

PCA Case No. 2017-15

A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany)

vs/

The Czech Republic

FINAL AWARD

11 May 2020

The Arbitral Tribunal

President:

Prof Pierre Tercier
5, chemin Guillaume Ritter
CH-1700 Fribourg, Switzerland
Tel.: +41 26 425 48 48
E-mail: bureau@tercier.net

Co-arbitrators:

Prof Stanimir A. Alexandrov
Stanimir A. Alexandrov PLLC
1501 K Street, N.W., Suite C-072
Washington, D. C. 20005, USA

Tel : +1 202 736 8186
Email : salexandrov@alexandrovlaw.com

Ms Jean E. Kalicki
Arbitration Chambers
142 West 57th St., 11th Floor
New York, NY 10019, USA

Tel : + 1 646 828 9292
Email : jean.kalicki@kalicki-arbitration.com

Secretary to the Tribunal:

Dr Réka Ágnes Papp
5, chemin Guillaume Ritter
CH-1700 Fribourg, Switzerland
Tel.: +41 26 425 48 41
E-mail: rekapapp@tercier.net

Place of arbitration:

Paris, France

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TABLE OF ABBREVIATIONS

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts of 2001
a.s.	<i>akciová společnost</i> (Public Limited)
Bankruptcy and Composition Act	Act No. 328/1991 on bankruptcy and composition
Bankruptcy and Settlement Act	Act No. 182/2006 on bankruptcy and settlement
BIT	Bilateral Investment Treaty
<i>cf.</i>	<i>Confer</i>
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
EU	European Union
Exh C-[]	Claimant's Factual Exhibit
Exh CL-[]	Claimant's Legal Authority
Exh R-[]	Respondent's Factual Exhibit
Exh RL-[]	Respondent's Legal Authority
Germany-Czech Republic BIT	Agreement on the Promotion and Reciprocal Protection of Investments between the Federal Republic of Germany and the Czech Republic, concluded on 2 October 1990 and entered into force on 2 August 1992
GmbH & Co. KG	<i>Gesellschaft mit beschränkter Haftung & Compagnie Kommanditgesellschaft</i>
<i>i.e.</i>	<i>Id est</i>
ICJ Statute	Statute of the International Court of Justice
Inc.	Incorporated
IR 2000	Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings
No.	Number
p.	Page
para.	Paragraph

PCA	Permanent Court of Arbitration
PILA	Swiss Federal Act on Private International Law enacted 18 December 1987
PO	Procedural Order
Prof	Professor
s.r.o.	<i>spoločnosť s ručením obmedzeným</i> (Limited)
TFEU	Treaty on the functioning of the European Union
Transcript	Tr
UNCITRAL	United Nations Commission for International Trade Law
VCLT	Vienna Convention on the Law of the Treaties of 1969

TABLE OF SUBMISSIONS AND DOCUMENTS

Abbreviation	Submission	Date
RfA	Request for Arbitration	30 November 2016
SoC	Statement of Claim	30 September 2017
Respondent's Application	Application for Security for Costs	15 January 2018
	Answer to the Application for Security for Costs	28 February 2018
	Comments on Claimant's Answer to the Application for Security for Costs	8 March 2018
	Response to Respondent's Comments on Claimant's Answer to the Application for Security for Costs	15 March 2018
Respondent's Request	Request for Bifurcation	11 April 2018
	Reply to the Request for Bifurcation	26 April 2018
	Comments to Claimant's Answer to the Request for Bifurcation	4 May 2018
SoD	Objections to Jurisdiction and Statement of Defence	29 June 2018
Reply	Answer to Objections to Jurisdiction and Statement of Reply	10 October 2018
Amicus Brief	European Commission's Amicus Curiae Brief	29 April 2019
Rejoinder	Request for Reconsideration and Security for Costs, Reply on Objections to Jurisdictions and Statement of Rejoinder	15 June 2019
	Reply to Respondent's Request for Security for Costs	24 June 2019
Sur-Rejoinder	Sur-Rejoinder on Jurisdiction	16 July 2019

DRAMATIS PERSONAE

Name	Description
Mr Václav Fischer	A German businessman born in the Czech Republic. He is a limited partner of Claimant
Mr Stephan Meier	The second limited partner of Claimant
Mr Kárel Komárek	A Czech citizen who bought Fischer Air and Fischer Travel from Mr Fischer in 2003
Mr [REDACTED]	The first bankruptcy trustee in the Czech bankruptcy proceedings of Mr Fischer
Mr [REDACTED]	The second bankruptcy trustee in the Czech bankruptcy proceedings of Mr Fischer
Mr [REDACTED]	The bankruptcy trustee in the bankruptcy proceedings of Charter Air
Mr [REDACTED]	A judge at the Municipal Court in Prague, supervising the bankruptcy proceedings of Mr Fischer
Mr [REDACTED]	The legal representative of Mr Fischer and AMF
Mr [REDACTED]	The legal representative of Mr Fischer's creditors
Mr [REDACTED]	The legal representative of Charter Air
Mr [REDACTED]	The expert who assessed the aircraft on 9 and 10 September 2009.
Mr [REDACTED]	A preliminary trustee in Mr Fischer's bankruptcy proceedings, appointed to determine the existence of Mr Fischer's assets in the Czech Republic

A. SUMMARY OF FACTS AND PROCEDURE

I. The Parties and other concerned entities

1. The Parties

1. Claimant is *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG* (hereinafter “AMF”), a German limited partnership (*Kommanditgesellschaft*) specialised in the leasing of aircraft, with registered office at Mittelweg 113, D – 20149 Hamburg. AMF has two limited partners, Mr Václav Fischer and Mr Stephan Meier, and a partner with full liability: Beteiligung A.M.F. Aircraftleasing Meier & Fischer GmbH.

Claimant is represented in the present proceedings by Mr [REDACTED].

2. Respondent is *the Czech Republic*.

Respondent is represented in the present proceedings by Dechert LLP (Paris).

3. Claimant and Respondent will be hereinafter jointly referred to as the *Parties*.

2. Other persons or entities involved

4. In addition, the following persons and entities are relevant to the present dispute:

- a) Mr Václav Fischer is a German businessman born in the Czech Republic. He is a limited partner of the majority capital share of Claimant.
- b) Mr Karel Komárek is a Czech citizen who bought Fischer Air and Fischer Travel from Mr Fischer in 2003.
- c) Fischer s.r.o. (hereinafter “**Fischer Travel**”) is a travel agency founded by Mr Fischer. Mr Fischer was the company’s sole shareholder until the sale to Mr Komárek in 2003.
- d) Fischer Air s.r.o. (hereinafter “**Fischer Air**”) is a limited liability company founded by Mr Fischer (an extract from the Commercial Registry has not been submitted on the record). In 2003, Mr Fischer sold Fischer Air to Mr Komárek, who later changed the name of the company to Charter Air s.r.o. (hereinafter “**Charter Air**”).

- e) A.V.F. Aircraftleasing Václav Fischer GmbH & Co. KG (hereinafter “**AVF**”) is a company which bought an aircraft from Fischer Air and transferred its assets to AMF in 2004.
- f) HSH Nordbank AG (hereinafter “**HSH**”) is a German Bank based in Hamburg and Claimant’s creditor with a pledge on the aircraft.
- g) Atlantik IB s.r.o. (hereinafter “**Atlantik IB**”) is a company belonging to Mr Komárek. It filed a petition for involuntary bankruptcy against Mr Fischer.

II. Chronology

- 5. The following summary is a general summary based on the factual evidence adduced in the present proceeding. It does not purport to be exhaustive. Rather, it gives an overview of the general factual background of the present dispute. If necessary, the Arbitral Tribunal will examine further factual elements regarding each claim in its legal considerations (Part B of the present award).

1. The agreements

- 6. On 13 December 1996, Fischer Air bought two aircraft from Ansett Worldwide Aviation Limited. The aircraft consisted of a Boeing Model 737-33A, Serial Number 27469 (hereinafter “**Aircraft 1**”) and a Boeing Model 737-33A, Serial Number 27910 (hereinafter “**Aircraft 2**”, together with Aircraft 1 “**the Aircraft**”). The purchase price of each aircraft amounted to USD 35,700,000.00 (Exh C-113, p. 2).
- 7. On 14 March 1997, HSH provided AMF with financing for the purchase of Aircraft 1 and entered into loan agreements with Mr Fischer and Mr Meier (hereinafter “**Loan Agreement 1**”) with respect to an initial loan amount of USD 6,000,000.00 and an additional loan amount of USD 1,500,000.00 (Exh R-10, pp. 6-7).
- 8. On the same day, Fischer Air and AMF concluded an aircraft purchase agreement (hereinafter “**Purchase Agreement 1**”), pursuant to which Fischer Air sold Aircraft 1 to AMF. The purchase price of USD 35,700,000.00 was transferred by AMF to an account of Ansett Worldwide Aviation Equipment with Citibank N.A. in New York (Exh C-107, p. 64 of the pdf).
- 9. On 7 April 1997, Fischer Air and AMF signed a lease agreement (hereinafter “**Lease Agreement 1**”). AMF leased Aircraft 1 to Fischer Air for a monthly net rent of USD 333,000.00, payable to an account in New York (Exh R-10, p. 14). There seems to be an inconsistency in the amount of the rent as the amendment of 2003 refers to a

monthly net rent of 337,000.00 under the Lease Agreement 1 (Exh R-10, p. 65 of the pdf)

10. On 17 April 1997, HSH provided financing for the purchase of Aircraft 2 and concluded a loan agreement with Mr Fischer (hereinafter “**Loan Agreement 2**”) with respect to an initial loan amount of USD 7,500,000.00 (Exh C-106, p. 6; Exh C-105, p. 1).
11. On the same day, Fischer Air and AVF concluded an aircraft purchase agreement (hereinafter “**Purchase Agreement 2**”). Fischer Air sold Aircraft 2 to AVF, which transferred the purchase price of USD 35,700,000.00 to an account of Ansett Worldwide Aviation Equipment with Citibank N.A. in New York (Exh C-107, p. 97 of the pdf).
12. On the same day, Fischer Air and AVF signed a lease agreement (hereinafter “**Lease Agreement 2**”). AVF leased Aircraft 2 to Fischer Air for a monthly net rent of USD 337,000.00, payable to an account in New York (Exh C-106, p. 14).
13. In 2003, due to financial difficulties, Mr Fischer sold Fischer Air and Fischer Travel to Mr Komárek, remaining a shareholder of the companies (Exh R-8).
14. On 3 March 2003, Mr Fischer lost influence in Fischer Air and Fischer Travel due to Mr Komárek increasing the companies’ capital (Exh R-14). Mr Komárek subsequently changed Fischer Air’s business name to Charter Air.
15. On 14 November 2003, the Lease Agreement 1 and the Lease Agreement 2 (together “**Lease Agreements**”) were amended. *Inter alia*, the monthly net rents of the Aircraft were reduced to USD 230,000.00 (Exh R-10, p. 65 of the pdf; Exh C-106, p. 68 of the pdf).
16. In January 2004, Mr Fischer left the management of Fischer Travel and Fischer Air (Exh R-14).
17. In April 2004, AVF and AMF merged, resulting in the cessation of AVF and AMF becoming its sole legal successor (Exh C-134).

2. The bankruptcy proceedings in Germany

18. On 2 March 2005, Mr Fischer filed a petition for initiation of bankruptcy proceedings on his own estate with the District Court of Hamburg (Exh C-208).
19. On 11 March 2005, an expert report on the assets and liabilities of Mr Fischer was presented before the District Court of Hamburg (Exh R-9). This report also contained information concerning AMF and was based on AMF’s financial statements (Exh R-9).

20. On 16 March 2005, the Court of first instance in Hamburg (*Amtsgericht*) opened insolvency proceedings against Mr Fischer (Exh C-211).

3. The bankruptcy proceedings in the Czech Republic

3.1 *Mr Fischer's bankruptcy proceedings*

21. On 10 February 2005, Atlantik IB., Mr Komárek's company, filed a petition for involuntary bankruptcy against Mr Fischer in the Czech Republic (Exh C-68).

22. On 8 March 2005, the Municipal Court in Prague (hereinafter "**Municipal Court**") appointed Mr ██████ as preliminary trustee to the bankruptcy case of Mr Fischer (Exh C-165).

23. On 29 March 2005, in a letter to the Municipal Court, Mr Fischer proposed that the bankruptcy proceedings against him be dismissed (Exh C-69). He further lodged an appeal against the Municipal Court's resolution of 8 March 2005, by which Mr ██████ had been appointed preliminary trustee (Exh C-69).

24. On 26 April 2005, the Municipal Court opened bankruptcy proceedings against Mr Fischer and appointed Mr ██████ as bankruptcy trustee (Exh C-5, p. 1).

25. On 16 May 2005, Mr Fischer appealed to the High Court in Prague (hereinafter "**High Court**") against the Municipal Court's decision to open the bankruptcy proceedings (Exh C-73).

26. On 9 September 2005, the High Court upheld the Municipal Court's decision dated 26 April 2005 and qualified the proceedings as secondary to the bankruptcy proceedings in Germany (Exh C-7; C-85).

27. On 10 October 2005, the creditors' meeting unanimously ordered Mr ██████ to include the Aircraft into Mr Fischer's bankruptcy estate (Exh C-146, p. 1).

28. On 11 October 2005, Mr ██████ included the Aircraft into Mr Fischer's bankruptcy estate (Exh C-41, p. 1).

29. On 12 October 2005, Mr ██████ informed Mr ██████, Mr Fischer's legal representative, that the Aircraft had been included into Mr Fischer's bankruptcy estate upon order of the creditors' committee (Exh C-41, p. 1). Mr ██████ further wrote that, "*according to the existing interpretations, a limited partnership formed under German law is not a legal entity, and its property is thus in the joint ownership of the partners, of which the bankrupt's share constitutes 75%*" (Exh C-41, p. 1).

30. On 13 October 2005, Charter Air suspended the monthly instalments to AMF, starting with the instalment that was due in October 2005 (Exh C-8).

31. On 20 October 2005, Mr ██████ AMF's legal representative, requested Mr ██████ to exclude the Aircraft from Mr Fischer's bankruptcy estate, stating that "*the legal opinion asserted by the creditors, who proposed the inclusion of the aforesaid aircraft [...] in the bankruptcy estate inventory, is not correct*" (Exh C-42). Mr ██████ pointed out several provisions of German law supporting his position (Exh C-42, p. 2).
32. On 25 October 2005, Mr Fischer filed an appellate review with the Supreme Court of the Czech Republic (hereinafter "**Supreme Court**"), contesting the High Court's decision dated 9 September 2005 (*cf.* above para. 26) considering that the conditions to open secondary insolvency proceedings against Mr Fischer in the Czech Republic were met (Exh C-88, pp. 5-6).
33. On 2 November 2005, AMF's legal representative provided Mr ██████ with a legal opinion written by Heribert Hirte, Professor from the University of Hamburg, further supporting the position that the Aircraft should be excluded from Mr Fischer's bankruptcy estate (Exh C-62).
34. On 14 November 2005, Mr ██████ removed the Aircraft from Mr Fischer's bankruptcy estate (Exh C-9, C-43).
35. On the same day, during a creditors' meeting, Mr ██████ asked to be removed from the office of bankruptcy trustee due to his medical condition (Exh C-83, p. 1).
36. On 15 November 2005, the Municipal Court removed Mr ██████ from his office and appointed Mr ██████ as the new bankruptcy trustee (Exh C-83).
37. On 28 November 2005, Mr ██████ informed the Czech Civil Aviation Authority that he had included the Aircraft into the bankruptcy estate of Mr Fischer (Exh C-55).
38. On 12 December 2005, AMF objected to the re-inclusion of the Aircraft into Mr Fischer's bankruptcy estate (Exh C-10).
39. On the same day, Mr Fischer's legal representative requested the Municipal Court to remove Mr ██████ from the role of bankruptcy trustee (Exh C-90).
40. On 15 December 2005, AMF filed an action with the Municipal Court for the exclusion of the Aircraft from Mr Fischer's bankruptcy estate (Exh C-118).
41. On 4 January 2006, the Municipal Court informed Mr ██████ that "[i]n view of the fundamentally differing legal analyses pertaining to the ownership" of the Aircraft, "*the question of the ownership ... must be decided in a proper court proceeding.*" The Municipal Court further stated that Mr ██████ was "*obligated to take such measures for the protection of the aircraft so that the value thereof does not decrease*". The Municipal Court added that the bankruptcy trustee "*shall not take any irreversible steps in the matter*" until the pending appeals against his appointment and the declaration of bankruptcy are resolved (Exh C-80).

42. On 17 January 2006, the Municipal Court dismissed the request to remove Mr [REDACTED] as bankruptcy trustee (Exh C-92).
43. On 19 January 2006, AMF expressed its concern to Mr [REDACTED] with regards to the current technical condition of the Aircraft (Exh C-44).
44. On the same day, AMF asked the Municipal Court to exercise supervisory activities in order to ensure, *inter alia*, that the Aircraft are properly maintained and that “*the Aircraft are leased out and the rent paid into the bankruptcy estate*” (Exh C-45).
45. On 1 February 2006, the High Court confirmed the Municipal Court’s decision to dismiss the request to remove Mr [REDACTED] (Exh C-95). The High Court observed that under Czech law, the trustee “*is obliged to include every single item ... which [he] considers to be a (potential) part of the bankruptcy assets, even if in doubt about whether it really is a part of the bankruptcy assets,*” and concluded that the trustee “*had proceeded with due care and listed the said aircraft in the bankruptcy assets correctly,*” and he “*invited the excluding action to be initiated*” in the courts (Exh C-95, p. 3).
46. On 13 February 2006, Charter Air was declared bankrupt (*cf.* below para. 93) and Mr [REDACTED] was appointed as bankruptcy trustee (Exh R-23).
47. On 6 March 2006, AMF informed Mr [REDACTED] that the Aircraft were no longer insured because Charter Air had stopped paying the insurance premiums (Exh C-48, p. 2 of the pdf). In the same letter, AMF inquired whether the Aircraft were insured and who performed the “*reasonable regular maintenance of the Aircraft*” (Exh C-48, p. 3 of the pdf).
48. On 7 March 2006, Mr Fischer filed an “*Extension of the appeal against the resolution of the Municipal Court dated 17 January 2006*”, referring to a new development (Exh C-94, p. 2).
49. On 13 March 2006, since it had not received an answer to the letter dated 6 March 2006, AMF wrote another letter to Mr [REDACTED] asking whether the Aircraft were insured and who performed the maintenance (Exh C-48, p. 4 of the pdf).
50. On the same day, AMF informed the Municipal Court that the Aircraft were neither insured nor regularly maintained and asked the Court to exercise its supervisory powers in order to remedy the situation (Exh C-48, p. 1 of the pdf).
51. On 24 April 2006, the Municipal Court excluded the Aircraft from Mr Fischer’s bankruptcy estate (Exh C-61). The Municipal Court stated that “*the aircraft had been entered in the bankruptcy estate unlawfully, of which the Defendant as the liquidator was very well aware.*” (Exh C-61, p. 4).
52. On 29 May 2006, Mr [REDACTED] launched an appeal against the judgement of 24 April 2006 before the High Court (Exh C-121).

53. On 14 September 2006, upon request of Mr ██████ Euro-Trend s.r.o. carried out an expert valuation of the Aircraft for the purposes of sale as part of bankruptcy (Exh C-49).
54. On 13 November 2006, Slovenské aerolínie a.s. (hereinafter “**Slovenské aerolínie**”), an aviation company operating in the Slovak Republic, signed a letter of intent with Air Consulting, a consulting company focusing on air business and operating in the Czech Republic, with AMF, HSH and Mr ██████ (Exh C-57). Slovenské aerolínie offered to “*provide an initial investment in order to return the aircraft to a condition fit for operation*”, provided that AMF, HSH and Mr ██████ agree to a five-year lease agreement between AMF, as the lessor, and Slovenské aerolínie, as the lessee (Exh C-57).
55. On 23 November 2006, the Municipal Court consented to Mr ██████ conducting negotiations regarding the lease of the Aircraft and ordered Mr ██████ to obtain written consent from the interested parties, in particular from Mr ██████, HSH, Mr Fischer, creditors’ representatives and AMF (Exh C-160).
56. On 12 December 2006, in a letter to Mr ██████, Mr ██████ the representative of Mr Fischer’s creditors, expressed regret that the lease of the Aircraft to Slovenské aerolínie had failed due to the disapproval of HSH. He also asked the bankruptcy trustee to act in strict accordance with the Bankruptcy and Settlement Act, and not to allow HSH, a non-authorised entity and not a creditor of Mr Fischer, to interfere in the bankruptcy process (Exh R-36).
57. On 14 December 2006, at a meeting with the interested parties related to Mr Fischer’s bankruptcy proceedings, HSH suggested to sell the Aircraft. It stated that a party outside of the Czech Republic was willing to purchase them for USD 27,000,000.00. HSH insisted that the price for both Aircraft be at minimum USD 27,000,000.00. The interested parties noted that, since the Aircraft were still registered simultaneously in two different bankruptcy estates, the first condition to the sale was the consent of Mr ██████. All interested parties expressed their various views concerning HSH’s suggestion and related issues (Exh C-161).
58. On 18 December 2006, Mr ██████ requested the Municipal Court to consent to the sale of the Aircraft by private sale, outside court auction, to the person presenting the highest written bid (Exh C-162).
59. On 3 January 2007, the Municipal Court consented to Mr ██████ selling the Aircraft outside auction under the condition that Mr ██████, Mr Fischer, Mr Meier and HSH all expressly agree to the sale in writing and in advance (Exh C-185).
60. On 29 January 2007, Mr Fischer’s legal representative requested the Municipal Court to restrict the unlawful conduct of Mr ██████ stating that the trustee was preparing the sale of the Aircraft without the consent of Mr Fischer (Exh C-159).

61. On 1 February 2007, upon AMF's request, the Municipal Court made AMF's prior written consent an additional condition to any private sale of the Aircraft outside a court auction (Exh C-153).
62. On the same day, the Municipal Court responded to the request of Mr Fischer's legal representative dated 29 January 2007, explaining that it had no information about the alleged conduct of Mr ██████. It further stated that "[t]here is no risk of immediate destruction or depreciation. The aircraft have been standing at the airport for a number of months and will not be significantly depreciated in the course of an additional month. By this time, the due, approved sale of the aircraft should be carried out according to the trustee's estimate" (Exh C-159).
63. On 2 February 2007, the High Court annulled the judgement of the Municipal Court dated 24 April 2006 (*cf.* above para. 51), by which it had excluded the Aircraft from Mr Fischer's bankruptcy estate, and referred the case back to the Municipal Court (Exh C-129, p. 12).
64. On 8 March 2007, the Municipal Court approved that Mr ██████ was entitled to give his consent to Mr ██████ to sell the Aircraft (Exh C-13, p. 2).
65. On 9 March 2007, Mr ██████ informed the Municipal Court that the position of HSH made it impossible to continue with the negotiations of the sale, even if all the other stakeholders agreed with the sale (Exh R-37, p. 2 of the pdf). He further considered it "*important to note that HSH Nord Bank thwarted also the previous intention to lease the aircraft in a similar manner*", believing that "*the reason why the aircraft were not sold to Norwegian Air Shuttle can be attributed exclusively to HSH*" (Exh R-37, p. 2 of the pdf).
66. On 3 April 2007, Mr ██████ informed Mr ██████ that his clients, Mr Fischer, Mr Meier and AMF, would only consent to the sale under the condition that the bids would be possible to assess in advance, in order to evaluate potential buyers and the draft purchase contract prior to the sale (Exh C-152, p. 2).
67. On 5 April 2007, Mr ██████ informed the Municipal Court that HSH would only give its consent to the sale of the Aircraft if the buyer is approved by HSH and if its other conditions are also fulfilled (Exh C-152, p. 2).
68. On 12 April 2007, Mr ██████ informed the Municipal Court that mould had been identified in Aircraft 2 and that, if the Aircraft remained parked under the current conditions, there was a risk that the mould would spread to Aircraft 1 (Exh C-152, p. 2).
69. On the same day, the Municipal Court amended the conditions of sale of the Aircraft, in that the sale no longer required consent from Mr Fischer, Mr Meier, AMF and HSH. The Court was of the opinion "*that the prompt sale of the respective aircraft, which seems now to be realistic, is advantageous for all the interested parties in terms of the ongoing bankruptcy proceedings.*" It further stated that "*any delay in the sale of the*

aircraft, to which the fulfilment of conditions for consent would necessarily lead, would increase the risk of damage to the aircraft and could consequently impede the possibility of selling the aircraft” (Exh C-152, p. 2).

70. On 19 April 2007, in a letter to the Municipal Court, Mr [REDACTED] expressed his views on the sale of the Aircraft and requested the Court to cancel its amendments on the conditions of sale made on 12 April 2007 (Exh C-157).
71. On 20 April 2007, AMF filed a constitutional complaint with the Czech Constitutional Court (hereinafter “**Constitutional Court**”), seeking the annulment of the Municipal Court’s decision dated 12 April 2007 (Exh C-1, p. 1)
72. On the same day, Aerotech s.r.o., a company providing the required minimum maintenance of the Aircraft, conducted a visual inspection of the Aircraft, noticing that *“corrosion of the Dural construction is starting to appear on both aircraft. [...] Furthermore, mould was discovered in the interior of the aircraft during inspection.”* According to Aerotech s.r.o., “[t]he reason for this condition is the long-term standing and non-aerial operation of the aircraft (17 months) under climatic conditions in CZ (large temperature changes and high humidity)” (Exh C-141).
73. On 23 April 2007, Mr [REDACTED] notified the Municipal Court about the inspection by Aerotech s.r.o. and the discovery of mould inside the Aircraft (Exh C-53).
74. On 24 April 2007, the Municipal Court addressed a letter to Mr [REDACTED], providing a detailed response to Mr [REDACTED] views on the issue of the sale of the Aircraft and the contents of Mr [REDACTED] letter dated 19 April 2007 (Exh C-156, p. 3).
75. On the same day, TNT Airways, financed by the leasing company Guggenheim Partners, offered to purchase the Aircraft for USD 25,000,000.00 (Exh C-167, p. 4 of the pdf).
76. On 27 April 2007, upon AMF’s motion, the Municipal Court issued a preliminary injunction, ordering Mr [REDACTED] to refrain from selling the Aircraft without AMF’s consent (Exh C-166).
77. On 21 May 2007, Air Consulting s.r.o. (hereinafter “**Air Consulting**”), a consulting company focusing on air business, analysed the current condition of the Aircraft, concluding that, for numerous reasons stated in the report, the sale of the Aircraft was urgent (Exh C-167, p. 4 of the pdf).
78. On 24 May 2007, Mr [REDACTED] informed the Municipal Court that AVITAS, an internationally qualified assessor for the International Society for Transport Aircraft Trading, assessed the Aircraft in their current condition to have the value of USD 10,600,000.00 (Exh C-167, p. 1 of the pdf).

79. On 25 June 2007, the High Court confirmed the preliminary injunction issued by the Municipal Court on 27 April 2007 (*cf.* above para. 75) (Exh C-163).
80. On 17 September 2007, the Constitutional Court partially admitted AMF's constitutional complaint, annulling part of the Municipal Court's decision dated 12 April 2007 (*cf.* above para. 69) (Exh C-1, p. 10).
81. On 24 October 2007, Aircraft 2 was inspected by Ms [REDACTED], judge at the Municipal Court, Ms [REDACTED], assistant to the judge, AMF's legal representative, the creditors' representative, Mr [REDACTED] an airport technician and Ms [REDACTED] General Manager of Air Consulting. They found that, due to the long-term parking on the ground and to extensive mould and rust, the value of Aircraft 2 continued to decrease (Exh C-154).
82. On 29 October 2007, the Municipal Court excluded the Aircraft from the bankruptcy estate of Mr Fischer because "*the aircraft had been registered in the inventory of the bankruptcy estate illegitimately*" (Exh R-28, p. 10). The Municipal Court referred to an earlier "ruling" of the Constitutional Court of 24 April 2007, in which the Constitutional Court stated that "*the sale of the aircraft would result in a disproportionately greater harm for the Plaintiff than the potential harm threatening the bankruptcy estate from postponing the enforceability of the resolution of the Municipal Court in Prague of 12 April 2007, [...] according to which consent of the company was not required for the sale of the aircraft*" (Exh R-28, p. 3).
83. On 29 November 2007, Mr [REDACTED] filed an appeal with the High Court against the judgement of the Municipal Court dated 29 October 2007 (Exh C-132).
84. On 31 January 2008, the Supreme Court cancelled the resolution of the High Court of 9 September 2005, which had confirmed the opening of bankruptcy proceedings against Mr Fischer (*cf.* above para. 28), and the resolution of the Municipal Court of 26 April 2005, which had declared bankruptcy against Mr Fischer (*cf.* above para. 24), returning the case to the Municipal Court for further proceedings (Exh C-100). The Supreme Court decided that it had not been proven that Mr Fischer had an establishment in the Czech Republic within the meaning of the Council Regulation (EC) No. 1346/2000 on insolvency proceedings (hereinafter "**IR 2000**") (Exh C-100, pp. 22-23 of the pdf).
85. On 16 April 2008, the High Court dismissed Mr [REDACTED] appeal against the judgement of the Municipal Court of 29 October 2007 (*cf.* above para. 82), which had excluded the Aircraft from Mr Fischer's bankruptcy estate (Exh C-127). The High Court did not resolve Mr [REDACTED] specific arguments on appeal regarding the appropriateness of originally including the Aircraft in the estate, but rather found that the issue had become moot by virtue of the Supreme Court's intervening decision (*cf.* above para. 84) that Mr Fischer had not been shown to have a permanent establishment in the Czech Republic, allowing secondary bankruptcy proceedings against him at all. The High Court concluded, *inter alia*, that "*the bankruptcy declared against*

bankrupt's property has been cancelled,” i.e., there was no “*continuing bankruptcy against [the] bankrupt's property*” and, therefore, the aircraft had to be excluded from the bankruptcy estate unless and until they “*are included in a new inventory of bankruptcy estate*” (Exh C-127, p. 3).

86. On 23 April 2008, the Municipal Court appointed Mr [REDACTED] as the preliminary trustee of Mr Fischer’s bankruptcy and ordered him to determine the existence of Mr Fischer’s assets in the territory of the Czech Republic (Exh R-29, p. 1).
87. On 9 July 2009, the Municipal Court dismissed a petition for the declaration of bankruptcy of Mr Fischer as secondary proceedings, concluding that “*the Court did not find sufficient evidence for the existence of the Defendant’s establishment within the meaning of the Regulation*” (Exh C-17, p. 3).
88. On 12 August 2009, the District Court for Prague 2 dismissed AMF’s action for damages against the Czech Republic (Exh C-29). The Court stated that the Claimant had not alleged facts enabling a conclusion that it should have been clear “*unambiguously ... that such property should not be included in the bankruptcy estate,*” and that “*a subsequent decision of the court which excludes the property*” does not demonstrate malfeasance on account of its not having been excluded earlier (Exh C-29, p. 8).
89. On 30 September 2009, AMF filed an appeal against the District Court’s decision of 12 August 2009, which had dismissed AMF’s action for damages (Exh C-30).
90. On 24 March 2010, the Municipal Court upheld the District Court’s judgment dated 12 August 2009, whereby AMF’s action for damages against the Czech Republic had been dismissed (Exh C-35). The Court stated there was no malfeasance on account of the Aircraft not having been excluded at an earlier stage, in circumstances where the bankruptcy court did not consider the legal issues presented under German law “*to be easy,*” and therefore considered it appropriate to maintain the asset in the bankruptcy estate until the outcome of the exclusion proceedings (Exh C-35, p. 7).
91. On 30 March 2015, the Supreme Court dismissed AMF’s appeal against the Municipal Court’s judgment of 24 March 2010 (Exh C-38). The Supreme Court agreed with prior courts that “*the assessment of to whom the aircraft belonged under German law was not an assessment which should be carried out as ‘simple’ by the bankruptcy court outside the initiated exemption proceedings,*” which therefore had to run their course before a definitive exclusion (Exh C-38, p. 29).
92. On 28 November 2017, the Constitutional Court rejected AMF’s constitutional complaint against the judgments of the Municipal Court and the Supreme court, dated 24 March 2010 and 30 March 2015, respectively (Exh R-4).

3.2 *Charter Air's bankruptcy proceedings*

93. On 13 February 2006, the Regional Court in Prague declared Charter Air bankrupt and appointed Mr ██████ as bankruptcy trustee (Exh R-23).
94. On 23 June 2006, Mr ██████ included the Aircraft into the bankruptcy estate of Charter Air, stating that “[t]he reason for their inclusion in the bankruptcy estate is the failure to fulfil the formal requirements for transfer of the aircraft from the proprietorship of Charter Air s.r.o. in 1997 to the assets of the current owner pursuant to Section 196a, Commercial Code, given that consent to such transfer was not granted in particular by the general meeting of the seller’s company” (Exh C-151, p. 2). Mr ██████ position was supported by a legal opinion of Prof Dedic (Exh C-112).
95. On 29 June 2006, HSH informed Mr ██████ that the balance of the loan debt secured by the lien to the Aircraft amounted to USD 32,700,293.03 (Exh C-151, p. 1).
96. On 26 July 2006, AMF filed an action with the Regional Court in Prague for the exclusion of the Aircraft from Charter Air’s bankruptcy estate, stating, *inter alia*, that AMF “is the owner of the aircraft and its ownership title to the aircraft does not admit the inclusion of the aircraft into the bankruptcy estate of the Bankrupt” (Exh C-113).
97. On 22 August 2006, Mr ██████ asked Mr ██████ to obtain AMF’s consent in order for HSH to submit the relevant documents regarding loans and pledges on the Aircraft (Exh C-151, p. 1).
98. On 12 December 2006, the Regional Court in Prague excluded the Aircraft from Charter Air’s bankruptcy estate, concluding that AMF’s action dated 26 July 2006 is “legitimate because the plaintiff is the owner of the aircraft specified in the operative part of the judgement and their inclusion in the bankruptcy estate is incorrect” (Exh C-109, p. 10 of the pdf).
99. On 6 February 2007, Mr ██████ filed an appeal to the High Court against the Regional Court’s decision dated 12 December 2006, whereby it had excluded the Aircraft from Charter Air’s bankruptcy estate (Exh C-115).
100. On 25 September 2007, the High Court partially modified the Regional Court’s decision dated 12 December 2006, declaring that since the Aircraft were already in the bankruptcy estate of Mr Fischer, the inclusion of the Aircraft into Charter Air’s bankruptcy estate had no effects (Exh C-111, p. 5).
101. On 26 March 2008, after Mr ██████ had included the Aircraft back into Charter Air’s bankruptcy estate, AMF filed an action with the Regional Court in Prague to exclude the Aircraft from Charter Air’s bankruptcy estate (Exh R-30, p. 2 of the pdf).
102. On 21 May 2008, Charter Air’s creditors, which had been summoned by Mr ██████, discussed the further procedure in the realisation of the Aircraft (Exh R-40). The Minutes of the meeting read that “HSH prefers the sale to be performed outside an

auction and intends to actively participate in the sale” (Exh R-40, p. 3). Mr ██████ pointed out that the sale of the Aircraft required AMF’s consent, and the creditors’ committee regarded *“this requirement of the bankruptcy trustee as a prerequisite for further negotiations on sale of the aircraft with participation of HSH Nordbank”* (Exh R-40, p. 4).

103. On 24 September 2008, Mr ██████ presented information on the planned sale of the Aircraft in a public auction to the creditors’ committee (Exh R-42, p. 1).
104. On 22 October 2008, the creditor’s committee informed the Regional Court in Prague of its disagreement with Mr ██████ proposition presented on 24 September 2008, stating that the creditors’ committee believed that, *“if there are doubts as to whether the very corporeal substance of the aircraft is threatened, the conditions set out in the provision of Section 19(3) of the Bankruptcy and Settlement Act cannot be deemed met”* (Exh R-42, p. 2).
105. On 3 November 2008, by order of Mr ██████, Charter Air’s legal representative, Prof Dedic issued an expert opinion assessing certain legal issues related to the sale of the Aircraft, concluding that the requirements of Section 19(3) of the Bankruptcy and Settlement Act had not been fulfilled and that the bankruptcy trustee was not authorised to monetise the Aircraft with reference to Section 19(3) (Exh C-143, p. 2).
106. On 17 June 2009, the Regional Court in Prague dismissed AMF’s action to exclude the Aircraft from Charter Air’s bankruptcy estate, stating that the Aircraft had been included in the bankruptcy estate legitimately since Purchase Agreement 1 and Purchase Agreement 2 (together **“Purchase Agreements”**) were invalid (Exh R-30).
107. On 27 August 2009, the Supreme Court annulled the decision of the High Court of 25 September 2007 (*cf.* above para. 99), referring the matter to the High Court for further proceeding (Exh C-110). The Supreme Court declared that *“the owner of the thing may not be denied the right to defend himself against the second inclusion of the thing in bankruptcy estate”* because the inclusion of the *“thing”* in the bankruptcy estate constituted a potential interference with the owner’s property rights (Exh C-110, p. 4).
108. On 9 September 2009, Mr ██████, working for Air Consulting which had been commissioned by Mr ██████ issued an expert opinion on Aircraft 1, assessing its current value at USD 1,049,000.00 (Exh C-175).
109. On 10 September 2009, Mr ██████ issued an expert opinion on Aircraft 2, assessing its current value at USD 1,072,000.00 (Exh C-176).
110. In both expert opinions dated 9 and 10 September 2009, Mr ██████ concluded that *“[t]he surface corrosion found on the aircraft will progress and become honeycomb corrosion due to weather conditions during the winter season. This will severely damage parts of the aircraft, engines and electronics and challenge its ability to be put into operation again”* (Exh C-175, p. 19; C-176, p. 13).

111. On 25 October 2009, in a partial report, Mr █████ informed the Regional Court in Prague that HSH had agreed with the sale of the Aircraft, leaving the form of the sale up to the bankruptcy trustee (Exh C-174, p. 2).
112. Mr █████ report further reads that, on the basis of Mr █████ expert opinion, “*the creditors’ committee stated that the conditions set forth in s. 19(3) of the Bankruptcy and Compensation Act had been met and agreed with the sale*” and that “*the creditors’ committee decided to sell the aircrafts in an auction*” (Exh C-174, p. 2).
113. According to Respondent, on 27 October 2009, the creditors’ committee approved the conditions of the auction. AMF and HSH did not raise objections (SoD, Annex I, p. 9).
114. On 29 October 2009, Mr █████ informed AMF and HSH that the sale by auction had been frustrated by the creditors’ committee (Exh C-148, p. 1). Mr █████ further asked AMF and HSH to respond to a number of issues, *e.g.* whether they agreed with the sale of the Aircraft in a public auction, and asked them to refrain from requesting an exclusion of the Aircraft from the bankruptcy estate (Exh C-148, p. 2).
115. On the same day, Mr █████ signed a power of attorney, empowering Mr █████ to revoke or cancel the auction, change its terms and conditions, and participate in the auction on behalf of Mr █████ (Exh C-139, p. 8 of the pdf).
116. On 12 November 2009, 1. Art Consulting Brno CZ s.r.o. (hereinafter “**Art Consulting**”), as the auctioneer, and Mr █████, acting on behalf of the auction proponent Mr █████, signed an auction decree for a voluntary public auction of the Aircraft (Exh C-139).
117. On 17 December 2009, the auction took place without any bidders (SoC, para. 60; SoD, para. 141).
118. On 28 January 2010, at the motion of Mr █████, Art Consulting carried out a repeated voluntary auction, during which the Aircraft were sold to AerSale Inc. for a total price of USD 2,188,750.00 (Exh C-236).
119. On 18 February 2010, the High Court annulled the Regional Court’s decision of 17 June 2009, which had dismissed AMF’s action to exclude the Aircraft from Charter Air’s bankruptcy estate (*cf.* above para. 94), and discontinued the exclusion proceedings due to *lis pendens* (Exh R-31).
120. On 23 March 2010, AMF was deleted and AerSale Inc. was registered as the owner of the Aircraft in the Aircraft Register of the Czech Republic (Exh C-142). In its decision, the Civil Aviation Authority also stated that the liens of HSH on the Aircraft ceased to exist through monetisation of the aircraft in auction (Exh C-142, p. 2).
121. On 24 November 2010, the High Court modified the Regional Court’s decision of 12 December 2006 (*cf.* above para. 98), in that the action to exclude the amount obtained by realising the Aircraft from the bankruptcy estate was dismissed (Exh

- R-32). The High Court declared that the Purchase Agreements were invalid because the procedure under Section 196a (3) of the Commercial Code had not been properly complied with in the sale of the Aircraft (Exh R-32, p. 11 of the pdf).
122. On 30 May 2013, the Supreme Court quashed the judgement of the High Court dated 24 November 2010, referring the case back to the High Court for further proceedings (Exh R-33). The Supreme Court concluded that Section 196a (3) of the Commercial Code was not applicable and that AMF was the owner of the Aircraft (Exh R-33, p. 4 of the pdf).
123. On 9 January 2014, the High Court upheld the part of the Regional Court's judgement of 12 December 2006 excluding USD 2,048,000.00 obtained through the sale of the Aircraft from Charter Air's bankruptcy estate (Exh C-108).
124. On 27 July 2015, the District Court in Prague closed the bankruptcy proceedings of Charter Air (Exh C-184).
125. According to the Respondent, the proceeds of the sale ultimately "*were transferred, with Claimant's consent, to Mr. Fischer's and Claimant's financing bank, HSH*" (SoD, para. 369). The Claimant has not disputed this statement.
126. On 25 August 2017, the District Court of Prague 2 dismissed AMF's action for damages in connection with the bankruptcy proceedings of Charter Air as "*groundless*" (Exh C-137, p. 20). The Court stated that "[b]ased on the evidence the court has not been satisfied that it would be possible by mere simple reasoning and determination of law to ascertain whether the Aircraft were owned by plaintiff [...]. It was necessary to [...] deal with [German law] and there was a reasonable doubt whether a valid purchase contract had been made" under that law. Further, "*it is necessary to take into account the duty of the receiver to include ... even those [assets] which it is not clearly obvious whether they belong in the bankruptcy estate or not [...]. The court believes that the receiver did not err by including the things in the bankruptcy estate*" (Exh C-137, p. 19). With respect to protection of the Aircraft, the Court concluded that it "*has not established any errors on the part of receiver,*" because there were no funds in the estate that could have covered ongoing maintenance of the Aircraft and the Claimant itself had objected to earlier sale efforts when a higher price might have been obtained (Exh C-137, p. 20).
127. On 10 January 2018, upon AMF's appeal, the Municipal Court upheld the judgement of the District Court of Prague 2 dated 25 August 2017 (Exh R-5).
128. On 27 June 2019, the Supreme Court rejected AMF's appeal against the Municipal Court's decision of 10 January 2018 (Tr 30:17-19).
129. On 10 September 2018, AMF filed a constitutional complaint seeking annulment of the Municipal Court's decision of 10 January 2018 and the resolution of the Supreme Court of 27 June 2018 (Exh R-69).

130. On 29 October 2019, the Constitutional Court rejected AMF’s complaint “*as clearly unfounded*” (Exh R-69, p. 4).

III. The Arbitral Proceedings

1. The initiation of the proceedings

131. On 30 November 2016, Claimant filed its Request for Arbitration (hereinafter “**RfA**”).
132. On 14 February 2017, the Parties jointly communicated with Professor Stanimir Alexandrov (appointed as co-arbitrator by Claimant) and Ms. Jean Kalicki (appointed as co-arbitrator by Respondent), and requested them to proceed with appointment of the third and presiding arbitrator.
133. On 21 March 2017, following the conclusion of a process of consultation agreed by the Parties, the co-arbitrators advised the Parties that they had decided to appoint Professor Pierre Tercier as President of the Tribunal, subject to his confirmation of availability and interest.
134. On 31 March 2017, the co-arbitrators forwarded to the Parties a communication received from Professor Tercier, and invited them to provide any comments.
135. On 7 April 2017, the Arbitral Tribunal was constituted after both Parties confirmed Professor Pierre Tercier as the President of the Tribunal.
136. On 18 April 2017, the Arbitral Tribunal suggested that the Permanent Court of Arbitration (hereinafter “**PCA**”) act as Registry.
137. On 21 April 2017, Respondent agreed with the Arbitral Tribunal’s proposal of 18 April 2017.
138. On the same day, Claimant refused to engage the PCA.
139. On 28 April 2017, Claimant provided the Arbitral Tribunal with a German and a Czech version of the Germany-Czech Republic BIT (hereinafter “**Germany-Czech Republic BIT**”).
140. On 10 May 2017, Claimant provided the Arbitral Tribunal with a corrected German version of the Germany-Czech Republic BIT.
141. On the same day, Respondent also provided the Arbitral Tribunal with a German version of the Germany-Czech Republic BIT.

142. On 16 May 2017, Claimant sent its own proposal concerning the Procedural Timetable to the Arbitral Tribunal.
143. On the same day, Respondent provided the Arbitral Tribunal with its own proposal regarding the Procedural Timetable.
144. On 1 June 2017, Respondent submitted an unofficial English translation of the Germany-Czech Republic BIT to the Arbitral Tribunal.
145. On 5 June 2017, a first conference call on the organisation of the proceedings was held between the Arbitral Tribunal and the Parties. During the call, Claimant withdrew its opposition as regards the engagement of the PCA and agreed to the Arbitral Tribunal's proposal dated 18 April 2017.
146. On 14 June 2017, the Arbitral Tribunal issued ***Procedural Order No. 1*** (hereinafter "**PO 1**"). Thereby, it designated Zurich, Switzerland, as the seat of arbitration and submitted the proceedings to the UNCITRAL Rules in their 2010 version.
147. In its PO 1, the Arbitral Tribunal also noted that the Parties agreed on English being the language of the proceedings. PO 1 further contained as an Annex a proposed Procedural Timetable. The Arbitral Tribunal invited the Parties to discuss the latter and to submit a jointly agreed Procedural Timetable to the Arbitral Tribunal.
148. On 28 June 2017, Claimant informed the Arbitral Tribunal that the negotiations with Respondent as regards the Procedural Timetable had failed. Claimant further stated that it considered the Procedural Timetable proposed by the Arbitral Tribunal as acceptable. However, it requested the Arbitral Tribunal to postpone the deadlines for the Statement of Claim and for the Statement of Defence to 30 August 2017 and 30 November 2017, respectively.
149. On 29 June 2017, Respondent informed the Arbitral Tribunal that it did not object to Claimant having an additional month to file the Statement of Claim, but that Respondent should equally benefit from an additional month for the Statement of Defence, *i.e.* until 29 December 2017.
150. On 30 June 2017, the Arbitral Tribunal informed the Parties that the official English version of the Germany-Czech Republic BIT was the one figuring in the United Nations Treaty Series, as provided by Claimant, with the modification concerning Article 4, para. 2, proposed by Respondent.
151. On the same day, the Arbitral Tribunal invited the Parties to comment on a draft Procedural Order No. 2 concerning the arbitration procedure, including the Procedural Timetable and the appointment of the PCA as the administering institution.
152. On 4 July 2017, Claimant requested the Arbitral Tribunal to modify the Procedural Timetable annexed to the draft Procedural Order No. 2 in that both deadlines for the Parties' submissions should be extended by one month.

153. On 7 July 2017, Respondent asked the Arbitral Tribunal to reject Claimant's request dated 4 July 2017.
154. On 13 July 2017, in light of the principle of equal treatment, the Arbitral Tribunal rejected Claimant's request as to the modification of the Procedural Timetable, according both Parties an additional month for their submission, *i.e.* Claimant until 30 August 2017 and Respondent until 29 December 2017.
155. On the same day, the Arbitral Tribunal rendered ***Procedural Order No. 2 and Terms of Appointment*** (hereinafter "**PO 2 and ToA**") and suggested to appoint Dr Papp as Secretary to the Arbitral Tribunal.
156. On 15 July 2017, Claimant sought clarification from the Arbitral Tribunal concerning the impact of the CJEU's decision relating to the validity of Intra-EU BITs on the present proceedings.
157. On 18 July 2017, the Arbitral Tribunal, referring to Claimant's letter dated 15 July 2017, informed the Parties that it would only consider the possible impact of this issue on the Procedural Timetable when, and if, Respondent filed a request in relation to the CJEU's decision.
158. On 19 July 2017, Respondent confirmed that it did not object to the appointment of Dr Papp as Secretary to the Arbitral Tribunal.
159. On 11 August 2017, Claimant agreed with the appointment of Dr Papp as Secretary to the Arbitral Tribunal.
160. On 30 August 2017, the Parties agreed to extend Claimant's deadline for the submission of its Statement of Claim to 30 September 2017.
161. On 12 September 2017, the Arbitral Tribunal noted the Parties' agreement as regards the modified Procedural Timetable and acknowledged receipt of the latter.

2. The exchange of briefs

162. On 1 October 2017, Claimant submitted its ***Statement of Claim*** (hereinafter "**SoC**"), together with factual exhibits C-1 to C-238 and legal exhibits CL-1 to CL-102.
163. On 18 October 2017, the Arbitral Tribunal acknowledged receipt of Claimant's SoC, pointing out that the SoC contained a number of deficiencies and non-conformities with the requirements set out in PO 2, most notably the absence of witness statements and expert reports. The Arbitral Tribunal requested Claimant to inform Respondent and the Arbitral Tribunal by 23 October 2017 about how it intended to remedy these deficiencies. The Arbitral Tribunal also requested Respondent to comment on Claimant's proposal by 25 October 2017.

164. On 23 October 2017, Claimant answered the Arbitral Tribunal’s request dated 18 October 2017. Claimant stated, *inter alia*, that it would need to submit at least two expert reports to fully present its case.
165. On 24 October 2017, Respondent requested an extension of the deadline to comment on Claimant’s proposal until 30 October 2017.
166. On the same day, the Arbitral Tribunal invited Respondent to submit its comments to Claimant’s letter dated 23 October by 27 October 2017.
167. On 27 October 2017, Respondent commented on Claimant’s proposal dated 23 October 2017.
168. On 28 October 2017, Claimant replied to Respondent’s comments dated 27 October 2017.
169. On 30 October 2017, the Arbitral Tribunal invited Respondent to reply to Claimant’s letter dated 28 October 2017.
170. On 31 October 2017, Respondent replied to Claimant’s comments dated 28 October 2017.
171. On 3 November 2017, the Arbitral Tribunal rendered ***Procedural Order No. 3*** (hereinafter “**PO 3**”), in which the Arbitral Tribunal fixed a final time limit for Claimant to submit a corrected version of its SoC and the related evidence. The Arbitral Tribunal further invited the Parties to agree on an amended Procedural Timetable by 10 November 2017.
172. On 15 December 2017, Claimant submitted the final amended version of its SoC.
173. On 29 June 2018, Respondent submitted its ***Objections to Jurisdiction and Statement of Defence*** (hereinafter “**SoD**”), along with the factual exhibits R-6 to R-63 and the legal authorities RL-28 to RL-188.
174. On 10 October 2018, Claimant submitted its ***Answer to Objections to Jurisdiction and Statement of Reply*** (hereinafter “**Reply**”).
175. On 15 June 2019, Respondent submitted its ***Reply on Objections to Jurisdiction and Statement of Rejoinder*** (hereinafter “**Rejoinder**”).

3. The Application for Security for Costs and the Request for Bifurcation

176. On 15 January 2018, Respondent submitted its ***Application for Security for Costs*** (hereinafter “**Respondent’s Application**”).

177. On 16 January 2018, the Arbitral Tribunal invited Claimant to answer to Respondent's Application until 30 January 2018.
178. On 31 January 2018, Claimant informed the Arbitral Tribunal that it would reply to Respondent's Application by 30 March 2018.
179. On 1 February 2018, the Arbitral Tribunal invited Respondent to comment on Claimant's request for the extension of the time-limit to reply to Respondent's Application.
180. On 2 February 2018, Respondent objected to Claimant's request dated 31 January 2018 and asked the Arbitral Tribunal to order Claimant to submit its reply immediately.
181. On 6 February 2018, the Arbitral Tribunal extended the time-limit for Claimant until 28 February 2018.
182. On 28 February 2018, Claimant submitted its *Answer to the Application for Security for Costs* (hereinafter "**Claimant's Answer**").
183. On 1 March 2018, the Arbitral Tribunal invited Respondent to comment on Claimant's Answer by 8 March 2018, and Claimant to respond to Respondent's comments by 15 March 2018.
184. On 8 March 2018, Respondent submitted its Comments to Claimant's Answer.
185. On 15 March 2018, Claimant replied to Respondent's Comments to Claimant's Answer.
186. On 28 March 2018, the Arbitral Tribunal rendered *Procedural Order No. 4 on Respondent's Application* (hereinafter "**PO 4**"), thereby denying Respondent's Application.
187. On 11 April 2018, Respondent submitted its *Request for Bifurcation* (hereinafter "**Request**"), requesting the Arbitral Tribunal to "*bifurcate these proceedings to decide the question of jurisdiction as a preliminary question, with respect to the Intra-EU BIT Objection*" and to modify the Procedural Timetable "*so that it may file a Memorial on Jurisdiction, instead of a Statement of Defense, on 29 June 2018*".
188. On 26 April 2018, Claimant submitted its *Answer to the Request for Bifurcation*.
189. On 4 May 2018, Respondent submitted its *Reply to the Answer*.
190. On 14 May 2018, Claimant submitted its *Comments to the Answer*.
191. On 24 May 2018, the Arbitral Tribunal rendered *Procedural Order No. 5 on Respondent's Request* (hereinafter "**PO 5**"), thereby rejecting Respondent's Request and maintaining the Procedural Timetable.

4. The Request for Document Production

192. On 13 July 2018, Claimant confirmed that it did not wish to submit any request for document production.
193. On 27 July 2018, Claimant informed the Arbitral Tribunal about its objections to Respondent's request for document production and requested a further opportunity to submit its request for document production.
194. On 10 August 2018, Respondent filed its *Request for Document Production* in the form of a completed Redfern Schedule and requested the Arbitral Tribunal to reject Claimant's request for an additional document production phase.
195. On 24 August 2018, the Arbitral Tribunal rendered *Procedural Order No. 6 on Respondent's Request for Document Production* (hereinafter "**PO 6**"), whereby the Arbitral Tribunal ordered Claimant to produce the documents pursuant to the decisions set out in the Annex to PO 6 by 3 September 2018.

5. The supplementary deposit and the conditional termination of the proceedings

196. On 12 July 2018, the PCA requested the Parties to establish a supplementary deposit by 13 August 2018.
197. On 27 July 2018, Respondent paid its share of the supplementary deposit.
198. On 13 August 2018, Claimant requested the Arbitral Tribunal to extend the deadline for the payment of the supplementary deposit until 30 September 2018.
199. On 14 August 2018, the Arbitral Tribunal granted the extension requested by Claimant on 13 August 2018.
200. On 27 September 2018, Claimant asked the Arbitral Tribunal for a second extension of the deadline to pay the supplementary deposit.
201. On 16 October 2018, the Arbitral Tribunal deemed the non-payment of the supplementary deposit by Claimant to be unjustified and invited Claimant to pay the supplementary deposit by 31 October 2018.
202. On 30 October 2018, Claimant requested a two-month extension of the time-limit to pay its share of the supplementary deposit, *i.e.* until 31 December 2018, explaining that it needed external funding to continue the present arbitral proceedings and that it was currently waiting for a decision from HSH in that regard. This was Claimant's third request for extension of the deadline.

203. On 8 November 2018, Respondent asked the Arbitral Tribunal to deny Claimant's request for a further extension of time to pay its share of the supplementary deposit, to order the immediate termination of the arbitral proceedings and to decide that Claimant shall bear the costs of the arbitration.
204. On 9 November 2018, Respondent drew the Arbitral Tribunal's attention to the fact that the German Supreme Court had set aside the *Achmea v Slovak Republic v Achmea B.V.* arbitral award.
205. On 20 November 2018, the Arbitral Tribunal rendered ***Procedural Order No. 7*** (hereinafter "**PO 7**"). Thereby, the Arbitral Tribunal extended the deadline to pay Claimant's share of the supplementary deposit one last time until 2 January 2019 and decided that if none of the Parties made the requested payment until this deadline, the Arbitral Tribunal would terminate the arbitral proceedings in conformity with Article 43(4) of the UNCITRAL Rules. The Arbitral Tribunal thus rejected Respondent's request for immediate termination of the proceedings.
206. The Tribunal further denied Respondent's renewed request for security for costs, thereby maintaining PO 4 in force. Referring to Respondent's email of 9 November 2018, the Arbitral Tribunal concluded PO 7 by inviting the Parties to refrain from discussing issues concerning the Arbitral Tribunal's jurisdiction or the merits of the case outside of their submissions.
207. On 28 December 2018, Claimant informed the Arbitral Tribunal that it did not obtain funding from HSH to continue the present proceedings. Claimant also indicated its willingness to enter into settlement negotiations with Respondent, and in case such negotiations failed, to request the consolidation of the present proceedings with two other pending arbitral proceedings opposing Claimant and Mr Fischer to Respondent.
208. On 9 January 2019, based on PO 7, Respondent requested the Arbitral Tribunal to immediately terminate the arbitral proceedings, in accordance with Article 43(4) of the UNCITRAL Rules.
209. On 16 January 2019, the Arbitral Tribunal rendered ***Procedural Order No. 8 on the conditional termination of the proceedings*** (hereinafter "**PO 8**"). Thereby, the Arbitral Tribunal ordered the suspension of the proceedings until 13 February 2019 and stated that "[u]nless payment of Claimant's share of the supplementary deposit [was] received until this date or the Parties submit a joint request for the continuation of the proceedings for some other reason, the Arbitral Tribunal [would] terminate the present proceedings without any further procedural steps."

6. The continuation of the proceedings

210. On 22 February 2019, Claimant requested the Arbitral Tribunal to reconsider its decision to terminate the proceedings, and informed the Arbitral Tribunal that it wired its share of the supplementary deposit on the same day.
211. On 3 March 2019, Claimant informed the Arbitral Tribunal that the payment of its share of the supplementary deposit was “*third-party financed*”.
212. On 13 March 2019, the Arbitral Tribunal rendered ***Procedural Order No. 9*** (hereinafter “**PO 9**”), whereby it lifted the suspension of the proceedings ordered in PO 8. The Arbitral Tribunal further invited the Parties to submit their comments to the European Commission’s Application for leave to intervene as non-disputing party (hereinafter “**European Commission’s Application**”), dated 21 December 2018.
213. On 14 March 2019, in a letter to the Arbitral Tribunal, Respondent made a ***Request for additional information concerning the payment of Claimant’s share of the supplementary deposit*** (hereinafter “**Respondent’s Request for Information**”).
214. On 20 March 2019, Claimant commented on Respondent’s Request for Information.
215. On 27 March 2019, Claimant and Respondent each sent a letter to the Arbitral Tribunal, commenting on the European Commission’s Application. Claimant objected to the intervention of the Commission as a non-disputing party. Respondent was not opposed to the intervention, provided that the Parties would be given the opportunity to comment on the Commission’s submissions.
216. On 5 April 2019, the Arbitral Tribunal rendered ***Procedural Order No. 10 on the European Commission’s Application*** (hereinafter “**PO 10**”). The Arbitral Tribunal granted the European Commission’s Application, subject to certain conditions.
217. On the same day, the Arbitral Tribunal issued ***Procedural Order No. 11 on Respondent’s Request for Information*** (hereinafter “**PO 11**”), ordering Claimant to reveal the identity of the person or entity that made the payment of Claimant’s share of the supplementary deposit. The Arbitral Tribunal further ordered Claimant to disclose whether the person or entity that made the payment had a stake in the outcome of the case.
218. On 15 April 2019, Claimant confirmed to have had recourse to a personal loan to fund its share of the supplementary deposit, without disclosing the identity of the funder.
219. On 29 April 2019, the European Commission submitted an ***Amicus Curiae Brief*** to the Arbitral Tribunal.
220. On 15 June 2019, Respondent submitted a ***Request for Reconsideration and Security for Costs***.

221. On 24 June 2019, Claimant commented on Respondent's Request for Reconsideration and Security for Costs.
222. On 7 July 2019, the Arbitral Tribunal invited Claimant to share certain information, namely a recent balance sheet, specification as to who was the beneficiary of the personal loan provided by Mr Fischer's friend, and specification as to whether the loan was conditioned to be used for the purposes of financing the present proceedings only.
223. On 16 July 2019, Claimant submitted a *Sur-Rejoinder on Jurisdiction* (hereinafter "**Claimant's Sur-Rejoinder**").
224. On 25 July 2019, Respondent requested the Arbitral Tribunal to strike Claimant's Sur-Rejoinder from the record.
225. On 30 July 2019, Claimant commented on Respondent's request to strike Claimant's Sur-Rejoinder from the record and provided information requested by the Arbitral Tribunal on 7 July 2019 (*cf.* above para. 222).
226. On 19 August 2019, the Arbitral Tribunal rendered *Procedural Order No. 12 on Respondent's Request for Reconsideration of the Arbitral Tribunal's decision on Security for Costs and to strike Claimant's Sur-Rejoinder from the record* (hereinafter "**PO 12**"). Thereby, the Arbitral Tribunal rejected Respondent's Request for Reconsideration and Security for Costs. The Arbitral Tribunal further rejected Respondent's request to strike Claimant's Sur-Rejoinder from the record, but agreed to disregard the parts of the Sur-Rejoinder that were not in compliance with the Arbitral Tribunal's instructions set out in PO 2.

7. The Hearing

227. On 6 August 2019, the Arbitral Tribunal sent the hearing schedule to the Parties.
228. On 19 August 2019, the Arbitral Tribunal reminded the Parties that the hearing would take place on 27 and 28 August 2019 at the Peace Palace in The Hague. It further informed the Parties that all organisational measures had been taken by Mr [REDACTED], Legal Counsel at the PCA, and that the Arbitral Tribunal did not consider it necessary to hold a pre-hearing conference.
229. On 27 August 2019, the **Hearing** took place at the Peace Palace in The Hague. Neither Party having presented any witnesses for examination, the Hearing consisted of oral arguments on behalf of the Parties and questions by the Tribunal.
230. On 19 September 2019, Respondent submitted the full Czech text of Exh C-238 as well as the full English translation. Respondent also confirmed that the Parties agreed on the corrections to the transcript and communicated the corrections to the court reporter.

231. On 25 September 2019, Claimant and Respondent each submitted their Statement of Costs to the Arbitral Tribunal.
232. On 27 September 2019, the court reporter submitted the final transcript as agreed by the Parties.
233. On 21 October 2019, the Arbitral Tribunal sent the European Commission's *Amicus Curiae Brief* (hereinafter "**Amicus Brief**") and its annexes to the Parties.
234. On 12 November 2019, Respondent informed the Arbitral Tribunal that it did not wish to make any comments on the Amicus Brief.
235. On 12 November 2019, Claimant, while providing a certain number of comments on the Amicus Brief, requested the Arbitral Tribunal not to consider the Amicus Brief in its Final Award.
236. On 15 November 2019, the Arbitral Tribunal informed the Parties that it would decide on the admissibility of the Amicus Brief in its Final Award. It also invited Respondent to respond to Claimant's comments regarding the content of the Amicus Brief.
237. On 26 November 2019, Respondent rebutted (1) Claimant's argument for the Arbitral Tribunal not to admit the Amicus Brief and (2) Claimant's comments on the content of the Amicus Brief. Respondent requested the Arbitral Tribunal to take into account the Amicus Brief when deciding on the Czech Republic's Intra-EU BIT Objection.
238. On 2 December 2019, the Arbitral Tribunal acknowledged receipt of both Parties' letters and e-mails and stated that it will decide this issue in its Final Award.
239. On 4 December 2019, Respondent informed the Arbitral Tribunal that, on 29 October 2019, the Czech Constitutional Court rendered a decision in the national proceedings of AMF against the Ministry of Justice of the Czech Republic for compensation of damages allegedly caused by the bankruptcy trustees in connection with inclusion of the aircrafts into the bankruptcy estate of Charter Air, during Charter Air's insolvency proceedings. Respondent requested leave to introduce the decision of the Czech Constitutional Court in the record. It informed the Arbitral Tribunal that Claimant had not consented to the introduction of the decision into the proceeding.
240. On 6 December 2019, the Arbitral Tribunal invited Claimant to communicate its position on the inclusion of the judgement on the record.
241. On 10 December 2019, Claimant requested that the Czech Constitutional Court's decision not be put on the record.
242. On 19 December 2019, by means of Procedural Order No. 13, the Arbitral Tribunal granted Respondent's request to put the decision rendered by the Czech Constitutional Court on the record and invited the Parties to comment on the content of the decision.

243. On 8 January 2020, Respondent stated that the Czech Constitutional Court’s decision confirmed what it pointed out when answering the Tribunal’s questions during the Hearing.
244. On 21 January 2020, Claimant stated that Respondent’s comments lacked “*material arguments*”; criticised the Constitutional Court’s decision; and stated that “*there is an irreparable breach in Claimant’s trust and confidence on any dispute resolution system that Respondent has to offer*”.
245. On 19 March 2020, the Arbitral Tribunal closed the proceedings according to Article 31(1) of 2010 UNCITRAL Arbitration Rules. It also invited the Parties to submit their Statements of Costs and informed them that the PCA would communicate a final call for a supplementary advance of fees.
246. On the same day, the PCA invited the Parties to make a supplementary deposit of USD 60,000 (i.e. USD 30,000 from each Party) by 20 April 2020.
247. On 6 April 2020, Claimant requested a statement of itemized costs of the Tribunal for its potential arbitration funder.
248. On 10 April 2020, the Arbitral Tribunal provided the statement of account as of 7 April 2020 prepared by the PCA.
249. On 13 April 2020, Claimant requested further explanations of the Tribunal’s costs and timesheets of each member of the Tribunal.
250. By letter dated 15 April 2020, the Arbitral Tribunal stated that it considered the provided information to be sufficient in accordance with the established practice. The Parties were ordered to submit the statements of costs by 17 April 2020; and to pay the required supplementary amount by 20 April 2020.
251. On 22 April 2020, Respondent paid its share of the supplementary amount required by the Arbitral Tribunal.
252. Claimant failed to pay its share.

B. LEGAL CONSIDERATIONS

I. In general

1. The arbitration agreement and the applicable legal framework

253. Article 10 of the Germany-Czech Republic BIT provides as follows:

(1) Disputes between either Contracting Party and an investor of the other Contracting Party should, as far as possible, be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months from the date on which it was officially raised by either party to the dispute, it shall at the request of the investors of the other Contracting Party, be submitted for arbitration. In the absence of any other arrangement between the parties to the dispute, the provisions of article 9, paragraphs 3 to 5 shall apply mutatis mutandis, subject to the proviso that the appointment of the members of the arbitral tribunal shall be appointed by the parties to the dispute in accordance with the provisions of article 9, paragraph 3, and that, if the time-limits provided for in article 9, paragraph 3, are not observed, either party to the dispute may, in the absence of any other arrangement request the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments, unless parties in disputes have not agreed otherwise. The award shall be recognized and enforced under the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. [United Nations, Treaty Series, vol. 330, p. 3]

(3) The Contracting Party which is a party to the dispute shall not in course of arbitration proceedings or the execution of the arbitral award raise an objection on the grounds that the investor who is the other party to the dispute has already received compensation for all or part of his losses under an insurance policy”.

254. The present arbitral proceedings have the following characteristics:

- The *institution* chosen to administer the present dispute and serve as registry is the Permanent Court of Arbitration (PO 2 para. 21).
- The *seat* of the arbitration is in Zurich, Switzerland (PO 2 para. 3.1).
- The *language* of the arbitration is English (PO 2 para. 6).

- The *law applicable to the procedure* is the UNCITRAL Rules in their 2010 version. If these provisions and rules do not address a specific procedural issue, the Arbitral Tribunal shall, after consultation with the Parties, determine the applicable procedure. In addition, the Arbitral Tribunal may seek guidance from, but shall not be bound by, the IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010 version) (PO 2 para. 5).
- The *law applicable to the merits* will be decided in the present award (*cf.* paras 499-504 below).

2. The constitution of the Arbitral Tribunal

255. The constitution of the Arbitral Tribunal has been described above (*cf.* above paras 132-135). Neither Party has challenged the constitution of the Arbitral Tribunal.

3. The arbitral proceedings

256. The arbitral proceedings have been described in full detail above (*cf.* above paras 131 et seq).
257. The Parties had ample opportunity to present their case in the form of several exchanges of written submissions; as well as at the Hearing.
258. At the end of the Hearing, the Parties confirmed that they had no objection to the manner in which the present proceedings were conducted (Tr 172:18-25 and 173:1-2).

4. The closing of the hearings

259. The proceedings were closed by the Arbitral Tribunal in accordance with Article 31(1) of 2010 UNCITRAL Arbitration Rules on 19 March 2020.

5. The Parties' prayers for relief

5.1 Claimant's prayers for relief

260. In its last written submission (Reply, p. 28), Claimant requested the following relief (the numbering in brackets has been added by the Arbitral Tribunal for ease of reference):

- [Claim. 1] *The Arbitral Tribunal has jurisdiction over all claims submitted by Claimant;*
- [Claim. 2] *All claims submitted by the Claimant are admissible;*
- [Claim. 3] *Respondent has breached the standard of just and equitable treatment under Article 2 (1) BIT;*
- [Claim. 4] *Respondent has breached the standard of full protection and full security under Article 2 (3) and 4 (1) BIT in conjunction with Article 2 (3) BIT;*
- [Claim. 5] *Respondent has breached the standard of non-arbitrary or discriminatory measures under 2 (2) BIT;*
- [Claim. 6] *Respondent has subjected the investments and investor to a measure with effects equivalent to expropriation under article 4 (2) in conjunction with article 4 (2) of the bilateral investment treaty valid between Czech Republic and Sweden, as well as Article 6 (4) bilateral investment treaty valid between Czech Republic and Kuwait;*
- [Claim. 7] *For the above breaches of its international obligations under BIT, Respondent shall pay:*
- [Claim. 7.1] *material damages in the amount of USD 375,328,861.00 (three hundred seventy five million three hundred twenty eight thousands eight hundred sixty one American dollars), of which the principal sum is USD 190,752,000.00 (one hundred ninety million seven hundred fifty two thousand American dollars) and interests in the amount of 184,576,861.00 (nine hundred);*
- [Claim. 7.2] *Each Party shall bear its own costs of legal representation and the costs of the arbitrator appointed by it. Both Parties shall share the costs of the Chairman of the arbitration tribunal equally. While Claimant will accept to carry its own costs in case of an award in its favour, it won't agree to support Respondent's costs in case of an award in favour of the latter. Should the Arbitral Tribunal decide otherwise, the costs incurred to Claimant in the amount of 1,127,924.90 EUR should be borne by Respondent (Claimant's Statement of Cost of 25 September 2019).*

In the second part of the Hearing, Claimant withdrew its claim for moral damages (Tr 122:24-25 and 123:1).

5.2 Respondent's prayers for relief

261. In its last written submission (Rejoinder, para. 51), Respondent requested the following relief (the numbering in brackets has been added by the Arbitral Tribunal for ease of reference):

[Resp. 1] *Declare that it has no jurisdiction over Claimant's claims;*

[Resp. 2] *Alternatively, declare that the Czech Republic has not breached the Treaty and dismiss all of Claimant's claims in their entirety; and*

[Resp. 3] *In any event, order Claimant to fully reimburse the Czech Republic for the costs it has incurred in defending its interests in this arbitration, plus interest on any costs at a rate to be determined by the Tribunal.*

5.3 The issues to be determined and the structure of the Award

262. In order to decide on the prayers for relief, the Arbitral Tribunal will analyse the issues raised by the Parties in the following order:

- It will first decide whether it has jurisdiction to hear the present dispute (below II);
- It will then determine whether Respondent breached the provisions of the Germany-Czech Republic BIT and whether it is liable for these breaches (below III);
- Finally, the Arbitral Tribunal will determine and allocate the costs of the present proceedings (below IV).

263. For each issue, the Arbitral Tribunal will first summarise the Parties' positions and then set forth its analysis. Concerning the summaries of the Parties' positions, they are not exhaustive. They present the Parties' main arguments, in which other arguments might be subsumed. However, this does not mean that the Arbitral Tribunal did not consider all of the Parties' arguments when making its decision.

II. Jurisdiction

1. The issues

264. Respondent contests the Arbitral Tribunal's jurisdiction on several grounds:

- The Arbitral Tribunal lacks jurisdiction over the dispute because, in accordance with the *Slovak Republic v Achmea B.V.* decision (hereinafter “**Achmea decision**” or “**Achmea judgement**”) of the Court of Justice of the European Union (hereinafter “**CJEU**”), the arbitration agreement contained in the Germany-Czech Republic BIT is invalid (*cf.* below 2);
- the Arbitral Tribunal lacks jurisdiction *ratione personae* over Claimant’s claims (*cf.* below 3);
- the Arbitral Tribunal lacks jurisdiction *ratione materiae* over Claimant’s claims (*cf.* below 4);
- the Arbitral Tribunal lacks jurisdiction because Claimant brought its claims in bad faith (*cf.* below 5).

265. The Arbitral Tribunal will also ascertain whether the Parties agreed to arbitrate the present dispute (*cf.* below 6).

266. Claimant rejects Respondent’s objections to the Arbitral Tribunal’s jurisdiction.

2. The effect of the Achmea decision on the Arbitral Tribunal’s jurisdiction

2.1 The Parties’ positions

2.1.1 Respondent’s position

267. For Respondent, the Arbitral Tribunal must decline jurisdiction because the arbitration provision in the Germany-Czech Republic BIT is precluded by European Union law (hereinafter “**EU law**”).

268. *First*, Respondent argues that the Arbitral Tribunal is bound by the *Achmea* judgment, and must conclude that there exists no valid arbitration agreement between the Parties.

269. In order to determine the validity of the arbitration agreement, Respondent refers the Arbitral Tribunal to Article 178(2) of the Swiss Private International Law Act (hereinafter “**PILA**”). According to this provision, for an arbitration agreement to be valid, it must conform either to: (i) the law chosen by the Parties; (ii) the law governing the subject matter of the dispute; or (iii) Swiss law (SoD, paras 176-178).

270. In PO1, the Parties came to a broad agreement that the law applicable to the dispute is the Germany-Czech Republic BIT, supplemented by international law. This agreement should be understood as also applying to the law governing the arbitration agreement. Once international law governs the arbitration agreement, EU law necessarily applies as well (SoD, paras 179-181).

271. Investment tribunals have repeatedly affirmed that EU law forms part of international law (SoD, para. 182). Claimant, having pleaded its treaty claims with reference to the EU Treaties and CJEU case law, expressly accepts the application of EU law to this dispute (SoD, paras 183-185). Therefore, in accordance with Article 178(2) PILA, the Arbitral Tribunal must apply EU law to determine the validity of the arbitration agreement (SoD, para. 186).
272. Even if the Arbitral Tribunal were to apply Swiss law to the validity of the arbitration agreement, the Arbitral Tribunal cannot ignore the role of international law in the formation of the arbitration agreement. The offer to arbitrate is contained in an international treaty between States, governed exclusively by international law (SoD, para. 187).
273. In line with the *Achmea* judgment, the Czech Republic's offer to arbitrate contained in the Germany-Czech Republic BIT was invalidated when the Czech Republic became a Member State of the EU in 2004. In essence, the *Achmea* judgment considers that EU law, applied as international law between the Contracting States, can affect a State's capacity to consent to arbitration, thereby impacting even the jurisdiction of tribunals established outside the EU legal order (SoD, paras 188-192). The fact that Advocate General Wathelet considered the arbitration provisions in Intra-EU BITs to be compatible with EU law is irrelevant, since his opinion has no legal force and was not followed in the *Achmea* judgement (SoD, para. 163; Rejoinder, para. 35).
274. The *Achmea* judgment created a conflict between Article 10 of the Germany-Czech Republic BIT and Articles 267 and 344 of the Treaty on the functioning of the European Union (hereinafter "TFEU"). Applying the relevant conflict rules, be it those of the Vienna Convention on the Law of the Treaties (hereinafter "VCLT") or Article 351 of the TFEU, the conclusion is the same: Article 10 of the Germany-Czech Republic BIT is incompatible with a subsequent treaty, the TFEU, and became inapplicable as of the Czech Republic's accession to the EU in 2004 (Tr 68:12-25).
275. The *Achmea* judgment is not about applicable law, but about the fundamental principles of EU law: mutual trust and sincere cooperation. The reference to the applicable law in the judgment has to be understood in this broader context, as the CJEU itself explains in paragraph 56 of the judgment (Tr 137, 138 and 139:1-11).
276. Respondent also notes that, in January 2019, all EU Member States, including Germany and the Czech Republic declared arbitration clauses contained in intra-EU BITs to be inapplicable (Rejoinder, para. 38). Pursuant to Article 31 of the VCLT, this declaration constitutes a subsequent agreement between the Parties regarding the interpretation of the Germany-Czech Republic BIT or the application of its provisions or subsequent practice in the application of the Germany-Czech Republic BIT, which establishes the agreement of the Parties regarding its interpretation (Tr 68:17-25).

277. Therefore, when Claimant submitted its Notice of Arbitration in 2016, there was no offer to arbitrate for Claimant to accept. Accordingly, no valid arbitration agreement could have been concluded between the Parties (SoD, para. 193).
278. This approach is upheld even though these arbitration proceedings are seated outside the EU, because this is a pure question of international law (SoD, para. 191).
279. *Second*, and in the alternative, Respondent claims that, due to the *Achmea* judgement, the subject matter of the dispute cannot be validly submitted to arbitration.
280. Even if the Arbitral Tribunal were to consider EU law not a part of international law, EU law is nevertheless applicable to this dispute. EU law forms part of both Czech and German law, and the Parties agreed in PO 1 that these laws would govern the present dispute (SoD, para. 194). Contrary to what Claimant alleges in its SoC, it does not treat EU law as a mere fact, but invokes it as a more favourable law to plead its treaty claims (SoD, para. 195).
281. Arbitrability, *i.e.* whether a dispute is capable of resolution by arbitration, is a prerequisite to the validity of the arbitration agreement and, therefore, the jurisdiction of the Arbitral Tribunal. The question of arbitrability is governed by the *lex arbitri*. For a tribunal with seat in Switzerland, the relevant legal provisions are Articles 19 and 177(1) PILA. Despite the broad formulation of these provisions, an arbitral tribunal seated in Switzerland may restrict the notion of arbitrability in the presence of foreign law when such law constitutes a mandatory rule (SoD, paras 196-198; Tr 69:19-23).
282. In the *Tensaccai v Freysinnet* case, the Swiss Federal Tribunal decided that EU law constitutes such mandatory foreign law under the “shared-values” test established by the Federal Tribunal. An arbitral tribunal seated in Switzerland must apply the relevant foreign mandatory rule when a party invokes EU law (SoD, paras 202-206).
283. Therefore, it follows from the *Tensaccai v Freysinnet* judgment that the Arbitral Tribunal must apply the foreign mandatory rule established in the *Achmea* judgment according to which the arbitration provision contained in Article 10 of the Germany-Czech Republic BIT is precluded by EU law.
284. The Arbitral Tribunal must conclude that this dispute is inarbitrable under Article 177(1) PILA, and that there is no valid arbitration agreement between the Parties.
285. *Third*, and in any event, Respondent argues that the Arbitral Tribunal should decline jurisdiction out of comity for the *Achmea* judgement.
286. Comity is a principle of judicial restraint, founded on mutual respect for the integrity and competence of tribunals. International tribunals generally exercise comity either by (i) suspending one legal proceeding pending resolution of another; or (ii) giving legal relevance to judgments by other courts and international tribunals, once rendered

(SoD, paras 210-216). Based on this, Respondent considers that the Arbitral Tribunal should exercise comity towards the *Achmea* judgment and decline jurisdiction.

287. If the Arbitral Tribunal forced the Czech Republic to arbitrate, the latter would be bound by contradictory obligations or decisions. As a Member State of the EU, the Czech Republic is bound by the *Achmea* judgment. It would violate its obligations under EU law if it were forced to arbitrate the merits of the present dispute (SoD, para. 218).
288. Moreover, it would be unreasonable and inappropriate for the Arbitral Tribunal to exercise jurisdiction because this would undermine the CJEU's authority to have the last word on the interpretation of EU law, in particular, since the Arbitral Tribunal decided to seat these proceedings outside the EU (SoD, para. 219; Rejoinder, para. 37).
289. Disregarding the *Achmea* judgement would not efficiently resolve litigation. If this Arbitral Tribunal ignored the *Achmea* judgement, it would create uncertainty as to which fora are available to resolve intra-EU investment disputes (SoD, para. 220).
290. Finally, Respondent never argued that intra-EU BITs had been automatically terminated, but rather that the arbitration clauses contained in the BITs were contrary to Union law and thus inapplicable (Respondent's letter dated 26 November 2019).
291. Consequently, Respondent requests the Arbitral Tribunal to follow the *Achmea* judgement and, as a result, to decline jurisdiction.

2.1.2 *Claimant's position*

292. For Claimant, the *Achmea* judgement has no impact on the jurisdiction of the Arbitral Tribunal.
293. Claimant considers that whether or not an award is enforceable is not a matter to be decided by the Arbitral Tribunal, and any award may be issued without regard to the *Achmea* decision (Reply, para. 125). In any event, the award rendered by the Arbitral Tribunal will not be unenforceable. Even Advocate General Wathelet spoke in favour of the validity of arbitration clauses in Intra-EU BITs (Reply, para. 126).
294. Claimant also expresses doubts as to “*whether an arbitration provision in a treaty between an EU member state and a non-member state, which must be assumed as valid in light of the ECJ [CJEU] jurisprudence, might be discriminatory against investors from EU member states, when precluding them from the right that a non-EU investor may enjoy*” (Reply, para. 127).
295. Claimant further states that, since the Arbitral Tribunal is seated outside the EU, the award will never be reviewed by the CJEU (Reply, para. 128). Moreover, as long as the Treaty has not been terminated, the arbitration clause contained therein remains valid, notwithstanding the *Achmea* judgment or any declaration by EU governments.

The Germany-Czech Republic BIT is a binding contract between the two States, and not only its conclusion but its termination also has to be submitted to the approval of the national parliaments (Reply, para. 129; Tr 111:10-19).

296. The January 2019 Declarations are a mere interpretation exercise made by its Signatories, and concern only the future legal consequences of the *Achmea* judgment. In particular, by stating that intra-EU BITs will be terminated, the Signatories admit that these treaties have not been automatically terminated due to the *Achmea* judgment (Claimant's letter dated 12 November 2019).

297. Therefore, despite the *Achmea* judgement, the Arbitral Tribunal has jurisdiction to hear the present dispute.

2.1.3 *Non-disputing party's position*

298. The European Commission submitted an *amicus curiae* brief on 29 April 2019, explaining that the Arbitral Tribunal lacked jurisdiction to hear the present dispute in light of the *Achmea* judgment, as the offer of the Czech Republic to investors from Germany to enter into investment arbitration contained in the Germany-Czech Republic BIT was invalidated with the accession of the Czech Republic to the EU in 2004 (Amicus Brief, para. 1).

299. The European Commission points specifically to two consequences of the *Achmea* judgment.

300. *First*, the findings of the *Achmea* judgment apply to all intra-EU BITs. The purpose of the preliminary ruling procedure under Article 267 TFEU is to give a binding interpretation of EU law and not to decide the case before it. Indeed, the preliminary ruling procedure is the keystone of uniform interpretation and application of EU law (Amicus Brief, paras 5 and 23).

301. Moreover, the operative part of the judgment refers to “*a provision in an international agreement concluded between Member States*” (Amicus Brief, para. 27).

302. The above is confirmed by the interpretative declarations issued by the EU Members States on 15 and 16 January 2019, pursuant to Articles 31(2)(b) and 31(3)(a) of the VCLT on the legal consequences of the *Achmea* judgment and on investment protection in the EU (hereinafter “**the January Declarations**”; Amicus Brief, paras 21-22). The January Declarations were signed both by Germany and the Czech Republic, and all declarations are identical insofar as the legal effects of the *Achmea* judgment for intra-EU BITs are concerned (Amicus Brief, para. 13).

303. The *Achmea* judgment further establishes that the general principle of autonomy of EU law and Article 19 of the Treaty on European Union as well as Articles 267 and 344 preclude any intra-EU investment arbitration.

304. Article 19 of the Treaty on European Union obliges the Member States to provide sufficient remedies to ensure effective legal protection in the fields covered by EU law. Together with the remedies provided for in the Treaties, a complete system of judicial protection is thereby ensured, which protects the integrity of the EU legal order (Amicus Brief, para. 4).
305. Arbitral tribunals established under intra-EU BITs do not form part of the judicial system of the EU and cannot be regarded as courts of the Member States within the meaning of Article 267 TFEU. As such, they cannot make reference to the CJEU for preliminary ruling, which calls into question the principle of mutual trust between Member States and the preservation of the nature of EU law, and thus the autonomy of EU law (Amicus Brief, para. 24). The principle of mutual trust is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TFEU (Amicus Brief, para. 7).
306. The objective of Article 267 is reinforced by Article 344 TFEU, which prohibits Member States from creating, in relation to any matter implicating EU law, dispute settlement mechanisms other than those set out in the EU Treaties (Amicus Brief, para. 5).
307. CJEU judgments contain a binding and authoritative interpretation of the relevant provisions of EU law for all Member States and any investors established in the Member States. These judgments are also binding, as part of international law applicable to the dispute and upon intra-EU arbitral tribunals (Amicus Brief, para. 26).
308. *Second*, the effects of the *Achmea* judgment apply *ex tunc*, since 1 May 2004. The decisions of the CJEU only interpret the law and do not create new law. Therefore, the conflict between the Germany-Czech Republic BIT and EU law has existed since 1 May 2004, the accession of the Czech Republic to the EU. As such, consent to arbitration was lacking *ab initio*. This was confirmed by the January Declarations (Amicus Brief, paras 28-29).
309. The Commission further states, and the January Declarations confirm, that EU law takes precedence over bilateral investment treaties concluded between Member States. To the extent there is a TFEU-based exception to this rule, it is limited in scope: Article 351(1) TFEU only protects rights of third States, but not rights of Member States. Such primacy also applies to international treaties that have been concluded between a Member State and another Member State, which acceded to the EU only after the conclusion of that agreement, as of the day of accession (Amicus Brief, paras 32-35).
310. As a matter of public international law, the starting point is to apply the special conflict rule of EU law, namely primacy of EU law vis-à-vis other international agreements concluded between Member States. The rule in Article 30 (3) to (5) of the VCLT was conceived as residual (Amicus Brief, paras 36-37 and 39).

311. EU law is based on the general principle of its primacy over not only the domestic laws of Member States, but also over international treaties concluded between two Member States. It is an unwritten element of primary EU law, at the same rank in the hierarchy of norms as the TFEU itself. It is closely linked to the unity of the EU legal order, without which this latter would not be able to function as such (Amicus Brief, paras 6 and 38-39).
312. In any event, the application of the conflict rules between successive treaties as enshrined in Articles 59 and 30 of the VCLT would lead to the same result (Amicus, Brief, para. 40).
313. Article 59 of the VCLT provides for two scenarios in which the conclusion of a successive treaty gives rise *ex lege* to the implied termination of an existing treaty (Amicus Brief, para. 42).
314. The first is based on the intention of the Contracting Parties. The types of investments listed in the Germany-Czech Republic BIT fall within the ambit of the EU internal market rules. EU law provides for a complete set of legal remedies and effective judicial protection in the event of a violation of those substantive rules. When signing the EU accession treaty of the Czech Republic, both Contracting Parties were aware of the rule of primacy of EU law. Their intention, when signing the accession treaty, was that the protection of intra-EU investments would be governed from that moment by EU law rather than the Germany-Czech Republic BIT (Amicus Brief, paras 43-44).
315. The second concerns the incompatibility between the two treaties. The incompatibility of the arbitration clause contained in the Germany-Czech Republic BIT with EU law has been demonstrated above. The incompatibility between the substantive provisions of the treaties is such that they are not capable of being applied at the same time. The substantive rules of intra-EU BITs constitute a parallel system overlapping with Single Market rules, and which prevent the full application of EU law. This is illustrated by awards that constitute illegal State aid or by the fact that intra-EU BITs confer rights only in respect of investors from one of the two Member States concerned, in conflict with the EU principle of non-discrimination on the ground of nationality (Amicus Brief, para. 45). In any event, Article 59 can lead to a partial termination of an international agreement, if one considers that only the arbitration agreement contained in the Germany-Czech Republic BIT is incompatible with EU law (Amicus Brief, para. 46).
316. The requirement of the same subject matter is automatically met when one of the two above-mentioned scenarios apply. In any event, the test is whether the two treaties govern the same legal situation, which is met in the present case: any investment made by an investor from one Member State in another Member State falls under the scope of application of the EU internal market rules (Amicus Brief, para. 48).
317. Even if there was no implicit termination in the present case, Article 30(3) of the VCLT would still apply in the present case. It applies to all situations where there is a conflict,

direct or indirect, between the earlier and the later treaty. In this context, “*conflict*” and “*same subject matter*” are one and the same thing in this context (Amicus Brief, paras 49-53).

318. In addition, according to the January Declarations, sunset or grandfathering clauses do not produce any effects. They only relate to the unilateral termination of the BIT by one Contracting Party. The Treaty of Accession of the Czech Republic to the EU reflects the common will of all contracting parties. These clauses breach EU law for the same reasons as the offer of arbitration contained in intra-EU BITs (Amicus Brief, paras 54-55).
319. Investment tribunals have held that the law applicable to the merits should apply to jurisdiction as well, and that in an intra-EU investment arbitration EU law was part of the law applicable to deciding issues related to jurisdiction. As EU law takes precedence due to the principle of its primacy, the Arbitral Tribunal should deny jurisdiction in light of the *Achmea* decision (Amicus Brief, paras 56-58).
320. The alternative view that might be taken by the Arbitral Tribunal is that the law applicable to the assessment of the existence and validity of offers for arbitration under the Germany-Czech Republic BIT is international law (Amicus Brief, para. 59). EU law precludes the offer for arbitration in the BIT, and the resulting conflict between EU law and Article 10 of the Germany-Czech Republic BIT has to be resolved in favour of EU law both as a matter of EU law and public international law. Therefore, no valid arbitration agreement was concluded between the Parties (Amicus Brief, paras 59-60).
321. Finally, any award rendered in favour of Claimant could not be enforced, as Member States’ courts are under the obligation to annul any arbitral award rendered on the basis of an intra-EU BIT and to refuse to enforce it (Amicus Brief, para. 62).

2.2 *The Arbitral Tribunal’s analysis*

322. Before analysing the merits of the objection, the Arbitral Tribunal will deal with Claimant’s objection concerning the admissibility of the Amicus Brief.
323. Claimant considered, in its letter dated 12 November 2019, that the Arbitral Tribunal should disregard entirely the European Commission’s Amicus Brief due to its late submission to the Parties for comments on 21 October 2019 (*cf.* the Arbitral Tribunal’s letter to the Parties dated 21 October 2019).
324. The Arbitral Tribunal communicated the Amicus Brief and its Annexes to the Parties on 21 October 2019, and gave the Parties until 12 November 2019 to make a first round of comments to the brief and then until 26 November 2019 to answer to the other Parties’ position (*cf.* the Arbitral Tribunal’s letter to the Parties dated 21 October 2019).

325. Given the short length of the Amicus Brief, only twenty pages, as well as the fact that the arguments contained therein were raised by Respondent in its submissions or have been publicly communicated and defended by the European Commission, five weeks seems sufficient time for the Parties to elaborate their positions. In addition, the proceedings had not yet been closed at the time.
326. If it needed more time, Claimant could have asked for an extension of the deadline. Instead, Claimant chose to contest the admissibility of the Amicus Brief three weeks after it received the document, *i.e.* on 12 November 2019, when the first rounds of comments were due.
327. Therefore, the Arbitral Tribunal finds that Claimant had full opportunity to review and respond to the Amicus Brief, but decided not to make use of its right.
328. In any event, the fact that the Arbitral Tribunal took the Amicus Brief into account does not change the outcome of the case, since the Arbitral Tribunal rejects all the arguments the European Commission raised (*cf.* section 2.2.1 below).
329. The Arbitral Tribunal will first analyse the validity of the arbitration agreement (*cf.* 2.2.1 below) and will then address the issues of arbitrability (*cf.* 2.2.2 below) and comity (*cf.* 2.2.3 below).

2.2.1 *The validity of the arbitration agreement*

(a) *The law applicable to the validity of the arbitration agreement*

330. As a preliminary issue, the law applicable to the jurisdiction of the present Arbitral Tribunal has to be established, which is distinct from the law that governs the merits of the dispute (*cf.* in this sense *Vattenfall v Germany*, Annex EC-01, para. 109; *Wirtgen v Czech Republic*, Exh RL-25, para. 156; Amicus Brief, para. 59).
331. The offer to arbitrate is contained in the Germany-Czech Republic BIT, which is an instrument of international law. Consequently, the Arbitral Tribunal shall examine whether Article 10 of the BIT contains a valid offer to arbitrate under international law. Nothing in the Germany-Czech Republic BIT indicates otherwise.

(b) *Whether Article 10 contains a valid offer to arbitrate when interpreted according to Article 31 of the VCLT*

332. Art 10 is a provision contained in bilateral investment treaty concluded between two States that has to be interpreted according to Art 31 of the VCLT, both the Czech Republic and Germany being signatories to this treaty. This provision reads as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. *There shall be taken into account, together with the context:*

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. *A special meaning shall be given to a term if it is established that the parties so intended.*

333. When interpreted in accordance with Article 31(1) of the VCLT, Article 10 constitutes an unambiguous offer to arbitrate, which, in particular in light of the Arbitral Tribunal's findings concerning the other aspects of its jurisdiction (*cf.* below sections 3, 4, 5, and 6), encompasses the present dispute.
334. Contrary to the European Commission's and Respondent's position, the January 2019 Declarations cannot change this conclusion, as they do not fall under either Article 31(2) or 31(3) of the VCLT.
335. The Germany-Czech Republic BIT entered into force on 2 August 1992, and the January 2019 Declarations were signed some seventeen years later. Therefore, they do not constitute agreements or instruments which "*were made in connection with the conclusion*" of the Germany-Czech Republic BIT. Given their *ex post facto* nature, they cannot possibly assist in determining the context for interpreting the original intent of the Contracting Parties under Article 31(2) of the VCLT.
336. Moreover, the January 2019 Declarations cannot be considered "*subsequent agreement[s] between the parties regarding the interpretation of the treaty or the application of its provisions*" under Article 31(3)(a) of the VCLT. The January 2019 Declarations are more expressions of the political will of EU Members States to comply with their obligations flowing from EU law as interpreted and defined by the *Achmea* Judgment (January 2019 Declaration, Exh R-66, p. 1). To this effect, they

declare that they *will*, in the future, undertake a number of actions concerning intra-EU BITs and pending related arbitrations (Exh R-66, pp. 3-4).

337. In any event, the kind of interpretative declaration described in Article 31(3)(a) of the VCLT may only specify or clarify the meaning or scope attributed to the treaty by the Contracting States, but it cannot modify treaty obligations. Given the wording and structure of Article 31 of the VCLT, an interpretative declaration may only constitute one element to be taken into account together with the context when interpreting the treaty in accordance with the general rules of interpretation enshrined in Article 31. It cannot however override the meaning revealed by the terms of the treaty. Consequently, the January 2019 Declarations could not retroactively invalidate Article 10 of the Germany-Czech Republic BIT and the clearly formulated offer to arbitrate contained therein.
338. Even if the Arbitral Tribunal accepted that the January 2019 Declarations constituted subsequent agreements to interpret or apply intra-EU BITs, it cannot accept that they should be given retroactive effect to require the termination of the present arbitration proceedings. These latter were initiated in good faith before the issuance of the January 2019 Declarations, and even before the rendering of the *Achmea* judgment. The fundamental principle of acquired rights does not permit States to deprive investors of their right to arbitration under a long-standing BIT mid-way through the arbitration by simply issuing an interpretative declaration. This is all the more true, since the January 2019 Declarations reveal that its signatories themselves do not believe that intra-EU BITs have been terminated, and consider that further future action is necessary to achieve this result (R-66, p. 4, point 5).
- (c) *Whether Article 10 is inapplicable to the present dispute by operation of Articles 30 or 59 of the VCLT*
339. Article 26 of the VCLT incorporates the customary international law principle of *pacta sunt servanda* and provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” This means that a treaty, and its provisions, remain in force until terminated following the procedures set out in the VCLT. The Germany-Czech Republic BIT has not been terminated or suspended either expressly, or impliedly by the Contracting States.
340. None of the Parties nor the European Commission invoked the articles of the VCLT which govern the express termination and suspension of treaties by Contracting States. The January 2019 Declarations cannot be interpreted as terminating the Germany-Czech Republic BIT, as they only contemplate the termination of intra-EU BITs as a prospective action to be taken in the future (R-66, p. 4, point 8).
341. However, the European Commission argues that the Germany-Czech Republic BIT is inapplicable by the operation of Articles 30 and 59 of the VCLT. Respondent also makes reference to the first of these conflict rules in passing (*cf.* para. 274 above).

342. Article 30 of the VCLT provides in relevant parts as follows:

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

[...]

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

343. Article 59 of the VCLT provides in relevant parts as follows:

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

344. Article 59 of the VCLT deals with the implied termination or suspension of a treaty by the conclusion of a later treaty. Article 30 concerns the application of successive treaties relating to the same subject matter, and the operation of which was not terminated or suspended in accordance with Article 59. Both provisions apply only to treaties that relate to the same subject matter. If this condition is not fulfilled, Articles 30 and 59 of the VCLT cannot be given effect.

345. In this respect, the European Commission's argument that the requirement of the same subject matter does not constitute a separate condition under Articles 30 and 59 of the VCLT, does not withstand scrutiny.

(i) Conditions of application under Article 59 of the VCLT

346. Concerning Article 59 of the VCLT, the European Commission relies on Judge Anzilotti's Dissenting Opinion in the *Electricity Company of Sofia and Bulgaria* case (Annex EC-21), claiming that, since Judge Anzilotti did not use the terms "same subject matter" and that Article 59 codifies the principles developed by him, such a criterion should not be applied. However, the European Commission did not provide any authorities to sustain its position nor further explanation as to why it considers that Article 59 was drafted by exclusive reliance on Judge Anzilotti's Dissenting Opinion.

347. Moreover, even if the European Commission's position was correct, Judge Anzelotti's Dissenting Opinion supports the Arbitral Tribunal's interpretation of Article 59 of the VCLT. First, Judge Anzelotti could not have used the exact terms "*same subject matter*", as his Dissenting Opinion predates the conclusion of the VCLT. Second, a close reading of his reasoning shows that he did consider a situation where two treaties "*lay down different rules for the same thing*", with the "*same thing*" being recourse to the Permanent Court of Justice (Annex EC-21, p. 29). He then further specifies that, "*in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences*" (Annex EC-21, p. 30). Judge Anzelotti's Dissenting Opinion thus clearly considers two distinct conditions, without any indication that one could absorb the other.
348. The European Commission essentially asks the Arbitral Tribunal to disregard the express wording of the VCLT agreed upon by the contracting States and thus to rewrite the text of the treaty. The terms "*same subject matter*" figure in paragraph 1 of Article 59 of the VCLT and are preconditions to the application of this provision. In accordance with the principle of effectiveness (*effet utile*), the Arbitral Tribunal cannot ignore the ordinary meaning of the terms contained in paragraph 1, and is required to give them some meaning rather than none.
- (ii) Conditions of application under Article 30 of the VCLT
349. Concerning Article 30(3) of the VCLT, the European Commission adopts a similar position. In its view, Article 30 does not contain two conditions of its applicability, but only one, since "*'the same subject matter' and 'conflict' are one and the same thing in this context*" (Amicus Brief, para. 51).
350. However, textually, Article 30 of the VCLT refers to the requirement that the successive treaties are related to the same subject matter both in its title and in its first paragraph. This latter constitutes a threshold provision, which is expressly stated to be a condition for the rest of Article 30 of the VCLT to apply. Once again, the Arbitral Tribunal cannot rewrite the text of the treaty, and it must give effect to the ordinary meaning of the terms used by its signatories.
351. Moreover, it is impossible to consider that the requirement of incompatibility between the provisions of two treaties set out in Article 30(3) of the VCLT alone is sufficient to trigger the application of Article 30. This is because Article 30(1) examines the relationship between treaties *as a whole*, whereas Article 30(3) refers to the relationship between *provisions contained in treaties* relating to the same subject matter.
352. Finally, the European Commission has offered limited support for its interpretation of Article 30 of the VCLT. It essentially relies on the International Law Commission's (hereinafter "**ILC**") drafting history of Article 30 of the VCLT. The European Commission explains that the ILC Draft of 1964 of what was then Article 63 had the

following wording: “[...] *the obligation of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs*”. It was only later that the terms “*the provisions of which are incompatible*” were replaced by “*relating to the same subject matter*”.

353. The accompanying commentary explains the change as follows:

On re-examining the article at the present session the Commission felt that, although the rules may have particular importance in cases of incompatibility, they should be stated more generally in term of the application of successive treaties to the same subject- matter. One advantage of this formulation of the rules, it thought, would be that it would avoid any risk of [the provision] being interpreted as sanctioning the conclusion of a treaty incompatible with obligations undertaken towards another State under another treaty. Consequently, while the substance of the article remains the same as in the 1964 text, its wording has been revised in the manner indicated. (Annex EC-24, p. 232, emphasis added).

354. Even if the Arbitral Tribunal accepted that this commentary can be used as a supplementary means of interpretation under Article 32 of the VCLT, it still does not help the European Commission’s case. The commentary demonstrates that there was a specific reason behind adding the terms “*related to the same subject matter*”, which serve a purpose and cannot thus simply be disregarded.

355. As to the other authority the European Commission invokes, it does not support its position either. The Report of the Study Group of the International Law Commission on the Fragmentation of International Law does not advocate for disregarding the criterion of “*same subject matter*”. On the contrary, it acknowledges that Article 30 of the VCLT approaches the issue of conflict from the perspective of the subject matter of the relevant rules (Annex EC-18, paras 21 and 23).

356. In light of the above, the Arbitral Tribunal will first examine whether the Germany-Czech Republic BIT and the TFEU can be considered to relate to the same subject matter as a condition to the application of both Articles 30 and 59 VCLT.

(iii) Whether the Germany-Czech Republic BIT relate to the same subject-matter

357. As a first step, the Arbitral Tribunal has to give meaning to the terms “*related to the same subject matter*”, as the VCLT does not define them. In this respect, the Arbitral Tribunal agrees with the findings of the *EURAM v Slovak Republic* case. The good faith interpretation of Article 30 VCLT does not support the conclusion that two treaties relate to the same subject matter only because they apply simultaneously to the same set of facts, or as the European Commission argues, to the same legal situation. Two treaties might both apply to the same set of facts or even share broadly stated goals, but they can still approach the achievement of those goals from different perspectives (*EURAM v Slovak Republic*, Exh RL-39, paras 168-171). Therefore, as

the *EURAM v Slovak Republic* tribunal put it: “*the subject matter of a treaty is inherent in the treaty itself and refers to the issues with which its provisions deal, i.e. its topic or its substance*” (Exh RL-39, para. 172).

358. The topic or subject of the EU treaties is to promote economic integration and to create and maintain a common market among the Member States; whereas the topic or substance of the Germany-Czech Republic BIT is to provide for specific guarantees in order to encourage the international flows of investment into the Contracting States.
 359. The substantive protections afforded to a foreign investor under the Germany-Czech Republic BIT are not comparable to, or of the same nature as, those offered under the EU treaties. For example, the FET standard is not coextensive with the fundamental EU freedoms, and EU law does not specifically forbid treatment that is not fair and equitable. It is true that existing EU law provisions prohibit discrimination, but the protections afforded by the FET standard go beyond the prohibition of discrimination.
 360. Neither Respondent nor the EU Commission have even attempted to establish that the EU treaties would offer comparable protections to those available under the Germany-Czech Republic BIT. In sum, the relevant provisions of EU law guaranteeing fundamental freedoms or prohibiting discrimination do not have the same “*topic or substance*” as the substantive protections provided under the Germany-Czech Republic BIT.
 361. The potential simultaneous application of EU law and the Germany-Czech Republic BIT to the same set of facts or that they both might afford protection to the same investors under certain circumstances is not sufficient to conclude that they relate to the same subject matter.
 362. Given these conclusions, there is no need for the Arbitral Tribunal to examine the other conditions of application of Article 30 and 59 VCLT, which apply cumulatively.
 363. As a final remark, the Arbitral Tribunal cannot accept the European Commission’s suggestion that the principle of primacy of EU law is the primary conflict rule to be relied upon when it comes to the relationship of the Germany-Czech Republic BIT and the TFEU. The relationship between successive treaties is exclusively governed by international law, and in particular the VCLT, to which both Germany and the Czech Republic are parties.
- (d) *Whether Article 10 is precluded by EU law in light of the Achmea judgment*
364. The Arbitral Tribunal wishes to emphasise at the outset that it offers no criticism of the *Achmea* judgment as such, and it accepts that the judgments of the CJEU constitute, in the EU legal order, binding interpretations of the EU law issues they deal with.

(i) The *Achmea* judgment's findings

365. The Arbitral Tribunal must first establish whether the *Achmea* judgment's findings, from the standpoint of EU law, even reach the arbitration agreement contained in Article 10 of the Germany-Czech Republic BIT.
366. Contrary to Respondent's position, the *Achmea* judgment is centred around the question of applicable law, the main concern and rationale underlying the CJEU's decision being to ensure the full effectiveness of EU law (*cf.* in this sense Exh RL-9, paras 39, 42, 50, 55, 56 and 58)
367. The starting point of the CJEU's analysis was to ascertain whether the disputes submitted to the arbitral tribunal under the relevant provision in the BIT in question were "*liable to relate to the interpretation or application of EU law*" (Exh RL-9, para. 39). In this respect, the CJEU observed that EU law "*must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between Member States*" (RL-9, para. 41). This dual nature of EU law resulted in the fact that under the terms of the arbitration agreement contained in the BIT at issue before the CJEU, the arbitral tribunal could have been called upon to interpret or apply EU law as part of either "*the law in force of the Contracting Party concerned*" or "*other relevant agreements between the Contracting Parties*" (Exh RL-9, para. 4). Importantly, the CJEU did not consider a third basis for applying EU law, albeit specifically mentioned in the BIT (Exh RL-9, para. 4), namely the general principles of international law.
368. Nothing in the *Achmea* judgment suggests that EU Member States were prohibited to offer arbitration under intra-EU BITs not governed even in part by EU law, but only by express treaty provisions and by general principles of international law. The CJEU did not consider that EU law could form part of either of these sources.
369. This is a very important distinction, since the Germany-Czech Republic BIT does not contain an applicable law clause comparable to the one in the BIT at issue in *Achmea*. In fact, it does not contain an applicable law clause at all.

(ii) Whether EU law may be applied to the present dispute under the Germany-Czech Republic BIT

370. At the time when PO 1 was rendered, the Parties disagreed on the applicability of EU law to the present dispute; Respondent considering that EU law applied as part of international law and Claimant opposing to this proposition. The Arbitral Tribunal had decided to rule upon this issue once it received the Parties' full submissions (PO 1, p. 9).
371. Contrary to Respondent's position, the Arbitral Tribunal does not consider that Claimant, by virtue of the references it makes to EU law in its Statement of Claim (*cf.*

the list in SoD, paras 184-185), would have accepted that EU law applies as part of international law to the merits of the present dispute.

372. The Arbitral Tribunal recalls that international law is composed of different legal sub-systems that co-exist without there being a hierarchy between the norms of each sub-system. As a whole, international law together with its sub-systems is bound by general principles of international law, *i.e.* by customary international law. EU law is one of the sub-systems of international law, which co-exists with other sub-systems, such as international investment law, including bilateral investment treaties. EU law thus does not form part of general international law displacing all other sub-systems of international law.
373. The CJEU itself confirmed the *sui generis* nature of the EU legal order, which manifests itself in the autonomy of EU law with respect both to the law of the Member States and to international law. The CJEU considers that this autonomy is justified by “*the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law*” (Exh RL-9, para. 33). EU law is thus a regional sub-system of law, different and separate from general international law and other sub-systems of international law.
374. Therefore, when a bilateral investment treaty, such as the Germany-Czech Republic BIT, remains silent as to the applicable law to disputes arising under it, it cannot be considered that the Contracting States, one of which was not even a Member State of the EU at the time of the conclusion of the BIT, intended for EU law, a regional sub-system of international law, to apply to the disputes under the BIT.
375. Consequently, the disputes that can be submitted to arbitration pursuant Article 10 of the Germany-Czech Republic BIT must be decided in accordance with the provisions of the BIT itself and general principles of international law. This however does not mean that the present Arbitral Tribunal could not consider EU law as a matter of fact if potentially relevant to the merits.

(iii) Whether the *Achmea* judgment binds the present Arbitral Tribunal

376. Even if the *Achmea* judgment’s conclusions encompassed the arbitration agreement in Article 10 of the Germany-Czech Republic BIT, the *Achmea* judgment still cannot bind the present Arbitral Tribunal constituted under a bilateral investment treaty.
377. The present Arbitral Tribunal is constituted under an international treaty, the Germany-Czech Republic BIT. As such, it operates on the plane of the international legal order and in a public international law context, not in a regional or national context (*cf.* in this sense *Electrabel v Hungary*, Exh RL-16, para. 4.112). The CJEU, as an institution belonging to the EU legal order, operates on the level of that order, and its judgments are binding within that legal order. The Report of the Study Group of the International Law Commission on the Fragmentation of International Law considers that “*when conflicts emerge between treaty provisions that have their home*

in different regimes, care should be taken so as to guarantee that any settlement is not dictated by organs exclusively linked with one of the other of the conflicting regimes” (Annex EC-18, p. 252).

378. Therefore, a tribunal situated on the international plane, such as the present Arbitral Tribunal, is not bound by the position adopted by the CJEU, which is a court within a regional sub-system of international law.

(iv) The Contracting Parties did not invalidate any provisions of the Germany-Czech Republic BIT in accordance with the relevant provisions of the VCLT

379. Even accepting that the *Achmea* judgment could bind the present Arbitral Tribunal, it cannot automatically invalidate Article 10 of the Germany-Czech Republic BIT. The principle of *pacta sunt servanda* enshrined in Article 26 VCLT implies that a judgment of the CJEU cannot by itself put an end to the Germany-Czech Republic BIT. According to Article 42 of the VCLT, “[t]he validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention”.

380. Therefore, if States wish to invalidate provisions of a treaty that is in force, they have to follow certain procedures that are set out in Articles 46 through 53 of the VCLT. Among these grounds, only Article 46 could conceivably have been invoked in the present case, which reads as follows:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

381. However, the conditions laid down by Article 46 of the VCLT are not fulfilled in the present case. Article 46 of the VCLT specifies that provisions of a State’s internal law may not be invoked in order to invalidate its consent to be bound by a treaty, unless the violation of internal law was manifest and concerned a rule of fundamental importance. Further, Article 46 defines “*manifest*” as “*objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.*”

382. An incompatibility between Article 10 of the Germany-Czech Republic BIT and Articles 267 and 344 TFEU cannot be considered “*manifest*” as this term is defined in Article 46(2) of the VCLT. The CJEU itself in the *Achmea* judgment framed the incompatibility between Article 10 of the Germany-Czech Republic BIT and Articles 267 and 344 TFEU as a mere potential to threaten the full effectiveness of EU law, not as a blatant violation of EU law (*cf.* in this sense Exh RL-9, paras 56 and 59).

383. Moreover, the compatibility of intra-EU investment treaties with EU law has been the subject of considerable debate. The position of the European Commission itself has evolved: at the initial stages of the European Union’s enlargement in Central and Eastern Europe, the purported incompatibility between intra-EU arbitration clauses and EU law was not raised as an issue. Subsequently, the European Commission took the view that Member States should begin proceedings to terminate intra-EU BITs according to their own terms. At that time, the European Commission was careful to note that these agreements did not terminate or cease to apply automatically. Finally, the European Commission began arguing that intra-EU BITs had already ceased to apply on the ground of being incompatible with EU law. However, this position was not universally accepted. Before the CJEU rendered the *Achmea* judgment, Advocate General Wathelet expressed the opinion that no incompatibility existed between intra-EU BITs and EU law (Exh RL-29).

384. The Arbitral Tribunal considers that the evolution in the European Commission’s position and the contrary opinion of Advocate General Wathelet demonstrate that, up until the *Achmea* Judgment was issued, the arbitration clauses’ compatibility with EU law was very much an open, complex, and disputed question on the plane of EU law. As a consequence, it could not have been “*objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith*” that the CJEU would eventually find the existence of such an incompatibility. Therefore, even if Respondent had invoked Article 46 of the VCLT, which it has not, that provision would not provide sufficient grounds for the Tribunal to conclude that the Germany-Czech Republic BIT, or its arbitration clause, is invalid.

385. In addition, even if the *Achmea* judgment were considered as a viable ground of invalidation under Article 46 VCLT, such invalidation must still follow the established procedures set forth in Articles 65 to 67 of the VCLT. No evidence was submitted to the Arbitral Tribunal proving that such procedures would have been complied with, nor did the Parties or the European Commission contend otherwise. According to Article 64 of the VCLT, the only circumstance in which a treaty may be deemed automatically terminated is where it is contrary to a norm of *jus cogens*, which is clearly not the case here.

(v) The effect of Article 351 TFEU on the validity of Article 10 of the Germany-Czech Republic BIT

386. The Arbitral Tribunal notes that both Respondent and the EU Commission invoked Article 351 TFEU to argue that Article 10 of the Germany-Czech Republic BIT is incompatible with a subsequent treaty, the TFEU. Article 351 provides as follows:

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

2. *To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.*

387. The first paragraph of Article 351 TFEU confirms that the Czech Republic's accession to the EU does not affect its rights and obligations arising out of its agreements with third States concluded before its accession. The provision is silent about the Czech Republic's agreements with EU Member States prior to its accession.
388. The second paragraph of Article 351 TFEU also only concerns "*such agreements*", *i.e.* agreements concluded by the Czech Republic with third States before its accession to the EU.
389. In any event, Article 351 TFEU does not contain any conflict rules, but simply requires the Member States to take steps to eliminate any existing incompatibilities between the Treaties and agreements concluded between Member States and third-States before the formers' accession to the EU. Therefore, this provision cannot help Respondent's case.
390. In light of the Arbitral Tribunal's conclusion that Article 10 of the Germany-Czech Republic BIT is not precluded by EU law, and the *Achmea* judgment in particular, there is no need to verify whether the judgment applies *ex tunc*, *i.e.* as of 1 May 2004, the Czech Republic's accession to the EU. In any event, this provision does not state that, in case of incompatibilities, EU law prevails or that the earlier agreement is invalid. It simply requires that the Member States concerned take steps to eliminate the incompatibilities. Therefore, Article 351 is not relevant to decide the question whether Article 10 of the Germany-Czech Republic BIT is precluded by EU law.

(vi) The validity of the arbitration agreement under Article 178(2) of the Swiss PILA

391. Finally, the Arbitral Tribunal's conclusions concerning the validity of the arbitration agreement contained in the Germany-Czech Republic BIT are not put into question due to the fact that it is seated in Switzerland. Under Article 178(2) of the Swiss PILA "*an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, of it conforms to Swiss law*" (Exh RL-34).
392. Under Article 178(2) of the Swiss PILA, the Germany-Czech Republic BIT and international law applies to the validity of the arbitration agreement either because the Parties chose it, Respondent by concluding the BIT and Claimant by accepting the offer to arbitrate contained in that same BIT; or because these rules constitute the law governing the subject-matter of the present dispute. As set out in detail above, the arbitration agreement remains valid in accordance with the Germany-Czech Republic BIT and international law, which govern the jurisdiction of the present Arbitral Tribunal.

(e) *The issue of the enforcement of the award*

393. Contrary to Respondent's and the European Commission's contentions, the Arbitral Tribunal does not consider that any award it may render would necessarily be unenforceable. It is true that there exist a limited number of scenarios, under which the enforcement of the Arbitral Tribunal's award might be challenging or create further disputes. However, this does not make the award unenforceable. A truly unenforceable award can only exist if it is rendered in violation of Article 190 of the PILA governing the setting aside of awards rendered by arbitral tribunals seated in Switzerland. The PILA provides no other remedy against such awards.
394. The only two grounds under which the award rendered by the present Arbitral Tribunal could be set aside are (i) where it would have wrongly accepted jurisdiction or (ii) its award would be incompatible with public policy due to its decision that the *Achmea* judgment does not preclude Article 10 of the Germany-Czech Republic BIT.
395. The Arbitral Tribunal considers that its decision is well-founded and not contrary to Swiss international public policy.
396. It follows from all the above developed arguments that Article 10 of the Germany-Czech Republic BIT has not been invalidated and contains a standing offer to arbitrate.

2.2.2 *The arbitrability of the dispute*

397. Respondent submits that EU law acts as a mandatory rule of foreign law that renders this dispute non-arbitrable.
398. However, Respondent's position is based on the erroneous interpretation of the Swiss Federal Tribunal's case law, in particular the *Tensaccai v Freysinnet* judgment (Exh RL-46).
399. Contrary to Respondent's position, the *Tensaccai v Freysinnet* decision concerns the interpretation of the notion of public policy in accordance with Article 190(2)(e) of the PILA. For instance, what Respondent calls the "shared-values" test relates exclusively the notion of public policy and has nothing to do with foreign mandatory laws (Exh RL-46, para. 2.2.3). The Swiss Federal Tribunal also expressly stated that European competition law does not belong to the realm of public policy under Article 190(e) of the PILA (Exh RL-46, paras 3.2 and 4).
400. The Federal Tribunal only remarked that, once a party invokes a foreign mandatory law, such as EU competition law, in order to challenge the validity of a contract, the Arbitral Tribunal cannot deny examining this issue without risking the setting aside of its award under Article 190(2)(b) of the PILA which sanctions arbitral tribunals that have wrongly denied jurisdiction (Exh RL-46, para. 3.3). It bears emphasising that these statements in the *Tensaccai v Freysinnet* judgment concern the merits of a

dispute and not the specifically the jurisdiction of arbitral tribunals, *i.e.* the question of the validity of the arbitration agreement or arbitrability.

401. In any event, the Arbitral Tribunal did consider in detail whether EU law could affect its jurisdiction as argued by Respondent and the European Commission. As explained above (*cf.* above paras 367-368), the *Achmea* judgment does not reach the present dispute, since the Arbitral Tribunal will not apply EU law to the contentious issues it has to decide.
402. Finally, concerning more specifically the issue of arbitrability under Swiss law, Article 177(1) establishes a substantive rule of private international law and considers that “[a]ny dispute involving an economic interest maybe the subject-matter of an arbitration” (Exh RL-34). Arbitrability under Swiss law is thus governed exclusively by this provision, thereby ruling out limitations of arbitrability based on other laws (*cf.* in this sense Exh RL- 35, pp. 21-22). The doctrinal source Respondent relies upon identifies only one possible bar to arbitrability of foreign law origin, namely public policy understood within the meaning of Article 190(2)(e) of the PILA (Exh RL-35, p. 22).
403. However, based on the definition of public policy in accordance with Article 190(2)(e) in the *Tensaccai v Freysinnet* judgment, it is highly doubtful whether the *Achmea* decision could ever be considered as forming part of the “*essential and broadly recognized values which, according to the concepts prevailing in Switzerland, would have to be found in any legal order*” (Exh RL- 46, para. 32.).
404. Consequently, the present dispute can be arbitrated under Article 177(1) of the PILA.

2.2.3 *The role of comity*

405. Finally, Respondent invites the Arbitral Tribunal to decline jurisdiction out of comity for the *Achmea* judgment rendered by the Grand Chamber of the CJEU.
406. The Arbitral Tribunal does not deny the existence and the relevance of the principle of comity in international law. However, Respondent’s position needs to be nuanced as to the circumstances under which it has been and can be applied in international (investment) law.
407. *First*, it must be emphasised that the principle of comity has no binding force at the international level and that even domestic judges grant its application rarely and only in extreme cases (Filippo Fontanelli ‘Comity’ *Overview of Topic Westlaw UK* (2016), Exh RL-55, Introduction and paras 1 and 20).
408. *Second*, it is true that comity can be a useful tool of coordination in the application of international obligations from different regimes in absence of a positive rule of conflict.

409. However, comity remains a discretion-driven device, which cannot impose precise obligations on international courts and tribunals, which can always uphold and exercise their jurisdiction (Exh RL-55, para. 13). In particular, comity is not a binding principle of international law (Exh RL-55, para. 20).
410. If one looks at the rare instances where comity was expressly exercised by international courts or tribunals, these latter never went as far as to decline their jurisdiction, but preferred instead to suspend their proceedings or grant comity at the level of applicable laws or remedies (Exh RL-55, paras 7, 8 and 18-19). In other words, the Arbitral Tribunal is not aware of any other (investment arbitral) tribunal or international court having declined to exercise jurisdiction over a dispute due to considerations of comity when its jurisdiction was otherwise established.
411. It is true that the International Court of Justice (hereinafter “**ICJ**”) considered in the *Cameroon v United Kingdom* case that, “*even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction*” (Exh RL-65, p. 29). Nonetheless, the ICJ made this statement *obiter dictum*. In addition, the ICJ when making this statement relied not on the principle of comity as such, but rather on the concept of administration of justice and the related need to maintain the ICJ’s judicial character (Exh RL-55, p. 29).
412. The present Arbitral Tribunal’s jurisdiction stems from the valid arbitration agreement that was concluded between the Parties and by which they entrusted the resolution of their dispute to the present Arbitral Tribunal. There exist no other forum that could adjudicate the Parties’ dispute that arose under the Germany-Czech Republic BIT.
413. Therefore, in absence of a specific provision contained in the Germany-Czech Republic BIT or a binding principle of international law, the present Arbitral Tribunal must exercise its jurisdiction once it has been established. Its award would otherwise be sanctioned by the Swiss Federal Tribunal under Article 190(b) of the PILA, which provides that an award can be set aside if the arbitral tribunal has wrongly denied jurisdiction (Exh RL-34).
414. It follows from all the above developed arguments that Article 10 of the Germany-Czech Republic BIT is not precluded by EU law.

3. Jurisdiction *ratione personae*

3.1 *The Parties’ positions*

3.1.1 *Respondent’s position*

415. Respondent considers that Claimant bears the burden of proving that it is a protected investor, and that it failed to discharge this burden (SoD, paras 223-224). In particular,

Respondent argues that once it challenges whether Claimant has a seat in Germany, it is for Claimant to demonstrate positively that its seat is indeed in Germany (Tr 130:19-25; 131:1-7).

416. According to Respondent's position, the Arbitral Tribunal does not have jurisdiction *ratione personae* for two independent reasons.
417. *First*, Claimant is not protected by the Treaty because it has no seat (*Sitz* (German)/*sidlo* (Czech)) in Germany as required by the authentic texts of the Germany-Czech Republic BIT (SoD, para. 225; *cf.* also Exh RL-6, pp. 2 and 15). The English translation of these terms in the Germany-Czech Republic BIT is incorrect (Tr 130:2-10).
418. The term "*seat*" must be interpreted autonomously under international law unless there is an express *renvoi* to domestic law. The Germany-Czech Republic BIT does not contain such a reference to domestic law in Article 1(3); therefore the term "*seat*" must be given an autonomous meaning under international law (SoD, paras 228-230).
419. When the term "*seat*" is interpreted according to Article 31 of the VCLT, it means the effective place of management and administration of a company's business operations. This has been confirmed by international law authorities and several investment arbitral tribunals (SoD, paras 227 and 231-234).
420. The little information Claimant has provided about its registered office confirms that no real business takes place there. The registered office is located in a residential neighbourhood in Hamburg, at the same address as Claimant's two limited partners Messrs Fischer and Meier. The publicly available evidence does not indicate that Claimant would have undertaken any business activities in Germany. In fact, only Claimant's certificate of registration and financial statements until 2016 are accessible, these being strictly required by German law. Based on its available financial statements, Claimant does not appear to be a going concern. Consequently, Claimant does not have its seat in Germany in accordance with Article 1(3) of the Germany-Czech Republic BIT (SoD, paras 236-240).
421. *Second*, Claimant does not qualify as a protected investor under the Treaty because it failed to actively invest in the Czech Republic.
422. Article 1(3) of the Germany-Czech Republic BIT defines "*investor*" as a body corporate who is "*authorized to make investments*": The ordinary meaning of these terms indicate that the investor must engage in a certain action, *i.e.* to invest (SoD, paras 242-244). Thus, the Treaty only protects investors who actively engage in the action of making investments (SoD, para. 251).
423. The active definition of the term "*investor*" is underscored by the Germany-Czech Republic BIT's object and purpose as well as by several of its provisions (SoD, paras 245-252). Other investment tribunals, when faced with similar treaty language, also required an active investor to establish their jurisdiction (SoD, paras 253-261).

424. It is for Claimant to prove that it has actively invested in the Czech Republic (SoD, para. 263). However, Claimant did not behave like an active investor contemplated by the terms of the Germany-Czech Republic BIT.
425. Claimant never managed its investment (Article 2(2) of the Germany-Czech Republic BIT), or purchased and transformed goods, conducted operations, or promoted its products in the Czech Republic (Article 3(2) of the Germany-Czech Republic BIT). Claimant had no role in deciding to make the investment, funding the investment, or controlling or managing the investment after it was made (SoD, paras 264-265).
426. Claimant is nothing more than a business entity, which was created to lease aircraft and to serve as a corporate vehicle to the exclusive benefit of Fischer Air. Its relationship to its alleged investment was limited to passively receiving monthly payments outside the Czech Republic for the lease of the Aircraft (SoD, para. 266).
427. It was Fischer Air who decided to purchase the Aircraft and controlled and managed them at all times. It was not Claimant but HSH that financed the purchase of the Aircraft (Tr 66:1-8).
428. Accordingly, Claimant does not qualify as an “investor” within the meaning of the Treaty and the Arbitral Tribunal must decline jurisdiction *ratione personae* (SoD, para. 267).

3.1.2 *Claimant’s position*

429. For Claimant, the Arbitral Tribunal has jurisdiction *ratione personae* because Claimant is an investor protected by the Treaty (SoC, para. 90).
430. Article 1(3) of the Treaty refers to the term “registered office” (SoC, para. 91). Since Claimant is a German limited partnership and has its registered office in Hamburg, Germany, it fulfils the Treaty’s definition of “investor” (SoC, para. 92).
431. A seat in Germany is not required in order to benefit from the protection of the Germany-Czech Republic BIT, but only registered offices (Tr 112:2-10). In any event, Claimant has its seat in Germany (Tr 21:13-21). If Respondent does not agree, it should indicate where it considers Claimant has its seat, other than Germany (Tr 112:10-12).
432. Moreover, Claimant actively invested “in the Czech Republic by placing these two aircraft at its disposal” (Tr 21:21-23).

3.2 *The Arbitral Tribunal’s analysis*

433. Article 1(3) of the Germany-Czech Republic BIT in its German and Czech versions provides as follows:

Bezeichnet der Begriff "Investor" eine natürliche Person mit ständigem Wohnsitz oder eine juristische Person mit Sitz im jeweiligen Geltungsbereich dieses Vertrags, die berechtigt ist, Kapitalanlagen zu tätigen.

Pojem „investor“ znamená fyzické osoby so stálým bydliskom alebo právnické osoby so sídlom v okruhu pôsobnosti tejto Dohody, ktoré sú oprávnené konať ako investori.

434. The English translation of the same provision states that:

The term "investor" refers to an individual having a permanent place of residence in the area covered by this Agreement, or a body corporate having its registered office therein, authorized to make investments.

435. According to Article 13 of the Germany-Czech Republic BIT, only its Czech and German versions are the authentic. Consequently, these two versions are authoritative, the English version being a mere translation.

436. With respect to the requirement for juristic persons to be considered investors, the authentic versions of the BIT refer to "Sitz" and to "sídlom". According to the Arbitral Tribunal's own reading of the original versions of the BIT, these terms should be translated as "seat" in English. It appears therefore that the English translation as "registered office" is erroneous. This has been confirmed by Respondent and not contested by Claimant (Tr 130:2-3)

437. Respondent argues that the term "seat" has to be interpreted autonomously under international law and without reference to any national laws. The Arbitral Tribunal agrees with this conclusion.

438. Article 1(3) of the Germany-Czech Republic BIT has to be interpreted in accordance with Article 31 of the VCLT, the first paragraph of which provides as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

439. Article 1(3) does not provide recourse to national law with respect to the definition of the term "investor". By contrast, other provisions of the Germany-Czech Republic BIT do refer to national law, such as Articles 1(1), 2(1) or 7(1). Therefore, when the Contracting Parties wished their municipal laws to govern a certain issue, they expressly provided for it in the text of the provision. On the contrary, if they did not include an express *renvoi* to municipal law, it is reasonable to conclude that they intended international law to apply to the interpretation of the term at issue.

440. Moreover, it is not unusual for contracting States to give a term used in a treaty an autonomous meaning, which may differ from its significance under national law. On the one hand, it ensures the uniform application of the treaty. On the other hand, in the

context of a bilateral investment treaty, it allows the contracting States to define the scope of application of the treaty independently of national laws, and extend its protection to persons and operations in a way that allows them to best achieve the purpose of the treaty.

441. Concerning the meaning of the term “*seat*” under international law, the overwhelming majority of international law authorities concur that it encompasses the effective place of management and central administration of a company’s business activities (Exh RL-72 and RL-74 to RL-83).
442. Consequently, in order to establish its jurisdiction over Claimant, the Arbitral Tribunal will verify whether Claimant has its seat, *i.e.* its effective place of management and central administration, in Germany in light of the evidence provided by the Parties.
443. Claimant is a German limited partnership (*Kommanditgesellschaft*) with registered offices in Hamburg, Germany. Claimant figures in the Companies Register in Hamburg, Germany (Exh C-3). All Claimant’s financial statements available on record were deposited in Germany (Exh R-46 to R-54).
444. Respondent does not argue that Claimant would have its seat elsewhere, but seems to suggest that these elements are not sufficient to conclude that Claimant has its seat in Germany.
445. However, there exists no established and exhaustive list of the elements indicating a company’s effective place of management and central administration. A company must have its seat somewhere, and it is the Arbitral Tribunal’s task to identify where it is located based on the specific facts of the case.
446. Claimant is a legitimate company with its registered office and all of its, admittedly limited, activities in Germany. Respondent offered no evidence that Claimant might be managed and administered from another place. The fact that according to Respondent Claimant does not appear to be a going concern does not change this analysis. The definition of seat does not equate to ongoing business.
447. Therefore, to the extent that Claimant, like every company in existence, must have a seat somewhere, its seat is in Germany in accordance with Article 1(3) of the Germany-Czech Republic BIT.
448. Respondent also argues that the Germany-Czech Republic BIT requires protected investors to engage in the act of investing, *i.e.* to actively invest.
449. It is important to clarify what is meant by the terms “*engage in the act of investing*” or “*actively invest*”. The provisions of the Germany-Czech Republic BIT and the authorities Respondent invokes in order to sustain its argument support a different, less far-reaching conclusion with regard to the role of the investor required under the Germany-Czech Republic BIT.

450. Article 1(3) of the Germany-Czech Republic BIT provides that investors must be authorized to “*make an investment*”. The ordinary meaning of these terms indeed indicates that the investor has to act and effectively engage in the action of making the investment. It is equally possible to draw the same conclusion based on other provisions of the Germany-Czech Republic BIT, such as Articles 2(1), 2(2), 4(1) and 8, referring to “*investments by investors*” or “*investments made by investors*”.
451. Article 3(2) of the Germany-Czech Republic BIT refers to investors’ “*activities in connection with such investments*” to which a certain treatment must be accorded. Protocol 3(a) of the BIT provides examples, in the form of a non-exhaustive list, of what constitutes “*activities*” under Article 3(2), which shall enjoy a certain treatment. However, this provision concerns not the making of, but the life of an investment. Therefore, it does not support Respondent’s position concerning the requirement of an active role for the investors in the making of the investment.
452. Moreover, Protocol 3(c), which promises sympathetic consideration to applications by individuals from the other Contracting Party for entry, residence and work permit in connection with an investment, is not relevant to the issue whether an active role is required from investors under the Germany-Czech Republic BIT.
453. Concerning the authorities Respondent invokes, as Respondent itself points out, they interpret similar or identical treaty language to what the Germany-Czech Republic BIT contains (SoD, para. 261). However, the arbitral tribunals and the judge rendering these decisions were faced with a different question, namely, whether “*passive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment*” (*Standard Chartered Bank v Tanzania*, Exh RL-84, para. 230), or where a company did not make any payment or transfer anything of value in return for becoming the indirect owner or controller of the shares in the company that owns the investment (*Gold Reserve v Venezuela*, High Court of Justice, Exh RL-85, paras 37 and 42-43; *Alapli v Turkey*, Exh R-86, paras 337-360), can be considered as an investor under the relevant bilateral investment treaties.
454. The findings of these tribunals and the English High Court judge must be interpreted in light of the specific facts and legal issue they faced, and should not be automatically transposed to the present case. In particular, since the factual matrix in the present case, where Claimant directly made and owns the investment, is very far from the ownership structures in the above-mentioned cases.
455. Nevertheless, even if one applies the tests established by the *Standard Chartered Bank v Tanzania* and the *Alapli v Turkey* tribunals, the conclusion that Claimant actively invested in the Czech Republic is inescapable.
456. According to the arbitral tribunal in the *Standard Chartered Bank* case, the investor should have a role in “*deciding to make the investment, funding the investment, or controlling or managing the investment after it was made*” (Exh RL-84, para. 228). The arbitral tribunal in the *Alapli v Turkey* case concluded that in order to establish the

activity of investing, it “*must find an action transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to another*” (Exh RL-86, para. 360).

457. Claimant, a German company, itself purchased the Aircraft from Fischer Air by transferring the purchase price to the Czech company’s account (*cf.* paras 10, 13 and 19 above). The fact that Claimant obtained the necessary funds for these transactions via a bank loan is entirely irrelevant (*cf.* SoD, para. 265). In addition, there is no evidence on record suggesting that the decision to buy the Aircraft and to lease them to Fischer Air was made by someone else than Claimant.
458. Consequently, Claimant must be considered an investor under Article 1(3) of the Germany-Czech Republic BIT, as it has its seat in Germany and has actively engaged in the act of investing in the Czech Republic.

4. Jurisdiction *ratione materiae*

4.1 *The Parties’ positions*

4.1.1 *Respondent’s position*

459. For Respondent, the Arbitral Tribunal does not have jurisdiction *ratione materiae* because Claimant’s alleged investments are not protected by the Treaty.
460. Article 1(1) of the Germany- Czech Republic BIT defines “*investments*” as “*all kinds of assets that are invested in accordance with domestic legislation*”, followed by a non-exhaustive list of examples. However, not all assets falling within the list of Article 1(1) can be considered investments under the Germany-Czech Republic BIT. The term “*investments*” also has an inherent meaning. This inherent meaning consists of three unanimously accepted criteria: (i) contribution; (ii) duration; and (iii) risk. It follows that the protection of the BIT cannot be accorded to purely commercial transactions not satisfying these criteria (SoD, paras 269-276).
461. Respondent qualifies the purchase and the lease of the Aircraft as pure commercial transactions that cannot benefit from the protection of the Germany-Czech Republic BIT (SoD, para. 277). No money or other resources flowed to the Czech Republic, and all payments with regards to the Aircraft were made to accounts outside the Czech Republic (SoD, paras 278-280).
462. Moreover, Fischer Air bore all risks and costs associated with the ownership, operation and maintenance of the Aircraft (SoD, para. 283). Claimant undertook only a general risk of doing business, if any, and no investment risk (SoD, paras 284-287). In other words, Claimant was never “*in a situation where ... it could not be sure of a return of [its] investment and may not know the amount [it] will end up spending* (Tr 61:4-7). It

follows that Claimant engaged in a purely commercial transaction that does not satisfy the inherent meaning of the term “*investment*” in Article 1(1) of the Germany-Czech Republic BIT (SoD, para. 288).

4.1.2 *Claimant’s position*

463. Claimant submits that the definition of investment in the Germany-Czech Republic BIT is an asset-based and wide one, with a non-exhaustive list of what shall be considered an investment. The aim of the provision is to provide a far-reaching protection (SoC, para. 95).

464. The Aircraft, as movable assets, fall under Article 1(1)(a) of the Germany-Czech Republic BIT (SoC, para. 97).

465. The revenues from the Lease Agreements are intrinsically linked to the Aircraft, thus falling within the scope of Article 1(1) (SoC, para. 99). Moreover, the future lease payments can be considered as “*amount yielded by an investment*”, thereby also falling under Article 1 (2) of the Germany-Czech Republic BIT (SoC, para. 101).

466. Finally, Claimant notes that its investment meets even the *Salini* criteria, which were elaborated for the purposes of the ICSID Convention and are thus not directly applicable in the present case (SoC, para. 100).

4.2 *The Arbitral Tribunal’s analysis*

467. Article 1(1) of the Germany-Czech Republic BIT provides as follows:

The term “investments” comprises all kinds of assets that are invested in accordance with domestic legislation, particularly:

(a) Movable and immovable property as well as any other rights in rem such as mortgages and liens;

(b) Shares and other kinds of participation in companies;

(c) Claims to money that has been used to create economic value or claims to services that have economic value and are related to an investment;

(d) Intellectual property rights, including, in particular, copyright, patents, registered designs, industrial designs and models, trademarks, trade names, technical processes, know-how and goodwill;

(e) Concessions under public law, including concessions for prospecting and exploitation.

468. The Arbitral Tribunal will interpret the term “*investment*” in accordance with the relevant provision of the VCLT.
469. As noted previously, Article 31(1) of the VCLT sets out that international treaties should be interpreted (i) in good faith, (ii) in accordance with the ordinary meaning of the terms, (iii) in their context and (iv) in the light of their object and purpose.
470. Article 1(1) refers to “*all kinds of asset*” when defining the term “*investments*”. It is also clear from the term “*particularly*” that the list it contains is non-exhaustive. These two elements of the definition of investment together indicate a broad scope of assets and operations that can be protected under the Germany-Czech Republic BIT.
471. However, these elements also mean that other categories of assets than those listed in Article 1(2) could be considered as investments under the Germany-Czech Republic BIT. Therefore, the term “*investments*” must have an inherent ordinary meaning, which encompasses the operations listed in Article 1(a) of the Germany-Czech Republic BIT, but also other operations; and which acts as a benchmark against which non-listed categories of assets must be assessed. Considering otherwise would go against the clearly expressed will of the Contracting Parties (*cf.* also in this sense *Romak v Uzbekistan*, Exh RL-14, para. 180).
472. The Arbitral Tribunal agrees with the position of a long line of investment awards, aptly formulated in the *Romak v Uzbekistan* award, that the ordinary meaning of the term “*investment*” entails a contribution that extends over a certain period of time and involves some risk, which is more than a simple commercial risk (Exh RL-14, paras 207 and 230).
473. Consequently, the Arbitral Tribunal agrees with the definition of investment proposed by Respondent and not specifically contested by Claimant. However, contrary to Respondent’s position, the Arbitral Tribunal considers that Claimant’s assets fulfil the relevant criteria and thus qualify as investments under the Germany-Czech Republic BIT.
474. The Lease Agreements are long-term contracts, concluded for a term of 30 years. They generated income as a result of the Aircraft being used in the Czech Republic, where they were also registered. In other words, Claimant bought and employed an asset in the Czech Republic for the purpose of generating a long-term cash flow.
475. Moreover, Claimant undertook an investment risk that went beyond mere commercial risk. The investment risk consisted of placing an income-generating asset in the territory of another State for a substantial amount of time. The long duration of the operation meant that a great number of events and contingencies could have happened to the asset while being utilised in another country, including governmental actions. Due to the location of the asset and the duration of the operation, Claimant’s risk was not limited to non-payment or similar general business risk.

476. Therefore, Claimant has made an investment in the Czech Republic in accordance with Article 1(1) of the Germany-Czech Republic BIT.

5. Abuse of right

5.1 *The Parties' positions*

5.1.1 *Respondent's position*

477. For Respondent, the Arbitral Tribunal does not have jurisdiction because Claimant abused its rights when initiating the present arbitral proceedings.

478. In international investment law, bringing multiple proceedings in multiple fora to recover the same economic harm amounts to an abuse of right and a violation of the principle of good faith (SoD, paras 290-294). Such violation is based on a principle of international law, the principle of good faith, and is thus independent of any language in the Germany-Czech Republic BIT or of the existence of a “*fork in the road*” provision (Tr 135:11-15 and 24-25, 136:1-2). In this respect, Respondent expressly refrained from making arguments based on a possible waiver of the arbitration agreement contained in Article 10 of the Germany-Czech Republic BIT by the initiation of national court proceedings or on the principle of *res judicata* (Tr 136: 3-11).

479. Respondent considers, based on the findings of the *Orascom v Algeria* tribunal, that an abuse is also committed if the multiple proceedings are initiated by the same entity before an arbitral tribunal and several national courts instead of different arbitral tribunals (SoD, para. 295).

480. Claimant has sought to recover damages for the same loss in multiple proceedings against Respondent, namely in two proceedings before the Czech courts and in one proceeding before the present Arbitral Tribunal (SoD, paras 297 and 303).

481. Claimant admitted that the court proceedings involved the same parties and the same facts as the present arbitral proceedings (SoD, para. 304). The fact that, compared to the proceedings before the Czech courts, Claimant increased its damage claims in the present arbitration, does not change anything with regards to its abusive behaviour (SoD, para. 304). Claimant itself stated that the reason why it turned to arbitration was that the proceedings before the Czech courts were likely to last a couple of years and that it did not consider litigation as an effective protection of its rights (SoD, para. 304). However, initiating three proceedings in order to increase one's chances of success amounts to an abuse of right (SoD, para. 304).

482. It follows that Claimant has violated its duty of good faith and that because of this abuse of right, the Arbitral Tribunal cannot hear Claimant's claims (SoD, para. 305).

5.1.2 *Claimant's position*

483. Claimant first argues that the Germany-Czech Republic BIT does not require the exhaustion of local remedies. Claimant chose to turn to the present Arbitral Tribunal for international law protection, because after years of proceedings before the Czech courts it does not consider litigation in the Czech Republic an effective way to enforce its rights (SoC, para. 109).
484. The proceedings before the Czech courts do not prevent this Arbitral Tribunal from hearing the dispute (SoC, para. 110). The arbitral proceedings would be prevented only if four cumulative conditions of litispendence were fulfilled: (i) the same parties; (ii) the same facts; (iii) the same cause of action; and (iv) the same legal order and courts/tribunals within that legal order (SoC, para. 112). Since the last two conditions are not met, Claimant deems its claims to be admissible (SoC, para. 113).

5.2 *The Arbitral Tribunal's analysis*

485. Respondent's interpretation of the principle of good faith with respect to multiple proceedings brought in multiple fora for the same economic harm is exclusively based on the findings of the *Orascom v Algeria* tribunal. It is on this basis that Respondent concludes that Claimant violated the principle of good faith and abused its rights when it brought proceedings before national courts and the present Arbitral Tribunal with respect to the same economic harm. However, the *Orascom v Algeria* tribunal never went this far in its conclusions.
486. In the *Orascom v Algeria* case, the arbitral tribunal dealt with a very different scenario from the one at issue in the present case, namely investment claims brought by different entities in a vertical chain of companies under different investment treaties.
487. It is strictly in this context that the tribunal stated the following:
- where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established*" (*Orascom v Algeria*, Exh RL-26, para. 543).
488. It is worth noting that the tribunal's finding of abuse of process is conditioned on the similar features of the different investment treaties under which the claims were brought, in particular on the similar procedural right of access to an arbitral forum and comparable substantive guarantees. There exist no such similarities between proceedings brought under municipal law before national courts and an arbitration initiated under a bilateral investment treaty providing specific international law

protection to foreign investment, including the investor's right to bring its claim before an international arbitral tribunal.

489. Moreover, there are no provisions in the Germany-Czech Republic BIT that would prohibit engaging in litigation before national courts at the same time or before initiating arbitration under its Article 10. Similarly, the principle of good faith in international law cannot be and has never been interpreted to exclude seeking remedies in parallel or subsequently before national courts and international tribunals for the same economic harm, given the different nature of the two legal systems, in particular the dispute resolution mechanisms and remedies they offer.
490. Consequently, Claimant has not abused its rights and did not act in violation of the principle of good faith when it initiated the present arbitral proceedings under Article 10 of the Germany-Czech Republic BIT, notwithstanding any ongoing litigation in the Czech courts.

6. Jurisdiction *ratione voluntatis*

491. The Parties do not contest that the present arbitration was initiated in accordance with the Parties' will and based on a valid arbitration agreement.
492. The Germany-Czech Republic BIT, including its Article 10 containing the offer to arbitrate, entered into force on 2 August 1992. On 1 February 2016, Claimant delivered its Notice on the Existence of the Dispute into the hands of the then Minister for Finance (SoC, para. 107), and submitted its Request for Arbitration on 30 November 2016.
493. There existed a valid offer to arbitrate when Claimant submitted its Notice of Dispute in February 2016. Claimant complied with the six-month period between the Notice of Dispute and its Request for Arbitration required by Article 10(2) of the Germany-Czech Republic BIT.
494. Therefore, there can be no doubt that the Parties validly consented to the present arbitral proceedings, which were brought in accordance with Article 10 of the Germany-Czech Republic BIT.

7. Conclusion

495. It follows from the above that

the Arbitral Tribunal has jurisdiction under the Germany-Czech Republic BIT to hear Claimant's claims.

III. Alleged breaches of the Germany-Czech Republic BIT

1. The issues

496. Claimant alleges the following breaches of the Treaty by Claimant:

- Unlawful expropriation;
- Full protection and full security standard;
- Just and equitable treatment;
- Arbitrary and discriminatory measures;
- National treatment (SoC para. 239).

497. Respondent denies any wrongdoing on its part and requests that the Arbitral Tribunal dismiss Claimant's allegations.

498. The Arbitral Tribunal will first determine the law applicable to the merits of the case. The next step of the analysis will be to ascertain whether any of the challenged acts is attributable to Respondent. And finally, the Arbitral Tribunal will analyse the allegations of a Treaty breach.

2. Applicable law

2.1 *The Parties' position*

2.1.1 *Claimant's position*

499. Claimant argues that the general principle of *iura novit curia* is applicable to the present dispute through Article 38(1)(c) ICJ Statute (SoC, para. 114). Additionally, the following sources of law are applicable in this case:

- (i) The Treaty is the primary source of law applicable to the dispute (SoC, para. 115).
- (ii) If the Treaty is silent on an issue, the Arbitral Tribunal should apply international customary rules, especially on responsibility of states as contained in the ARSIWA and on treaty interpretation as reflected in the VCLT (SoC, para. 115).
- (iii) If the case cannot be resolved by the Treaty or by international customary law, the Arbitral Tribunal should apply general principles of law (SoC, para. 116).

500. For Claimant, “[d]omestic law should be treated as a mere fact”, which means that (i) *iura novit curia* principle does not apply to domestic law, and (ii) Respondent cannot invoke its domestic law to justify breach of international obligations.

501. Claimant also states that EU law is a part of Respondent’s domestic law and, pursuant to Article 1 (2) of the Czech Republic’s Constitution, national law should be interpreted in a manner consistent with international law (SoC, paras 117 and 119).

2.1.2 Respondent’s position

502. Respondent argues that the law applicable to the present dispute is the Treaty, supplemented by international law, including EU law (SoD, para. 186).

2.2 The Arbitral Tribunal’s analysis and conclusions

503. As stated in the PO1, there appears to be no contradiction between positions of the Parties as to the law applicable to this dispute, apart from the application of EU law.

504. The Arbitral Tribunal has addressed the issue of potential applicability of EU law to the dispute under the Treaty in paras 370-375 hereof. It came to the conclusion that when a Treaty is silent on the applicable law, and one of the Contracting States was not even a Member State of the EU at the time the Treaty was concluded, the disputes brought under such Treaty should be decided in accordance with the Treaty provisions and general principles of international law. EU law can be considered as a matter of fact.

3. Attribution

3.1 Issues to be considered

505. Claimant believes that the actions of both the courts and bankruptcy trustees are attributable to Respondent.

506. While Respondent appears to not oppose the attribution of the courts’ actions to the State, it strongly objects to attribution of the acts of the bankruptcy trustees due to their special status under the Czech law.

507. The Arbitral Tribunal will summarise the positions of the Parties on attribution, determine the applicable law and will analyse the arguments presented by both Parties.

508. It should be noted that the issue of attribution becomes relevant only if the Arbitral Tribunal finds that any or all of the allegedly attributable acts were in violation of Respondent’s obligations under the Treaty.

3.2 *The Parties' position*

3.2.1 *Claimant's position*

509. Claimant argues that since the Treaty remains silent on the issue of attribution, Articles 4, 5 and 8 ARSIWA apply (SoC, paras 126-127).
510. *First*, acts and omissions of courts are attributable to Respondent because they are state organs *de jure* (SoC, para. 128); therefore, in accordance with Article 4 (1) ARSIWA, the courts' failure to prevent the sale of the Aircraft is attributable to Respondent (SoC, paras 130-132).
511. *Second*, Claimant argues that the acts of bankruptcy trustees are attributable to the States on the following grounds:
- (a) *Pursuant to Article 4 (1) ARSIWA, as bankruptcy trustees are the organs of the state de jure*
512. Claimant states that although bankruptcy trustees are individuals, they are organs of the state *de jure* under Czech law because (i) they are appointed by the court, (ii) they must be impartial and independent, and (iii) they fulfil a role that is usually reserved to executive or judicial organs of the state (SoC, paras 136-137).
513. Furthermore, the Constitutional Court has considered bankruptcy trustees as public organs (SoC, paras 146-147).
- (b) *Pursuant to Article 5 ARSIWA, as bankruptcy trustees exercise elements of governmental powers*
514. Claimant points out that the legal status as well as rights of the bankruptcy trustees arise from the law (SoC, para. 161) and are therefore delegated by the state (SoC, para. 163). The fact that states delegate such powers to non-state entities does not prevent the states from being held responsible internationally (SoC, para. 163).
515. The Bankruptcy and Composition Act, notably Sections 14, 19 and 27, delegate to bankruptcy trustees certain powers otherwise reserved to the state (SoC, paras 171-178). Czech legal scholars unanimously consider bankruptcy trustees to be organs of the state by function and to be invested with elements of governmental powers (SoC, para. 141).
516. Moreover, the Criminal Division of the Supreme Court recognised that bankruptcy trustees may commit a crime that can only be committed by a public official (SoC, para. 180).
517. The forced sale of the Aircraft by Mr ██████ qualifies as the exercise of governmental powers which should be attributed to Respondent (SoC, paras 164-168)

518. Claimant further argues that the *Vöcklinghaus* decision is erroneous with regards to the attribution of bankruptcy trustees' actions to the state for the following reasons:

- As pursuant to Article 3 ARSIWA, international responsibility is independent from liability under national laws (SoC, para. 191), the issue of attribution must be resolved based on Article 4, 5 or 8 ARSIWA (SoC, para. 192) and not in accordance with the national law.
- The Tribunal in *Vöcklinghaus* failed to rely on recognised scholars who all consider bankruptcy trustees to be organs of the state in terms of international law (SoC, para. 195).
- The fact that a bankruptcy trustee is personally liable for damages caused by acts or omissions does not resolve the question of attribution to the state (SoC, para. 196).

519. Claimant relies on *Dan Cake v Hungary* which established that bankruptcy trustees are conferred with governmental powers (SoC, paras 206-207). While bankruptcy trustees may be private persons, it does not mean that they cannot, simultaneously, have the monopoly for exercise of these governmental powers (SoC, para. 208).

(c) *In alternative, pursuant to Article 8 ARSIWA, as bankruptcy trustees are state organs de facto*

520. Claimant argues that the test of “*effective control*” is applicable not only to state-to-state relations (SoC, para. 216). In the present case, both the test of “*overall control*” and the test of “*effective control*” are met (SoC, para. 221).

521. Although Judge ██████ had effective control over the bankruptcy trustees pursuant to Section 12 of the Bankruptcy and Composition Act, he tolerated their illegal behaviour and did not use the court's supervisory power to exclude the Aircraft from the bankruptcy estates (SoC, paras 218-220). Hence, the conduct of the bankruptcy trustees must be attributed to Respondent (SoC, para. 221).

3.2.2 Respondent's position

522. Respondent argues that the acts of the bankruptcy trustees cannot be attributed to Respondent (SoD, para. 306) for the following reasons.

(a) *Bankruptcy trustees are not the organs of the state de jure in the meaning of Article 4(1) ARSIWA*

523. According to Article 4 ARSIWA, the domestic law of the state must be examined in order to determine whether a person or entity is an organ of the state (SoD, para. 310). The relevant criteria are whether the person or entity (i) has an “*independent juristic*

personality”; (ii) “*can be sued in its own name*”; and (iii) “*exercises operational autonomy*” (SoD, para. 311).

524. To this effect, Respondents states the following:

- Under Czech Republic, bankruptcy trustees have their own legal personality which is supported by *Vöcklinghaus* (SoD, para. 313);
- Bankruptcy trustees are not remunerated by the courts or other state organs, but from the proceeds of the sale of the debtor’s assets (SoD, paras 313-314);
- Bankruptcy trustees do not exercise legislative, executive, judicial or regulatory duties, since their activities are, at all times, controlled by the creditors’ committee, therefore, Claimant’s comparison of bankruptcy trustees and judicial bailiffs is erroneous (SoD, para. 316);
- Bankruptcy trustees can only be sued in their own name. According to the Supreme Court, even if, due to the acts of a bankruptcy trustee, a “*maladministration*” in its supervision by the court occurs, the bankruptcy courts cannot be held liable (SoD, para. 317).
- According to Section 7 of the Bankruptcy and Composition Act, the Czech Republic is not a party to the bankruptcy proceedings, which means that they are independent (SoD, para. 319).
- After having rejected Claimant’s arguments of impartiality as irrelevant, Respondent notes that the fact that bankruptcy trustees are supervised by the courts does not make them organs of the state (SoD, para. 320).

(b) *Bankruptcy trustees do not exercise elements of governmental powers under Article 5 ARSIWA*

525. Since the function of a bankruptcy trustee is confined to managing the debtor’s assets, bankruptcy trustees do not act on behalf of the Czech Republic or in the general public interest (SoD, paras 324-326). They do not exercise elements of governmental authority due to their limited powers (SoD paras 327-328).

526. Claimant’s criticism of *Vöcklinghaus* is unfounded, as the tribunal qualified bankruptcy trustees as independent not with regards to the exercise of governmental authority, but to find that they are not a state organ *de jure* (SoD, para. 329). Claimant also failed to provide authorities to support its allegation that having a monopoly is relevant for the application of Article 5 ARSIWA (SoD, para. 329).

(c) *Bankruptcy trustees are not state organs de facto under Article 8 ARSIWA*

527. Respondent argues that bankruptcy trustees do not fall under Article 8 ARSIWA because they do not act under the direction of the Czech Republic (SoD, para. 330).

Contrary to Claimant's argument, Section 12 of the Bankruptcy and Composition Act does not show that the bankruptcy trustees were acting under the direction, instigation or control of the state, as is required by Article 8 ARSIWA (SoD, paras 334-335).

528. Claimant failed to submit any authority to show that investment tribunals apply the test of "*overall control*" (SoD, para. 333). No investment tribunal has ever attributed an act to a state on the grounds that the state had the means to prevent the breach of obligation (SoD, para. 333). The fact that Claimant criticizes the courts' lack of use of their supervisory powers over the bankruptcy trustees further shows that the latter were not acting under the direction, instigation or control of the Czech courts (SoD, para. 336).
529. Finally, even if the actions of the bankruptcy trustees were attributable to Respondent, the bankruptcy trustees conducted the proceedings with the necessary due diligence, aiming to preserve the value of the Aircraft (Tr 82:8-9).

3.3 *The Arbitral Tribunal's analysis*

530. Respondent does not contest Claimant's allegation that the actions of Czech courts, if found to be wrongful, are attributable to the State. Therefore, the Arbitral Tribunal will focus on the Parties' arguments as to whether the acts of bankruptcy trustees are attributable to the State.
531. It appears that the Parties agree that the issue of attribution should be resolved based on the provisions of the ARSIWA.

3.3.1 *Article 4 ARSIWA*

532. Article 4(1) ARSIWA establishes that "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".
533. Under Article 4(2) ARSIWA, "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State".
534. It is clear that, in order to determine whether bankruptcy trustees are considered to be organs of the Czech Republic, the Tribunal must apply Czech domestic law. Therefore, in analysing the status of bankruptcy trustees under Czech law, the Arbitral Tribunal will rely on the decisions of the Constitutional Court.

(a) *Decision of the Constitutional Court dated 25 June 2002 (Exh C-238)*

535. The question before the Court was whether the bankruptcy trustee may be denied payment for her services if the bankruptcy estate contains no assets and no advance payment has been made to cover the bankruptcy costs.

536. As the first step of its analysis, the Court found that, according to law and doctrine, “*the bankruptcy trustee is not a party to the bankruptcy proceedings; however, as a special procedural entity it has a separate position vis-à-vis both the bankrupt, and the bankruptcy creditors, and cannot be considered as a representative of the bankruptcy creditors, nor a representative of the bankrupt*” (Exh C-238, p. 7 of the pdf).

537. The Court indicated that “[*t*]he doctrine classifies the bankruptcy trustee as a special public law body, whose task is to ensure the proper conduct of the bankruptcy process” (Exh C-238, p. 7 of the pdf).

538. The Court agreed with the doctrinal definition and identified three “*aspects defining the concept of a public law body*”, namely, public purpose, method of constitution and powers (Exh C-238, p. 7 of the pdf). The Court came to the conclusion that bankruptcy trustees satisfied all three aspects. Therefore, the Court concluded that a bankruptcy trustee is “*a special public law body*” and as such must enjoy the “*constitutional safeguards of remuneration and reimbursement of the costs associated with the performance of public functions*” (Exh C-238, p. 10 of the pdf).

539. Although, as argued by Respondent at the hearing (Tr 145:6-9), this Court decision was rendered in the context of answering a question relating to the remuneration of the bankruptcy trustees, this Arbitral Tribunal believes that the Court’s findings on the public purpose, the method of constitution and the nature of the powers of the bankruptcy trustee, and ultimately on its nature of a public organ, are of general nature and cannot be interpreted as applicable only to the question of remuneration.

540. In light of the above, when read as a stand-alone decision of the Constitutional Court, the decision dated 25 June 2002, defines bankruptcy trustees as *de jure* organs of the State.

541. However, this definition has been since updated and elaborated upon in further jurisprudence.

(b) *Decision of the Constitutional Court dated 29 October 2019 (Exh R-69)*

542. In Decision dated 29 October 2019, the Constitutional Court had an additional opportunity to address the “*distinctive nature of the position of a bankruptcy trustee*” under Czech law, including its own prior description of a trustee as a “*special public law body*”. In this decision, it explained, among other things that, while the trustee is “*in a special position where he has certain powers entrusted to him by the law on the one hand,*” on the other hand he is required by the State to take out liability insurance

precisely because he “cannot be considered a ‘regular’ public officer” for whose actions the State would be liable (Exh R-69, p. 4 of the pdf).

543. The Constitutional Court also distinguished the trustee from the supervising courts, which are necessarily State organs and on whom there is no “*duty to take out insurance*”. Under Czech law, therefore, “[t]he State is liable exclusively for maladministration in the discharge of its supervision over the bankruptcy trustee” (i.e., by the failures of its courts), but is not liable for the malfeasance of the trustee itself. “*The bankruptcy trustee’s liability is determined in view of his special position, where the performance of his activities is associated with a higher share of liability reflected ... in the duty to take out insurance*” (Exh R-69, p. 4 of the pdf).
544. The Arbitral Tribunal recognizes that this 2019 judgment was made in a case filed by Claimant itself. However, there is no reason to believe the Czech Constitutional Court was not analysing independently in this case, nor has Claimant even so alleged. And in absence of a suspicion that the Constitutional Court was not analysing its own law in good faith, the Tribunal cannot set aside the Court’s interpretation of its own prior holding, in order to decide that prior holding means the opposite under Czech law of what the Constitutional Court is now saying it means.
545. The Constitutional Court described the trustee as being in a “*distinctive*” position, or as an individual with a “*special position*” of a “*distinctive nature.*” Deciding whether the trustee is a *de jure* organ of the State for purposes of the analysis under Article 4 ARSIWA thus involves interpretation of complex matters under Czech law. Ultimately, however, it is not necessary to resolve that question because, as explained below, the same difficulty does not arise under Article 5 ARSIWA.

3.3.2 Article 5 ARSIWA

546. Pursuant to Article 5 ARSIWA “[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance”.
547. In light of the analysis of the two decisions of the Constitutional Court herein above, it is abundantly clear that bankruptcy trustees have “*certain powers entrusted to [them] by the law*” (Exh R-69, p. 4).
548. It follows that, regardless of whether a bankruptcy trustee is defined as a private citizen or a special public law body, so long as he/she is being delegated public duties, essentially to act as an agent of the State within a limited remit, Article 5 ARSIWA requires attribution of acts taken within the scope of the delegation/agency.

3.3.3 Article 8 ARSIWA

549. Article 8 ARSIWA stipulates that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.

550. The Arbitral Tribunal agrees with Respondent that Article 8 ARSIWA is not applicable in the situation at hand, where bankruptcy trustees acted within the framework of their statutory duties and without specific directions, instructions or control from the State.

551. Equally, Claimant’s argument that the failure by the courts to prevent the alleged wrongful acts by bankruptcy trustees makes those acts attributable to the State by application of the “overall control” test is unfounded.

3.4 Conclusion

552. It follows from the above

that acts and omissions of the bankruptcy trustees, if found to be wrongful, are attributable to Respondent in accordance with Article 5 ARSIWA, whether or not they might independently be attributable to the Respondent in accordance with Article 4 ARSIWA.

4. Legality of acts and omissions by the bankruptcy trustees and the courts

553. The Arbitral Tribunal notes that Claimant relies on the same set of acts and omissions by the bankruptcy trustees and the courts when it alleges various breaches of the Treaty by Respondent. Therefore, the Tribunal will first analyse each of the acts and omissions about which Claimant complains and determine whether those acts and omissions were unlawful under Czech law.

4.1 Seizure of the Aircraft and their inclusion into Mr Fischer’s estate by Mr ██████████

554. Claimant dates the beginning of the alleged expropriation and other breaches of its rights under the Treaty back to the seizure of the Aircraft and inclusion of them into Mr Fischer’s bankruptcy estate by the bankruptcy trustee Mr ██████████ on 12 October 2005 (SoC, para. 319).

555. The Bankruptcy and Composition Act provides the following:

- (i) “[t]he creditors’ committee is obliged to protect the common interest of the bankruptcy creditors” (Exh R-24, Section 11(7));
- (ii) “[a]n inventory of the estate ... shall be drawn up by the trustee in accordance with the instructions of the court based on the list submitted by the bankrupt and with the co-operation of the creditors’ committee”(Exh R-24, Section 18(1)).

556. As described above, Mr ██████ was appointed by the Municipal Court of Prague first as a preliminary trustee and later as a bankruptcy trustee on 26 April 2005 (Exh C-5, p. 1).

557. When Mr ██████ included the Aircraft into Mr Fischer’s bankruptcy estate, his decision was based on the unanimous order by the creditors’ meeting (Exh C-146, p. 1). Following the objections by Claimant and, in particular, the submission of Prof Hirte’s legal opinion on German law, Mr ██████ excluded the Aircraft from the estate (Exh C-9, C-43).

558. Therefore, the bankruptcy trustee followed the procedures established by Czech law when he complied with the decision of the creditors and included the assets claimed by the creditors. Once this decision was contested, he evaluated the arguments and came to the conclusion that the assets did not belong to the estate (Exh C-9, C-43). This conclusion was ultimately confirmed by the courts (Exh R-28).

559. Claimant failed to prove that Mr ██████a was acting in bad faith and/or in breach of his duties as a bankruptcy trustee when he took the decision to seize the Aircraft.

4.2 Re-inclusion of the Aircraft into Mr Fischer’s estate by Mr ██████

560. Claimant further argues that the subsequent re-inclusion of the Aircraft into Mr Fischer’s bankruptcy estate by Mr ██████ ensured that Claimant remained deprived of its property rights (SoC, para. 254).

561. In accordance with Section 19(1) of the Bankruptcy and Composition Act, “[s]hould there be doubts as to whether a thing, a right or another property value is part of the bankrupt’s estate or not, it shall be included in the inventory, with a note stating the claims asserted by other parties or other grounds which make such inclusion in the inventory doubtful” (Exh R-24).

562. In accordance with Section 19(2) of the Bankruptcy and Composition Act “persons claiming that a particular thing, right or other property value, should not have been included in the inventory of the bankrupt’s estate” should file “a suit against the estate within a time-limit determined by the court”, otherwise the asset “shall be deemed to have been rightfully included in the inventory” (Exh R-24).

563. In the case at hand, Mr ██████ was removed from office due to his health issues at his request and the Municipal Court appointed Mr ██████ to substitute him as the bankruptcy trustee (Exh C-83).
564. Upon his appointment, Mr ██████ took measures to include the Aircraft into the bankruptcy estate of Mr Fischer (Exh C-55).
565. In response, Claimant objected to re-inclusion of the Aircraft into the bankruptcy estate (Exh C-10) and filed an action with the Municipal Court for the exclusion of the Aircraft from Mr Fischer's bankruptcy estate (Exh C-118).
566. Various courts explained that "*the bankruptcy administrator had proceeded with due care and listed the said aircraft in the bankruptcy assets correctly*", given that "*the administrator is obliged [...] to include all items the administrator considers to be potential parts of the bankruptcy assets*", subject to subsequent review by the courts in the context of exclusion proceedings (Exh C-95, p. 4). The legal requirement to err on the side of potential over-inclusion in the event of any doubts was further justified in this case because otherwise (if the aircraft were found later to properly belong to the estate) "*it would be very difficult for the [bankruptcy trustee] to get the aircraft back, and the creditors would incur damage because they would not be able to be satisfied from the sale of the aircraft*" (Exh C-61, p. 6). The ultimate conclusion about ownership of contested assets is left to the courts because "*the bankruptcy proceedings are non-contentious proceedings and that disputes arising from them are resolved outside of the bankruptcy*" (Exh C-163, p. 4).
567. It should be noted that although the courts ultimately ruled that the Aircraft were not the property of Mr Fischer and therefore should be excluded from his estate, they did not find that the actions of Mr ██████ in initially including the aircraft subject to later court review were incorrect or unlawful (Exh R-28).

4.3 Inclusion of the Aircraft into Charter Air's estate by Mr ██████

568. Claimant complains that the bankruptcy trustee of Charter Air included the Aircraft into Charter Air's bankruptcy estate, despite the fact that they were already included in Mr Fischer's bankruptcy estate. According to Claimant, this inclusion maintained Claimant's loss of its property rights after the Aircraft were excluded from Mr Fischer's bankruptcy estate (SoC, para. 255).
569. Mr ██████ explained his decision to include the Aircraft by "*the failure to fulfil the formal requirements for transfer of the aircraft from the proprietorship of Charter Air s.r.o. in 1997 to the assets of the current owner pursuant to Section 196a, Commercial Code, given that consent to such transfer was not granted in particular by the general meeting of the seller's company*" (Exh C-151, p. 2). This decision was based on the legal opinion of Prof Dedic (Exh C-112).

570. Claimant objected to the inclusion of the Aircraft in court proceedings (Exh C-151, p. 1)

571. When assessing the actions of Mr ██████, the District Court of Prague stated that in order to resolve the issue of contested ownership, it “*was necessary to [...] deal with [German law] and there was a reasonable doubt whether a valid purchase contract had been made*” under that law. It found that the answer to that question was not obvious at the outset, and further stated as follows:

It is necessary to take into account the duty of the receiver to include in the bankrupt’s estate all things which belong in it and even those with which it is not clearly obvious whether they belong in the bankrupt’s estate or not. The receiver is to a great extent bound by the decisions of the creditors’ committee as to what things are to be included in the bankrupt’s estate. In this respect the court believes that the receiver did not err by including the things in the bankrupt’s estate (Exh C-137, p. 19).

572. In light of the above, it is clear that Mr J ██████ decision to include the Aircraft into the bankruptcy estate of Charter Air was in compliance with Czech law.

4.4 Courts’ failure to intervene in the actions of bankruptcy trustees

573. Claimant argues that the Czech courts’ non-intervention in the bankruptcy trustees’ actions constituted expropriation by omission (SoC, para. 278) and breach of FET and FPS standards (SoC, paras 407-409, 503).

574. The Bankruptcy and Composition Act contains the following provisions regarding court supervision:

- (i) *The court is entitled to request reports and explanations from the bankruptcy trustee, to inspect the accounts and to conduct enquiries as necessary. The court may require the trustee to seek the opinion of the creditors’ committee on certain issues, or it may contact the committee directly (Exh R-24, Section 12(1));*
- (ii) *When performing supervisory activity, the court decides on matters concerning the course of the bankruptcy proceedings and takes the necessary steps to ensure the purpose of such proceedings (Exh R-24, Section 12(2)).*
- (iii) *Claims for the exclusion of things from the bankrupt’s estate [...] may be satisfied at any time in the course of the bankruptcy proceedings (Exh R-24, Section 31(1)).*

575. Claimant and Mr Fischer filed several complaints as to the actions of the bankruptcy trustees (Exh. C-90, Exh C-118, Exh C-45, Exh C-159, Exh C-166, Exh C-113). Every claim was considered by the relevant courts and adjudicated in a reasonably timely fashion in accordance with Czech law.

576. Claimant did not demonstrate that the courts failed to carry out their supervisory functions in accordance with the law.

4.5 Failure by the bankruptcy trustees and the courts to prevent damage to the Aircraft

577. Claimant asserts that neither the bankruptcy trustees nor the courts took any measures to avoid the damage to the Aircraft (SoC, para. 277), in particular, in the following instances:

- (i) Mr ██████ did not prevent the deterioration and devaluation of the Aircraft (SoC, paras 291 - 294).
- (ii) Mr ██████ failed to lease the Aircraft despite the fact that Slovenské aerolínie a.s. had been willing to enter into a lease agreement (SoC, para. 286).
- (iii) The Municipal Court failed to sanction Mr ██████ as soon as it found out that the latter had not been performing his duties with the required diligence (SoC, para. 290).

578. Section 8(1) of the Bankruptcy and Composition Act stipulates that “[t]he bankruptcy trustee is obliged to carry out the duties imposed upon him by the law or by the court with due diligence (expert care) and is liable for any damage resulting from a breach of such duties” (Exh R-24).

579. In relation to Mr ██████ alleged failure to lease the Aircraft to Slovenské aerolínie a.s., the facts are the following:

- In his report dated 23 December 2005, Mr ██████ explained that (i) substantial funds would be required for maintenance of the aircraft; (ii) such funds were not available in the bankruptcy estate; (iii) that he “*opened intensive negotiations on potential lease of the aircraft*”; (iv) that there were “*only two companies in the Czech Republic that are able to operate the aircraft*” - ČSA, Travel service, a.s. and Charter Air, s.r.o.; and (v) that he contacted foreign companies but it was problematic because Claimant and HSH Nordbank AG threatened to seize the aircrafts abroad if they are operated (Exh R-27, p. 2).
- On 13 November 2006, Slovenské aerolínie a.s. offered to “*provide an initial investment in order to return the aircraft to a condition fit for operation*”, provided that AMF, HSH and Mr ██████ agree to a five-year lease agreement between AMF, as the lessor, and Slovenské aerolínie, as the lessee (Exh C-57).
- On 23 November 2006, the Municipal Court allowed Mr ██████ to conduct the negotiations and ordered him to obtain written consent from the interested parties, in particular from Mr ██████, HSH, Mr Fischer, creditors’ representatives and AMF (Exh C-160)

- HSH refused to provide the approval, and the deal could not go through (Exh R-36)
580. It is clear that Mr █████ followed the instructions from the court and made all the efforts to negotiate a potential lease, including the leasing agreement with Slovenské aerolínie a.s. However, the deal was frustrated by HSH's refusal to approve the lease.
581. In relation to Mr █████ alleged failure to prevent the deterioration of the Aircraft, the facts are the following:
- Claimant expressed its concern to Mr █████ and to the court with regards to the technical condition of the Aircraft on several occasions (Exh C-44, C-45, C-48, p. 3 and 4 of the pdf).
 - The first evaluation of the Aircraft was requested by Mr █████ in September 2006 (Exh C-49, p. 1) and in February 2007, the Municipal Court stated that there was “*no risk of immediate destruction or depreciation*” (Exh C-159).
 - In April 2007, in the midst of prolonged negotiations as to the sale of the Aircraft, Mr █████ informed the Municipal Court that mould had been identified in Aircraft 2 and that there was a risk that the mould would spread to Aircraft 1 (Exh C-152, p. 2). The Municipal Court immediately stated that “*any delay in the sale of the aircraft would increase the risk of damage to the aircraft and could consequently impede the possibility of selling the aircraft*” (Exh C-152, p. 2).
 - Claimant strongly opposed the decision stating that “[t]he mould which allegedly appeared inside the Aircraft surely does not constitute damage that would harm the Aircraft so intensively as to justify the planned interference in the proprietary right of AMF, i.e. sale of the Aircraft during the exclusion proceedings” (Exh C-157, p. 2 of the pdf).
 - Upon another inspection, Mr █████ informed the court of the discovery of mould inside the Aircraft (Exh C-53).
 - Claimant obtained a preliminary injunction ordering Mr █████ to refrain from selling the Aircraft without AMF's consent (Exh C-166), therefore, Mr █████ had to decline the offer from TNT Airways to purchase the Aircraft for USD 25,000,000.00 (Exh C-167, p. 4 of the pdf).
 - In May 2007, upon the assessment by AVITAS, Mr █████ informed the Municipal Court that the value of the Aircraft went down to USD 10,600,000.00. (Exh C-167, p. 1 of the pdf).
 - On 24 October 2007, the joint inspection found that, due to the long-term parking on the ground and to extensive mould and rust, the value of Aircraft 2 continued to decrease (Exh C-154).

582. In light of the above, it is clear that Mr █████ ordered the assessment of the assets and informed the court and the creditors about the condition of the Aircraft in a timely manner. It also appears that, in light of lack of funds in the estate for maintenance of the Aircraft and Claimant's and HSH's refusals to lease the aircraft, Mr █████ exhausted all the opportunities to minimize the depreciation.

583. In relation to the alleged failure of the Municipal Court to sanction Mr █████ for not performing his duties with the required due diligence, in particular, when the court became aware that the Aircraft was no longer insured, the Arbitral Tribunal notes the following:

- In March 2006, Claimant informed both Mr █████ and the Municipal Court that the Aircraft were no longer insured because Charter Air had stopped paying the insurance premiums (Exh C-48).
- Claimant also requested the Court to exercise its supervisory powers in order to remedy the situation (Exh C-48).
- Euro-Trend s.r.o. expert evaluation of the Aircraft dated 14 September 2006 states that the unpaid quarterly insurance premiums for the Aircraft amounted to USD 109,216 in total. The expert also explains the following:

The liquidator █████ █████ negotiated with Allianz on renewing the insurance premiums. However, the negotiations were unsuccessful, especially due to high financial demands of the insurance company and a limited scope of the insurance (e.g. it was not possible to insure the aircraft against natural disasters) (Exh C-49, p 16).

584. The facts of the case at hand demonstrate that Mr █████ attempted to negotiate the insurance coverage for the Aircraft. However, in light of the lack of funds in the bankruptcy estate, it was impossible for the trustee to procure such insurance. Since Claimant and HSH thwarted the trustee's attempts to lease the Aircraft and generate funds for maintenance and insurance, Mr █████ found himself in a deadlock where he had an obligation to insure the assets but did not have any funds to do it.

585. In light of the above, Claimant did not provide sufficient proof that Mr █████ acted in breach of his obligations as bankruptcy trustee, and consequently of the alleged failure by the courts to exercise due supervision.

4.6 Sale of the Aircraft

586. Claimant asserts that the sale of the Aircraft to a third party made Claimant's loss of its property rights permanent (SoC, para. 255).

587. The Bankruptcy and Composition Act provides for the following rules as to the sale of the assets included into the bankruptcy estate:

- Section 19 (3) states:

Until the lapse of the time-limit for filing [an exclusion] suit and during the period until the legally final completion of proceedings on the suit, the trustee may not realize (convert into money) a thing, right or other property value or even dispose of them otherwise, unless by so doing he averts the threat of damage to the property which is the subject of the suit.

- Section 27(2) establishes the following:

The sale, other than by auction, shall be effected by the trustee, if this is approved by the court. In its decision-making, the court shall take particular account of the opinion of the creditors' committee and the expected time of realization as well as of the costs which will be required for the maintenance and administration of the bankrupt's estate. In its approval, the court may also determine the conditions for the sale. A thing sold outside an auction may be sold below its estimated price (valuation). Disputable and uneasily recoverable receivables of a bankrupt whose collection (enforcement) would be particularly difficult can be transferred (disposed of) in a similar manner. No approval by the court is required for the sale of things which are in danger of immediate destruction or devaluation. When realizing an estate, the trustee shall proceed in such a way as to allow a further opportunity for business activity and jobs and to promote maximum protection of the environment or some other especially important public interest. The trustee is not bound by the administrator's contractual pre-emptive rights (Exh R-24).

588. In September 2009, the Aircraft remained a part of Charter Air's bankruptcy estate with the exclusion proceedings pending before the High Court (Exh C-110).
589. The expert reports dated 9 and 10 September 2009 assessed the value of Aircraft 1 at USD 1,049,000.00 (Exh C-175) and the value of Aircraft 2 at USD 1,072,000.00 (Exh C-176).
590. The reports also found corrosion and indicated that it would potentially develop into a "honeycomb corrosion" during the winter and this would "severely damage parts of the aircraft, engines and electronics and challenge its ability to be put into operation again" (Exh C-175, p. 19; C-176, p. 13).
591. On 25 October 2009, Charter Air's bankruptcy trustee Mr [REDACTED] informed the Regional Court in Prague that (i) HSH had agreed to the sale of the Aircraft (Exh C-174, p.2); (ii) on the basis of Mr [REDACTED] expert opinion the creditors' committee stated that the conditions of Section 19(3) of the Bankruptcy and Compensation Act had been met; and (iii) that "the creditors' committee decided to sell the aircrafts in an auction" (Exh C-174, p. 2).

592. On 29 October 2009, Mr █████ informed Claimant and HSH that HSH failed to provide its definitive approval and the sale by auction had been frustrated by the creditors' committee (Exh C-148, p. 1). Mr █████ further suggested several potential ways of dealing with the issue, including an auction, a tender and conservation of the Aircraft. Mr █████ asked Claimant and HSH to respond whether they agreed with the sale of the Aircraft in a public auction, and asked them to refrain from requesting an exclusion of the Aircraft from the bankruptcy estate (Exh C-148, p. 2).
593. On 12 November 2009, an auction decree was signed and the auction took place on 17 December 2009 without bidders (SoC, para. 60; SoD, para. 141). The repeated auction took place on 28 January 2010 and the Aircraft were sold to AerSale Inc. for a total price of USD 2,188,750.00 (Exh C-236).
594. On 23 March 2010, the sale of the Aircraft was registered with the Civil Aviation Authority and the liens of HSH on the Aircraft ceased to exist through monetisation of the aircraft in auction (Exh C-142).
595. It is clear from the facts of the case that the sale of the Aircraft was carried out in accordance with the rules and regulations established by Czech law. The bankruptcy trustee acted in accordance with the decisions of the creditors' committee, regularly reported to the supervising court and informed Claimant of the potential sale and requested it to provide its consent.

4.7 Failure to provide judicial protection of the owner's rights

596. Claimant argues that the state has failed to provide judicial protection of the owner's rights and this resulted in expropriation of the assets (SoC, para. 271). In support of its argument, Claimant quotes from *Venable v. United Mexican States*, which states the following:
- When it was apparent to bankruptcy court and officials that property in their custody was rapidly deteriorating through theft, complete inaction on the part of the court will entrain the responsibility of respondent Government.* (Exh CL-13 as quoted in SoC, para. 274).
597. In order to rely on the *Venable* case, Claimant needs to prove that the supervising Czech courts were aware of the wrongdoings on the part of the bankruptcy trustees and chose to ignore them or omitted to prevent them.
598. In the case at hand, the bankruptcy trustees acted in accordance with the Czech law and adhered to the instructions of the respective creditors' committees and supervising courts. From the analysis above, it is clear that the bankruptcy trustees regularly reported to the courts and Claimant had access to the courts at all time.
599. There has been no demonstration, that the Czech courts did not follow the principles of Czech law.

4.8 *The length of bankruptcy proceedings*

600. Claimant argues that the time frame of five years between the seizure and the sale of the Aircraft suffices to trigger an expropriation (SoC, paras 327 - 332) because it took away Claimant's possibility to administer and deal with his property for a longer period of time (SoC, para. 316).
601. It should be noted that the Aircraft were subject to two separate bankruptcy proceedings, overlapping in time, due to inter alia the structure of Claimant's business.
602. In fact, Fischer Air, which originally purchased the aircraft, sold them to Claimant, which at virtually the same time leased them back to Fischer Air (both companies then under the common ownership of Mr Fischer). Under these arrangements, Claimant was set up to be entirely dependent on Fischer Air to make regular lease payments and also to maintain and service the plane (Exh R-10, C-106). However, Fischer Air stopped making lease payments to Claimant years before the bankruptcy, and the debts of both companies and of Mr. Fischer mounted (Exh R-9). Meanwhile, it appears that the same aircraft also had been pledged as security for multiple HSH loans, including not just for loans to Claimant to acquire the aircraft from Fischer Air but also for very large personal loans to Mr. Fischer (SoD, paras 41-44). Mr. Fischer then failed to make timely payments on those loans (SoD, para. 44; R-9).
603. Mr. Fischer sold off Fischer Air to Charter Air (Exh R-14). However, Claimant still remained financially dependent on ongoing lease payments from Charter Air to service its substantial debt, and Charter Air also acquired the receivables of various banks against Mr. Fischer personally (Exh R-8, R-14). Ultimately, it led to the start of involuntary bankruptcy proceedings against Mr. Fischer in the Czech Republic (SoD, Sec 3.1.4). This in turn led Mr. Fischer to file a voluntary bankruptcy proceeding in Germany, presumably thereby further defaulting on the HSH personal loans which were secured by liens on the aircraft, on which Mr. Fischer already had defaulted with respect to prior loan payments (Exh R-21). This was followed by Charter Air's own filing for bankruptcy in the Czech Republic, on account of which it lost its license to operate the Aircraft (so obviously such operations no longer could be the source of any lease payments to Claimant) (Exh R-22).
604. There is no claim in this case that the Czech courts proceeded in a way that was unduly dilatory, arbitrary, abusive or discriminatory. On the issue of dilatoriness, each level of the courts actually decided the challenge before it reasonably promptly, particularly given that the issues not only involved competing claims but also competing expert opinions, some of them on issues of foreign (German) law.
605. For example, in Mr. Fischer's bankruptcy proceedings, the Municipal Court decided Claimant's exclusion petition (Exh C-118) in roughly 4 months (Exh C-61); the High Court decided the trustee's appeal (Exh C-121) in roughly 8 months, resulting in a remand (Exh C-129); the Municipal Court decided the remanded case in less than 9

months; and the High Court decided the trustee's appeal (Exh C-132) in 4-1/2 months (Exh C-127, C-16).

606. In Charter Air's bankruptcy proceeding, the Regional Court decided Claimant's exclusion proceeding in 4-1/2 months (Exh C-109), and the High Court decided the eventual appeal about 7-1/2 months after it was filed (Exh C-111; C-115). There is a longer gap before the Supreme Court weighed in on the High Court decision (Exh C-110), but it appears that there was collateral court activity in between, so the exact timing here is unclear, but in any event there has been no suggestion by Claimant that the Supreme Court was dilatory.

4.9 Conclusions

607. In light of the above, the Arbitral Tribunal came to the following conclusions:

- (i) *Each individual act of the bankruptcy trustees and the courts were in compliance with Czech law;*
- (ii) *Claimant failed to provide sufficient proof that the bankruptcy trustees or the courts acted in bad faith or in breach of their legal obligations.*

5. Expropriation

5.1 The Parties' positions

5.1.1 Claimant's position

608. Claimant believes that Respondent's actions amounted to an expropriation and that this expropriation is unlawful and in breach of Article 4(2) of the Treaty (SoC, paras 239 and 241).

609. In the present case, Claimant argues that a combination of different acts and omissions of the state, be they illegal or not, resulted in a "creeping" or "de facto" expropriation (SoC, paras 260-261 and 263). In particular, Claimant lists the following acts and omissions:

- (1) From the moment when Mr ██████ seized the Aircraft and included them into Mr Fischer's bankruptcy estate Claimant gradually lost all its ownership rights on the Aircraft (SoC, paras 266 and 268).
- (2) The subsequent re-inclusion of the Aircraft into Mr Fischer's bankruptcy estate by Mr ██████ made sure that Claimant remained deprived of its property rights (SoC, para. 254).

- (3) Mr █████ included the Aircraft into Charter Air's bankruptcy estate, despite the fact that he knew or ought to have known that they were already included in Mr Fischer's bankruptcy estate (SoC, para. 255). This inclusion maintained Claimant's loss of its property rights after the Aircraft were excluded from Mr Fischer's bankruptcy estate (SoC, para. 255).
 - (4) The time frame of five years between the seizure and the sale of the Aircraft suffices to trigger an expropriation (SoC, paras 327-332) because it took away Claimant's possibility to administer and deal with his property for a longer period of time (SoC, para. 316).
 - (5) The Czech courts' non-intervention in the bankruptcy trustees' actions constitutes expropriation by omission (SoC, para. 278).
 - (6) Neither the bankruptcy trustees nor the courts took any measures to avoid the damage to the Aircraft (SoC, para. 277), in particular, in the following instances:
 - (i) Mr █████ did not prevent the deterioration and devaluation of the Aircraft (SoC, paras 291-294).
 - (ii) Mr █████ failed to lease the Aircraft despite the fact that Slovenské aerolinie a.s. had been willing to enter into a lease agreement (SoC, para. 286).
 - (iii) The Municipal Court failed to sanction Mr █████ as soon as it found out that the latter had not been performing his duties with the required diligence (SoC, para. 290).
 - (7) The sale of the Aircraft to a third party made Claimant's loss of its property rights permanent (SoC, para. 255).
 - (8) The state failed to provide judicial protection of the owner's rights (SoC, para. 271).
610. Claimant further argues that, in order to be legal, an expropriation must occur (i) in the public interest; (ii) against full compensation without undue delay, including interest; and (iii) within a properly constituted judicial proceeding (SoC, para. 243). For Claimant, these conditions were not satisfied.
611. Claimant alleges that the burden of proof for a lawful expropriation lies with Respondent (SoC, para. 247). Claimant also contends that only the effect of a measure is decisive when assessing expropriation, not the intent behind the measure (SoC, paras 251 and 310-311). The reasoning behind the courts' and the bankruptcy trustees' actions or omissions is irrelevant (SoC, para. 314) and, therefore, Respondent's actions amount to an unlawful expropriation in breach of the Treaty.

5.1.2 Respondent's position

612. Respondent maintains that it did not breach Article 4 (2) of the Treaty (SoD, para. 349).
613. For Respondent, carrying out bankruptcy proceedings is an exercise of police powers, i.e. “*non-discriminatory regulations adopted by a host State in accordance with due process*” (SoD para. 350). And unless pursued unlawfully or with a purpose of expropriation, bankruptcy proceedings do not amount to expropriation (SoD, paras 350-351).
614. When assessing the lawfulness of bankruptcy proceedings, investment tribunals looked at whether there was no access to the courts; whether the courts rendered an unfair decision; or whether a state acted with an intent to confiscate the debtor's assets (SoD, para. 352). For Respondent, the burden of proof as regards the allegedly unlawful nature of the bankruptcy proceedings lies with Claimant (SoD, paras 353-354).
615. As to intent Respondent argues the following:
- (1) the intent behind bankruptcy proceedings is decisive, not the effect (SoD, paras 357-359).
 - (2) the public interest of bankruptcy proceedings to satisfy creditors in a non-discriminatory manner outweighs the incidental detriment to the property of third parties (SoD, para. 360).
 - (3) without the state's intent to expropriate, there cannot be expropriation (SoD, para. 361).
 - (4) in the present case, Claimant does not contest that the bankruptcy proceedings were conducted without a purpose of expropriation (SoD, para. 357).
616. Respondent states that the bankruptcy proceedings were carried out lawfully (SoD, para. 362), in particular:
- (1) The seizure and inclusion of the Aircraft into Mr Fischer's bankruptcy estate, as well as the related court proceedings, were carried out in accordance with the law and do not amount to expropriation (SoD, para. 364).
 - (2) When Mr █████ included the Aircraft into Charter Air's bankruptcy estate, he acted reasonably and according to his rights and obligations under the Bankruptcy and Composition Act (SoD, para. 365).
 - (3) The bankruptcy trustees intended to preserve the value of the assets and thus, tried to lease and sell the Aircraft. However, every offer they received was

blocked by Claimant or HSH, who ultimately are responsible for the decrease in the asset's value (SoD, paras 366-367).

- (4) The courts were also in favour of the lease and sale of the Aircraft and expropriation cannot be done by omission (SoD, para. 288).
- (5) The sale of the Aircraft through public auction was not an expropriation (SoD, para. 369) because
 - (i) Claimant itself recognised that the sale of the Aircraft was necessary in order to avoid the further diminution of their value;
 - (ii) The expert opinion concluded that if the Aircraft were not sold immediately, no value would be recovered at all; and
 - (iii) After the auction, Mr ██████ duly transferred the proceeds from the sale to HSH (SoD, para. 369).

617. The lawful exercise of police powers does not oblige a state to compensate an investor (SoD, paras 350-351). Since the bankruptcy proceedings were carried out lawfully and in exercise of the Czech Republic's police powers, the Arbitral Tribunal should find that there was no expropriation (SoD, paras 371-372). Accordingly, no compensation is due (SoD, para. 372).

5.2. The Arbitral Tribunal's analysis

5.2.1 Scope of the standard

618. Article 4 (2) of the Treaty stipulates the following:

Investments by investors of either Contracting Party may be expropriated, nationalized or subjected to other measures with effects equivalent to expropriation or nationalization only in the public interest and against compensation. Such compensation shall correspond to the value of the investment expropriated immediately before the date on which the actual or pending expropriation, nationalization or similar measure was made public. Compensation shall be paid without delay and shall bear interest at the normal rate of bank interest; it shall be effectively convertible and freely transferable. Provision for the determination and payment of such compensation shall be made in an appropriate manner no later than the date of the expropriation, nationalization or similar measure. The legality of the expropriation, nationalization or similar measure and the amount of the compensation may be subject to review in a properly constituted legal proceeding (Exh CL-5).

619. The Treaty does not provide for a definition of expropriation, therefore the Arbitral Tribunal will apply international law, including international investment law, as

determined in paras 499-504 above, in order to decide whether the acts and omissions of Respondent amount to expropriation.

620. Claimant relies on the case law which provides for a general definition of expropriation as a partial or complete deprivation of use of the investment (SoC, paras 251-253) to argue that a number of actions and omissions of the bankruptcy trustees and courts amount to an unlawful expropriation.
621. Respondent rightly refers to the decisions of investment tribunals that dealt specifically with the issue of whether bankruptcy proceedings can amount to expropriation.
622. The tribunal in the *Saluka* case stated the following:

In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary law today (Exh CL-82, para. 262).

and

The CNB’s decision [to impose forced administration] is, in the opinion of the Tribunal, a lawful and permissible regulatory action by the Czech Republic aimed at the general welfare of the State, and does not fall within the ambit of any of the exceptions to the permissibility of regulatory action which are recognised by customary international law (Exh CL-82, para. 275).

623. The tribunal in the *Binder* case ruled as follows:

[...] bankruptcy is not tantamount to expropriation, and there is no indication that the bankruptcy in this case was unlawful or irregular or that it pursued an expropriatory purpose (Exh RL-111, para. 480)

624. As both the tribunals in *Saluka* and *Binder* ruled, bankruptcy proceedings in general are within the Czech Republic’s lawful regulatory power. It is in the nature of such proceedings (and as established in Czech law) that they are authorized to temporarily sequester possible assets of a bankrupt estate to prevent dissipation, while contested ownership claims are being considered and resolved. The result of such determination is that either the assets ultimately are excluded from the bankrupt’s estate, or they are maintained in the estate and are allocated among creditors. In this particular context of the exercise of a generally recognized police power, the Tribunal considers that more is needed to demonstrate expropriation than simply that the process of lawful sequestration and eventual exclusion of a particular asset led to some *lost value* between the dates of those events. Of course, if the assets (or their fair value at the end of the process) were *never returned at all*, despite an ultimate finding that they did not properly belong to the bankrupt estate, the situation could be different. But where some return of the assets (or their value) took place, the question is whether and in what

circumstances either the initial sequestration of the contested assets, or their mere loss in value between the time of sequestration and the time of return, can amount to expropriation of the difference.

625. In this context, the Tribunal considers that some indicia of a *wrongful exercise* of what otherwise would be a valid exercise of these bankruptcy powers must be shown, consistent with the *Saluka* and *Binder* tribunal's focus on unlawfulness, irregularity and expropriatory purpose. Since Claimant does not argue that Respondent's actions had an expropriatory intent, the Arbitral Tribunal will focus on assessing the lawfulness and good faith of the acts and omissions listed by Claimant.

5.2.2 *Application of the standard*

626. As discussed above (*cf.*, above paras 553-607), it is undisputed that basic principles of Czech bankruptcy law include (i) that the trustee has the *legal duty* to include any disputed assets in the estate, in the event of any challenge presented about ownership (Exh C-137); (ii) that disputing owners then are required to bring legal action against the estate to exclude the asset (Exh R-24, Sec 19(2)); (iii) that the decision on exclusion is placed in the hands of the court, not the trustee, whose obligation is to err on the side of over-inclusion to protect potential creditors (Exh C-61); and (iv) that the Czech legal system like most is structured with a multi-level system of appeals, allowing all disputing parties to seek higher recourse before determinations of ownership are finally resolved. Czech law also (v) forbids the trustee from disposing of contested assets while these exclusion proceedings are under way, unless there is consent by all relevant parties or there is a finding of imminent damage to the property (Exh R-24, Sec 19(3)).

627. The evidence indicates that all of these requirements of Czech law were duly respected. In one case, private parties (creditors of Mr. Fischer) claimed that he owned the Aircraft, and in the other case, private parties (creditors of Charter Air) claimed that it owned the Aircraft. These claims were not transparently frivolous, given the web of related party transfers, liens, defaults, and etc., and the trustees thus were required under the law to include the disputed assets in the estate *pro tem*, subject to later exclusion proceedings. The courts considered the competing claims and rendered certain first instance rulings, which were duly appealed and also decided, consistent with the requirements of Czech law, and in general without undue delay. The trustee in the meantime sought in various ways to maintain the assets and prevent undue deterioration, but these efforts were thwarted by a series of objections by interested parties, including Claimant itself. Ultimately, with no other solution presenting itself, the assets were sold and their sale value returned to Claimant. The Tribunal does not consider this process to have been either an unlawful exercise of Respondent's legitimate police powers nor to have been implemented in bad faith.

5.3 *Conclusions*

628. In light of the above, the Arbitral Tribunal came to the following conclusions:

- (i) *The temporary sequestration of disputed assets during the course of bankruptcy proceedings can amount to expropriation only if they were carried out unlawfully, in bad faith or with an expropriatory purpose, or if upon determination that the asset does not properly belong in the bankruptcy estate, the assets (or their fair value at the time of such determination) are nonetheless not returned to the owner .*
- (ii) *Claimant concedes that after the Czech courts ultimately resolved the ownership issue in its favour, the sale value of the aircraft was returned to it.*
- (iii) *Claimant does not argue that Respondent's actions had an expropriatory intent.*
- (iv) *Upon analysis of the acts and omissions listed by Claimant as constituting expropriation, the Arbitral Tribunal found that both bankruptcy trustees and Czech courts acted in accordance with Czech law and therefore lawfully.*
- (v) *Claimant failed to demonstrate that the bankruptcy proceedings were carried out in bad faith or in a manner inconsistent with international law.*
- (vi) *In these circumstances, Claimant has failed to show expropriation either of the aircraft themselves or of the difference in value between the time of their lawful sequestration and their lawful sale.*

6. Full Protection and Security

6.1 *The Parties' position*

6.1.1 *Claimant's position*

629. Relying on *Siag and Vecchi v Egypt*, Claimant argues that whenever there is expropriation, lawful or not, the duty of full protection and security for investors (hereinafter "FPS") is breached if the state does not take measures to return the investment to the owner (SoC, paras 414-415).

630. For Claimant FPS is not limited to physical protection and security, but extends to legal and commercial protection (SoC, para. 394). Therefore, Section 19 (3) of the Bankruptcy and Composition Act must be interpreted in conformity with international law (SoC, paras 448-449) to mean that the aim of bankruptcy proceedings is not only to satisfy the creditors, but also to protect "*other interested persons*", including Claimant (SoC, paras 450-451).

631. Hence, the bankruptcy trustees in the present case should not only have taken the necessary measures to physically protect the Aircraft, but should also have provided the Aircraft with legal and commercial protection, *i.e.* with insurance and lease agreements (SoC, para. 395).
632. Claimant further argues that pursuant to Article 8 (2) of the Bankruptcy and Composition Act, bankruptcy trustees have a duty of due diligence when exercising their function (SoC, para. 405). The standard for assessing due diligence is that of a “*reasonably well-organised state*” (SoC, para. 412).
633. In the present case, Respondent did not meet the required standard of due diligence (SoC, paras 412-413). While the bankruptcy trustees displayed a lack of impartiality, the court (i) failed to appoint competent bankruptcy trustees (SoC, paras 432-433) and the courts did not intervene to sanction the trustees (SoC, paras 407-409). Therefore, Respondent failed to adequately supervise the bankruptcy trustees (SoC, para. 447).
634. None of the bankruptcy trustees acted with the necessary due diligence (SoC, para. 411). The bankruptcy proceedings conducted by Mr █████, Mr █████ and Mr █████ were ineffective and inefficient (SoC, paras 426-427). Although there is no express provision in the Czech law that imposes a duty upon bankruptcy trustees to protect the assets and their value, such a duty may be found when interpreting Section 8 of the Bankruptcy and Composition Act (SoC, paras 428-429). However, Mr █████ and Mr █████ failed to protect the Aircraft, especially their value (SoC, para. 429). Due to the conduct of the bankruptcy trustees, the Czech bankruptcy regime lost all credibility and trustworthiness (SoC, para. 430).
635. For Claimant, the Czech legal framework is insufficient and thus breaches the FPS standard (SoC, para. 417). Apart from a lengthy complaint to the Constitutional Court, it had no legal means to review or prevent the decision to sell the Aircraft in an auction (SoC, para. 439).
636. Claimant compares the Czech legal framework to the UNCITRAL Legislative Guide on International Insolvency (hereinafter “ULGII”) (SoC, paras 420-421). Contrary to the ULGII, when a third party disputes an asset involved in bankruptcy proceedings, the Czech law does not contain a provision which enables an *interim* protection of the asset (SoC, para. 422). Accordingly, such measures should be encompassed in the bankruptcy trustee’s duty of diligence contained in Section 8 of the Bankruptcy and Composition Act, and in the court’s duty of supervision contained in Section 12 of the Bankruptcy and Composition Act (SoC, para. 422).

6.1.2 Respondent’s position

637. Respondent argues that the Aircraft were not physically harmed within the meaning of the Treaty (SoD, para. 444).

638. Claimant's authorities all relate to physical destruction of property during "*internal armed conflict, riot and acts of violence*" (SoD, para. 446). Respondent recalls that, in the absence of physical violence, FPS claims have not been admitted by tribunals (SoD, para. 445). In the present case, the Czech Republic was not in a situation of public disorder and the Aircraft were physically protected at the Prague Airport (SoD, para. 446).
639. Respondent argues that if, as Claimant alleges, FPS extends beyond the physical protection, the legal protection contained therein is limited (SoD, paras 448-450). FPS only requires a state to keep its judicial system available and acting in good faith (SoD, paras 448-450). Claimant has had full access to the Czech courts, which, in the end, agreed with Claimant (SoD, para. 450). Thus, the Czech legal system provided the required protection (SoD, para. 450).
640. Respondent argues that even if the conduct of the bankruptcy trustees was attributable to the Czech Republic, the latter does not have a strict liability for FPS (SoD, para. 452). The duty is fulfilled when a state acts with a reasonable due diligence and it is for Claimant to prove that Respondent breached this duty (SoD, para. 452).
641. Respondent qualifies Claimant's allegation of a treaty breach due to an insufficient legal framework as erroneous (SoD, para. 453). The Czech legal framework for bankruptcy proceedings does not contain any gaps and only minimally differs from the non-binding ULGII (SoD, para. 453).
642. Contrary to Claimant's allegation, expropriation and FPS are not closely linked, since they can be found in two different and independent paragraphs of Article 4 of the Treaty (SoD, para. 456). FPS is also contained in Article 2 (3) of the Treaty (SoD para. 456). In light of the principle of *effet utile*, FPS and expropriation are separate and have a different scope and role (SoD, para. 456).
643. Finally, due to significant differences between the present case and *Siag and Vecchi v Egypt*, Claimant cannot rely on the latter to argue that whenever any form of expropriation arises, FPS is breached if the state does not return the investment to the owner (SoD, paras 457-460).

6.2 The Arbitral Tribunal's analysis

644. Article 2(3) of the BIT establishes that "[i]nvestments and returns thereon together with returns on any reinvestment shall enjoy full protection under this Treaty".
645. The Arbitral Tribunal will first determine the scope of the FPS obligation established in international law and analyse whether Respondent has breached its FPS obligation.

6.2.1. *Scope of the FPS obligation*

646. Claimant correctly indicates the trend to interpret the “*full protection*” obligation as including not only physical protection (SoC, para. 394). A number of arbitral tribunals followed *Azurix* in holding that the full protection and security standard extends beyond physical protection to include some elements of legal stability and security (Exh CL-34, paras 320-321; CL-59, para. 326). These interpretations have not been adopted by all other tribunals, however, with the result that the scope and reach of the FPS obligation (beyond physical protection) is not yet a matter of broad consensus.

647. In any event, *Azurix* involved in particular the issue of a stable (versus changing) legal and regulatory environment, an issue that is not encompassed by the case at hand, which does not involve any changes in law or administrative rules.

648. One particular application of the FPS standard relevant to this case is the host State’s duty to maintain a functioning judicial system and make it available to foreign investors seeking redress. For example, the *Parkerings* tribunal stated:

The Respondent’s duty under the Treaty was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court (Exh CL-60, para. 360).

649. The *Frontier Petroleum v. Czech Republic* tribunal, which reached a similar conclusion, clarified that legal security includes effective means of redress should an investment be harmed. It held that it is:

apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors – including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights (Exh CL-64, para. 263).

650. The *Frontier Petroleum* tribunal continued as follows:

In this Tribunal’s view, where the acts of the host state’s judiciary are at stake, “full protection and security” means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor (Exh CL-64, para. 273).

651. The *Frontier Petroleum* tribunal qualified that statement by observing that not every failure to obtain redress is a violation of the principle of full protection and security, and that a decision that in the eyes of an outside observer, such as an international tribunal, is “*wrong*” would not automatically lead to state responsibility (Exh CL-64, para. 273).

652. Other tribunals have also confirmed that the FPS standard includes legal security, in the sense of providing the necessary means for the investor to obtain redress. For

example, in *Al-Bahloul v. Tajikistan* the claimant relied on Article 10(1) of the Energy Charter Treaty, which provides for “*the most constant protection and security*”, to complain about an alleged miscarriage of justice in the courts. The tribunal said:

[...] *it is true that, while the concept of protection and security in investment treaties has developed principally in the context of physical security, some tribunals have applied it more broadly to encompass legal security as well. Therefore, it could arguably cover a situation in which there has been a demonstrated miscarriage of justice* (Exh RL-182, para. 246).

653. Further, in *Electrabel v. Hungary*, the tribunal found that the obligation under Article 10(1) of the Energy Charter Treaty to provide “*the most constant protection and security*” included the duty to put at the disposal of the claimant “*the [legal] tools for obtaining redress*” (Exh RL-37, para. 7.146).
654. As Claimant argues, the FPS standard is indeed one which requires “*due diligence*” by authorities, to take reasonable steps to try to protect against foreseeable harm; it is not a “*strict liability*” standard by which the government is rendered responsible for making the investor whole for all harm the State nonetheless fails to prevent. The “*due diligence*” (versus “*strict liability*”) framing has been adopted by both the ICJ and numerous tribunals (Exh CL-88, para. 108; RL-139, para. 821; RL-107, para. 430; RL-161 para. 228).

6.2.2 *Application of the FPS standard*

655. The facts of the case demonstrate that there was no impediment to Claimant’s duly accessing the Czech courts. To the contrary, it availed itself repeatedly of those courts, and the courts rendered reasonably timely (and indeed favourable) rulings on its applications.
656. In this case, as discussed above (*cf.* above paras 581-582), the trustees did not ignore the issue of the depreciating asset value. The trustees were alert to the asset depreciation and tried to forestall it in a variety of ways, but ultimately failed notwithstanding their efforts.
657. Finally, Claimant alleges that the Czech legal framework provides insufficient interim protection of disputed assets, such as might have prevented the depreciation and ensured that it received the aircraft back at the end of the court proceedings, and this systemic flaw constitutes a breach of Respondent’s international law obligations.
658. It should be noted that there has been no attempt by Claimant to show that there is any other bankruptcy system (much less a consensus of systems) which provides mechanisms to forestall or remedy the type of harm Claimant suffered (*e.g.*, either some form of State funding to prevent depreciation of sequestered assets in estates with no funds, while disputes over ownership are being considered and resolved, or

some form of a damages remedy to make up the difference later between the original value and the depreciated value returned to the proper owner).

659. As far as the record shows, the Czech bankruptcy system is designed generally in keeping with international norms, apparently reflected in the UNCITRAL Legislative Guide on International Insolvency (ULGII) (Exh CL-65).
660. In the absence of any showing that the Czech system meaningfully departs from international practice in how it handles this dilemma, the Arbitral Tribunal cannot denounce the system as falling below established standards.

6.3. Conclusions

661. In light of the above, the Arbitral Tribunal makes the following conclusions:
- (i) *The FPS standard extends beyond physical protection to include (at least) the provision of legal security, in the sense of a duty of due diligence in maintaining a functioning judicial system that is available to foreign investors seeking redress.*
 - (ii) *In the case at hand, Claimant had full access to Czech judicial system.*
 - (iii) *The bankruptcy trustees and the courts carried out the bankruptcy proceedings with due diligence.*
 - (iv) *The Czech legal system has not been shown to fall below international law standards in any respect relevant to this case.*
 - (v) *Respondent's actions do not amount to a breach of the FPS standard.*

7. Fair and Equitable Treatment and Arbitrary measures

7.1 The Parties' position

7.1.1 Claimant's position

662. According to Claimant, the duty of fair and equitable treatment (hereinafter "FET") found in Article 2 of the Treaty applies to every situation (SoC, paras 461-462).
663. In the present case, Respondent breached its FET duty, in particular:

Claimant's right to a fair trial

664. The Czech bankruptcy courts infringed Claimant's right to a fair trial in several instances:

665. The courts wrongly assumed jurisdiction over Mr Fischer (SoC, para. 473), while FET implies that jurisdiction should only be exercised on the basis of a firm legal provision (SoC, para. 470). Also the right to be heard is protected before the opening of bankruptcy proceedings (SoC, paras 474 and 478).
666. The Court did not interpret the IR 2000 in good faith and violated Claimant's right to a fair trial contained in Article 6 ECHR (SoC, paras 575-576).
667. The Czech courts should have found out and applied the content of German law to the questions of ownership of a limited partnership and of the law applicable to the Purchase Agreements (SoC, paras 503-514). By denying Claimant's ownership rights under German law, Respondent breached FET (SoC, paras 553-571).
668. Hence, the Czech courts' interference in Claimant's property, coupled with the absence of a legal opportunity to prevent the Aircraft from being included into the bankruptcy estates, violated Claimant's right to a fair trial (SoC, para. 478). Consequently, Respondent breached FET (SoC, para. 478).

Denial of justice

669. The wrongful assumption of jurisdiction over Mr Fischer also constitutes a denial of justice which breaches FET (SoC, para. 495). If the Czech courts had not opened the bankruptcy proceedings, the Aircraft would not have been included into Mr Fischer's bankruptcy estate (SoC, para. 495). The Czech courts took many years to decide on the exemption of the Aircraft from Charter Air's bankruptcy estate (SoC, paras 520-529). These proceedings lasted more than twice as long as the proceedings on the exclusion of the Aircraft from Mr Fischer's bankruptcy estate (SoC, paras 534-540). When the High Court, bound by the judgement of the Supreme Court, eventually sided with Claimant in 2014, the Aircraft had been sold for four years (SoC, para. 530). This decision-making qualifies as undue delay, which amounts to a breach of FET (SoC, para. 529).
670. Claimant further alleges that the deterioration of the Aircraft can be attributed to the conduct of Mr █████ and Mr █████ as well as to the undue delay of the Czech courts (SoC, para. 530). If the courts had decided sooner, the Aircraft would not have deteriorated to such extent (SoC, para. 531). They would either have been excluded from the bankruptcy estate or sold for a much higher price (SoC, para. 531-533).

Legitimate expectations

671. Respondent violated Claimant's legitimate expectations. When Claimant invested in the Czech Republic, it could not have known that the latter would eventually become an EU Member State in 2004, thereby triggering the application of the IR 2000 (SoC, paras 496-497). Thus, Claimant's legitimate expectations of a stable business environment were violated (SoC, paras 498-499).

Standard of consistency

672. FET implies that states should not treat investors inconsistently (SoC, para. 541). In the present dispute, the Czech courts did not treat Claimant according to the standard of consistency because they issued contradictory decisions and behaved inconsistently (SoC, paras 544-552).

Arbitrary and discriminatory treatment

673. The conduct of the Czech courts and the bankruptcy trustees qualifies as arbitrary and discriminatory (SoC, para. 554). In particular, in on the following occasions:

674. *First*, the inclusion of the Aircraft by Mr ██████ into Mr Fischer's bankruptcy estate was arbitrary (SoC, para. 572). Mr ██████ did not sufficiently and reasonably substantiate why he chose a version of German law that allowed him to include the Aircraft into Mr Fischer's bankruptcy estate (SoC, para. 572). The Municipal Court also failed to display an adequate reasoning and ignored the existence of the main insolvency proceedings under Article 3 (1) IR 2000 in Germany (SoC, para. 575).

675. *Second*, making a difference between German and Czech limited partnership was discriminatory (SoC, para. 569).

676. *Third*, Mr ██████ included the Aircraft into Charter Air's bankruptcy estate, knowing that Mr ██████ had already included them into Mr Fischer's bankruptcy estate (SoC, para. 578). This does not represent good practice (SoC, para. 578).

677. *Fourth*, according to the arbitration clauses contained in the Purchase Agreements, disputes arising out of the Purchase Agreements should have been resolved through arbitration in Hamburg and under German law (SoC, para. 590). This should have prevented the Czech courts from assuming jurisdiction (SoC, para. 593). Instead, the Czech courts did not deny their competence and examined the Purchase Agreements under Czech law (SoC, para. 593). This violates the principle of party autonomy (SoC, para. 596). The lack of reasoning behind the Czech courts' decisions to neglect the arbitration clauses contained in the Purchase Agreements breaches FET (SoC, para. 598).

678. *Fifth*, the validity of the Purchase Agreements should have been examined under German law, not Czech law (SoC, para. 601).

679. *Sixth*, the Purchase Agreements were valid and should have benefitted from the principles of legitimate expectations and legal security (SoC, para. 602). When the validity of a contract is uncertain, the contract is presumed to be valid (SoC, paras 603-604). In the present case, Mr ██████ took the opposite approach and, acting in bad faith, included the Aircraft into Charter Air's bankruptcy estate (SoC, paras 604-605). This led to the situation in which Claimant had to request the exclusion of the same Aircraft in two parallel civil proceedings (SoC, para. 605).

680. *Finally*, questioning the validity of the Purchase Agreements after so many years amounts to a violation of the minimum standard of treatment (SoC, para. 606).

7.1.2 *Respondent's position*

681. Respondent argues that it has treated Claimant's alleged investments in accordance with FET.

682. *First*, there can be no denial of justice without a shocking and fundamentally unfair wrongdoing (SoD, para. 385). Unless "*clear and malicious*", an incorrect application of the law does not suffice (SoD, para. 385).

683. In any event, the Czech courts did not act in such a malicious way when applying the IR 2000 (SoD, para. 386). Moreover, the fact that Claimant had access to the Czech courts and that, in the end, the latter agreed with Claimant, proves that there was no denial of justice (SoD, para. 386).

684. *Second*, since domestic courts are entitled to make definitive interpretations of domestic law, this Arbitral Tribunal cannot review the decision of the Czech Courts as to the application of the IR 2000 (SoD, paras 390-395).

685. In any event, the doctrine of legitimate expectations only applies to executive and legislative organs, not to the judicial organs (SoD, paras 375 and 395).

686. *Third*, since Claimant is not claiming a denial of justice with regards to undue delay, Respondent understands Claimant's position to be that Respondent should be liable for undue delay because it affected the value of the Aircraft (SoD, para. 398). However, the low sale price obtained for the sale of the Aircraft at the auction cannot be attributed to Respondent, but is due to Claimant's constant opposition to sell the Aircraft (SoD, paras 399-400). Thus, there was no undue delay that could have breached the Treaty (SoD, para. 400).

687. *Fourth*, contrary to executive organs, judiciary organs are not required to act consistently (SoD, para. 403). If national courts were obliged to always decide a case in the same way, every successful appeal would amount in an international wrong (SoD, para. 403). The decisions from the High Court issued in two different bankruptcy proceedings were not inconsistent (SoD, para. 404). To the contrary, the decision rendered in Charter Air's bankruptcy proceedings took into account the bankruptcy proceedings of Mr Fischer (SoD, para. 404).

688. For these reasons, the Arbitral Tribunal should dismiss Claimant's FET claims (SoD, para. 406).

689. The Czech Republic's conduct was neither arbitrary nor discriminatory (SoD, para. 411).

690. The threshold for arbitrary measures is high (SoD, paras 412-413). Simple unlawfulness cannot amount to arbitrariness and it is for Claimant to prove that the bankruptcy proceedings were carried out in “*wilful disregard of the law*” (SoD, paras 414-416).
691. *First*, the High Court’s decision dated 2 February 2007, which annulled the Municipal Court’s judgement to exclude the Aircraft from Mr Fischer’s bankruptcy estate, was well-reasoned and not arbitrary (SoD, para. 420).
692. *Second*, the Czech courts acknowledged both Claimant’s procedural capacity and Claimant’s legal capacity to own property under German law (SoD, paras 422-424).
693. *Third*, Mr █████ acted within his rights and obligations under the Bankruptcy and Composition Act and sufficiently justified the inclusion of the Aircraft into Mr Fischer’s bankruptcy estate (SoD, paras 425-426). He did not have to further explain why he chose this version of German law (SoD, para. 426).
694. *Fourth*, Claimant failed to explain why the inclusion of the Aircraft into Charter Air’s bankruptcy estate did not represent good practice (SoD, para. 428). Like Mr █████, Mr █████ justified the inclusion of the Aircraft into the bankruptcy estate, thereby staying within his rights and obligations under the Bankruptcy and Composition Act (SoD, para. 428).
695. *Fifth*, Claimant’s right to turn to arbitration was not violated. The question of the validity of the Purchase Agreements was not a contractual dispute, but one that was connected to the action for exclusion of the Aircraft brought against Mr █████ who is not a party to the contracted arbitration clauses (SoD, para. 430). In any case, instead of challenging the Czech courts’ jurisdiction to resolve that issue, Claimant took part in the court proceedings (SoD, para. 430). Therefore, the Czech Republic’s conduct was not arbitrary.
696. Discrimination is given when (i) a case similar to Claimant’s case; (ii) is treated differently by Respondent; (iii) without reasonable justification (SoD, para. 433). These criteria must be fulfilled cumulatively (SoD, para. 433). Claimant omitted to refer to this legal standard and, thus, failed to duly substantiate its discrimination claim (SoD, para. 433). In any event, the Czech courts always recognised Claimant as a legal subject, capable of owning property under German law (SoD, para. 434). Hence, the Czech Republic’s conduct was not discriminatory.
697. Should the Arbitral Tribunal consider that the Czech Republic’s conduct was arbitrary and discriminatory, Respondent alleges that Article 2 (2) of the Treaty is still not breached, because Claimant has not established that the Czech Republic’s conduct “*impede[d] the management, maintenance, use or enjoyment*” of the Aircraft (SoD, paras 437-440).

7.2 *The Arbitral Tribunal's analysis*

7.2.1. *Scope of the FET standard*

698. Article 2(1) of the Treaty stipulates the following:

Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party, permitting such investments in accordance with its laws. It shall in all Cases afford investments just and equitable treatment.

699. It is an established trend in jurisprudence of investment tribunals to include within the FET standard an element of reasonable compliance with investors' legitimate expectations (defined somewhat differently by different tribunals), in addition to a prohibition on arbitrary, abusive or discriminatory conduct, and also – when the acts of the judiciary are put at issue – to include within the FET standard an obligation not to deny justice (Exh CL-64, para. 273; RL-159, para. 314; CL-60, para. 360). However, although this case certainly involves the actions of the judiciary, it also involves the actions of the bankruptcy trustees. The Tribunal accepts that the FET standard before it is therefore not limited to an inquiry about denial of justice.

700. In principle, the Tribunal accepts that a violation of the BIT could result cumulatively from the combination of administrative actions and the failure of the judiciary to correct them, even though none of these actions taken in isolation might be sufficient on its own to rise to the level of a treaty breach. For example, the tribunal in *RosInvest v. Russia* observed that it cannot act as a court of appeal of the decisions of Russian courts and that the standard of finding a denial of justice is high. However, according to the same tribunal, this did not exclude the possibility that the totality of the measures taken by the respondent, in their cumulative effect, including but not limited to the decisions of the courts, could result in a finding of a treaty violation (Exh RL-136, para. 280).

7.2.2. *Application of the FET standard*

701. It should be noted that in this case, Claimant's claims of various Treaty breaches rely on the same factual allegations for each claim. When analysing the facts of the case in the section (*cf.* above paras 553-607) above, the Arbitral Tribunal found that: (a) the trustees followed their legal duty under Czech law to err on the side of over-inclusion of assets to enable the courts to sort out contested ownership claims, (b) the trustees followed their legal duty under Czech law to try to preserve the value of the sequestered assets in the meantime, to the extent they could in the unfortunate absence of funds in the estates and in the face of repeated objections to the various solutions the trustees suggested; and (c) meanwhile, the various levels of the judicial system worked the way they were designed, namely to render reasonably timely rulings on all

applications, while allowing interested parties the opportunity to present legal arguments and to appeal rulings with which they did not agree.

702. Therefore, the Arbitral Tribunal came to the conclusion that the bankruptcy trustees and the courts acted in compliance with Czech law, and although individual acts may not have been perfect, Claimant nonetheless was given full access to the judiciary which eventually came to conclusions in its favour regarding the disputed ownership issues. It also should be noted that the Arbitral Tribunal did not find proof that Claimant and its investment were treated in a discriminatory, arbitrary or abusive manner.
703. The Tribunal recognizes that nonetheless, the outcome of events that was objectively unsatisfactory for Claimant. The Czech courts ultimately concluded that the two aircraft were not assets of the various bankruptcy estates and thus vindicated Claimant's position on ownership, but by the time these rulings had been rendered, the aircraft already had been sold to forestall further depreciation, with the result that what ultimately was excluded from the estates was not the aircraft as such, but rather the proceeds of their sale. Stated otherwise, in the end, Claimant was adjudged to be right in its claim of ownership, but this vindication came too late for it to regain possession and control of the aircraft.
704. In this context, this Tribunal will need to determine whether a cumulative effect of Respondent's individually lawful actions were nonetheless unfair to the extent that holistically they amounted to a breach of FET standard. Such an inquiry requires the Tribunal to consider whether "fairness" for Claimant under the FET standard consists not only of fairness *in process* (in the sense that the trustees and courts at all times complied with applicable law), but also fairness *in effect*, in the sense of ensuring at the end of the legal proceedings, Claimant would be left in no worse position than before the proceedings started.
705. In the Tribunal's view, a finding that the Respondent breached its obligations in the latter respect would require a conclusion that its legal system should have been designed to accomplish the opposite result. Presumably, there are at least two notional mechanisms by which a legal system could do so. One would be through some kind of State funding mechanism to ensure that even where a bankruptcy estate does not have liquid assets of its own, bankruptcy trustees have recourse to sufficient funds to maintain (and not have to sell as depreciating assets) any property that is temporarily sequestered to prevent dissipation pending resolution of competing claims. The other would be through some kind of damages mechanism (available against the trustee, the courts, or the State itself) to make up any loss that a property owner ultimately suffers from depreciation while the courts are determining ownership, or from a sale in order to prevent further depreciation.
706. As for the former, there has been no suggestion that any other recognized bankruptcy system provides this form of subsidy to a cashless estate, to provide a trustee with additional resources to main contested assets when the estate itself cannot fund such

efforts and the various disputing stakeholders cannot agree on alternative funding mechanisms. As for the latter, Czech law has damages mechanisms available for demonstrated malfeasance by the courts, as discussed *inter alia* in the recent Constitutional Court decision, and also has a requirement that the trustee maintain insurance to be able to cover damages liability for his own actions, but again this operates in circumstances of a breach of his duties, not as a pool of funds to cover any and all harm absent malfeasance (Exh R-69). There has been no suggestion that these limitations on damages recovery resulted from any recent changes in law, as opposed to long-standing principles of law that were in existence when Claimant invested in the Czech Republic.

707. In these circumstances, the Tribunal is unable to condemn the Respondent for a breach of BIT obligations, on account of its not having some additional mechanisms in its legal system to prevent the type of harm that Claimant ultimately sustained. Such a finding would amount to a conclusion that legal systems fall below required treaty standards when cumulatively they fail to provide an “*effective remedy*” against harms that befall an investor through the normal operation of State laws, even where the State action has been found *not otherwise wrongful* under international law (*i.e.*, it is in good faith, not arbitrary or abusive, non-discriminatory, and in compliance with domestic law.). The Tribunal is unable to extend the FET obligation to this degree.
708. In declining to do so, the Tribunal finally observes that some treaties contain a separate standard that arguably might be interpreted as requiring legal systems to provide “*effective remedies*.” For example, Article 10(12) ECT provides that “*Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments*”. There is no need in this case to interpret the scope of such a standard, for example to decide whether “*effective means for the assertion of claims*” equates to a requirement of “*effective remedies*,” to forestall or compensate for harm befalling a litigant while it is pursuing the claims thus asserted. The Tribunal simply notes that the BIT in this case does not include such a distinct clause, and the Tribunal cannot extend the reach of the FET (or FPS) obligation to impose the same requirement. That would defeat the *effet utile* of including a separate provision to this effect in treaties where States have done so, since in such treaties there already are separate FPS and FET clauses, and the “*effective means*” clause thus would be rendered entirely redundant and superfluous.

7.3 *Conclusions*

709. In light of the above, the Arbitral Tribunal concludes that:
- (i) ***Claimant has not demonstrated any arbitrary, abusive, or discriminatory conduct on the part of either the bankruptcy trustees or the Czech courts, nor that either the trustees or the Czech courts violated its legitimate expectations regarding the protections afforded by the Czech legal system.***

- (ii) *None of the acts by the bankruptcy trustees and the courts amounted to denial of justice.*
- (iii) *The FET standard in this BIT does not include an additional obligation to ensure a fully effective remedy against all harm, such that deteriorating assets embroiled in contested ownership claims during bankruptcy proceedings will be fully preserved and returned unharmed to their ultimate owner, even in circumstances where bankruptcy estates have insufficient assets to forestall deterioration; and as such,*
- (iv) *Claimant has failed to prove the breach of FET standard.*
- (v) *Because the Tribunal has found no breach of the BIT (either its provisions on expropriation, FET or FPS, discussed in Sections III.5, III.6 and III.7 respectively), there is no need to consider whether Claimant has sufficiently proven harm resulting from such breach. However, the Tribunal notes that there were significant problems with Claimant's case on causation and quantum, as noted in the Separate Declaration of Professor Alexandrov.*

IV. Costs

1. The issues

710. The last question that the Arbitral Tribunal has to decide upon concerns the costs of the arbitration proceedings.

2. The Parties' positions

2.1 Claimant's position

711. In its last written submission (Reply, p. 28), Claimant requested the following relief:

[Claim. 7.2] *Each Party shall bear its own costs of legal representation and the costs of the arbitrator appointed by it. Both Parties shall share the costs of the Chairman of the arbitration tribunal equally. While Claimant will accept to carry its own costs in case of an award in its favour, it won't agree to support Respondent's costs in case of an award in favour of the latter. Should the Arbitral Tribunal decide otherwise, the costs incurred to Claimant in the amount of 1,127,924.90 EUR should be borne by Respondent (Claimant's Statement of Cost of 25 September 2019).*

712. Claimant reiterated its position in further submissions (Letter dated 17 April 2020).

2.2 Respondent's position

713. In its last written submission (Rejoinder para. 51), Respondent requested the following relief:

[Resp. 3] *In any event, order Claimant to fully reimburse the Czech Republic for the costs it has incurred in defending its interests in this arbitration, plus interest on any costs at a rate to be determined by the Tribunal.*

714. In the Submission on Costs dated 22 February 2019, Respondent argues that Claimant failed to “*orderly prosecute its claims*” for the following reasons:

(a) by initiating this arbitration even though (1) “*it did not have the financial means to see it through to its end*”; and (2) the Tribunal has no jurisdiction under an intra-EU BIT;

(b) by refusing to pay its share of the deposit and by ignoring the Tribunal’s procedural instructions on several occasions.

715. Based on the above, and considering the fact that Respondent’s costs are reasonable, Respondent argues that the Tribunal should apply Article 42(1) of the UNCITRAL Rules and order Claimant to bear all costs (Submission on Costs dated 22 February 2019).

3. The Arbitral Tribunal’s analysis

716. Article 10 para. 2 of the Germany-Czech Republic BIT, in connection with the arbitration proceedings initiated by an investor against a State, reads as follows: “[...] *In the absence of any other arrangement between the parties to the dispute, the provisions of article 9, paragraphs 3 to 5 shall apply mutatis mutandis [...]*”.

717. Article 9 para. 5 of the Germany-Czech Republic BIT addresses the disputes between the Contracting Parties (the States) and in this regards reads as follows:

[...] Contracting Party shall bear the costs of its own member and of its legal representation in the arbitration proceedings. The costs of the chairman and any other costs shall be shared equally between the two Contracting Parties. The tribunal may determine a different allocation of costs. [...]

718. The Parties have not expressly adopted “*any other arrangement*”. However it has been agreed that the proceedings shall be submitted to the 2010 UNCITRAL Arbitration Rules (PO 1, para. 7).

719. In those Rules, the principle is expressed by Article 40 that reads as follows:

1. *The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.*
2. *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 41;*
 - (b) *The reasonable travel and other expenses incurred by the arbitrators;*
 - (c) *The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;*
 - (d) *The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*
 - (e) *The legal and other costs incurred by the parties in relation to the arbitration 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 fees and expenses of the Secretary-General of the PCA.*

[...]

720. It appears from this text that the Arbitral Tribunal should distinguish between the costs of the arbitral proceedings as such and the costs incurred by the Parties.

3.1 *The costs of the arbitral proceedings*

3.1.1 *The Arbitral Tribunal*

(a) *The fees of the Arbitrators*

721. Articles 9 and 10 of the BIT do not address the description of the costs. The Arbitral Tribunal considers that it may apply Article 40(2)(a) of the 2010 UNCITRAL Rules. According to that provision, the fees of the Arbitral Tribunal are to be fixed separately as to each arbitrator. According to Article 41 of the Rules, “[t]he fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.”

722. The Parties have agreed with the Arbitral Tribunal that the arbitrators would work at an hourly rate of USD 700 per hour. The arbitrators’ fees for the proceedings have been fixed finally as follows:

	Nr of hours	USD
Jean Kalicki	██████	██████
Stanimir Alexandrov	██	██████
Pierre Tercier	██████	██████
TOTAL	1,046.75	732,725

This amount seems reasonable in view of the amount in dispute, the complexity of the issues and the time spent.

(b) *The expenses of the Arbitrators*

723. According to Article 40(2)(b) of the UNCITRAL Rules, the costs include “*the reasonable travel and other expenses incurred by the arbitrators*”. The related statement is as follows:

	USD
Jean Kalicki	██████
Stanimir Alexandrov	██████
Pierre Tercier	██████
TOTAL	22,940.70

(c) *Other Tribunal Expenses*

	USD
Bank costs	557.09
Catering	1,919.07
Courier expenses	136.75
Court reporting	9,249.57
Currency translation variances	131.86
IT/AV support	8,494.35
Printing and Supplies	580.11
Tribunal Secretary expenses	896.57
TOTAL	21,965.37

Except for the legal and other costs incurred by the Parties that the Arbitral Tribunal will discuss further, there were no other costs (neither experts nor witnesses whose costs were borne by the Arbitral Tribunal).

3.1.2 *The Permanent Court of Arbitration*

724. Pursuant to the Terms of Appointment of the Permanent Court of Arbitration, the International Bureau of the PCA was designated to act as registry in this arbitration. Total PCA fees amount to USD 22,368.93. The PCA incurred no expenses.

3.1.3 *Summary*

725. Summing up the overall costs of the arbitral proceedings are the following: USD 800,000.

726. The Parties have first paid advance deposits of USD 400,000 each, amounting in total to USD 800,000.

727. On 10 April 2020, in view of the financial situation, the Arbitral Tribunal invited each party to pay a supplementary deposit of USD 30,000 each. Respondent made the requested payment. Claimant did not pay.

728. The Arbitral Tribunal has decided to forego using the supplementary amount in order to be able to finalise the proceedings. Therefore the amount of USD 30,000 paid by Respondent will be reimbursed to it.

3.2 *Allocation of the costs*

729. According to Articles 9 and 10 of the BIT, each Party shall bear the fees and expenses of the Arbitrator it has appointed and bear half of the fees and expenses of the Presiding arbitrator. However the rule also states that *[t]he tribunal may determine a different allocation of costs.*

730. According to Article 42 of the UNCITRAL Rules:

“1. *The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. 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. *The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.*”

731. The Arbitral Tribunal has taken into consideration the following circumstances:

- On the merits, Claimant is the “*unsuccessful party*”, as far as its claims have indeed been rejected by the Arbitral Tribunal. It should therefore “*in principle*” bear the costs of the arbitration.
- However, the Arbitral Tribunal notes that the substantial objections raised by Respondent as to jurisdiction have all been rejected. It follows that Respondent is the “*unsuccessful party*” with respect to issues of jurisdiction, and therefore should bear part of the costs of arbitration as well.
- Moreover, even on the merits, the Arbitral Tribunal considers, in view of the complexity and the particularity of the case, which raised questions that were very disputable, that it would be unfair for either Party to bear more than half of the costs of the proceeding.
- The Arbitral Tribunal considers that it would be more appropriate to follow the general practice, according to which each Party shall bear half of the total costs.

732. Therefore, the Arbitral Tribunal decides that the Parties shall bear equally the costs of the proceeding, i.e., each Party shall bear USD 400,000.

3.3 *Indemnity of the Parties*

733. According to Article 9 para. 5 of the BIT, applicable by reference to Article 10, “[c]ontracting Party shall bear the costs [...] of its legal representation in the arbitration proceedings. Article 40(2)(e) of the UNCITRAL Rules mentions as one of the element of the costs of arbitration consists in “*the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable*”.

734. The Parties have been invited to submit their statement of costs by a letter dated 17 April 2020.

735. Claimant requests the following amount, excluding the advance paid to the Arbitral Tribunal:

Description	EUR
Attorney [REDACTED]	[REDACTED]
Attorney [REDACTED]	[REDACTED]
Attorney [REDACTED]	[REDACTED]
Law Firm of White and Case	17,250.00
[REDACTED]	[REDACTED]
Translations, travel expenses Mr Fischer	[REDACTED]

TOTAL	727,924.90
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736. Respondent submitted the following statement of costs, excluding the advance paid to the Arbitral Tribunal:

Description	EUR
Dechert (Paris) LLP, legal fees	575,854.94
Dechert (Paris) LLP, expenses	16,783.55
Ministry of Finance of the Czech Republic, expenses	3,388.28
TOTAL	596,026.77

737. The Arbitral Tribunal has given the reasons for which it considers that each Party shall bear an equal part of the costs of the proceedings. It appears to it that these grounds should also be decisive in declining to order the indemnity that each Party requests with respect to its own costs.

738. In light of the above, the Arbitral Tribunal considers it appropriate for each Party to bear its own costs.

4. Conclusions

739. In light of the above, the Arbitral Tribunal decides the following:

- (i) *Each Party shall bear half of the cost of the proceedings, i.e. USD 400,000.*
- (ii) *The supplementary deposit of USD 30,000 paid by Respondent is to be returned to it.*
- (iii) *Each Party shall bear its own costs.*

C. AWARD

For the reasons set forth above, the Arbitral Tribunal decides the following:

1. *Respondent's jurisdictional and admissibility objections are dismissed and the Arbitral Tribunal has jurisdiction under the Germany-Czech Republic BIT to hear Claimant's claims.*
2. *Claimant's claims [Claim. 3 – Claim. 7] are dismissed. Professor Alexandrov has prepared a Separate Declaration, attached to this award as Annex 1, in connection with some aspects of this decision.*
3. *Each Party shall bear half of the cost of the proceedings, i.e. USD 400,000.*
4. *The supplementary deposit of USD 30,000 paid by Respondent is to be returned to it.*
5. *All other claims are dismissed.*

Place of arbitration: Paris, France

Date: 11 May 2020

For the Arbitral Tribunal:

Prof. Pierre Tercier
President



Prof. Stanimir A. Alexandrov
Co-arbitrator



Ms Jean E. Kalicki
Co-arbitrator



PCA Case No. 2017-15
A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany)
vs/
The Czech Republic

SEPARATE DECLARATION

Stanimir A. Alexandrov
May 11, 2020

I agree with most of the analysis and conclusions of the Award. My views, however, differ from those of my esteemed colleagues on several important points.

Expropriation: The Award concludes in para. 628 that there was no expropriation because, *inter alia*, Claimant does not argue that Respondent's actions had an expropriatory intent (iii); and that both the bankruptcy trustees and the Czech courts acted in accordance with Czech law and therefore lawfully (iv).

I do not believe that the question whether there was an intent to expropriate is determinative. Whether there was an expropriation is a question of result, of effect, not a question of intent or purpose. Further, the question of whether the bankruptcy trustees and the courts acted in accordance with Czech law is, of course, relevant, but not dispositive. It is entirely possible that a host State's conduct is in full compliance with its domestic laws, yet inconsistent with international law and in breach of the BIT. Thus, to conclude that the trustees and the courts acted in accordance with Czech law *and therefore lawfully* under international law is incorrect.

In my view, the correct analysis is to look at the effect of Respondent's conduct. Claimant's aircraft were included in the bankruptcy estates and sold. As the Czech courts themselves ultimately concluded, the aircraft should not have been included in the bankruptcy estates in the first place. Claimant received the value of the sold aircraft. The analysis should focus on the difference between that sale value and the value of the aircraft at the time of the sequestration.

The Award appears to recognize that this is the proper analysis by referring to "the difference in value between the time of their lawful sequestration and their lawful sale" (para. 628(vi)). However, it concludes earlier (para. 628(i)) that "[t]he temporary sequestration of disputed assets during the course of bankruptcy proceedings can amount to expropriation only if ... upon determination that the asset does not properly belong in the bankruptcy estate, the assets (or their fair value at the time of such determination) are nonetheless not returned to the owner." In my view, this is not the correct standard. The question is rather whether there was a substantial loss of value between (i) *the time of the sequestration* and (ii) the time of the sale (and the corresponding return of the proceeds to Claimant).

I believe that the Award should have examined Claimant's arguments relating to the value of the aircraft at the time of the sequestration, should have determined what that value

was, should have compared that value with the amount received by Claimant as a result of the sale, and should have determined on that basis whether there was a substantial deprivation of value. If so, then the Award should have turned to causation.

Just and equitable treatment (FET): The Award concludes in para. 709 that (i) “Claimant has not demonstrated any arbitrary, abusive, or discriminatory conduct on the part of either the bankruptcy trustees or the Czech courts, nor that either the trustees or the Czech courts violated its legitimate expectations regarding the protections afforded by the Czech legal system”; (ii) “[n]one of the acts by the bankruptcy trustees and the courts amounted to denial of justice;” and (iii) “[t]he FET standard in this BIT does not include an additional obligation to ensure a fully effective remedy against all harm...”. I agree with conclusion (ii) that there was no denial of justice in this case. My view differs, however, with respect to conclusions (i) and (iii).

Conclusion (i) lists some elements, such as abusive, arbitrary or discriminatory conduct, or undermining the investor’s legitimate expectations, which – if proven – would constitute unjust and inequitable treatment. But these are not the only elements of the FET standard. Article 2(1) of the BIT requires that Respondent “in all cases afford investments just and equitable treatment.” This standard cannot be reduced to a list of types or categories of conduct. The treaty standard remains just and equitable treatment.¹ To determine what is just and equitable, and what is unjust and inequitable, requires an assessment of the overall treatment afforded to the investor, rather than an assessment of each individual act or omission. If the overall result of such treatment is unjust or inequitable, the FET protection will have been breached.

A violation of the BIT could result from the combination of administrative actions (such as those of the bankruptcy trustees) and the failure of the judiciary to correct them even though none of the administrative actions or the court decisions, taken separately, would rise to the level of a breach of FET. The totality of the acts and omissions of a respondent, the whole course of a respondent’s conduct, including the decisions of its court, may well result in a finding of a treaty violation.² The relevant question, therefore, should be whether the conduct of the bankruptcy trustees and the courts as a whole resulted in treatment that was unjust or inequitable. I conclude that it did.

In the end the Czech courts sided with Claimant. As the Award rightly observes in para. 703, “in the end, Claimant was adjudged to be right in its claim of ownership, but this vindication came too late for it to regain possession and control of the aircraft.” None of the individual decisions of the bankruptcy trustees or the Czech courts may have been incorrect as a matter of Czech law. However, the treatment of Claimant (the combination of the acts or omissions of the bankruptcy trustees and the courts), resulted in an outcome that was unfair to Claimant. At different times different courts ruled that the aircraft should be

¹ See *JKX Oil v. Ukraine*, Award, 6 February 2017 (Crawford, Hanotiau, Reisman), paras. 444-445.

² See *RosInvestCo. UK v. Russian Federation*, Final Award, 12 September 2010 (Böckstiegel, Lord Steyn, Berman), para. 280; *AlGhanim v. Jordan*, Award, 14 December 2017 (McLachlan, Fortier, Kohen), para. 365.

included in, or should be excluded from, the bankruptcy estates; the sale of the aircraft without Claimant's consent was sometimes allowed and sometimes prohibited. At the end of this long saga, Claimant prevailed; its rights were, in the end, vindicated, but it was too late – Claimant had lost the asset. This treatment, as a whole, is hardly just and equitable.

Conclusion (iii) focuses on the absence of an explicit requirement (present in other BITs) that the judiciary must provide an effective remedy from the actions of State organs and declines to read into the BIT such a requirement. The absence of such an explicit requirement, however, does not mean that an investor left without an effective remedy is treated justly and equitably, as required by Article 2(1) of the BIT.

In this case, the Czech courts eventually ruled that the aircraft should not have been included in the bankruptcy estates. The aircraft were included in the bankruptcy estates, in the first place, by the bankruptcy trustees, whose actions were attributable to Respondent. After a lengthy process, that inclusion was “undone” by the courts as a matter of Czech law; Claimant, however, remained without a remedy – Claimant received the sale value of the aircraft, which Claimant argues was significantly less than the value at the time of the sequestration. Thus, Respondent did not provide an effective remedy for its own actions, which cannot be just and equitable.

Valuation: In sum, my conclusion is that Respondent is liable for breaches of the BIT. Where Claimant's case may fall is on valuation.

It is Claimant's burden to prove that the value of the aircraft at the time of the sequestration in the fall of 2005 was substantially higher than the amount it received after the sale. I have some difficulties with Claimant's arguments on this point. First, it seems unclear why there would be separate claims for actual damages and future lost profits, as Claimant appears to argue in its written submissions, given that the price of an arms-length transaction (such as the sale of the aircraft) would typically include the asset's revenue-generating potential. At the hearing, Claimant appeared to argue that its damages claim consisted of the lost profits and the residual value of the aircraft (Transcript, pages 121-122), which I believe to be a reasonable argument. Yet, it still leaves open the question why the sale of the aircraft (presumably a “willing seller – willing buyer” transaction) would not capture both the expected future profits and any residual value.

Second, Claimant relies on several documents for the value of the aircraft at or around the time of the sequestration, which do not appear to fully support its claims. One example is the Euro-Trend report (Exhibit C-49), on which Claimant relies to assert a value of \$27.2 million as of June 2006 (Amended Statement of Claim, para. 617). However, that report acknowledges that it is based on several untested assumptions. Further, the report appears to calculate the value of the aircraft within a range of \$20.1 - \$22.4 million (Exhibit C-49, page 22), rather than the \$27 million asserted by Claimant, and also states that an amount of almost \$5 million would be needed for maintenance before recommissioning the aircraft (pages 22-23). Finally, the report values the aircraft rather than Claimant's interest in them and assumes that Claimant's ownership was free from any liens. There is also a serious question as to whether Claimant has met its burden to rebut Respondent's criticism of

Claimant's reliance on this report and on other similar reports and purchase offers (Statement of Defense, paras. 481-492).

In sum, a careful analysis of Claimant's arguments on valuation may lead to the conclusion that Claimant did not meet its burden to prove the existence of harm and to quantify it.

Washington, May 11, 2020



Stanimir A. Alexandrov