLA-159**, ¶ 183.

<sup>480</sup> Rejoinder, ¶ 491.

<sup>481</sup> Rejoinder, ¶ 493.

<sup>482</sup> Rejoinder, ¶¶ 494-505.

<sup>483</sup> Rejoinder, ¶ 495.

<sup>484</sup> Rejoinder, ¶¶ 499-502; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, **RLA-49**, ¶¶ 173-174, 178; *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, **RLA-55**, ¶¶ 57-59; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, **RLA-93**, ¶ 78; *United States – Definitive Anti-dumping and Countervailing Duties on Products from China*, Report of the Appellate Body, 11 March 2011, **CLA-84**, ¶ 311.

<sup>485</sup> Rejoinder, ¶¶ 503-504, referring to Export Policy, **C-232**.

State for use of those finances by means of scrutiny by the Supreme Audit Office of the Czech Republic.<sup>486</sup> The mere fact of state financial support, subject to accountability through audits, is “entirely insufficient” to empower an entity that otherwise carries out purely commercial activities with governmental authority.<sup>487</sup> The Supreme Audit Office audits not only CEB and EGAP but also all other commercial companies in which the Czech Republic owns an interest and does not direct the activities of CEB or EGAP.<sup>488</sup> The Respondent denies that the supervisory bodies of CEB and EGAP “consist of state officials” since they are not exclusively composed of state officials but also include various private individuals without state affiliation.<sup>489</sup>

253. The Respondent contends that all of the activities of CEB and EGAP which are at issue, namely, the assessment of credit and insurance applications, the proposed reallocation of projects, and the reporting of suspicious banking transactions are ordinary commercial actions within the finance and insurance sectors.<sup>490</sup>
254. In particular, as regards the alleged “mishandling” of credit applications, the Respondent emphasizes that the Claimant itself admits that it wanted to be financed on non-commercial terms, and its disappointment at not receiving such terms “confirms that CEB and EGAP made purely commercial decisions”.<sup>491</sup> The correspondence relied upon by the Claimant from the Deputy Minister of Finance and from the Minister of Finance does not constitute a promise of financing, nor is it relevant to the question whether the provision of financing is a governmental activity.<sup>492</sup>

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<sup>486</sup> Rejoinder, ¶¶ 506-514.

<sup>487</sup> Rejoinder, ¶¶ 507-509, citing *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, **RLA-49**, ¶¶ 145, 154, 169, 177-178; *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, PCA Case No. 2009-12, Final Award, 29 May 2012, **RLA-159**, ¶¶ 53, 186; *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, PCA Case No. 2009-12, Final Award, 29 May 2012, **RLA-159**, ¶¶ 146, 169.

<sup>488</sup> Rejoinder, ¶¶ 510-511.

<sup>489</sup> Rejoinder, ¶ 513.

<sup>490</sup> Rejoinder, ¶¶ 517-532.

<sup>491</sup> Rejoinder, ¶ 518.

<sup>492</sup> Rejoinder, ¶¶ 520-524; Letter from I. Fuksa to FITE, 16 February 2009, **C-43**; Letter of Ministry of Finance (Fuksa) to FITE, dated 16 February 2009 (Respondent’s translation; originally submitted as C-43), **R-108**; Letter from the Minister of Finance to FITE, 22 December 2008, **C-41**.

State for use of those finances by means of scrutiny by the Supreme Audit Office of the Czech Republic.<sup>486</sup> The mere fact of state financial support, subject to accountability through audits, is “entirely insufficient” to empower an entity that otherwise carries out purely commercial activities with governmental authority.<sup>487</sup> The Supreme Audit Office audits not only CEB and EGAP but also all other commercial companies in which the Czech Republic owns an interest and does not direct the activities of CEB or EGAP.<sup>488</sup> The Respondent denies that the supervisory bodies of CEB and EGAP “consist of state officials” since they are not exclusively composed of state officials but also include various private individuals without state affiliation.<sup>489</sup>

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<sup>486</sup> Rejoinder, ¶¶ 506-514.

<sup>487</sup> Rejoinder, ¶¶ 507-509, citing *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, **RLA-49**, ¶¶ 145, 154, 169, 177-178; *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, PCA Case No. 2009-12, Final Award, 29 May 2012, **RLA-159**, ¶¶ 53, 186; *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, PCA Case No. 2009-12, Final Award, 29 May 2012, **RLA-159**, ¶¶ 146, 169.

<sup>488</sup> Rejoinder, ¶¶ 510-511.

<sup>489</sup> Rejoinder, ¶ 513.

<sup>490</sup> Rejoinder, ¶¶ 517-532.

<sup>491</sup> Rejoinder, ¶ 518.

<sup>492</sup> Rejoinder, ¶¶ 520-524: Letter from I. Fuksa to FITE, 16 February 2009, **C-43**; Letter of Ministry of Finance to FITE [redacted] dated 16 February 2009 (Respondent’s translation; originally submitted as C-43), **R-108**; Letter from [redacted] to FITE, 22 December 2008, **C-41**.

255. The Respondent emphasizes that all commercial banks have a duty under EU and Czech law to report suspicions of improper transactions aimed at money laundering, asset draining, or other actions,<sup>493</sup> and given that HSBC acted identically to CEB in reporting the “unusual and commercially irrational” transfer instructions received from Škoda Export on 17 April 2009, “the bright line rule from international law” to the effect that activity of a commercial nature can never be considered an exercise of governmental authority “is conclusive”.<sup>494</sup>

(b) Whether the Freezing Orders constituted a legitimate exercise of police powers

256. The Respondent contends that if the challenged conduct were attributable to the Czech Republic, such conduct constituted a legitimate exercise of police powers under international law.<sup>495</sup>

257. The Respondent emphasizes that the burden of proving that the actions allegedly constituting expropriation were not a legitimate exercise of police powers because they were disproportionate, discriminatory, or in bad faith, falls on the Claimant.<sup>496</sup> The Respondent responds to the two allegations made by Claimant in purporting to show that the suspicious activity reports and Freezing Orders were not legitimate exercises of police power, namely, the finding by the Prosecuting Authority that the reports were “baseless and unwarranted”; and the allegedly disproportionate nature of the CEB’s response in failing first to raise its suspicions directly with Škoda Export.

258. According to the Respondent, the suspicious activity reports and the subsequent Freezing Orders were made in good faith fulfilment of legal obligations, under the Anti-Money Laundering Act and EU mandatory law, designed to prevent financial crimes.<sup>497</sup> The Respondent notes that a payment can be suspicious without being illegal, and the Prosecuting Authority made no finding of bad faith.<sup>498</sup> Concerning the alleged failure to communicate beforehand with Škoda Export, the

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<sup>493</sup> Rejoinder, ¶ 530; **RLA-3**; **CLA-8**, Sections 2(1), 6(1).

<sup>494</sup> Rejoinder, ¶ 532.

<sup>495</sup> Statement of Defence, ¶¶ 621-630; Rejoinder, ¶¶ 596-617.

<sup>496</sup> Rejoinder, ¶ 600.

<sup>497</sup> Rejoinder, ¶¶ 604-606.

<sup>498</sup> Rejoinder, ¶¶ 607-608.

Respondent notes that CEB was “legally obliged” not to report its suspicions to Škoda Export since this would undermine the purpose of the Anti-Money Laundering Act.<sup>499</sup>

259. The Respondent asserts that the Claimant has put forward no evidence or allegation that the failure to provide Škoda Export with additional financing and the proposed transfer of the Balloki and Muridke projects were anything other than legitimate exercises of police powers.<sup>500</sup> The Respondent notes that the decisions on the relevant credit applications were made on the basis of a risk assessment of the transaction in question, and the proposal to transfer those projects to a third party was part of a good faith attempt to find terms on which the projects could be completed and Škoda Export could be disburdened from the obligations it had incurred.<sup>501</sup>

(c) Whether the alleged conduct of the Respondent was the cause of Škoda Export’s insolvency

260. The Respondent denies that Škoda Export’s insolvency was caused by the measures complained of by the Claimant, whether those measures are taken alone or cumulatively.<sup>502</sup> Specifically, the Respondent denies that the insolvency of Škoda Export was caused by the failure to provide financing, the alleged harm to Škoda Export’s relationship with its customers and sub-contractors, or the issuing of the suspicious activity reports and the Freezing Orders.<sup>503</sup>

261. The Respondent’s position is that the financial difficulties experienced by Škoda Export were caused by the Claimant’s own conduct in managing the business of the company, including in particular its refusal to accept financing on the terms offered by CEB and its refusal to accept transfer of the loss-making projects to a third-party EPC contractor.<sup>504</sup>

262. According to the Respondent, the suspicious activity report and Freezing Orders, which were in place for only 29 days, did not deprive the Claimant of any asset or have any substantial effect on Škoda Export’s financial situation or business conduct. Škoda Export had stopped paying its external sub-

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<sup>499</sup> Rejoinder, ¶ 610.

<sup>500</sup> Rejoinder, ¶¶ 612-617.

<sup>501</sup> Rejoinder, ¶¶ 615, 617.

<sup>502</sup> Statement of Defence, ¶¶ 631-638; Rejoinder, ¶¶ 618-631.

<sup>503</sup> Rejoinder, ¶ 618.

<sup>504</sup> Statement of Defence, ¶¶ 575, 635-636.



contractors on the Balloki and Muridke projects at the beginning of 2009 and did not make any payments to its creditors after the Freezing Orders were lifted.<sup>505</sup>

263. Concerning the transfer of projects to a third party, the Respondent observes that the Claimant has “failed to explain why getting rid of defaulted and underfunded projects and the obligations associated with them would cause Škoda Export’s insolvency”.<sup>506</sup>
264. The failure to provide financing did not constitute an expropriatory measure because no risk-conscious creditor would have provided financing, given the dire financial condition of Škoda Export, without requiring changes that would have restored its minimal financial viability such as the transfer of the Balloki and Muridke projects, or requiring security for additional credit. By refusing to accept such measures when they were proposed, the Claimant effectively declined to accept credit that was potentially available to it.<sup>507</sup>
265. The Respondent adds that failure to provide assistance which would have been contrary to EU state aid law to a company in difficulty cannot constitute an expropriatory measure or every single bankruptcy of a company would constitute expropriation and every collapse of a foreign-owned company could result in a BIT claim.<sup>508</sup>
266. The Respondent distinguishes the investment BIT award relied upon by the Claimant, *Eureko v. Poland*, on the grounds that in that case, the state had created a legitimate expectation that it would act and did not do so, whereas in the present case the Claimant had no legitimate expectation to the additional financing it had requested on non-commercial terms from CEB.<sup>509</sup>

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<sup>505</sup> Rejoinder, ¶ 622.

<sup>506</sup> Rejoinder, ¶ 623.

<sup>507</sup> Rejoinder, ¶ 624.

<sup>508</sup> Rejoinder, ¶ 626.

<sup>509</sup> Rejoinder, ¶ 630.

**D. DAMAGES AND QUANTUM**

**1. Quantum of damages**

**(1) The Claimant's position**

267. The measure of damages claimed by the Claimant in the first instance (“**Primary Damages Claim**”) is based on a comparison “between the actual cash flows realized by Škoda Export and the cash flows it would have realised “but for” the Respondent’s wrongful conduct.<sup>510</sup> The damages calculated by the Claimant in respect of this claim consist of (i) the expected income from Škoda Export’s current and potential projects as represented to WNC during the privatization process, and (ii) lost profits from the additional projects that WNC arranged for Škoda Export to obtain after acquisition.<sup>511</sup>
268. In the alternative, to the extent the Tribunal is minded to use the purchase price as a measure of the compensation due to the Claimant under Article 2(3) of the BIT, the Claimant claims the purchase price of the shares together with the value of the Transferred Projects (“**Alternative Damages Claim**”).<sup>512</sup>
269. In respect of its Primary Damages Claim, the Claimant claims that it is entitled to the reasonably expected value of Škoda Export’s existing and potential projects, plus the value of the Transferred Projects and Škoda Export’s real estate, so as to calculate the full value that the Claimant expected to realise from the acquisition of Škoda Export, subject to a discount reflecting the probability that the Claimant might not have won the bid.<sup>513</sup> The value of Škoda Export as reasonably expected by the Claimant is calculated by applying a DCF analysis to each of Škoda Export’s projects as represented to the Claimant during privatisation, using the project-specific information available supplemented by “reasonable assumptions” based on standard EPC practice.<sup>514</sup>

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<sup>510</sup> Statement of Claim, ¶¶ 248-260; Reply, ¶¶397-404; Transcript, Day 1 at pp. 150-155 (Claimant’s Opening Statement, Mr Triantafilou); Transcript, Day 4 at 85-110- ( Mr Mizrahi’s Presentation); Transcript, Day 4 at 156-177 (re-examination of Mr Mizrahi); Transcript, Day 5 at p. 26-38, 41-52 (cross-examination of Mr Dearman); Transcript, Day 5 at p. 54-102 (expert conferencing).

<sup>511</sup> Statement of Claim, ¶ 234.

<sup>512</sup> Statement of Claim, ¶¶ 261-264, Reply, ¶¶ 405-407.

<sup>513</sup> Statement of Claim, ¶¶ 251-254; FTI Report, ¶¶ 85-86.

<sup>514</sup> Statement of Claim, ¶ 252.

270. In respect of its Alternative Damages Claim, the Claimant contends that the purchase price must be subject to a reasonable interest rate to reflect the time value of the funds; and the Claimant must be compensated for the lost value of the projects that it transferred to Škoda Export, the value of which was “destroyed in its entirety” by the refusal of financing and the Freezing Orders.<sup>515</sup>
271. In response to the Respondent’s critique of its damages methodology, the Claimant asserts that the Respondent and its expert have failed to recognise the underlying principles of the Claimant’s calculations. The Second FTI Report “makes clear that the applied method is the acceptable method of comparing the cash flows of Škoda Export’s projects “but for” the wrongful conduct of the Respondent with the actual cash flow”.<sup>516</sup>
272. In response to the allegation that Claimant’s damages calculations constitute “a calculation of a risk-free business with guaranteed cash flows” the Claimant notes that the authors of the Second FTI Report recognize and address the risks associated with the expected cash flows of the projects, and “consider that the expected cash flows of the projects are net of reserves for the risk of realization and reasonably represent the cash flows that the Claimant would have generated in the absence of the Measures”.<sup>517</sup>
273. The Claimant quantifies its primary damages claim as follows:<sup>518</sup>
- (1) the value of Škoda Export’s Existing Projects, which the FTI Report has stated as USD 8,321,952;
  - (2) the value of Škoda Export’s Potential Projects, which the FTI Report has stated as USD 3,365,812;
  - (3) the value of the Transferred Projects, which the FTI Report has valued at USD 23,952,551;
  - (4) the value of the Additional Bids which the FTI Report has valued at USD 1,809,695; and

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<sup>515</sup> Statement of Claim, ¶¶ 263-264; Reply, ¶ 405.

<sup>516</sup> Reply, ¶ 403; Second FTI Report, ¶ 46.

<sup>517</sup> Reply, ¶ 408; Second FTI Report, ¶ 66.

<sup>518</sup> Reply, ¶ 410; FTI Report, ¶¶ 127, 139; Second FTI Report, Schedule V.

- (5) the value of Škoda Export's real estate, which the FTI Report has set at USD 15,477,849.
274. The Claimant quantifies its alternative damages claim as follows:<sup>519</sup>
- (1) the purchase price for Škoda Export which based on the exchange rate of the time the FTI Report has determined to be USD 13,020,297; and
  - (2) the value of Škoda Export's Transferred Projects, which the FTI Report has valued at USD 23,952,551.
275. The Claimant's primary damages claim amounts to USD 71,581,414. The Claimant's alternative damages claim amounts to USD 46,898, 664.<sup>520</sup>

## (2) The Respondent's position

276. The Respondent's position is that no damages can be awarded to the Claimant since the Respondent did not violate any provision of the BIT, Czech law, the SPA or any "specific agreement" alleged by the Claimant, and the losses allegedly incurred by the Claimant were not caused by actions or inactions for which the Respondent is responsible.<sup>521</sup>
277. In the event of a finding by the Tribunal that the Claimant is entitled to damages, the Respondent maintains that the Claimant has not proved any damage from the purported violations of the Umbrella Clause or the BIT provisions on FET or unreasonable and discriminatory measures.<sup>522</sup> In the alternative, the Respondent asserts that any compensation for violation of the Umbrella Clause must be calculated in accordance with the amount agreed in the SPA.<sup>523</sup> At the time when the SPA was signed, Section 386(1) of the Czech Commercial Code prohibited only a total exclusion of damage liability, but not its limitation.<sup>524</sup>

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<sup>519</sup> Reply, ¶ 414.

<sup>520</sup> Reply, ¶¶ 413, 415.

<sup>521</sup> Statement of Defence, ¶¶ 639-650; Rejoinder, ¶¶ 675-679.

<sup>522</sup> Rejoinder, ¶¶ 633-641.

<sup>523</sup> Statement of Defence, ¶¶ 541-542; Rejoinder, ¶¶ 642-647.

<sup>524</sup> Rejoinder, ¶ 645.

278. As to the calculation of the damages claimed by the Claimant, the Respondent asserts that the Claimant's alternative claims in the amounts of USD 90,000,000 and 65,000,000 are not backed by any evidence.<sup>525</sup>
279. The Respondent challenges the quantification of the amounts based on the report of Messrs Rosen and Mizrahi, contending that the 20 general assumptions adopted in the FTI Report, if inapplicable, can lead to a material change in the results of the valuation.<sup>526</sup> According to the Respondent, the vast majority of the assumptions made in the FTI Report are unsustainable,<sup>527</sup> including for instance assumptions regarding the projected profit margins applicable to each project and how such profit margins compare with those realised by other EPC contractors.<sup>528</sup>
280. According to the Respondent, in estimating the damages allegedly sustained by the Claimant, the authors of the FTI Report "did not apply any commonly recognized method of valuing a business" and specifically "did not apply a discounted cash flow (DCF) method" despite the Claimant having referred to the DCF method as the appropriate method of quantification of damages.<sup>529</sup> The Respondent characterizes the valuation in the FTI Report as "a valuation of a risk-free business with guaranteed cash flows" since it applies a zero discount rate to Existing Projects and Transferred Projects.<sup>530</sup>
281. According to Dr David Dearman, to calculate the value of the company "but for" the alleged misrepresentations, the Claimant should have (i) made a best *ex ante* reliable cash flow forecast from all of the evidence available in the Data Room, not just the Project Cards; (ii) applied a discount rate

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<sup>525</sup> Statement of Defence, ¶ 653.

<sup>526</sup> Statement of Defence, ¶ 654.

<sup>527</sup> Statement of Defence, ¶ 654, referring to Expert Report of David Dearman (REX-1), section 4.9.

<sup>528</sup> Expert Report of David Dearman (REX-1), ¶¶ 4.9.12-4.9.16. See also Transcript, Day 4 at 128-156 (cross-examination of Mr Mizrahi); Transcript, Day 4 at 181-203 (Mr Dearman's Presentation); Transcript, Day 5 at p. 102-104 (expert conferencing/examination by Ms. Stein); Transcript, Day 5 at p. 54-102 (expert conferencing).

<sup>529</sup> Statement of Defence, ¶ 655.

<sup>530</sup> Statement of Defence, ¶ 656.

to reflect the risk of these cash flows; and (iii) added to the resulting valuation the value of any excess assets, i.e. assets which Škoda Export did not need to run its business.”<sup>531</sup>

282. The Respondent asserts that the “future losses” claimed by the Claimant are speculative, uncertain, and hypothetical, by reason of the selection of the value of Škoda Export’s real estate as a proxy measure of future loss, which rests on the “inherently speculative” assumption that Škoda Export was going to be carried out on a profitable or break-even basis.<sup>532</sup> Such losses are not recoverable pursuant to the settled principle of international law according to which only those damages that can be reasonably ascertained can be recovered.<sup>533</sup>
283. The Respondent contends that the primary calculation of damages made by FTI is fundamentally flawed. First, FTI does not quantify loss to the Claimant because it does not quantify the value of Škoda Export but instead merely quantifies Škoda Export’s cash flows, and even assuming cash flows were an appropriate measure of value, “they could only be so to the extent they were lost by Claimant, not Škoda Export”, and any loss to the Claimant should be measured by the cash that would ultimately flowed up to the Claimant by way of dividends payable by Škoda Export.<sup>534</sup> The value of any sums payable up to the Claimant as dividends would need to be calculated taking into account central office overheads, which the FTI Reports fail to take into account.<sup>535</sup> Further, should the Claimant be correct in its allegation that the data on the Project Cards turned out to be misleading or false, “this would necessarily mean that those Project Cards cannot represent profits or cash flows that Škoda Export could have earned and therefore cannot represent Claimant’s losses”.<sup>536</sup> Finally, the calculation is flawed because the value of Škoda Export’s real estate is overstated and only that part of the premises which was not occupied by Škoda Export itself, amounting to 13 percent of the

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<sup>531</sup> Statement of Defence, ¶ 656; Expert Report of David Dearman (REX-1), section 4.2.4.

<sup>532</sup> Rejoinder, ¶ 654.

<sup>533</sup> Rejoinder, ¶¶ 648-656, citing *Rudloff Case (merits)*, United States-Venezuela Mixed Claims Commission, Reports of International Arbitral Awards, (1903-5), Vol. IX, pp. 255-261, **RLA-172**, p. 258; *Amoco International Finance Corp. v. Iran*, IUSCT No. 310-56-3, Partial Award dated 23 July 1987 **RLA-173**, ¶ 238; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007 **RLA-171**, ¶ 51.

<sup>534</sup> Rejoinder, ¶ 664, citing Second Expert Report of David Dearman (**REX-2**), ¶ 3.2.2.

<sup>535</sup> Rejoinder, ¶ 668.

<sup>536</sup> Rejoinder, ¶¶ 666-667, citing Second Expert Report of David Dearman (**REX-2**), ¶ 3.2.13.

total office area, can be deemed an excess (redundant) asset whose value can be added to the damages calculated as the loss of cash flows.<sup>537</sup>

284. The Respondent contends that the alternative calculation made by FIT based on “the share purchase price paid for Škoda Export, cash flow generated from Transferred Projects ... and a pre-Award interest”<sup>538</sup> is flawed.<sup>539</sup> In particular, the amount of the damages thus calculated based on the purchase price is inflated due to the use of an incorrect exchange rate,<sup>540</sup> and the projects identified as “Transferred Projects” “either are not “Transferred Projects” or losses from them reasonably can be projected to be nil.”<sup>541</sup>

## 2. Contributory negligence or fault

### (1) The Claimant’s position

285. The Claimant does not make any allowance in its written pleadings for any reduction in the amount of damages due to it for contributory negligence or fault.

### (2) The Respondent’s position

286. The Respondent alleges that the Claimant contributed directly to its alleged loss through its own actions, such as its insufficient evaluation of the information provided during the due diligence process, the price it offered to pay for the shares in Škoda Export, and its unreasonable actions following the acquisition of Škoda Export.<sup>542</sup> Citing the rule of international law, as stated in Article 39 of the ILC Articles, that any damages awarded to a claimant must reflect its contribution to its

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<sup>537</sup> Rejoinder, ¶¶ 670-672.

<sup>538</sup> Reply, ¶ 405.

<sup>539</sup> Rejoinder, ¶ 673.

<sup>540</sup> Rejoinder, ¶ 674, referring to Second Expert Report of David Dearman (REX-2), ¶¶ 4.2.1-4.2.3.

<sup>541</sup> Rejoinder, ¶ 674, referring to Second Expert Report of David Dearman (REX-2), section 4.3.

<sup>542</sup> Rejoinder, ¶¶ 678, 683.

own losses, the Respondent contends that any damages awarded to the Claimant must be appropriately reduced to reflect the Claimant's contribution to its loss, in the Tribunal's discretion.<sup>543</sup>

### 3. Interest

#### (1) The Claimant's position

287. The Claimant claims pre-award interest and asserts that "the applicable statutory interest, which comes into effect as at the date a demand for damages is made, is 8 percent plus the repo rate set by the Czech National Bank for the first day of the calendar half-year in which the default occurred", which currently stands at 8.05 percent.<sup>544</sup> The Claimant contends that the same rate should apply after the rendering of the Tribunal's award.<sup>545</sup>

#### (2) The Respondent's position

288. According to the Respondent, the interest claimed by the Claimant is unreasonable. The Claimant claims pre-award interest at "the risk free rate of US Treasury bills plus a premium of 3 percent" whereas the Respondent contends that the appropriate standard is the interest rate payable on the loan FITE obtained from PPF Bank to acquire Škoda Export, namely, "3 month PROBOR plus 1.69%".<sup>546</sup>

289. With regard to post-award interest, the Respondent contends that the Claimant misinterprets Czech law by a defective translation of Regulation No. 351/2013 Coll. ("**Regulation 351**"). Regulation 351 sets out not "statutory interest" as contended by Claimant, but "default interest". The rate of statutory interest is found in Section 1802 of the Czech Civil Code, which refers to the "interest required on loans provided by banks in the place of residence or seat of the debtor at the time of entering into a contract".<sup>547</sup> The Respondent contends that the purpose of the BIT would not be served by the application of the default rate established by Regulation 351, which is concerned with sanctions

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<sup>543</sup> Rejoinder, ¶¶ 680-683.

<sup>544</sup> Reply, ¶ 416.

<sup>545</sup> Reply, ¶ 416.

<sup>546</sup> Rejoinder, ¶ 685.

<sup>547</sup> Rejoinder, ¶¶ 688-690, citing Regulation No. 351/2013 Coll., Art. 2, 16 October 2013, **CLA-58**, Regulation No. 351/2013 Coll. (corrected translation), **RLA-177**; Act No. 89/2012 Coll., Civil Code, **RLA-121**.



imposed on debtors to discourage future late payment of their obligations.<sup>548</sup> Rather, as the award would constitute Respondent's debt towards the Claimant, it would be "fundamentally unfair" to apply the interest rate of 8.05 percent as requested by the Claimant, and the proper post-award interest rate is nil.<sup>549</sup>

290. Alternatively, the rate of post-award interest should not be higher than Claimant's own cost of funds, which the Respondent calculates at 1.98 percent per annum, based on the interest rate offered by PPF Bank at the time of the loan agreement dated 24 April 2009, 3 month PRIBOR (currently 0.29 percent) plus 1.69 percent per annum.<sup>550</sup>
291. According to the Respondent, international and Czech law both require simple interest in connection with the payment of an arbitral award.<sup>551</sup> Any interest granted to the Claimant should be simple and not compounded.<sup>552</sup>

## VI. THE TRIBUNAL'S CONCLUSIONS

292. In reaching its determination of the claims herein, the Tribunal has had regard to the entirety of each Party's memorials, statements, exhibits and other filed documents and attachments and oral evidence, and written and oral submissions, including skeleton outlines, post-hearing briefs, aide memoires and transcripts of hearings.

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<sup>548</sup> Rejoinder, ¶ 690; Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), OJ L 48/1, 23.2.2011, **RLA-178**.

<sup>549</sup> Rejoinder, ¶ 693.

<sup>550</sup> Rejoinder, ¶¶ 692, 694; Loan Agreement between PPF Bank and CEX dated 24 April 2008, **R-64**, Article III(1); PRIBOR Rates, monthly and yearly averages, year 2016, **R-337**.

<sup>551</sup> Rejoinder, ¶¶ 695-697; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003 **RLA-179**, ¶ 395; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, **RLA-56**, ¶ 457; Regulation No. 351/2013 Coll. (corrected translation), **RLA-177**, Section 2; Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), OJ L 48/1, 23.2.2011, **RLA-178**, Article 2(6).

<sup>552</sup> Rejoinder, ¶ 698.

**A. JURISDICTION AND ADMISSIBILITY**

293. As a preliminary observation, it is to be recalled that jurisdiction arising under a BIT is conferred and defined by the terms of that treaty. Where jurisdictional objections arise from disputed facts (for example whether there has been an “investment”), the onus is upon the Claimant to establish those facts. However, where, as here, the objections arise from the construction of specific provisions of the BIT, the Tribunal must apply the principles of interpretation reflected in the Vienna Convention on the Law of Treaties (“VCLT”). Issues of onus do not come into play and the process of interpretation engaged in by the Tribunal determines the result.

**1. The intra-EU BIT jurisdictional objection**

294. The Respondent objects to the Tribunal’s jurisdiction on the basis that the BIT has been superseded by EU law.<sup>553</sup> It contends that the BIT has been terminated pursuant to Article 59(1) of the VCLT. Alternatively, it is not applicable to the present case under Article 30(3) of the VCLT. The objection has two limbs.

295. **Limb (1):** The Respondent says that EU law has the same subject matter as the BIT because it provides protection to investors from one Member State in connection with investing in another Member State. The Respondent points to laws which guarantee freedom of movement of capital and freedom of establishment,<sup>554</sup> as well as investors’ access to the courts of EU Member States.<sup>555</sup> Second, the rights and protections in the BIT are only available to investors from the UK and the Czech Republic. The Respondent contends that the BIT consequently discriminates on grounds of nationality against investors from other EU States, contrary to rules laid down in the Treaty on the Functioning of the European Union (“TFEU”).<sup>556</sup> In light of the subject matter overlap and the incompatibility of the laws, and given the BIT is the earlier instrument, the Respondent says that the

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<sup>553</sup> Statement of Defence, ¶¶ 510-514; Rejoinder, ¶¶ 398-413.

<sup>554</sup> Statement of Defence, ¶ 512.

<sup>555</sup> Rejoinder, ¶ 405.

<sup>556</sup> Statement of Defence, ¶ 512.

BIT should be considered terminated under VCLT Article 59(1).<sup>557</sup> Alternatively, it says that under VCLT Article 30(3) the BIT cannot be applied in the present case.<sup>558</sup>

296. The Tribunal makes the preliminary observation that the Respondent's objection is not clearly pleaded in its Statement of Defence. The Respondent refers to the VCLT's rules in footnotes and does not explain how its arguments relate to or satisfy the elements of those rules. The Respondent also advances its case under both the subjective and objective elements in sub-paragraphs (a) and (b) to Article 59(1), when only the latter is open to it on its pleaded case. These defects are not remedied in its Rejoinder. Notwithstanding this, the Tribunal takes the first limb of the Respondent's argument to be directed towards the 'sameness' criterion in Articles 59(1) and 30(1) of the VCLT (i.e., that the treaties share the same subject matter), whilst the second limb is directed towards the criterion of incompatibility between the treaties in Articles 59(1)(b) and 30(3). Viewed in this way, any "confusion or conflation between sameness and incompatibility"<sup>559</sup> can be overcome and the Tribunal can proceed to determine the objection.
297. The grounds advanced by the Respondent in support of its objection have been considered and consistently rejected by a number of arbitral tribunals. The Respondent acknowledges this,<sup>560</sup> but calls on the Tribunal to disregard these decisions on the grounds that they "have either applied EU law incorrectly, or are incomplete and irrelevant".<sup>561</sup> The Respondent also relies on recent public statements made by the EC that intra-EU BITs have been superseded by EU law;<sup>562</sup> it also refers to enforcement action taken by the EC against EU Member States in this area.
298. Arbitral tribunals have consistently held that EU law and BITs do not have the same subject matter on the basis that EU law does not offer equivalent procedural or substantive protections to foreign investors. Tribunals have been particularly persuaded by the fact that EU law does not provide

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<sup>557</sup> Statement of Defence, ¶ 512.

<sup>558</sup> Statement of Defence, ¶ 512.

<sup>559</sup> *European American Investment Bank AG (EURAM) v. Slovak Republic*, Award on Jurisdiction, 22 October 2012, ¶ 173.

<sup>560</sup> Statement of Defence, ¶ 513; Rejoinder, ¶ 407.

<sup>561</sup> Rejoinder, ¶ 407.

<sup>562</sup> Statement of Defence, ¶ 513; Rejoinder, ¶ 406.

investors with a right to institute an arbitration against a host state. For instance, in *Eastern Sugar v. Czech Republic* it was decided that:

The BIT also provides 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. ... EU law does not provide such a guarantee.<sup>563</sup>

299. The tribunal in *Rupert Binder v. Czech Republic* reached the same conclusion, holding that “investor-state arbitration is not addressed by EC law, and the EC legal order has not offered a substitute for investor-state arbitration”.<sup>564</sup>
300. The Respondent argues that EU law protects foreign investment by providing investors access to Member State courts.<sup>565</sup> But in many cases suits in municipal courts under EU law do not offer the same advantages as independent arbitration under an investment BIT. This issue was considered in *Eureko B.V. v. Slovakia* in relation to the claimant’s right to arbitrate under the BIT between the Netherlands and Czechoslovakia. The tribunal held that:

Such a consensual arbitration under well-established arbitration rules adopted by the United Nations, in a neutral place and with a neutral appointing authority, cannot be equated simply with the legal right to bring legal proceedings before the national courts of the host state; and, moreover, the locus standi of an investor under the BIT, with its broad definition of “indirect” investments under Article 1, is unlikely to be replicated under the court procedures of an EU Member State.<sup>566</sup>

The situation is no different in the present case under Article 8(2) of the BIT, which provides *inter alia* for arbitration by an *ad hoc* tribunal under the UNCITRAL Rules

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<sup>563</sup> *Eastern Sugar B.V. (Netherlands) v Czech Republic*, Partial Award, 27 March 2007, **CLA-69**, ¶¶ 164-165. This was endorsed in *European American Investment Bank AG (EURAM) v Slovak Republic*, Award on Jurisdiction, 22 October 2012, **RLA-24**, ¶¶ 180, 182.

<sup>564</sup> *Rupert Binder v. Czech Republic*, Award on Jurisdiction, 6 June 2007, ¶ 40.

<sup>565</sup> Rejoinder, ¶ 405.

<sup>566</sup> *Eureko B.V. v. Slovakia*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CLA-70**, ¶ 264.

301. Tribunals have also concluded that the substantive protections offered to investors in investment treaties are not available under EU law. In *Eastern Sugar*, it was resolved that the right to move capital in and out of different jurisdictions within the EU, and to invest in a host state with the same rights and entitlements as a local investor, are not co-ordinate with the right to FET and the prohibition on expropriation.<sup>567</sup> In *Eureko* it was accepted that “it is at least arguable that there is a duplication of rights to free movement of capital, which exist both under the BIT and under EU law.”<sup>568</sup> However, in that case the tribunal was comparing a right to free transfer of profits and dividends under the BIT with the right to free movement of capital under EU law. In the present suit, the Claimant does not rely on an equivalent protection under the BIT (such as Article 6, which provides for repatriation of investment and returns) and so the juxtaposition of these two protections need not be made.
302. In *Eureko*, the tribunal considered whether freedom of establishment under EU law was co-ordinate with protection from expropriation. It stated that:

Similarly, the protection in Article 5 of the BIT against expropriation is by no means covered by the EU freedom of establishment. While it certainly overlaps with the right to property secured by Article 17 of the EU Charter of Fundamental Rights (and the First Protocol to the ECHR, as applied under EU law), the BIT provision on expropriation is not obviously co-extensive with it. Both the considerable body of jurisprudence on indirect takings that has emerged in the context of BITs, and also the fact that the BIT protects “assets” and “investments” rather than the arguably narrower concepts of “possessions” and “property” protected by the EU Charter on Fundamental Rights, give rise to the possibility of wider protection under the BIT than is enjoyed under EU law.<sup>569</sup>

303. Consistently with these BIT authorities, the Tribunal does not accept the Respondent’s contention that freedom of establishment is co-ordinate with protection from expropriation.

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<sup>567</sup> *Eastern Sugar B.V. (Netherlands) v. Czech Republic*, Partial Award, 27 March 2007, **CLA-69**, ¶¶ 161, 163.

<sup>568</sup> *Eureko B.V. v. Slovakia*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CLA-70**, ¶ 249.

<sup>569</sup> *Eureko B.V. v. Slovakia*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CLA-70**, ¶ 261.

304. The Respondent challenges the *Eastern Sugar*, *EURAM* and *Eureko* awards and argues that the Tribunal should not have regard to those decisions because they applied EU law incorrectly or are incomplete and irrelevant.
305. The Respondent argues that the tribunal in *Eastern Sugar* incorrectly states that EU law does not offer protection during the time in which an investment is in place in a host state.<sup>570</sup> In doing so, however, it mischaracterises a statement made by the tribunal in the context of the right to free movement of capital and not EU law in general. The tribunal stated as follows:

The European Union guarantees the free movement of capital. Thus, it guarantees to non-Czech investors from other EU member countries the right to invest in the Czech Republic on a par with any Czech investor. ... Similarly, the European Union guarantees the free movement of capital outwards, thus, the investor may take out profits and even the investment as such out of the host country. By contrast, the BIT provides 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 *Eastern Sugar* tribunal's comparison of the free movement of capital with BIT protections is brief, but its distinction between capital inflows and outflows on the one hand, and the treatment afforded to investments whilst operating *in situ* is apposite. Indeed this distinction is enlivened in the present case, where the Claimant seeks to rely on the FET standard both with respect to the acquisition of Škoda Export and its treatment by CEB. While free movement of capital might complement the FET standard in respect to the acquisition, it is difficult to see how it could be invoked with respect to the treatment of FITE or Škoda Export (as domestically incorporated companies) by a Czech bank. On this basis, the Respondent's arguments with respect to *Eastern Sugar* must be rejected.

306. The Respondent condemns the *EURAM* award because the tribunal "fundamentally misunderstood EU law".<sup>571</sup> Yet one need only look at the extract of the award presented by the Respondent to appreciate that – whether or not it was accurate as a matter of law – the tribunal's statement was not determinative of its finding on the intra-EU jurisdictional objection in that case. The extract begins with "The Tribunal wishes to add that..."; viewed in its context, the extracted paragraph follows a

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<sup>570</sup> Rejoinder, ¶ 408.

<sup>571</sup> Rejoinder, ¶ 410.

substantive analysis by the Tribunal in which it evaluates the different subject matter of EU law and the BIT. Again, the Tribunal is not persuaded to reject the reasoning in *EURAM*.

307. Finally, the Respondent contends that the findings in *Eureko* are not applicable because it considered EU law “before the Lisbon Treaty came into force, amending the EU Treaty and the EC Treaty (now the TFEU).”<sup>572</sup> Yet the Respondent does not explain how developments in EU law following the entry into force of the Lisbon Treaty align the subject matter of EU law with that contained in the BIT. For instance, one of the reasons the inter-EU jurisdictional objection was rejected in *Eureko* was because EU law contained no equivalent of the arbitration clause in the BIT. The Lisbon Treaty (and other subsequent EU law) has not changed this fact, and, on this basis, the legal framework considered by the tribunal in 2008 does not seem materially different to that in place today.
308. It follows that the Respondent has not established that EU law relates to the same subject matter of BIT under Articles 59(1) or 30 of the VCLT. Accordingly, the first limb of its jurisdictional objection must fail.
309. **Limb (2):** The second limb of the Respondent’s EU law objection, under Articles 59(1)(b) and 30(3) of the VCLT, likewise fails. It is argued that there is an incompatibility between EU law and the BIT. But the BIT does not discriminate on the grounds of nationality against EU investors from third states. The fact that the BIT affords certain rights not available to other EU investors does not make the BIT discriminatory; there is nothing in the BIT that prevents investors of other states claiming equal rights under the BIT. It also does not bar investors of non-party states from accessing commensurate protections under EU law. As the tribunal observed in *Eastern Sugar*:

If the EU Treaty gives more rights than does the BIT, then all EU parties, including the Netherlands and Dutch investors, may claim those rights. If the BIT gives rights to the Netherlands and to Dutch investors that it does not give other EU countries and investors, it will be for those other countries and investors to claim their equal rights. But the fact that these rights are unequal does not make them incompatible.<sup>573</sup>

310. For these reasons, the Tribunal rejects the Respondent’s argument about the effect of EU law on jurisdiction under the BIT. As already noted, a number of investor-State tribunals have considered

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<sup>572</sup> Rejoinder, ¶ 411, citing *Eureko B.V. v. Slovakia*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CLA-70**, ¶ 218.

<sup>573</sup> *Eastern Sugar B.V. (Netherlands) v. Czech Republic*, Partial Award, 27 March 2007, **CLA-69**, ¶ 170.

the question of intra-EU BITs and to date they have all concluded that the intra-EU BIT before them has legal force and effect.<sup>574</sup> There is no principle of binding precedent in international law. Each case must be decided on its own merits and each tribunal must consider the case before it as pleaded by the disputing parties. Nonetheless, to the extent that they are based on sound legal reasoning, the decisions of tribunals in prior international law cases can provide useful insights to subsequent tribunals considering those issues.

311. Of course EU law was modified by the Treaty of Lisbon, and the EC has been developing its views of the legal questions involved with intra-EU investment treaties; the European Court of Justice has also expressed views about related questions of competence and will no doubt define its position more precisely in due course. The Tribunal recognizes that a different view may eventually prevail. However, this Tribunal is obligated under the BIT to decide this case based on the consent of the States parties as set out in the text of the BIT, and on the arguments presented by the Parties. This it has done.

## 2. Jurisdiction in respect of the SPA under the Umbrella Clause Article 2(3)

312. The Respondent's second jurisdictional objection relates to the SPA between FITE and the Czech Republic for the acquisition of Škoda Export. The Respondent contends that the Umbrella Clause in the BIT (Article 2(3)) does not apply to the SPA because the SPA is not an agreement between the Czech Republic and the Claimant, but between the Czech Republic and FITE.<sup>575</sup> FITE is a Czech joint stock company, which is owned as to 70% by CKD Praha DIZ a.s. and as to 30% by CKD NOVE Energo a.s. The Claimant is an English holding company that was the majority shareholder of ČKD during the privatisation. Accordingly, there is no agreement between a Contracting Party and an investor of the other Contracting Party as contemplated in Article 2(3).

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<sup>574</sup> See, e.g., *Charanne B.V. Construction Investments S.A.R.L. v. Kingdom of Spain*, Final Award, 16 January 2016; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain*, Decision on Jurisdiction, 6 June 2016; *PV Investors v. Spain* (UNCITRAL Rules) Award on Jurisdiction, 2016; *EDF v. Hungary*, Award on Jurisdiction, 3 December 2014, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **RLA-78**.

<sup>575</sup> Statement of Defence, ¶¶ 497-509; Rejoinder, ¶¶ 418-458.



313. The Claimant seeks to refute the Respondent's objection on the basis that the Umbrella Clause contains no privity of contract requirement.<sup>576</sup>

314. It is first necessary to consider the relevant provisions of the BIT. Article 2(3) provides that:

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

315. "Investors" in respect of the United Kingdom are defined under Article 1(c)(ii) to mean:

(aa) Physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;

(bb) corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12.

316. "Investments" is defined in Article 1(a) as:

[E]very kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity...

Article 1(a) enumerates a non-exhaustive list of different types of asset.

**(1) "Specific agreements" under BIT Article 2(3)**

317. Although "specific agreements" is not a defined term in Article 1, the Tribunal accepts that the first sentence of Article 2(3) applies to give the term definition. This much is apparent from the second sentence, which refers back to "*these* specific agreements", thus creating a *renvoi* to the scope given to "specific agreements" in the first sentence. Hence the ordinary meaning of the first sentence is that a specific agreement is one between an investor (as defined) and a Contracting Party.

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<sup>576</sup> Reply, ¶ 198.

318. FITE is not an investor of the UK because it is incorporated in the Czech Republic, and there is no deeming provision giving it standing as a wholly-owned subsidiary.<sup>577</sup> Therefore, *prima facie*, the SPA is not a “specific agreement” within the meaning of Article 2(3).
319. The Claimant contends that, as there is no privity of contract requirement in Article 2(3), it is immaterial whether the investor concludes the specific agreement directly or through an investment vehicle. Put another way, there must be an express privity of contract requirement for the Umbrella Clause to be restricted to agreements between a UK investor and the Czech Republic.
320. The Parties joined issue on the requirement of privity under umbrella clauses in general. But even if there is no requirement of privity under umbrella clauses couched in general terms (e.g. “any obligation entered into with regard to investments”), in contrast, the BIT uses quite precise language: it refers to “specific agreements” which are to be concluded between a Contracting Party and an investor of the other Contracting Party. In the Tribunal’s view, in accordance with the governing principle of treaty interpretation, this language must be given effect, and it follows that the SPA is not a specific agreement for the purposes of Article 2(3).

## (2) Observation of undertakings in international law

321. The term “umbrella clause” is often used as a convenient shorthand for “observation of undertaking”. That nomenclature does not expand the scope of the obligation to observe an undertaking under international law. An undertaking is a formal and legally binding pledge to do something. States are obliged under international law to observe their undertakings. This is, *inter alia*, part of the duty of good faith and the principle of *pacta sunt servanda*.
322. The obligation to observe an undertaking is owed by the State that has given the undertaking. It is owed to the party to which the undertaking has been given. It is not a freely transferrable obligation, without the consent of the State that has given the undertaking (although such consent can be identified in different ways, including by way of a treaty or a contract governed by municipal law). The requisite elements of an undertaking to be observed under international law are a specific, clear and direct commitment from a State to an identified beneficiary. It is not sufficient, for example,

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<sup>577</sup> Cf ICSID Convention, Art 25(3).

that there be a general policy, a generic statement of principle, a general legal principle or a municipal law of universal application (which would not include a law specifically identified to provide foreign investment with protections or a law formalising a concession agreement).

323. An undertaking is likewise owed to the identified beneficiary of the undertaking. Under international law, merely because a State may owe an obligation to observe an undertaking given to a company does not mean that the State also owes that same obligation to observe the undertaking to that company's shareholders. Of course, that principle is subject to any specific transfer provisions, such as in agreements to extend the benefit of the undertaking to shareholders, affiliates, heirs or assignees.
324. The scope of the obligation to observe an undertaking is separate and distinct from other obligations under international law. Thus, it is not coterminous with the principles of FET. Although an entity might have legitimate expectations in relation to an undertaking, that does not convert it into the beneficiary of the undertaking. Nor does it expand the obligation of the undertaking State so as to make it beholden to anyone other than the beneficiary.

### **(3) Privity of contract under umbrella clauses**

325. The issue of the requirement of privity under umbrella clauses has been addressed in a number of investment BIT arbitrations. There is no consensus, but the dominant view is that in respect of contractual obligations, only parties entitled to enforce the obligation under the proper law of the contract may sue.
326. In *Azurix Corp. v. Argentina*, the tribunal considered whether it had jurisdiction under the umbrella clause in the US/Argentina BIT to consider obligations arising from a concession agreement between the Claimant's subsidiary and the Province of Buenos Aires. The umbrella clause provided that "[e]ach Party shall observe any obligation it may have entered into with regard to investments." The tribunal held as follows:

The Tribunal finds that none of the contractual claims as such refer to a contract between the parties to these proceedings; neither the Province [of Buenos Aires] nor ABA are parties to them. While Azurix may submit a claim under the BIT for breaches by Argentina, there is no undertaking to be honored by Argentina to Azurix other than the obligations under the BIT. Even if for argument's sake, it would be possible under Article II(2)(c) to hold Argentina responsible for the alleged breaches of the Concession

Agreement by the Province, it was ABA and not Azurix which was the party to this Agreement.<sup>578</sup>

327. In *Siemens v. Argentina*, the tribunal held that: “to the extent that the obligations assumed by the State party are of a contractual nature, such obligations must originate in a contract between the State party to the BIT and the foreign investor...”.<sup>579</sup> On this basis, the tribunal concluded that obligations in a contract between Siemens’ subsidiary and Argentina did not qualify under the umbrella clause in the BIT between Germany and Argentina.
328. In 2007, the Annulment Committee in *CMS v. Argentina* criticised the tribunal for its seemingly broad interpretation of the umbrella clause in the Argentina/US BIT,<sup>580</sup> which gave CMS standing to enforce obligations in a licence agreement between Argentina and a company in which CMS was a minority shareholder. The Annulment Committee observed that there were “major difficulties” with this reading of the umbrella clause, including, *inter alia*:

(b) Consensual obligations are not entered into *erga omnes* but with regard to particular persons. Similarly the performance of such obligations or requirements occurs with regard to, and as between, obligor and obligee.

(c) The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.<sup>581</sup>

329. In *Burlington Resources v. Ecuador*, the tribunal determined that the claimant could not rely on the umbrella clause in the US/Ecuador BIT to enforce production sharing contracts entered into between the claimant’s wholly owned subsidiary and Ecuador. As with the umbrella clause in the US/Argentina BIT considered in *Azurix* and *CMS*, the US/Ecuador BIT required each state party to

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<sup>578</sup> *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, **CLA-35**, ¶ 384.

<sup>579</sup> *Siemens A.G. v. The Argentine Republic*, Award, 17 January 2007, **CLA-44**, ¶ 205

<sup>580</sup> The Tribunal did not express this interpretation, but it is implied by its finding that Argentina breached obligations under the umbrella clause arising under the licence agreement: *CMS Gas Transmission Company v. Republic of Argentina*, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **RLA-37**, ¶¶ 93-94.

<sup>581</sup> *CMS Gas Transmission Company v. Republic of Argentina*, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **RLA-37**, ¶ 95.

“observe any obligation it may have entered into with regard to investments.”<sup>582</sup> The tribunal articulated the following test to interpret the umbrella clause:

The word “obligation” is thus the operative term of the umbrella clause. The BIT does not define “obligation”. The Parties agree – and rightly so – that the clause refers to legal obligations. This is of little assistance, however, to resolve the question of privity. To answer this question, the Tribunal relies primarily on two elements which in its view inform the ordinary meaning of “obligation.” First, in its ordinary meaning, the obligation of one subject is generally seen in correlation with the right of another. Or, differently worded, someone's breach of an obligation corresponds to the breach of another's right. An obligation entails a party bound by it and another one benefiting from it, in other words, entails an obligor and an obligee. Second, an obligation does not exist in a vacuum. It is subject to a governing law. Although the notion of obligation is used in an international BIT, the court or tribunal interpreting the BIT may have to look to municipal law to give it content. This is not peculiar to “obligation”; it applies to other notions found in investment treaties, e.g. nationality, property, exhaustion of local remedies to name just these. In this case, the PSCs are governed by Ecuadorian law. It is that law that defines the content of the obligation including the scope of and the parties to the undertaking, i.e. the obligor and the obligee.<sup>583</sup>

In respect of the first element, it can be seen that the tribunal elaborates on the concept of reciprocity between “obligee” and “obligor” raised in *CMS v. Argentina*.

330. In *Oxus Gold v. Uzbekistan*, one of the grounds on which the tribunal decided that the claimant could not rely on an umbrella clause to import obligations from an exploration agreement was because “the parties to the PEA are Goskomgeology and Marakand and not the State and Oxus.”<sup>584</sup> Goskomgeology was a State Committee of Uzbekistan and Marakand was a subsidiary of Oxus.
331. Finally, it is necessary to consider *Continental Casualty v. Argentina*. This case has been raised by the Claimant in support of the conclusion that umbrella clauses apply to obligations between an investor’s subsidiary and a host state.<sup>585</sup> The Claimant refers to *Continental Casualty* only in respect of its alternative submission that the Tribunal has jurisdiction under broader umbrella clauses in other

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<sup>582</sup> *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability, 14 December 2012, **RLA-46**, ¶ 211.

<sup>583</sup> *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability, 14 December 2012, **RLA-46**, ¶ 214.

<sup>584</sup> *Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, Award, 17 December 2015, **RLA-147**, ¶ 377.

<sup>585</sup> Reply, ¶¶ 210-211.

BITs through the MFN provision in the BIT (discussed below). However, it is relevant to look at it here, in order to determine whether it impacts on the line of reasoning considered above.

332. *Continental Casualty* concerned the same US/Argentina BIT umbrella clause that was considered in *Azurix* and *CMS*. With respect to the umbrella clause, the tribunal observed:

Finally, provided that these obligations have been entered “with regard” to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary such as CNA is not in principle excluded.<sup>586</sup>

333. This statement is seemingly in conflict with the cases considered above. However, there are a number of reasons why *Continental Casualty* should not upset the otherwise consistent jurisprudence on the privity objection. First, in making this statement, the tribunal was referring to obligations of the host state in general and not contractual promises in particular. Second, the tribunal did not ultimately pursue its investigation of whether contractual obligations of Argentina were justiciable under the umbrella clause because it had already decided Argentina could rely on the defence of necessity with respect to those obligations.<sup>587</sup> As such, it did not need to conduct a full analysis of the issue or engage with cases that had resolved similar questions. Finally, it commented that the contracts in question “could...be considered as guaranteed by the umbrella clause, subject to the caveat that they were not directed to foreign investors nor specifically addressed to their investments”.<sup>588</sup> Accordingly, it is not apparent that the contracts would have fallen under the umbrella clause even if the tribunal had taken this question to its conclusion.
334. To summarise, the Claimant’s contention that there is no requirement of privity in relation to umbrella clauses finds no authoritative support in the case law of international investment tribunals. To the contrary, tribunals have rather consistently resolved that they have no jurisdiction under umbrella clauses to consider contractual obligations between host states and investors’ locally incorporated subsidiaries.

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<sup>586</sup> *Continental Casualty Company v. Argentine Republic*, Award, 5 September 2008, **RLA-65**, ¶ 297.

<sup>587</sup> *Continental Casualty Company v. Argentine Republic*, Award, 5 September 2008, **RLA-65**, ¶¶ 302-303.

<sup>588</sup> *Continental Casualty Company v. Argentine Republic*, Award, 5 September 2008, **RLA-65**, ¶ 302.

335. If it were necessary to do so, the Tribunal would uphold the requirement of privity even for generally worded umbrella clauses, which are intended to give effect to legal commitments entered into by the host state with regard to investments, not to change their scope or content.
336. This conclusion is reinforced by applying the reasoning of the tribunal in *Burlington*, which noted that tribunals may have to look to municipal law to give content to an obligation. The tribunal observed that “Burlington has not alleged, not to speak of established, that under Ecuadorian law the non-signatory parent of a contract party may directly enforce its subsidiary's rights.”<sup>589</sup> Similarly, the Claimant has not suggested that Czech law would entitle it to enforce the rights of FITE under the SPA.

337. The *Burlington* tribunal added:

As to the terms “with regard to investments” also employed by the relevant BIT provision, they denote a “link between the obligation and the investment” as Burlington argued at the hearing. This is certainly in keeping with the object and purpose of the BIT, which are to encourage and protect investments. However, as Ecuador pleaded, this link “does not replace but qualifies” the notion of obligation. If there is no obligation in the first place, there is nothing to qualify. Nor can these qualifications create an “obligation” where there is none to begin with.<sup>590</sup>

338. The Claimant seeks to distinguish the present case from those considered above on the basis that the SPA “includes multiple warranties applying to FITE and its ‘Affiliates’, including WNC”.<sup>591</sup> It refers in this respect to *EDF v. Argentina*, where the tribunal held that it had jurisdiction to consider breaches of a concession agreement between a company in which the Claimants owned shares and the Government of Mendoza. The tribunal rejected Argentina’s privity objection on the following basis:

The Tribunal notes that Article 12 of the Concession Agreement makes explicit mention of shareholders. That provision prohibits shareholders from transferring EDEMESA shares without prior consent from EPRE. Respondent itself mentions at paragraph 231 of its Counter-Memorial that the Concession Agreement required authorization by the

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<sup>589</sup> *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability, 14 December 2012, **RLA-46**, ¶ 215.

<sup>590</sup> *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability, 14 December 2012, **RLA-46**, ¶¶ 216-217.

<sup>591</sup> Reply, ¶ 201.

Executive Power for the transfer of EDEMSA's majority shareholding during the first 5 years of the agreement's effective date.<sup>592</sup>

339. It is apparent from this extract that the Concession Agreement in the *EDF* case imposed a positive contractual obligation on the claimant companies not to transfer shares without prior consent. In short, they were parties to the transaction, not merely beneficiaries. The SPA, however, does not impose contractual obligations on the Claimant. Rather, FITE assumes certain contractual obligations that extend to the conduct or state of affairs of the Claimant. This occurs in Clause 6.1(h) of the SPA, which provides:

The Purchaser [FITE] warrants to the Seller on the Signing Date that all the below facts (the Purchaser's Warranties) are true, complete and correct and undertakes to ensure that the facts remain true, complete and correct on each of the following days until and including the Settlement Date:

...

(h) neither the Purchaser nor any of its Affiliates are party to any judicial proceedings or any arbitration proceedings against the Czech Republic and/or the Company...<sup>593</sup>

It is apparent to the Tribunal that Clause 6.1(h) is a contractual promise made solely by FITE which does not bind the Claimant. As the SPA imposes no obligation on the Claimant, the Claimant and the Respondent cannot be said have a relationship of obligor and obligee. The Claimant has no standing to enforce any obligation under the SPA merely because it is referred to (in generic terms, i.e., as an "Affiliate") in certain provisions.

340. The Claimant argues that a restrictive interpretation of Article 2(3) would enable the Respondent "to circumvent the BIT by prescribing domestic incorporation" as a condition of acquiring Škoda Export.<sup>594</sup> It says that this "would lead to a manifestly absurd result and should be rejected".<sup>595</sup> But as the seller in an open tender process, the Respondent was free to impose such a condition, and any

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<sup>592</sup> *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, Award, 11 June 2012, CLA-61, ¶ 942.

<sup>593</sup> Under clause 1.1 of the SPA, 'Affiliate' means 'in relation to any person, any other person that directly or indirectly, through one or more persons, controls that person, is controlled by it or is controlled along with that person.' The Claimant would thus have been an 'Affiliate' of FITE.

<sup>594</sup> Reply, ¶ 199.

<sup>595</sup> Reply, ¶ 200.



potential bidder was free not to bid on those terms. It cannot be said that, if a foreign investor voluntarily enters into an agreement which is clearly excluded from the plain terms of an umbrella clause, there is a manifestly absurd result. This is all the more so because such an agreement would not preclude the investor from recourse to other protections open to it *qua* investor under the BIT.

#### **(4) Conclusion**

341. For these reasons the Tribunal upholds the Respondent's objection to jurisdiction in respect of the Umbrella Clause claims, insofar as they concern obligations under the SPA, on the basis that the SPA is not a specific agreement under Article 2(3) of the BIT.

#### **3. Jurisdiction in respect of Czech law under the Umbrella Clause**

342. The Claimant invokes the Umbrella Clause not only in respect of alleged breaches of the SPA, but also for alleged violations of Czech law. It alleges that the Respondent:

- (a) violated an express warranty in the SPA that it had complied with its own legal obligations, including under Czech law;<sup>596</sup> and
- (b) breached "its implied contractual obligations of good faith under Czech law towards FITE in the negotiation, execution and performance of the SPA".<sup>597</sup>

343. The Respondent's position is that the Umbrella Clause does not cover or concern provisions of general legislation addressed to the public.<sup>598</sup>

344. The Claimant's first allegation (a) relates to clause 5.1(c) of the SPA, by which the Respondent warranted that:

entering into this Agreement or by the meeting of the Seller's obligations under this Agreement will not result in any...breach of any valid legal regulation applicable to the Seller.

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<sup>596</sup> Reply, ¶¶ 106, 290-312.

<sup>597</sup> Statement of Claim, ¶ 180.

<sup>598</sup> Statement of Defence, ¶ 483.

345. The warranty does not impose any new obligation on the Respondent. What it does do is provide FITE with a right to seek damages for a breach of domestic law by the MoF. But that right arises from the SPA and is only enforceable by FITE. Article 2(3) does not extend rights to the Claimant because the SPA is not a “specific agreement”: see paragraph 320. Consequently, the Tribunal has no jurisdiction to consider the Claimant’s first allegation.

346. The Claimant’s second allegation (b) also presents difficulties. The Claimant does not point to any source of Czech law to support its contention that there is an implied obligation of good faith when negotiating agreements. For this reason, it is difficult for the Tribunal to analyse the content of any such obligation. But even considering this question in the abstract, it is uncontroversial that umbrella clauses do not elevate states’ domestic laws to the level of the BIT or convert them into promises. The Annulment Committee in *CMS* stated that:

In speaking of “any obligations it may have entered into with regard to investments”, it seems clear that Article II(2)(c) is concerned with consensual obligations arising independently of the BIT itself (i.e. under the law of the host State or possibly under international law). Further they must be specific obligations concerning the investment. They do not cover general requirements imposed by the law of the host State.<sup>599</sup>

347. Even in *Continental Casualty*, which seemingly departed from other cases on the scope of umbrella clauses, it was held that the “umbrella clause does not come into play when the breach complained of concerns general obligations arising from the law of the host State”.<sup>600</sup> On this basis, the umbrella clause does not afford the Tribunal jurisdiction to consider the Claimant’s second allegation.

#### **4. Article 3(1): Jurisdiction under the Umbrella Clause through the MFN clause**

348. The Tribunal has concluded there is no “specific agreement” under Article 2(3). But it must also consider the Claimant’s alternative argument that jurisdiction is established under more favourable umbrella clauses in other BITs to which the Respondent is party.<sup>601</sup> The Claimant contends that it

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<sup>599</sup> *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **RLA-37**, ¶ 95(a).

<sup>600</sup> *Continental Casualty Company v. The Argentine Republic*, Award, 5 September 2008, **RLA-65**, ¶ 300.

<sup>601</sup> Reply, ¶¶ 204-213.

would be entitled to rely on more favourable umbrella clauses pursuant to Article 3(1), which provides:

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

349. The immediate problem with the Claimant's reliance on the MFN provision is that, *prima facie*, the Tribunal has no jurisdiction to hear disputes arising under Article 3. The Tribunal's jurisdiction derives from Article 8(1) of the BIT, which provides that:

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

350. This part of the Claimant's case concerns a dispute as to the application and interpretation of the Article 3, which is not provided for in Article 8(1).

351. The Claimant makes the argument that, because Article 2(3) of the BIT is activated by the existence of a "specific agreement", the second sentence of the Article applies to extend jurisdiction to all substantive obligations in the BIT.<sup>602</sup> The Claimant makes this argument in order to bring its FET claim under Article 2(2) of the BIT within the Tribunal's jurisdiction, but the argument could in principle apply with respect to Article 3(1). However, as the Tribunal has already resolved that there is no "specific agreement" under Article 2(3), that provision cannot be relied upon to expand the Tribunal's jurisdiction. But even if the SPA were a "specific agreement", for the reasons which follow, the Tribunal would not agree with the Claimant's interpretation of the second sentence of Article 2(3).

352. The ordinary meaning to be given to the second sentence of Article 2(3) is to be informed by the context of that sentence within wider text of the BIT, including Article 8(1).

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<sup>602</sup> Reply, ¶¶ 214-218; Claimant's Post-Hearing Brief, ¶ 162.

353. The meaning of Article 8(1) is clear. The only obligations that may be the subject of arbitration are those contained in the specified articles, including Article 2(3). If Article 8(1) did not exist, the effect of the second sentence of Article 2(3) might well be as the Claimant interprets it. But read in conjunction with Article 8(1), it is clear that it cannot be intended to extend an arbitral tribunal's jurisdiction to all other substantive obligations in the BIT. If that were the case, Article 8(1) would be superfluous. In this respect, the Tribunal concurs with the Respondent's *effet utile* argument.
354. The second sentence of Article 2(3) must be read in the context of Article 2(3) in its entirety as well as the structure of Article 2 generally. Article 2 is divided into three parts; each imposes a substantive obligation on the Contracting Parties. The first relates to the admission of foreign capital, the second to FET and the third to investor-State contracts. The second sentence of Article 2(3) does not sit apart as a separate requirement. It is included in Article 2(3) and therefore the Tribunal would infer that its effect was intended to be limited to the Umbrella Clause.
355. The Tribunal also does not consider that the Respondent's interpretation is right. The Respondent's view is that the second sentence is merely intended to ensure that national courts considering a specific agreement take into account all applicable law, including the BIT.<sup>603</sup> But this cannot be correct because there is no reference to courts or what they need to consider. To the contrary, the obligation in question is imposed expressly on the Contracting Parties under the BIT.
356. In the Tribunal's opinion, the correct interpretation of the second sentence of Article 2(3) is that the Contracting Party has an obligation both to adhere to the specific agreement and to observe the BIT protections in so far as those protections are contained in the specific agreement. Thus, if a specific agreement contained a protection tantamount to the FET standard, a tribunal would have jurisdiction to consider a breach of that standard. This interpretation gives effect to the ordinary meaning of Article 2(3) when read in its context. It links with the idea in the first sentence of Article 2(3) that specific agreements might contain protections equivalent or superior to (but not less than) those contained in the BIT. It also has an *effet utile* in that it bars a respondent party from arguing there is no jurisdiction to hear a claim based on an obligation in a specific agreement where that obligation is mirrored in the BIT but not captured by Article 8(1).

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<sup>603</sup> Rejoinder, ¶ 477.

357. If the SPA is not a “specific agreement”, then the Claimant cannot rely on Article 2(3) to expand the Tribunal’s jurisdiction. However, even if the Tribunal had held that the SPA was a “specific agreement”, it does not contain protections commensurate with or superior to the protections in the BIT that are not covered by Article 8(1).
358. On this basis, the Tribunal has no jurisdiction to determine the Claimant’s arguments based on the MFN clause.

#### **5. Exclusive jurisdiction of Czech Courts**

359. The Respondent also contends that claims in respect of the SPA are inadmissible because Czech courts have exclusive jurisdiction over those claims.<sup>604</sup> In its view, if the Claimant wishes to enforce the obligations in the SPA, it must comply with the modalities of enforcement of those obligations in the SPA.
360. In the SPA, dispute resolution is addressed by Clause XIV, which provides:

Any dispute that arises between the Parties based on or in connection with this Agreement shall be decided by the court in Prague having subject-matter jurisdiction, unless exclusive jurisdiction of a court is stipulated.

361. The Respondent relies on the line of cases holding that umbrella clause claims brought contrary to an exclusive jurisdiction clause in the relevant contract are inadmissible.<sup>605</sup> Since, for the reasons stated, the Umbrella Clause claim falls outside the Tribunal’s jurisdiction on other grounds, the issue of admissibility need not be further discussed.

#### **6. Jurisdiction over the FET claim**

362. The Respondent contends that the Tribunal has no jurisdiction to hear the Claimant’s FET claim because Article 8(1) does not extend to claims arising under Article 2(2).<sup>606</sup> The Claimant responds

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<sup>604</sup> Statement of Defence, ¶¶ 530-536; Rejoinder, ¶¶ 459-472.

<sup>605</sup> Relevant cases include *BIVAC BV v. Republic of Paraguay*, Decision on Objections to Jurisdiction, 29 May 2009, **RLA-54**, ¶ 148; *SGS Société Générale de Surveillance v. Republic of Philippines*, Decision on Objections to Jurisdiction, 29 January 2004, **RLA-43**, ¶ 155.

<sup>606</sup> Statement of Defence, ¶ 442.

that the Tribunal's jurisdiction to hear its FET claim under Article 2(2) arises by virtue of the operation of Article 2(3).<sup>607</sup> As the Tribunal has already decided, in relation to the MFN clause, Article 2(3) cannot operate to extend the Tribunal's jurisdiction beyond Article 8(1) in the absence of a "specific agreement". Accordingly, the Tribunal has no jurisdiction to hear to the FET claim arising under Article 2(2).

**7. Jurisdiction over the expropriation claim**

363. The Tribunal considers that, as the Respondent conceded during argument,<sup>608</sup> it has jurisdiction to hear the Claimant's expropriation claim as Article 8(1) of the BIT extends to disputes arising *inter alia* under Article 5.

**8. Jurisdiction over the general international law claim**

364. The Claimant further requests that the Tribunal declare that the Respondent has breached international law in relation to the Claimant's investment.<sup>609</sup> As the Tribunal has already decided, in relation to other claims submitted by the Claimant, the Tribunal's jurisdiction is constrained by Article 8(1). It matters not whether the facts before the Tribunal might have given rise to a claim under international law or under provisions of the BIT not listed in Article 8(1). Although principles of international law are of course applicable to the interpretation of that Article and, indeed, the entire BIT, they cannot on their own provide a basis to expand the scope of the Tribunal's jurisdiction as expressly set out in Article 8(1). Accordingly, the Tribunal has no jurisdiction to hear to the Claimant's general international law claim.

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<sup>607</sup> Reply, ¶¶ 214-218; Claimant's Post-Hearing Brief, ¶ 162.

<sup>608</sup> Transcript, Day 2, p. 78.

<sup>609</sup> Claimant Post-Hearing brief ¶ 247(b).

**B. LIABILITY**

365. As the Tribunal has decided that it does not have jurisdiction to hear claims under the Umbrella Clause or the FET clause, the Tribunal is confined to the Claimant's remaining expropriation claim.
366. The Claimant's principal expropriation case is that the Respondent dealt its investment three critical blows which resulted in its "destruction".<sup>610</sup> First, CEB and EGAP failed to provide critically needed funding. Second, CEB and EGAP attempted to divert its projects to third parties. Finally, CEB and the MoF acted to freeze Škoda Export's bank accounts.
367. The Claimant, in its Statement of Claim, reserved the right to advance an expanded expropriation claim in the event the Tribunal made a determination (as it has done) that it has no jurisdiction to hear the Umbrella Clause or FET claims. The Claimant said that its expanded expropriation case would be based on all the factual allegations it makes in the case. It contended that:

the Czech Republic's blatant and deliberate misrepresentations in connection with the SPA can and should be conceptualised as the first of a series of acts that gradually and directly caused the complete devaluation of the Claimant's investment, until the complete extinguishment of its value.<sup>611</sup>

368. However, the Claimant did not plead out its expanded case in its pleadings or at the hearing. Moreover, it did not elaborate on the individual allegations which would make up the expanded expropriation claim. In the absence of any pleadings on the broader claim, the Respondent could not be expected to, and did not in fact, defend the claim. For its part, the Tribunal is not in a position to make any determination with respect to the expanded expropriation claim. Even if it were in a position to do so, it notes that there would likely be serious difficulties in establishing that events occurring prior to the sale of Škoda Export to FITE were expropriatory in character. This is because the investment in question had not come into existence at that time and so it is unlikely that it could be considered to have been taken (or partially taken) by the Respondent.

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<sup>610</sup> Reply, ¶ 360.

<sup>611</sup> Reply, ¶ 229.

**1. The expropriation claim**

369. The Claimant alleges that the Respondent, through EGAP and CEB, offered export financing for Škoda Export's projects on unreasonable and unconscionable terms, terms that the institutions knew were impossible for Škoda Export to accept.<sup>612</sup> The Respondent knew that the requested finance was critical to Škoda Export's projects and its failure to offer financing on acceptable terms resulted in the expropriation of the Claimant's investment.<sup>613</sup>
370. The Claimant further alleges that CEB and EGAP attempted to divert Škoda Export's projects to a third party contractor, BTG. These acts damaged Škoda Export's reputation and relationships at a critical stage.<sup>614</sup>
371. Finally, the Claimant alleges that CEB took steps to freeze Škoda Export's bank accounts on false and unsubstantiated grounds. Further, once the Freezing Orders were in place, the Respondent did not take adequate steps to have them lifted.<sup>615</sup>
372. The Claimant contends that these three events directly caused Škoda Export's insolvency. It argues that the Freezing Orders prevented it from meeting its obligations to creditors and irreparably damaged its reputation.<sup>616</sup> This, it says, was a direct cause of a flood of bankruptcy petitions in June 2009 and the declaration of insolvency made by the Insolvency Court in November 2009.<sup>617</sup> The Claimant does not expect to receive any distribution from the liquidation in respect of its equity in Škoda Export.<sup>618</sup>
373. The Claimant alleges that the above events formed part of a campaign against Škoda Export that was "triggered by the personal vendetta of high-ranking officials of the Respondent against

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<sup>612</sup> Statement of Claim, ¶ 215.

<sup>613</sup> Statement of Claim, ¶¶ 218-219.

<sup>614</sup> Statement of Claim, ¶¶ 220-222.

<sup>615</sup> Statement of Claim, ¶¶ 222-223.

<sup>616</sup> Statement of Claim, ¶ 156.

<sup>617</sup> Statement of Claim, ¶¶ 160-161.

<sup>618</sup> Statement of Claim, ¶¶ 163.



who orchestrated measures intended to inflict damage upon \_\_\_\_\_ business interest in the Czech Republic, including Škoda Export”.<sup>619</sup>

374. The Respondent disputes each allegation made by the Claimant and denies the existence of a conspiracy against Škoda Export. It further says that it has not breached Article 5 of the BIT on the grounds that (i) the conduct of the CEB and EGAP is not attributable to the Respondent under international law; (ii) even if such conduct were attributable to the Respondent, the Freezing Orders constituted a legitimate exercise of police powers under international law; and (iii) Škoda Export’s insolvency was not caused by the Czech Republic.<sup>620</sup>

## 2. Analysis of the expropriation claim

375. The expropriation claim gives rise to a number of distinct legal and factual questions which require determination. The Tribunal will first make findings with respect to the factual allegations made by the Claimant. It will then consider whether the Claimant has made out its expropriation claim under Article 5 of the BIT.

376. Based on the material available to the Tribunal, there are serious issues which arise in attributing the conduct of CEB and GAP to the Respondent under Article 5 of the ILC Articles. However, consistent with the decision in *Waste Management*,<sup>621</sup> the Tribunal does not need to consider the attribution issue unless it finds that there is conduct capable of breaching the expropriation standard in the BIT.

### (1) Factual allegations

#### (a) Existence of a conspiracy

377. The Claimant alleges that the MoF was CEB’s puppeteer in a campaign by the bank against Škoda Export. The Claimant says, for instance, that “senior government officials used aggressive tactics against \_\_\_\_\_ to induce him to cease broadcasting the Ministry’s fraudulent misrepresentation

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<sup>619</sup> Reply, ¶ 354.

<sup>620</sup> Statement of Defence, ¶ 575; Rejoinder, ¶ 596.

<sup>621</sup> *Waste Management, Inc. v. United Mexican States (No 2)*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004, **RLA-71**, ¶ 75.

during the privatisation...<sup>622</sup> It also contends that “[b]oth the Ministry and CEB knew that such an investigation would place undue pressure on Škoda Export and could lead it, as it eventually did, to bankruptcy”.<sup>623</sup> However, the Claimant adduced no evidence to corroborate its allegation of conspiracy. Its case relies on the witness evidence of [redacted], who in turn relied on supposition and inference. For instance, he said:

Mr Pokorny would not have acted in this way unless he was certain to have the support of the Czech Ministry of Finance, and more precisely the Minister of Finance at the time, Mr Kalousek. Mr Pokorny’s hostile behaviour continued even after Mr Kalousek was replaced by Mr Eduard Janota in May 2009. I believe that Messrs Kalousek and Janota were fully aware at all times of the status of ČKD’s negotiations with ČEB, and also of the requests that ČEB was making of ČKD in the context of the financing package. Messrs Kalousek and Janota would have been aware that ČEB was seeking to transfer Škoda Export’s projects to BTG Energy.<sup>624</sup>

378. The Claimant also referred to the minutes of the CEB Directors meeting of 23 April 2009, and in particular the board’s decision ‘to inform the Czech Ministry of Finance...about the entire case’, as evidence of the Ministry’s invisible hand in the affair.<sup>625</sup> But it does not follow from the Ministry’s subsequent awareness of CEB’s treatment that the Ministry instructed, or directed and controlled, CEB’s treatment *ex ante*.
379. In its Post-Hearing Brief, the Claimant asks the Tribunal to draw an adverse inference from Minister Kalousek’s failure to appear and give evidence at the hearing.<sup>626</sup> Minister Kalousek has (or should have had) much to say on that topic. But the Claimant has not produced even *prima facie* evidence supporting the alleged conspiracy, and the Tribunal is not in a position to draw any adverse inference against Minister Kalousek *vis-à-vis* the MoF’s involvement in CEB’s treatment of Škoda Export. Regrettable though Minister Kalousek’s declining to make himself available even by video link may

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<sup>622</sup> Reply, ¶ 354.

<sup>623</sup> Statement of Claim, ¶ 134.

<sup>624</sup> First Witness Statement of [redacted] (CWS-5), ¶ 14; see also Second Witness Statement of [redacted] (CWS-9), ¶ 13.

<sup>625</sup> Claimant’s Post-Hearing Brief, ¶ 111.

<sup>626</sup> Claimant’s Post-Hearing Brief, ¶ 157.

have been, the Tribunal does not think that an adverse inference, standing alone and unsupported by other evidence, can carry the day.

(b) Failure to provide critically needed funding

380. The Claimant sought a loan from CEB for CZK 1 billion (USD 60 million), which CEB refused to grant. The Claimant says that, while there was no legal obligation on CEB to provide the funding, “providing assistance to Škoda Export would have been seen either as a form of compensation or settlement of legal claims arising out of the SPA, or as a reasonable commercial transaction”.<sup>627</sup>
381. The Claimant’s case is thus framed in two ways. First, the Respondent owed the Claimant damages by virtue of its breaches of the SPA, and the way this debt should have been discharged was through a grant or soft loan framed as made by CEB as the principal liable for repayment or alternatively to be expressed as repayable conditional upon the receipt of moneys from the impugned and doubtful projects. This was the proposed route because state aid rules would have prevented the Respondent from making the payment or loans directly. Additionally, it was seeking a loan from CEB on “commercial terms” and that CEB acted unreasonably in rejecting its terms and imposing more onerous conditions.
382. Apart from the live issue whether the proposals for uncertain and conditional obligations for repayment without adequate security may be characterised as “commercial”, in the Tribunal’s opinion, these two arguments are contradictory and mutually undermining. With respect to the first argument, it is not possible that a loan can be equated with a compensation payment as a loan would require repayment with interest and hence would not compensate for the damage suffered by the Claimant. As to the second argument, it cannot be said that a loan sought to compensate for alleged damages suffered by the Claimant is a loan on commercial terms.
383. The Claimant argues that the loan would have been commercial for CEB because to not grant it and to let the projects fail would necessarily result in the Respondent having to pay out the projects’ customers a sum of up to USD 70 million on guarantees earlier given.<sup>628</sup> But if CEB thought that the projects were unlikely to be successful, it could well have been more prudent for it to cut its losses

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<sup>627</sup> Claimant’s Post-Hearing Brief, ¶ 100.

<sup>628</sup> Claimant’s Post-Hearing Brief, ¶ 102.

and forfeit USD 70 million than to commit an additional USD 60 million and risk losing almost double its original investment. There are a number of reasons why CEB might have thought the projects were no longer safe investments,<sup>629</sup> including that NEPRA had not approved any increase in the project payments,<sup>630</sup> which was the only thing that would have made either project (marginally) profitable and allowed for the repayment of the loan amounts. In the absence of that decision there was a great risk of throwing good money after bad.

384. The Tribunal considers that CEB's refusal to grant the loan to Škoda Export on the terms demanded was nothing more than a commercial decision which CEB was free to make as it saw fit. There was no obligation on CEB to grant the loan arising from legal claims made by the Claimant against the Respondent or otherwise. Nor, in the Tribunal's view, was the decision to refuse funding shown to have been part of any broader conspiracy to undermine and erode the value of Škoda Export.

(c) Transfer of Škoda Export's projects

385. This part of the Claimant's case concerns allegations that CEB and EGAP attempted to transfer the Claimant's key projects to third parties. It allegedly did so by bullying and threatening the Claimant's senior management<sup>631</sup> and by approaching the Claimant's stakeholders with information about the proposed transfer.<sup>632</sup>

386. The Respondent does not deny that it entered into discussions with stakeholders regarding a transfer of the projects.<sup>633</sup> However, it disputes the allegations of threats and disagrees with the timing of events proposed by the Claimant. The Claimant suggests that the attempts to transfer happened from April 2009,<sup>634</sup> whereas the Respondent says they occurred from June 2009.<sup>635</sup> Moreover, the parties disagree as to motive. The Claimant alleges it was a corrupt attempt at enrichment for a member of

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<sup>629</sup> See Respondent's Post-Hearing Brief, ¶¶ 153-155.

<sup>630</sup> Claimant's Post-Hearing Brief, ¶ 92 ; Respondent's Post-Hearing Brief, ¶ 154.

<sup>631</sup> Claimant's Post-Hearing Brief, ¶¶ 114-118.

<sup>632</sup> Claimant's Post-Hearing Brief, ¶ 113.

<sup>633</sup> Respondent's Post-Hearing Brief, ¶ 182.

<sup>634</sup> Claimant's Post-Hearing Brief, ¶ 113.

<sup>635</sup> Respondent's Post-Hearing Brief, ¶ 183.

CEB.<sup>636</sup> The Respondent says that it was a commercial move to rescue the projects after they had been *de facto* abandoned by the Claimant.<sup>637</sup> Moreover, it says that its attempts to transfer were openly discussed with the Claimant and that the Claimant was in principle open to the idea.<sup>638</sup>

387. In the Tribunal's view, the allegations of threats and harassment against the Claimant's management are not made out on the evidence. The evidence relied upon, in respect of the meeting with CEB, is the witness testimony of . It is not corroborated by contemporaneous documentary evidence. Moreover, the Respondent in its Post-Hearing Brief shows the inconsistencies in witness statements and oral testimony, successfully undermining the credibility of his evidence.<sup>639</sup> The other evidence is of SMS messages sent to . However, as the Claimant concedes in its Post-Hearing Brief, these were sent from disposable phones and SIM cards and the police were not able to connect them with any individual or organisation.<sup>640</sup> As such, the Tribunal has no basis to find that they originated from CEB or one of its affiliates.
388. Furthermore, it is clear on the evidence that from 21 June 2009, the Claimant was at least open to discussing the transfer of its projects with CEB. This is born out in emails produced by the Parties. On 10 June 2009, Mr Porkony sent an email to discussing the takeover of the projects.<sup>641</sup> On the same day, responded, stating he wants "to discuss the provision of additional finance etc...I don't think that a takeover was ever a topic".<sup>642</sup> Yet, by 16 June 2009, a director of CEB sent a proposal for the transfer to ,<sup>643</sup> who responded on 21 June 2009 that he was "ready to negotiate with [CEB] about the proposed arrangement".<sup>644</sup> Given the Claimant was open to the possibility of transferring projects, it cannot complain of discussions had by CEB about this possibility with relevant suitors and stakeholders.

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<sup>636</sup> Claimant's Post-Hearing Brief, ¶¶ 106-107.

<sup>637</sup> Respondent's Post-Hearing Brief, ¶ 183.

<sup>638</sup> Respondent's Post-Hearing Brief, ¶ 183.

<sup>639</sup> Respondent's Post-Hearing Brief, ¶¶ 195-199.

<sup>640</sup> Claimant's Post-Hearing Brief, ¶ 116.

<sup>641</sup> Emails between and L. Pokorný, 10 June 2009, **C-146**, p. 1.

<sup>642</sup> Emails between and L. Pokorný, 10 June 2009, **C-146**, p. 1.

<sup>643</sup> E-mail from to Tlustý dated 21 June 2009, **R-155**, pp. 2-3.

<sup>644</sup> E-mail from to Tlustý dated 21 June 2009, **R-155**, pp. 2-3.

(d) Freezing of bank accounts

389. With respect to the Freezing Orders, it is alleged that CEB (with the knowledge and support of the MoF) acted to freeze the Škoda Export's accounts on the basis of false and unsubstantiated charges.<sup>645</sup> It also alleges that CEB was under an obligation to consult with and inform the Claimant of its concerns about the transactions prior to notifying the authorities.<sup>646</sup> The submission is that for these reasons the freezing of Škoda Export's accounts with CEB was unlawful.
390. As to the first complaint, although the Tribunal need not make a positive finding, at the least it appears to the Tribunal that, as the Respondent contends, the circumstances summarised in paragraph 161 of the Respondent's Post-Hearing Brief *ex facie*, and as otherwise established by the actions taken by WNC to rescind the SPA and cast adrift its control of FITE during the last 14 days of April 2009, suffice to justify the administrative actions leading to the Freezing Orders being made.
391. As to the second complaint, the Claimant points to no positive legal obligation on banks to contact or inform customers prior to notifying authorities of suspicious transactions. To the contrary, banks are prohibited from warning customers that a suspicious activity report is, or is likely, to be filed.<sup>647</sup> Whilst banks have an inspection obligation<sup>648</sup> – meaning that they need to do some due diligence on the transaction before notifying authorities – this does not necessarily require the making of enquiries of the customer. This position is, as far as the Tribunal is aware, general in Europe, and not an idiosyncrasy of Czech money-laundering regulations.
392. The only corroborating documentary evidence adduced by the Claimant in support of its allegation that the filing of the suspicious activity reports was improper is the decision by the Prague District State Attorney's Office lifting the Freezing Orders.<sup>649</sup> The Claimant says that it was found that "the suspicious transaction reports filed by CEB were baseless and unwarranted, and that CEB was aware of the negative impact that the Freezing Orders would have on Škoda Export's ability to complete its

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<sup>645</sup> Statement of Claim, ¶¶ 130-140.

<sup>646</sup> Claimant's Post-Hearing Brief, ¶ 143.

<sup>647</sup> Respondent's Post-Hearing Brief, ¶¶ 220-221.

<sup>648</sup> Respondent's Post-Hearing Brief, ¶ 144.

<sup>649</sup> Statement of Claim, ¶¶ 137-138; Reply, ¶ 377; Ruling of the District State Attorney's Office for Prague 1, 5 June 2009, with English translation, C-58.

projects”.<sup>650</sup> However, this report is directed merely to the outcome of the enquiries enlivened by the making of the Report, not to the propriety of the circumstances under which it was made. The conclusion of the Report by the District State Attorney was as follows:

Based on this evidence, it can no longer be inferred that the financial funds of PA EXPORT, a.s. carried on the accounts of these banks were designated to committing a crime. Therefore, the attachment of the cash funds is no longer required and may be lifted.

The report is not critical of CEB, and there is nothing to support the Claimant’s contention that CEB acted improperly in filing a suspicious activity report.

393. The Claimant further alleges that, after the Freezing Orders were imposed, “the Police Authority took an inordinate amount of time to conduct its investigation”.<sup>651</sup> But the Claimant does not further substantiate this claim. In fact, it explains that it submitted a request to the District State Attorney’s Office to lift the Freezing Orders on 28 May 2009 and that the request was granted on 5 June 2009.<sup>652</sup> In the circumstances there is nothing to suggest that the authorities were unresponsive or untimely in investigating and lifting the Freezing Orders.
394. The Respondent argues that the steps taken to impose and maintain the Freezing Orders were “legitimate actions in pursuit of the exercise of the police powers of the state.”<sup>653</sup> The Claimant “accepts that in certain cases the legitimate exercise of [police] powers would not result in an obligation to compensate the Claimant”.<sup>654</sup> However, it says that the powers must be exercised: (i) in good faith; (ii) for a public purpose; (iii) in a way proportional to that purpose; and (iv) in a non-discriminatory manner.<sup>655</sup>
395. It is uncontroversial that “States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide*

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<sup>650</sup> Reply, ¶ 377.

<sup>651</sup> Statement of Claim, ¶ 136.

<sup>652</sup> Statement of Claim, ¶ 138.

<sup>653</sup> Statement of Defence, ¶ 622.

<sup>654</sup> Reply, ¶ 376.

<sup>655</sup> Reply, ¶ 376.

regulations that are aimed at the general welfare”.<sup>656</sup> In the present case, based on the evidence before it, the Tribunal is satisfied that the imposition of the Freezing Orders meets the four criteria stipulated by the Claimant. As explained above, CEB acted in accordance with money laundering rules and the District State Attorney’s Office investigated the basis for the Freezing Orders in a timely manner and directed that they be lifted.

**(2) Did the Respondent’s conduct amount to expropriation?**

396. The Tribunal has decided, with respect to each allegation made by the Claimant, that there was no unlawful or improper conduct on the part of the Respondent. It has also determined that there was no conspiracy implicating the MoF and connecting the three events. That being so, the events complained of were not, in the circumstances, expropriatory acts. The refusal to grant the loan and the discussions regarding transfer of assets were commercial decisions by CEB, made with the knowledge and involvement of the Claimant. The decision to report the suspicious transfers was taken in accordance with applicable money-laundering legislation and the Freezing Orders were lifted promptly. These were not regulatory acts which had the effect of confiscating, or unreasonably interfering in the enjoyment of, the investment.
397. As the tribunal in *Pope & Talbot Inc v. Canada* noted, “[t]he test is whether that interference is sufficiently restrictive to support the conclusion that the property has been ‘taken’ from the owner”.<sup>657</sup> Even taking the (overly) broad definition of expropriation in *Metalclad Corporation v. Mexico*, the interference with the use of the property must have “the effect of depriving the owner” of the expected economic benefit of the property.<sup>658</sup>
398. It can be a difficult task to pinpoint any one event (or even a series of events) which directly results in a company not being able to pay its debts. Škoda Export suffered from management problems and was mired in financial difficulty before its acquisition by FITE. The company had a plethora of competing financial commitments under a number of contracts across a range of jurisdictions. For instance, the Respondent points to payments of CZK 300 million made by Škoda Export to

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<sup>656</sup> *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, CLA-19, ¶ 255.

<sup>657</sup> *Pope & Talbot Inc v Government of Canada*, Interim Award, 26 June 2000, ¶ 102.

<sup>658</sup> *Metalclad Corporation v. United Mexican States*, Award, 30 August 2000, CLA-45, ¶ 103. Emphasis added.



consultants at ETAL, Ashfield and Sky Invest between June 2008 and April 2009.<sup>659</sup> In these circumstances, it is difficult to accept that these three isolated events caused its demise. More likely, it was the accumulation of numerous internal decisions taken over a number of years, combined with various market and political factors in the Czech Republic and the countries in which it operated.

399. With respect to the apparent attempts by CEB and EGAP to transfer Škoda Export's assets, no actual transfer took place. At most the harm from this activity was reputational. Reputational problems do not provide a legal basis for the filing of bankruptcy petitions or for a declaration of insolvency. It is also not apparent that the Freezing Orders were the cause, or even a cause, of the insolvency. Škoda Export failed to make payments to its creditors both before and after the Freezing Orders were imposed. It also wrote to CEB and EGAP regarding its dire financial predicament before the Freezing Orders were put in place.<sup>660</sup> For instance, a restructuring plan the Respondent emailed to EGAP on 6 April 2009 provided:

The above co-operation/financial aid is required within the order of weeks; otherwise, the following is impending/has already occurred:

...

(b) Collapse of CEX at the end of April 2009!<sup>661</sup>

The orders were imposed on 24 April 2009 and were in place for 29 business days. The Claimant has not shown that the failure to pay creditors within that period resulted in its bankruptcy and insolvency. It has also not shown that, absent these events, Škoda Export would not have been made insolvent or that, in the event it were declared insolvent, FITE would have recovered some value in the liquidation.

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<sup>659</sup> Respondent's Post-Hearing Brief, ¶ 174.

<sup>660</sup> Respondent's Post-Hearing Brief, ¶ 206.

<sup>661</sup> Letter from [redacted] to EGAP, attaching CKD Export Restructuring Action Plan Summary, 9/2008-12/2009, 6 April 2009, C-96, p.8.

**3. The Tribunal's conclusions**

400. The Tribunal concludes that the Respondent has not breached Article 5 of the BIT. In summary:

- (a) The conduct of the Respondent prior to the sale of Škoda Export cannot fall within Article 5 because the investment did not exist at that time;
- (b) There is no evidence of any conspiracy on the part of the Respondent to destroy Škoda Export. Thus there is nothing to link together the individual acts said to give rise to the expropriation;
- (c) CEB's decision to refuse funding was not an expropriation of Škoda Export. In the absence of any obligation to provide a loan to Škoda Export, the refusal was nothing more than a commercial decision which CEB was free to make in any way it chose. In addition, the Claimant has not proved that the failure to obtain finance was a factor which directly resulted in its bankruptcy and eventual insolvency;
- (d) CEB and EGAP's discussions with stakeholders regarding the transfer of assets were made with the knowledge and (at least tacit) consent of the Claimant. Moreover, as no actual transfer took place, there was no taking of the assets which could constitute an expropriation;
- (e) The imposition and maintenance of the Freezing Orders was a legitimate exercise of police powers by the Respondent. In any event, the Claimant has not proved that the Freezing Orders were a direct cause of its insolvency.

401. It follows as to issues of liability that the Claimant's claims, as set out in paragraph 58 above, wholly fail from a combination of objections on grounds of admissibility and jurisdiction and on the merits on the expropriation ground for breach of Article 5 obligations, including any claims alleging breach of international law other than that arising under the BIT.

402. **Damages:** Hence, the claims for damages and quantum and other relief set out in Part D above do not fall for consideration.

403. **Orders:** It follows also that the Respondent is entitled to declarations, that –

- (1) The Tribunal does not have jurisdiction over alleged breaches of the BIT other than arising under Article 5; and
- (2) The Respondent has not breached the BIT;

and that the Claimant's claims stand dismissed.

## VII. COSTS

### 1. Costs claimed by the Parties

#### (1) The Claimant

404. The Claimant submits that the total costs it incurred in this matter, as set out in the Claimant's Costs Schedule, are reasonable in all the circumstances.<sup>662</sup> The Claimant requests that the Tribunal "order the Respondent to pay all costs incurred in connection with the arbitration proceedings, including the costs of the arbitrators as well as legal and other expenses incurred by the Claimant on a full indemnity basis, plus interest thereon at a reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of the Award until payment in full."<sup>663</sup>

405. The Claimant claims its total costs in the amount of USD 6,117,315.06.<sup>664</sup>

#### (2) The Respondent

406. The Respondent submits that it is entitled to an award of all of the costs and expenses specified in the Respondent's Costs Schedule, on the basis of the principle that the "costs follow the event" in

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<sup>662</sup> Claimant's Post-Hearing Brief, ¶ 246; Claimant's Costs Schedule annexed to Claimant's Post-Hearing Brief.

<sup>663</sup> Claimant's Post-Hearing Brief, ¶ 247(f).

<sup>664</sup> Claimant's Costs Schedule annexed to Claimant's Post-Hearing Brief (USD 6,089,815.06), updated to incorporate the final supplementary deposit of USD 27,500 paid by Claimant pursuant to the PCA's letter dated 18 January 2017.

accordance with Article 40(1) of the UNCITRAL Rules.<sup>665</sup> The Respondent submits that the costs it incurred in this matter are reasonable, were necessitated by the manner in which the Claimant presented its claims, and are low in comparison to the reported average costs of investment disputes.<sup>666</sup> The Respondent notes that it retained counsel based on a public procurement process based on the price offered.

407. On 7 February 2017, the Respondent sought to increase its costs claims by a substantial amount referable to previously unclaimed costs. On 11 February 2017, the Tribunal refused to allow such costs upon the grounds of implied election to forego such late claims.
408. Concerning the Claimant's costs, the Respondent submits that the costs claimed by the Claimant appear to be inflated, in large part are not reimbursable under the UNCITRAL Rules, and in certain cases have been incorrectly calculated.<sup>667</sup>
409. The Respondent claims its aggregate total costs in the amounts of USD 452,500 and CZK 35,940,599.34.<sup>668</sup>

## 2. Relevant Rules on costs

410. In the UNCITRAL Rules, provisions relevant to costs are found in Articles 38 to 40. Article 38 of the UNCITRAL Rules defines the "costs of arbitration" as follows:

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

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;

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<sup>665</sup> Respondent's Submission on Costs, ¶¶ 2-9.

<sup>666</sup> Respondent's Submission on Costs, ¶¶ 10-12.

<sup>667</sup> Respondent's Reply Submission on Costs, ¶¶ 2-26.

<sup>668</sup> Respondent's Submission on Costs, Annex 1 (USD 425,000 and CZK 35,940,599.34), updated to incorporate the final supplementary deposit of USD 27,500 paid by Respondent pursuant to the PCA's letter dated 18 January 2017.

- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

411. According to paragraphs 1 and 2 of Article 40 of the UNCITRAL Rules, the allocation of costs is addressed differently as to Tribunal costs on the one hand (paragraphs (a) to (d), and (f) of Article 38) and the parties' own costs of representation and assistance on the other hand (paragraph (e) of Article 38). Article 40 of the UNCITRAL Rules provides as follows:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

### **3. Fixing the costs of the arbitration**

412. The Parties deposited with the PCA a total of USD 905,000 (USD 452,500 by the Claimant; USD 452,500 by the Respondent) to cover the costs of arbitration.
413. The fees of Professor Robert Volterra, the arbitrator appointed by the Claimants, amount to USD 207,390.00. His expenses amount to USD 7,850.03. The fees of Judge James Crawford, the arbitrator appointed by the Respondent, amount to USD 201,316.25. The fees of Dr Gavan Griffith, the presiding arbitrator, amount to USD 312,322.50. His expenses amount to USD 6,020.55.

414. Pursuant to the Terms of Appointment and the agreement of the Parties, the International Bureau of the PCA was designated to act as Registry in this arbitration. The PCA's fees for registry services amount to USD 82,388.86. Other tribunal costs, including court reporters, hearing rooms, meeting facilities, travel, bank charges, and all other expenses relating to the arbitration proceedings, amount to USD 87,711.81.
415. Based on the above figures, the combined Tribunal costs, comprising the items covered in Article 38 (a), (b) and (c) of the UNCITRAL Arbitration Rules, as enumerated above, are fixed at a total of USD 905,000.00. These costs are deducted from the deposit, with no unexpended balance to be returned to the Parties.
416. Finally, under Article 38(e), the Tribunal finds the costs claimed by the successful party, the Respondent, to be reasonable in amount and proportionate to the nature and complexity of the matter. For the purposes of Article 38(e), the Tribunal therefore fixes Respondent's legal and other costs of representation at CZK 35,595,254.34 (comprising CZK 27,824,759.32 for its legal fees and CZK 7,770,495.02 for its expert's fees).

#### **4. Allocating the costs of arbitration**

417. With respect to the tribunal costs, the Tribunal applies the general principle of "costs follow the event." That approach is the more compelling here given that the UNCITRAL Rules expressly contemplate the rule of "costs follow the event" in Article 40(1) by its emphasis on "success" or its opposite. This conclusion is bolstered by both Parties' choice to argue that the unsuccessful side in this arbitration bear the full amount of tribunal costs as well as the successful Party's costs of legal representation.
418. While the Tribunal retains discretion to apportion the tribunal costs between the Parties if it determines that such apportionment is "reasonable, taking into account the circumstances of the case", it is not persuaded that such circumstances exist in the present case. Accordingly, the Tribunal determines, pursuant to Article 40(2) of the UNCITRAL Rules, that it is reasonable to apportion the costs of the arbitration between the Parties such that the Claimant shall bear the full costs of the Tribunal.

419. With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the Tribunal notes that there is no equivalent presumption in Article 40(2) of the UNCITRAL Rules that the unsuccessful party shall bear such costs. The Tribunal is “free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”
420. As to the costs for legal representation, as defined under Article 38(e) of the UNCITRAL Rules, although the Tribunal considers that each Party’s conduct during the course of proceedings was reasonable, efficient and professional, it remains that the Claimant was entirely unsuccessful in result, in the context that many of the factual issues already had been litigated to finality in curial proceeding.
421. Each Party’s Costs Submissions were predicated upon costs awards to follow the event, and neither proposed in advance the not uncommon costs orders made in investment disputes that no costs orders be made.
422. It appears to the Tribunal that in all the circumstances it is appropriate for its costs determinations to reflect the Parties’ common positions as to the appropriate basis for professional costs and other expenses to be ordered by reference to the result. On this approach, no occasion arises for analysis of the net result on the many separate issues, as their disposition was entirely one way to the Respondent. Hence, in the terms of Article 40(2), set out above, the Tribunal does not regard it as appropriate to any portion of the Respondent’s actual costs not to be reimbursed by the Claimant.

*Quantum*

423. As to quantum, *ex facie* the separate claims by the Respondent for actual costs and expenses comprising –

<b>Expert fees and expenses</b>	CZK 7,770,495.02
<b>Compensation for Witnesses</b>	CZK 345,345.00
<b>Counsel Fees:</b>	CZK 25,217,815.70

<b>Counsel Expenses:</b>	CZK 2,037,355.69
<b>Translations</b>	CZK 443,356.10
<b>Travel and Other Expenses of Representatives</b>	CZK 126,231.83

objectively appear reasonable in subject matter and amount having regard to the course of this contested dispute, as is confirmed by the extensive summaries of facts and argumentation and determination of issues in the course of this dispute. The fact that the similar professional costs and expenses sought by the Claimant are a multiple of the actual costs of the Respondent is not separately determinative of reasonableness, nonetheless they may be referred to as confirmatory of this factor.

424. It follows that the costs decisions of the Tribunal is that the Claimant should bear the entire costs of the dispute by reimbursing to the Respondent for its net arbitration costs advanced of **USD 452,500** and also to pay the Respondent's professional and other costs and expenses to the total amount of **CZK 35,940,599.34**.

## **VIII. AWARD**

**For the reasons stated –**

**1. IT IS DECLARED THAT –**

(1) **The Tribunal does not have jurisdiction over the alleged breaches of the BIT other than arising under Article 5; and**

(2) **The Respondent has not breached the BIT.**

**2. The Claims herein are wholly dismissed.**

**3. The Claimant is ordered to pay to the Respondent:**

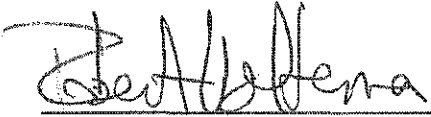
(1) **USD 452,500.00 to recoup the Respondent's share of the costs of the arbitration; and**


(2) **CZK 35,940,599.34. for the Respondent's costs and expenses.**



Place of arbitration: Geneva

Date: 22 February 2017

  
\_\_\_\_\_  
Professor Robert Volterra  
Arbitrator

  
\_\_\_\_\_  
Judge James Crawford  
Arbitrator

  
\_\_\_\_\_  
Dr. Gavan Griffith QC  
President