

**IN THE MATTER OF AN ARBITRATION CONDUCTED UNDER THE ARBITRATION RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)**

AND

**IN THE MATTER OF A CLAIM UNDER THE TREATY BETWEEN THE FEDERAL REPUBLIC OF
GERMANY AND THE CZECH AND SLOVAK FEDERAL REPUBLIC CONCERNING THE
ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS**

B E T W E E N:

**(1) ECE PROJEKTMANAGEMENT INTERNATIONAL GMBH
(2) KOMMANDITGESELLSCHAFT PANTA ACHTUNDSECHZIGSTE
GRUNDSTÜCKSGESELLSCHAFT MBH & CO**

Claimants

-and-

THE CZECH REPUBLIC

Respondent

(PCA Case No. 2010-5)

AWARD

19 September 2013

The Tribunal:

Sir Franklin Berman KCMG QC, Chairman

Professor Andreas Bucher

Mr J. Christopher Thomas QC

Legal Assistant / Secretary to the Tribunal:

Mr Simon Olleson

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PART I INTRODUCTION

A. INTRODUCTION

1.1 The present dispute arises under the Treaty between the Federal Republic of Germany and the Czech and Slovak Federal Republic concerning the Encouragement and Reciprocal Protection of Investments, signed at Prague on 2 October 1990 (“the BIT” or “the Treaty”).

1. The Parties

a. The Claimants

1.2 The Claimants are ECE Projektmanagement International GmbH (“**ECE International**”) and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co (“**PANTA**”), both of which form part of the ECE Group, the ultimate holding company of which is ECE Projektmanagement GmbH & Co. KG (“**ECE or ECE KG**”).

1.3 The first Claimant, ECE International, is a corporation incorporated and organized under the laws of Germany and a fully-owned subsidiary of ECE KG.

1.4 The second Claimant, PANTA, is a limited partnership likewise organized under the laws of Germany. ECE International is the limited partner in PANTA, and holds all of the limited participation rights. The general partner in PANTA is PANTA Erste Grundstücksgesellschaft mbH, a company also incorporated under the laws of Germany.

1.5 The Claimants have been represented throughout the course of the present proceedings by Dr [redacted] to. As at the date of the institution of proceedings, Dr [redacted] was a Partner in the Frankfurt office of White & Case LLP. During the course of the hearing, the Tribunal was notified that Dr [redacted] had left White & Case and had become a partner in the Frankfurt office of Norton Rose LLP.

1.6 For the oral hearings in the present proceedings, the Claimants were also represented by Mr Arthur Marriott QC, 12 Gray’s Inn Square, London, and by Ms Mahnaz Malik.

b. The Respondent

1.7 The Respondent is the Czech Republic.

1.8 The Respondent is represented by Dr [redacted] a Partner in the Prague office of Squire Sanders, v.o.s., advokátní kancelář, and by Mr Stephen P. Anyway, a Partner in the New York office of Squire Sanders LLP.

2. Brief Overview of the Dispute

- 1.9 The Claimants, and the ECE Group of which they are subsidiaries, are involved in the business of property development, and in particular the construction, management and sale of shopping centres.
- 1.10 The present dispute relates to the Claimants' planned construction of a shopping centre in a city of some inhabitants situated in the north of the Czech Republic. is some of Prague, close to
- 1.11 The Claimants' planned shopping centre, which has been referred to throughout the proceedings as GALERIE ("Galerie" or the "Galerie project"), was to have been constructed on a sloping hillside site closely adjacent to the bus station in the centre of
- 1.12 Although substantial earthworks were conducted in preparation for the construction of Galerie (a matter in relation to which the Tribunal will have to return later in this Award), the Claimants' project ultimately never progressed to the construction phase.
- 1.13 In broad outline, the Claimants complain about the actions of the relevant city, regional and national Czech administrative authorities having responsibility for planning matters. They say that the conduct of these authorities in respect of permits required for the construction of Galerie resulted in delays to the planned construction of Galerie, and that, in the circumstances, the combined effect of these delays left them no choice but to abandon their investment.
- 1.14 In the Request for Arbitration, the Claimants alleged breaches of "the Claimants' right to fair and equitable treatment, protection against arbitrary measures, the right to admission of lawful investments, expropriation and non-discrimination".¹
- 1.15 As remedies for these breaches, the Request for Arbitration and Statement of Claim sought damages in the amount of "€70.289 million, plus moral damages",² which the Claimants asserted were made up of "obsolete expenditure and lost profits"; these damages were stipulated to be in respect of:
- a. the reduction in the value of the shares in Tschechien 7 and ECE Praha (including a claim for imputed interest that could have been earned with comparable alternative investments);
 - b. the obsolete expenditure of various entities within the ECE Group other than Tschechien 7 and ECE Praha (again including a claim in respect of imputed interest that allegedly could have been earned with comparable alternative investments).³

In addition, a further sum of imputed interest was claimed "based on the legal interest rate in the Czech Republic as of 31 May 2009 that exceeds the alternative investment yield".⁴

¹ Request for Arbitration and Statement of Claim, para. 17.

² Request for Arbitration and Statement of Claim, para. 1.

³ Request for Arbitration and Statement of Claim, paras. 19 and 20.

⁴ Request for Arbitration and Statement of Claim, para. 21.

B. RELEVANT PROVISIONS OF THE BIT

- 1.16 As noted above, the present dispute arises under the BIT, and the jurisdiction of the Tribunal is derived solely from the dispute resolution provisions it contains.
- 1.17 The original parties to the BIT were, on the one hand, the Federal Republic of Germany, and on the other, the Czech and Slovak Federal Republic. Following the separation of the latter the two successor States (one of which is the Respondent in this Arbitration) regulated between them succession to bilateral treaties concluded by the predecessor State. On the first day of the hearing in London on jurisdiction and the merits, in response to a question from the Tribunal, the representatives of both Parties confirmed that there were no issues resulting from application of the rules of State succession.⁵ The Tribunal has accordingly treated the BIT in the same way as if it had been from the outset a treaty concluded between Germany and the Czech Republic.
- 1.18 It is useful to begin by setting out the pertinent provisions of the BIT laying down the standards on the basis of which the Tribunal is required to decide the dispute.
- 1.19 The Tribunal notes that the BIT was concluded in the German and Czech languages, both being stipulated to be equally authentic. The BIT was accompanied by a Protocol (“**the Protocol**”), likewise concluded in both German and Czech, both texts being equally authentic. The Protocol contains additional provisions relating to Articles 1-5 of the Treaty itself, together with a further provision, not relevant to the present case, about the transportation of goods or persons connected with an investment.
- 1.20 By its introductory provision, the Protocol is expressly made an integral part of the Treaty. This makes it unnecessary for the Tribunal to consider what status the Protocol might have for interpretative purposes under Article 31(2)(a) of the Vienna Convention on the Law of Treaties, since the plain intention of the Contracting Parties was that the terms of the Protocol were to be treated as if they had been incorporated into the text of the BIT itself.
- 1.21 It became apparent at an early stage in the proceedings (which by common consent were conducted entirely in English; see paragraph 1.44 below) that the translations into English of the BIT relied upon respectively by the Claimants and by the Respondent were not in all respects identical. The Tribunal directed the Parties in its Procedural Order No. 3 of 3 December 2010 to “consult over the possibility of providing to the Tribunal at some convenient point an agreed translation into English of the treaty (and, as the case may be, its Protocol) – or, if that proves not to be possible, a single text in English indicating where and in what respect differences remain between the Parties over the correct translation”.
- 1.22 The Parties, having proved unable to reach agreement on all points, in due course on 25 January 2011 provided to the Tribunal a joint translation which for the most part was agreed, but which indicated a certain number of remaining points of disagreement. In setting out the relevant terms of the BIT and Protocol below, the differences between the Parties as to the translation of particular words or phrases are indicated in square brackets, with an identification of which translation is preferred by which of the Parties.

⁵ T1, p. 34, ll. 10-17.

1.23 The Preamble to the BIT is comparatively brief, recording the Parties' desire to intensify their mutual economic cooperation, their intention to create favourable conditions for reciprocal investments, and their recognition that encouragement and reciprocal protection of investments are apt to strengthen all forms of economic initiative, in particular in the area of private entrepreneurial activity.

1.24 Article 1 contains definitions of certain defined terms, and provides as follows:

For the purposes of this Treaty

1) the term "investments" shall include every kind of asset [Claimants: which has been invested; Respondent: contributed] in conformity with domestic law, in particular:

a) movable and immovable property as well as any other rights in rem such as mortgages, liens and pledges;

b) shares of companies and other kinds of interest in companies;

c) receivables and claims to money which has been used to create an economic value or claims to any performance which has an economic value and which relates to an investment;

d) intellectual property rights, in particular copyrights, patents, utility models, industrial designs or models, trademarks, trade names, technical processes, know-how and goodwill;

e) business concessions under public law, including concessions to search for, extract and exploit natural resources.

2) the term "Returns" shall mean the amounts yielded by an investment, such as profit, dividends, interest, royalties or fees.

3) the term "investor" shall mean a natural person with permanent residence or a juridical person with its seat in the respective area of application of this Treaty, entitled to engage in investments.

1.25 Paragraph (1) of the Protocol provides, *Ad Article 1*, as follows;

Receivables and claims to money under Article 1 (c) include receivables and claims to money arising under loans that are related to the interest in a company and can be characterized as interest in companies based on their [Claimants: purpose and extent; Respondent: importance and extent] (loans similar to interest in companies). Third-party loans e.g. bank loans under banking conditions are not covered.

1.26 Article 2 provides:

1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such

investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment.

2) Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments in its territory of investors of the other Contracting Party.

3) Investments and returns of investment as well as [Claimants: in case of their re-investment the returns thereof; Respondent: reinvestments and returns thereof] shall enjoy full protection under this Treaty.

1.27 Article 4(2) provides

Investments of investors of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for public interest and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure [Claimants: has become publicly known; Respondent: was publicly announced]. The compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of such compensation. [Claimants: The legality; Respondent: The validity] of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law.

1.28 Paragraph (4) of the Protocol provides, *Ad Article 4*, that

An investor is also entitled to compensation where a measure set out in Article 4 (2) harms the investment by affecting an undertaking in which investor has an interest.

1.29 Article 7 provides *inter alia* that

Each Contracting Party shall observe any other obligation it has assumed with regard to investments of investors of the other Contracting Party in its territory.

1.30 The dispute resolution provision on which the Claimants found the jurisdiction of the Tribunal to hear the dispute is contained in Article 10, which provides, insofar as relevant:

1. [Claimants: Differences of opinion regarding; Respondent: Disputes relating to] investments 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 a [Claimants: difference of opinion; Respondent: dispute] cannot be settled within six months of the date when it was [Claimants: raised; Respondent: notified] by one of the parties in dispute, it shall, at the request of the investor of the other Contracting Party, be submitted to arbitration. The provisions of paragraphs 3 to 5 of Article 9 shall be applied mutatis mutandis subject to the proviso that the appointment of the members of the arbitral tribunal according to Article 9(3) shall be made by the parties to the dispute, and that, if the periods specified in Article 9(3) are not observed, either party to the dispute may invite the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments. This applies unless no other agreement applies between the parties to the dispute. The award shall be recognized and enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).*

3. *During arbitration proceedings or the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage.*

1.31 In the light of the terms of Article 9(2), paragraphs (3) to (5) of Article 9, governing inter-State disputes, are also of relevance; they provide:

[...]

3. *The arbitral tribunal shall be constituted ad hoc as follows: each Contracting Party shall appoint one member, and these two members shall agree upon a national of a third State as their chairman, to be confirmed by the two Contracting Parties. Members of the arbitral tribunal shall be appointed within two months, and its chairman within three months from the date on which either Contracting Party has informed the other Contracting Party that it intends to submit the dispute to an arbitral tribunal.*

4. *If the periods specified in paragraph 3 above have not been observed, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments.*

5. *The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting Party shall bear the cost of its own member and of its representatives in the arbitration proceedings, the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitral tribunal may make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure.*

C. PROCEDURAL HISTORY

1.32 By letter dated 7 November 2008 pursuant to Article 10(2) BIT (“the Trigger Letter”),⁶ the Claimants gave notice to the Respondent of the existence of various claims of breach of the BIT relating to “the unlawful administrative procedure regarding ECE’s development and construction of a retail center in Liberec”.

1.33 The present proceedings were formally instituted by a combined “Request for Arbitration and Statement of Claim” dated 31 July 2009, by which the Claimants alleged that the Respondent had violated Articles 2(1) and 2(2) and 4 of the BIT and sought the payment of compensation for the damage thereby suffered by the Claimants in the sum of € 70.289 million, as well as “moral damages to be determined by the Tribunal based on further submissions.”

1. Constitution of the Tribunal

1.34 In the Request for Arbitration and Statement of Claim, the Claimants noted that they had nominated Dr Andreas Bucher to serve as member of the Tribunal, and that he had accepted that appointment.⁷

1.35 Subsequently, the Respondent nominated Mr J. Christopher Thomas QC to serve as member of the Tribunal. He likewise accepted his appointment.

1.36 Following consultations between them, Professor Bucher and Mr Thomas jointly nominated Sir Franklin Berman KCMG QC, to serve as the third member and Chairman of the Tribunal. By letter dated 15 December 2009, Sir Franklin Berman noted this nomination and, in light of the terms of Article 10(2) read with 9(3) of the BIT, requested the Parties to state their position as to whether any further steps were required in order to formalize his appointment.

1.37 By letter dated 18 December 2009, the Respondent confirmed the appointment of Sir Franklin Berman KCMG QC as Chairman of the Tribunal for the purposes of Article 9(3) read with Article 10(2) of the BIT.

1.38 Subsequently, as recorded in the approved Minutes of the Preliminary Procedural Meeting held on 2 February 2010, both Parties confirmed the appointment of Sir Franklin Berman as Chairman as well as the regularity of the appointment of all of the members of the Tribunal and the constitution of the Tribunal as a whole.

2. Preliminary Procedural Meeting

1.39 As noted above, a Preliminary Procedural Meeting was convened by the Tribunal on 2 February 2010 at Essex Court Chambers, Lincoln’s Inn Fields, London, at which the representatives of the Parties attended.

⁶ Core 8/291 (Exhibit C-2).

⁷ Request for Arbitration and Statement of Claim, para. 285.

- 1.40 In advance of the Preliminary Procedural Meeting, the Parties had consulted and sought to reach agreement on procedural matters; the remaining matters, on which agreement had not been reached, were the subject of discussion at the Preliminary Procedural Meeting.
- 1.41 Consequent upon the Preliminary Procedural Meeting, a draft Minute was circulated to the Parties for approval and comment, as was a draft of the Tribunal's procedural order embodying the Parties' agreements on procedural matters, and the Tribunal's decision on those matters on which it had not been possible to reach agreement.

3. The Tribunal's Procedural Order No. 1

- 1.42 The Tribunal's Procedural Order No. 1, as previously provided to and duly approved by the Parties, was issued on 19 March 2010. The Minutes of the Preliminary Procedural Meeting held on 2 February 2010, as likewise approved by the Parties, were annexed.
- 1.43 Procedural Order No. 1, provided, inter alia, that :
- a. save as otherwise agreed, and subject to the provisions of Procedural Order No. 1 and any subsequent Procedural Order of the Tribunal, the 1976 UNCITRAL Arbitration Rules were to govern the proceedings (Article 2);
 - b. without prejudice to the power of the Tribunal to meet or deliberate in any other place, the place of the arbitration was to be Paris, and that without prejudice to the power of the Tribunal, having consulted the Parties, to hold hearing elsewhere, the hearings would take place in London (Article 3);
 - c. a quorum for the Tribunal was to be constituted by all three members of the Tribunal; that, save for agreement to the contrary by the Parties, a quorum was required for all hearings and meeting of the Tribunal; and without prejudice to the power of the Tribunal to delegate decisions on purely procedural matters to the Chairman, the Tribunal was to make any Award or other decision by a majority of its members (Article 4);
 - d. the language of the arbitration was to be English (Article 5);
 - e. Mr Simon Olleson was to be appointed by the Tribunal to act as its Assistant and Secretary to the Tribunal, and was to undertake such tasks as in relation to the present proceedings as were directed by the Chairman or the Tribunal, as well as holding and retaining on behalf of the Tribunal a copy of all pleadings, documents and correspondence in the arbitration (Article 6);
 - f. the International Bureau of the Permanent Court of Arbitration was to be appointed to act as registry for the arbitration, its tasks to include, in particular: holding and administering the deposits made by the Parties by way of advance of the costs of the proceedings; undertaking the organisation and logistical preparations for all hearings and any meetings of the Tribunal; providing administrative support and performing such other tasks as might be required upon the request of the Tribunal; and

maintaining an archive of all filings and correspondence in the proceedings (Article 7);

g. as to document production, the document production phase was to be conducted in accordance with the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration (“the 1999 IBA Rules”) save insofar as inconsistent with the remaining provisions of Procedural Order No. 1. The timetable for the document production phase foreseen was that:

- i. the Parties were to exchange Requests to Produce by 6 April 2010;
- ii. production of any documents pursuant to a Request to Produce which the requested Party did not object to was to be made by 20 April 2010;
- iii. where the requested Party objected to all or part of a Request to Produce, or to the production of particular documents or categories of documents, or if the requesting Party was of the view that the other Party had not complied with a Request to Produce, the Parties were to attempt to settle any disagreement by 23 April 2010;
- iv. in the case any such disagreements could not be settled, the requesting Party could, by request in writing, submit the matter to the Tribunal for decision no later than 6pm on 23 April 2010;
- v. the requested Party was required to file any submissions in reply by 6pm on 26 April 2010, with any submissions in rebuttal being filed by the requesting Party by 6pm on 28 April 2010;
- vi. thereafter, the Tribunal would provide its ruling, if at all possible, by 3 May 2010, and in doing so would, subject to its residual discretion, apply the 1999 IBA Rules;
- vii. any documents as to which the Tribunal ordered production were to be produced within fourteen days of the Tribunal’s ruling (Article 8);

h. as to the schedule for written pleadings, the timetable originally envisaged was:

- i. the Claimants’ Request for Arbitration and Statement of Claim was to stand as the notice of arbitration for the purposes of Article 3(1) of the UNCITRAL Rules;
- ii. by 15 March 2010 the Respondent was to file and serve an Answer to Statement of Claim, it being recognized that that document need not be a full pleading but should, on the basis of the documents then available to the Respondent, contain an outline of the nature of its substantive defences and of any objections to jurisdiction or admissibility;
- iii. by 13 August 2010 the Claimants were to file and serve i) a “Memorial on the Merits” and ii) separate “Observations on Jurisdiction and

Admissibility” dealing with any objections to jurisdiction or admissibility raised in the Respondent’s Answer to Statement of Claim;

- iv. by 12 November 2010, the Respondent was to file and serve a “Counter-Memorial on the Merits” as well as a “Reply on Jurisdiction and Admissibility”;
 - v. by 10 December 2010, the Claimants were to file and serve a “Reply on the Merits” as well as a “Rejoinder on Jurisdiction and Admissibility”;
 - vi. by 14 January 2011, the Respondent was to file and serve a “Rejoinder on the Merits” (Article 9);
- i. the Parties were to attempt to produce an agreed Chronology, to be provided to the Tribunal not less than 30 days in advance of the scheduled start of the Hearing (Article 10);
 - j. the Hearing, which was to be held in London, and the scope of which was to extend to any objections to jurisdiction or admissibility raised by the Respondent as well as the merits of the Claimants’ claim, was provisionally scheduled for March 2011, with a time estimate of one week certain, with a further week held in reserve in case of need, the precise dates and venue to be fixed by the Tribunal subsequently (Article 11);
 - k. a pre-hearing review by telephone was to be scheduled on a date to be fixed but in any case no later than three weeks prior to the scheduled start of the hearing (Article 11.4);
- 1.44 Detailed provision was made as to the form and content of the pleadings and the accompanying witness, expert and documentary evidence (Article 12), including specific provision that:
- a. the written pleadings were to be accompanied by all evidence, including witness statements and expert reports, on which the submitting Party intended to rely (Article 12.1), and
 - b. the Parties’ respective Replies and Rejoinders on jurisdiction and admissibility and upon the merits were to be limited to responding to points raised in the other Party’s immediately preceding pleading (Article 12.2);
- 1.45 In addition, detailed provision was made as to matters of evidence, it being specified, inter alia, that:
- a. all evidence upon which a Party intended to rely was to be submitted with the Memorial or Counter-Memorial on the Merits, and that, save with the permission of the Tribunal the evidence to be filed with the Reply and Rejoinder was to be limited to evidence relating to points raised in and arising from the other Party’s preceding pleading, with the same applying mutatis mutandis to the Parties’ respective pleadings on jurisdiction and admissibility (Article 13.1 to 13.3);

- b. all witness statements and expert reports relied upon by a party were to be submitted contemporaneously with the pleading to which they related, and were to stand as the direct testimony of the witness or expert, save that where a witness or expert was called to give oral evidence at the hearing, the Party calling them would be able to conduct a brief direct examination (Article 13.4);
- c. witnesses or experts would not be permitted to testify at the hearing unless a written witness statement or expert report had been provided; that each Party had the right to cross-examine at the hearing any witness or expert whose statement or report had been submitted by the other Party and that, save with the leave of the Tribunal, the evidence of any witness or expert who did not appear for cross-examination at the hearing was to be disregarded.(Article 13.5);
- d. the authenticity of documents was to be assumed unless expressly challenged by the other Party (Article 13.8);
- e. as regards any question in relation to the taking of evidence, subject to the Tribunal's residual discretion, the Tribunal could take guidance from the 1999 IBA Rules (Article 13.12).

4. The Respondent's Answer to Statement of Claim and Objections to Jurisdiction

- 1.46 By email sent on 15 March 2010, in accordance with the agreement reached at the Preliminary Procedural Meeting, as reflected in Article 9.3 of Procedural Order No. 1 (which at that point had been circulated to the Parties, but was still in draft form) the Respondent filed its Answer to the Claimants' Statement of Claim ("the Answer to Statement of Claim") accompanied by a separate document containing an outline of its Objections to Jurisdiction ("the Objections to Jurisdiction").

5. The Document Production Phase and the Claimants' Request for Extension of the Deadline for Filing of their Memorial on the Merits and Observations on Jurisdiction and Admissibility

- 1.47 As noted above, Procedural Order No. 1 foresaw that the Parties could submit to the Tribunal for decision any matters in relation to their respective Requests to Produce on which they had been unable to reach agreement by 23 April 2010.
- 1.48 By email dated 22 April 2010, subsequently confirmed by Counsel for the Respondent, Counsel for the Claimants wrote to the Tribunal noting that the Parties were still attempting to resolve some issues in relation to their respective requests for production, indicated that the Parties had agreed on a modified schedule for the submission of unresolved issues and the subsequent timetable of submissions, and requested that the Tribunal confirm those modifications.
- 1.49 By email dated 23 April 2010, the Tribunal granted the joint request made by the Parties.

1.50 Pursuant to the timetable as amended, the Parties submitted the matters relating to their respective Requests on which they had been unable to reach agreement on 26 April 2010, submitted their respective submissions in reply on 27 April 2010, and submitted their rebuttal submissions on 28 April 2010.

a. The Tribunal's Guidance on Requests to Produce

1.51 On 17 May 2010, in light of the several disputes which had arisen between the Parties in relation to their respective Requests to Produce, resulting in the referral of multiple issues for decision and extensive submissions from both Parties, the Tribunal provided the Parties with "Guidance on Requests to Produce" (the "Guidance"), in which it noted that the procedure laid down in Article 8 of Procedural Order No. 1 was not sufficient to deal with the situation which had presented itself, and invited the Parties:

- a. in the light of the observations set out in the Guidance as to the principles governing the admissibility of Requests to Produce, to resume contact in particular as regards:
 - i. the relevance and materiality of documents or categories of documents requested (including the periods during which documents were likely to be regarded as being relevant or material);
 - ii. issues of privilege and confidentiality;
 - iii. the identity of the Parties, including issues as to the persons or entities from which documents could legitimately be requested;
 - iv. procedural issues relating to reformulation of certain requests, and objections taken thereto.
- b. to file, by 31 May 2010, a joint report setting out the points on which they had been able to reach agreement, and those points on which agreement had not been reached, including a brief statement of the position of each party, as well as a joint Redfern Schedule.

1.52 The Tribunal indicated that it expected both Parties to exercise restraint and discipline in resolving the continuing disagreement, and that it would provide a ruling on any remaining areas of dispute as soon as practicable following submission of the joint report.

1.53 The Tribunal indicated further that the revised timetable for document production should not have any impact upon the timetable for pleadings contained in Procedural Order No. 1, and that the hearing schedule for March 2011 would be maintained. It would however be open to either Party to make a reasoned application for extension of the pleading deadlines should delay in the document production phase make that necessary.

1.54 By email dated 28 May 2010 from Counsel for the Claimants, subsequently confirmed by Counsel for the Respondent, the Parties requested an extension to submit the joint report requested in the Guidance. By communication sent on behalf of the Tribunal on 31 May 2010, the Tribunal acceded to this request.

1.55 In accordance with that short extension, the Parties submitted their joint report, accompanied by a joint Redfern Schedule, on 4 June 2010.

1.56 By letter dated 1 July 2010, the Claimants requested an extension of the deadline for submission of their Memorial on the Merits and Observations on Jurisdiction and Admissibility from 13 August 2010 to 15 September 2010. Pursuant to a request from the Tribunal, the Respondent provided its comments on the Claimants' request on 7 July 2010. The Claimants submitted additional comments on 8 July 2010, including new matters relevant to its application for an extension, to which the Respondent responded on 9 July 2010. Counsel for the Claimants wrote to the Tribunal requesting a decision on its application for extension on 14 July 2010.

b. The Tribunal's Ruling on Document Production

1.57 On 15 July 2010, the Tribunal issued its "Ruling on Document Production", to which was annexed a consolidated Redfern Schedule, in which it provided its decision on the outstanding issues in dispute as submitted to it in the joint report filed by the Parties on 4 June 2010. The Ruling set a deadline of 29 July 2010 for production to the requesting Party of documents responsive to those Requests to Produce which it had upheld in whole or in part, or of confirmation that no responsive documents were in the possession, custody or control of that Party.

c. The Claimants' Request for Extension of the Deadline for Filing of their Memorial on the Merits and Observations on Jurisdiction and Admissibility

1.58 As noted above (paragraph 1.56), by their letter dated 1 July 2010, the Claimants requested an extension of the deadline for the filing of their Memorial on the Merits and Observations on Jurisdiction and Admissibility, and the Parties then exchanged submissions in that regard. By email dated 16 July 2010, Counsel for the Claimants wrote to the Tribunal providing further information relevant to their request, and modified the extension requested to eight weeks. The Claimants noted that that implied that it would not be possible to maintain the scheduled hearing date in March 2011.

1.59 On 20 July 2010, the Chairman of the Tribunal held a teleconference with the representatives of the Parties to discuss the procedural timetable.

1.60 In consequence of the agreements reached during the teleconference, as subsequently recorded in Procedural Order No. 2 dated 26 July 2010, the Claimants' request for an extension was granted, and the timetable was modified to the effect that

- a. the Claimants were to file and serve their Memorial on the Merits and Observations on Jurisdiction and Admissibility by 15 October 2010;
- b. the Respondent was to file and serve its Counter-Memorial on the Merits and Reply on Jurisdiction and Admissibility by 11 February 2011;
- c. the Claimants were to file and serve their Reply on the Merits and Rejoinder on Jurisdiction and Admissibility by 8 April 2011;
- d. the Respondent was to file its Rejoinder on the Merits by 3 June 2011; and

- e. the hearing period scheduled for March 2011 was vacated, with the hearing to take place after September 2011, at a date to be subsequently fixed, and consequential modifications were made to other procedural deadlines relating to preparation for the hearing.

6. The Claimants' Memorial on the Merits and Observations on Jurisdiction and Admissibility

- 1.61 In accordance with the timetable as modified, the Claimants filed their Memorial on the Merits (incorporating their Observations on Jurisdiction and Admissibility) on 15 October 2010 ("the Memorial").

7. The Respondent's Applications dated 26 November 2010

- 1.62 By letters dated 26 November 2010, the Respondent:
 - a. drew attention to certain alleged deficiencies in the Claimants' document production and to the exhibits to the Expert Report of Deloitte & Touche filed with the Memorial;
 - b. requested leave to submit a new Request to Produce in relation to various categories of documents;
 - c. applied to the Tribunal to reject what it alleged were certain "new and amended claims", which it said had been raised for the first time in the Memorial ("the Respondent's Application to Reject New Claims").
- 1.63 The Claimants' response was received on 1 December 2010. The Respondent replied by letter dated 2 December 2010, and the Claimants responded by email dated 3 December 2010.
- 1.64 By letter from the Chairman dated 3 December 2010 constituting Procedural Order No. 3 (a corrected version of which was sent to the Parties on 8 December), the Tribunal:
 - a. as regards the alleged defective document production, directed that the Claimants were, by 15 December 2010, "to provide to the Respondent the requested documents or to lodge with the Tribunal the reasons for its inability or, as the case may be, its refusal to do so", and further directed that, from that point, the Respondent's initial Request for the production of documents "will be considered as closed, and it will be open to either Party in its subsequent written and oral pleadings to invite the Tribunal to draw whatever inferences may be considered appropriate from the state of document production in connection with the Respondent's First Request";
 - b. as regards the Respondent's request for leave to submit an additional Request to Produce, set a deadline of 8 December 2010 for the Claimants to provide any further observations as to whether the request should be granted, and indicated that it did not wish to receive any further submissions on the issue thereafter;

- c. directed that the Claimants should submit, by at latest 15 December 2010, their submissions on the Respondent's Application to Reject New Claims.
- 1.65 The Tribunal further indicated that all other procedural time limits were maintained, and that it expected the Parties to abide by them.
- 1.66 In accordance with Procedural Order No. 3, by letter dated 8 December 2010 the Claimants submitted observations on the Respondent's request for leave to submit a further request for document protection, in which, inter alia, they indicated their own intention to submit a further request for document production in the near future.
- 1.67 By Procedural Order No. 4, dated 13 December 2010, the Tribunal, recalling the procedure for document production set out in Procedural Order No. 1 and its Guidance (paragraph 1.51 above), and recalling further that document production could not be used for the purpose of developing new claims and defences, indicated that it was not prepared to entertain any further requests from either Party at that stage in the proceedings. It accordingly rejected the Respondent's application for leave.
- 1.68 Likewise in accordance with the directions contained in Procedural Order No. 3, by letters dated 15 December 2010 the Claimants submitted
- a. their observations on the Respondent's Application to Reject New Claims; and
 - b. their observations on the completeness of document production in the first round of document production. The Claimants proposed that certain missing documents be produced, or as the case may be, a confirmation that the documents requested did not exist be given, within a deadline of 30 December 2010.
- 1.69 By email dated 23 December 2010, the Tribunal recalled the terms of Procedural Order No. 3 (paragraph 1.64a., above), noted the proposal made by the Claimants in their observations dated 15 December 2010, and directed that any further documents produced, and any confirmations given, by the Claimants by 30 December 2010 would be taken into account, without prejudice to the right of the Respondent to make whatever submissions it considered appropriate in that regard.
- 1.70 By Procedural Order No. 5, dated 4 January 2011, the Tribunal rejected the Respondent's Application to Reject New Claims (see below, paragraph 4.730). The Tribunal indicated in addition that the time limits remained as fixed in Procedural Order No. 2, but that it would be willing to entertain a reasoned application by the Respondent for a short extension of the time for filing of its Counter-Memorial on the Merits and Reply on Jurisdiction and Admissibility, while making clear that any amendment to the timetable, including consequent amendment of deadlines for subsequent pleadings, would not affect other time limits, including in particular the dates for the hearing (which in the meantime had been fixed for 19 to 30 September 2011).

8. The Respondent's Application for Extension of the Deadline for Filing of its Counter-Memorial on the Merits and Reply on Jurisdiction and Admissibility

1.71 By letter dated 5 January 2011 the Respondent sought an extension for the filing of its Counter-Memorial on the Merits and Reply on Jurisdiction and Admissibility, which, pursuant to Procedural Order No. 2, was foreseen for 11 February 2011. No comment thereon was received from the Claimants.

1.72 By letter from the Chairman dated 12 January 2011, constituting the Tribunal's Procedural Order No. 6, the Tribunal

- a. granted an extension for the filing by the Respondent of the Counter-Memorial on the Merits and Reply on Jurisdiction and Admissibility to 25 February 2011;
- b. as a consequence modified the deadline for filing of the Claimants' Reply on the Merits and Rejoinder on Jurisdiction and Admissibility to 26 April 2011, and the deadline for the filing of the Respondent's Rejoinder on the Merits to 25 June 2011.
- c. in the light of the Respondent's indication in its letter of 5 January 2011 that it anticipated that it would have difficulty in producing translations into English of witness statements and expert reports within the deadline, provided for a further period of two weeks (ie. to 11 March 2011) for submission of translations of any statements and reports which were submitted in original in the Czech language together with the pleading.

9. The Claimants' Application for Leave to Submit Further Requests to Produce

1.73 By letter dated 26 January 2011, the Claimants sought leave to make a further request for production of documents.

1.74 By letter sent on behalf of the Tribunal dated 27 January 2011, the Tribunal recalled that in Procedural Order No. 4 (above, paragraph 1.67) it had already indicated that it saw no justification for deviation from the procedures and timetables previously already laid down, and that it was not therefore willing to entertain any further requests for document production at the present stage of the proceedings, and on that basis stated that it would take no further action on the Claimants request for leave for the time being. It further indicated that, should the Claimants wish to revert on the matter following the filing of the Respondent's Counter-Memorial on the Merits and Reply on Jurisdiction and Admissibility, foreseen for 25 February 2011, it expected that any such application would be made within the shortest time possible thereafter, and that the Tribunal, to the extent that it decided to permit any further requests, would lay down a short timetable for production so as to maintain the timelimit for filing of the Claimants' Reply on the Merits and Rejoinder on Jurisdiction and Admissibility.

10. The Respondent's Counter-Memorial on the Merits and Reply on Jurisdiction and Admissibility.

1.75 In accordance with the revised time limit set in Procedural Order No. 6 (above, paragraph 1.72), the Respondent filed its Counter-Memorial on the Merits and Reply on Jurisdiction and Admissibility ("the Reply") on 25 February 2011. By letter dated 11 March 2011, the Respondent drew attention to a number of minor modifications to the Reply which were required in order to correct erroneous references, and on 17 March 2011 provided a corrected electronic version of the Reply.

1.76 Also pursuant to Procedural Order No. 6, on 11 March 2011 the Respondent filed English translations of the witness statements and experts report which had originally been submitted in Czech in support of the Reply.

11. The Claimants' Request for Extension of the Deadline for Filing of their Reply on the Merits and Rejoinder on Jurisdiction and Admissibility

1.77 By letter dated 10 March 2013, the Claimants requested an extension of the deadline for the filing of their Reply on the Merits and Rejoinder on Jurisdiction and Admissibility, scheduled for 26 April 2011.

1.78 By email dated 11 March 2013, the Respondent indicated that it opposed that request (as well as the application made in the Claimants' second letter dated 10 March 2013 (as to which, see below, paragraph 1.80), and that it proposed to file its observations on both matters by 18 March 2013 unless otherwise directed by the Tribunal.

1.79 By letter from the Chairman of the Tribunal dated 13 March 2013, constituting Procedural Order No. 7, the Tribunal

- a. granted the Claimants request and extended the deadline for the filing by the Claimants' of their Reply on the Merits and Rejoinder on Jurisdiction and Admissibility to 27 May 2011;
- b. as a consequence, extended to 25 July 2011 the deadline for the Respondent to file its Rejoinder on the Merits.

12. The Claimants' Renewed Request for Leave to Submit Further Requests to Produce

1.80 By a further letter dated 10 March 2011, the Claimants renewed their request for leave to make further Requests to Produce.

1.81 As noted above (paragraph 1.78), by its letter dated 11 March 2011, the Respondent had indicated that it opposed the Claimants' request, and that it intended to file its observations in that regard by 18 March 2011.

1.82 By letter of 13 March 2011, the Tribunal, in order to save time, and without prejudice to the issue of whether the Claimants had put forward good grounds to justify the grant of leave,

invited the Respondent to comment on the individual requests, as well to provide its observations as to whether leave should be granted by, at latest, 18 March 2011.

1.83 In accordance with the direction of the Tribunal, the Respondent provided its observations both on whether leave should be granted and on the individual requests on 17 March 2011.

1.84 By letter dated 22 March 2011, the Claimants submitted (unsolicited) comments on the Respondent's observations dated 17 March 2011.

1.85 Also on 22 March 2011, by Procedural Order No. 8, the Tribunal

- a. recalled the agreed parameters for document production contained in Procedural Order No. 1;
- b. ruled that, in light of the fact that the Claimants had formally pleaded a claim of discrimination in their Memorial, the making of requests for document production in that regard was in principle admissible;
- c. indicated that no production would be ordered upon matters covered by the witness statements submitted by the opposing Party if supporting documents had been submitted with the witness statement;
- d. granted, on a limited basis, certain of the requests for document production made by the Claimants insofar as they related to the administrative proceedings relating to Multi's applications for permits, recalling in that regard the position previously taken by the Respondent that any objection to disclosure based on the confidentiality of administrative proceedings under Czech law would be overcome to the extent that the Tribunal ordered production;
- e. denied the Claimants' remaining requests for production;
- f. in accordance with the indication contained in its letter of 27 January 2011 (above, paragraph 1.74), ordered the Respondent to produce relevant documents by 4 April 2011.

13. The Claimants' Reply on the Merits and Rejoinder on Jurisdiction and Admissibility

1.86 On 27 May 2011, in accordance with Procedural Order No. 7 the Claimants filed their Reply on the Merits and Rejoinder on Jurisdiction and Admissibility ("the Reply"). In the covering email, the Claimants requested leave to submit a second witness statement by Mr [redacted] as soon as was possible thereafter, as Mr [redacted] had fallen ill and had therefore not been able to sign his witness statement prior to the deadline for submission.

1.87 By email dated 31 May 2011 the Tribunal granted the Claimants' request.

1.88 On 13 July 2011, the Claimants provided an update in relation to the witness statement of Mr [redacted] noting that he had received, that his statement had been finalized, and that the Claimants were awaiting completion of its translation into English. They requested the leave of the Tribunal to submit the statement, together with a translation into English, by 20 July 2011.

- 1.89 By email dated 14 July 2011, the Respondent requested that the Claimants immediately submit the original version of the statement of Mr [REDACTED] together with the original versions of any supporting documents on which he relied, with the translations to follow as soon as possible thereafter. Given the delay, it reserved its right to make procedural applications once it had had the chance to review the statement and to assess how disruptive the delay was for the preparation of its Rejoinder on the Merits and supporting witness and expert evidence.
- 1.90 By email dated 14 July 2011, the Tribunal indicated that it wished to see Mr [REDACTED]'s statement, together with its translation into English, as soon as possible, and requested the Claimants to provide the finalized statement, as signed by Mr [REDACTED] in its original language version, to the Respondent at once.
- 1.91 By email dated 19 July 2011, the Claimants provided to the Tribunal the Czech language original of the statement of Mr [REDACTED] together with annexes, accompanied by English translations.
- 1.92 By letter dated 20 July 2011, the Respondent objected to the late submission of the statement of Mr [REDACTED], noting inter alia that, despite the Tribunal's request contained in the email dated 14 July 2011, it was only on 19 July 2011 that it had been provided with the original of the of Mr [REDACTED] statement and annexes, together with the translations; the statement was however dated 6 July 2011 and was only six pages long, and at least two of the annexes had clearly been available to the Claimants prior to 6 July 2011. As the statement and annexes had been provided to the Respondent only shortly before the deadline for submission of its Rejoinder on the Merits, due to be filed on 25 July 2011, the Respondent requested that the statement of Mr [REDACTED] and its annexes be declared inadmissible.
- 1.93 On 21 July 2011, the Tribunal requested the Claimants to explain, no later than 25 July 2011, why the statement of Mr [REDACTED] and annexes had not been provided to the Respondent immediately following the Tribunal's communication dated 14 July 2011, and to make any other comments they wished on the Respondent's request.
- 1.94 By letter dated 21 July 2011, the Claimants apologized for the late submission and explained that the delay in providing the original statement and annexes had been due, amongst other things, to the absence of Counsel from the office.

14. The Respondent's Rejoinder on the Merits

- 1.95 By email dated 25 July 2011, and in accordance with the revised deadline set in Procedural Order No. 7 (above, paragraph 1.79) the Respondent filed its Rejoinder on the Merits ("the Rejoinder").

15. The Tribunal's Ruling on the Respondent's Request to Exclude the Second Witness Statement of Mr [REDACTED]

- 1.96 By letter dated 27 July 2011 the Parties were provided with advance notice of the content of the Tribunal's ruling on the Respondent's request to exclude the second statement of Mr [REDACTED]

That ruling was subsequently embodied in Procedural Order No. 9, also of 27 July 2011, in which the Tribunal:

- a. noted the prejudice inevitably caused to the Respondent by the delay in provision of the statement of Mr
- b. observed that the Claimants had provided no satisfactory explanation for non-compliance with the Tribunal's direction of 14 July 2011, nor why it had not been possible to provide the Czech original of the statement of Mr substantially earlier; but
- c. declined to exclude the statement on the basis that the statement and its annexes were relatively brief, and the issues it dealt with were familiar, but instead granted the Respondent the opportunity to supplement its Rejoinder by responding to any points arising from the statement or annexed documents which it felt it had not had the opportunity to address adequately, such supplemental submission to be filed by 9 September 2011.

1.97 In addition, the Tribunal fixed 15 August 2011 as the date for the notification by each Party of its intention to cross-examine the other Party's witnesses.

1.98 Notices were received from the Respondent on 15 August 2011, and from the Claimants on 17 August 2011.

16. Joint Chronology

1.99 By email dated 19 August 2011, Counsel for the Respondent informed the Tribunal that the Parties had not been able to agree a joint chronology of events, as requested in Procedural Order No. 1 (as later modified), and forwarded its own chronology.

1.100 By email dated 19 August 2011, the Tribunal reiterated its wish to receive an agreed chronology, and granted the Parties an extra week for that purpose, whilst making clear that it was acceptable that the joint chronology could indicate areas of disagreement between the Parties.

1.101 By email dated 22 August 2011, Counsel for the Claimants made certain clarifications in response to the email from Counsel for the Respondent dated 19 August 2011.

1.102 By email dated 26 August 2011, Counsel for the Claimants submitted the Parties' joint agreed chronology, indicating areas of disagreement, in both list and table formats.

17. Pre-Hearing Review

1.103 In accordance with Procedural Hearing No. 1, a pre-hearing review was fixed for 30 August 2011.

1.104 In advance of the pre-hearing review, by letter dated 29 August 2011, Counsel for the Claimants:

- a. submitted a revised list of the Respondent's witnesses whom it wished to cross-examine;
 - b. withdrew the testimony of three of their own witnesses, noting that, in lieu, they would rely on the testimony of other witnesses, and invited the Respondent to indicate whether it wished to cross-examine those other witnesses;
 - c. made various proposals as to the conduct of the hearing, including as to the order of witnesses, joint conferencing of experts, etc;
 - d. noted that their witness Mr [redacted] had suffered an injury and would be unable to attend the hearing in London, although he would be available to testify via videoconference.
- 1.105 By letter dated 29 August 2011, Counsel for the Respondent set out its views on the Claimants' letter. As regards the withdrawal by the Claimants of certain of their witnesses, the Respondent stated that it understood that, in accordance with Article 13.5.2 of Procedural Order No. 1 (above, paragraph 1.45c, the statements of those witnesses were to be disregarded. As to the Claimants' statement that they were relying on the evidence of certain other witnesses "in lieu", the Respondent requested a short period to consider whether it wished to cross-examine those witnesses.
- 1.106 The Claimants also proposed that a core bundle should be prepared for use at the hearing, and that to that end a timetable should be set for the parties to designate the documents they wished to be included.
- 1.107 On 30 August 2010, the Chairman held a pre-hearing conference with Counsel for the Parties at which various matters relating to the conduct and organization of the hearing were discussed, agreement was reached on a variety of matters (including that a core bundle would be prepared), and certain matters were left over for the subsequent decision of the Tribunal. In that last regard, in particular, issues arose as to:
- a. the Respondent's representative and witness, Mr [redacted] of the Ministry of Finance, with the Claimants taking the view that he should not be present for the evidence of any other witness prior to giving his own evidence;
 - b. the order in which the expert witnesses were to be heard; and
 - c. the manner in which the expert witnesses were to be heard, including whether there was to be witness conferencing, and if so, whether joint examination by the Tribunal was to precede, or follow, cross-examination of the individual experts by the Parties.
- 1.108 By communication dated 31 August 2011, the Tribunal directed:
- a. that Mr [redacted] evidence was to be taken first, immediately following the conclusion of opening statements, and prior to the Respondent's cross-examination of the Claimants' witnesses; Mr [redacted] would be permitted to be present for the opening statements of the parties, save that he would be required to withdraw if either Party made submissions addressing his involvement in the matters in dispute; once he had given his evidence, Mr [redacted] would be free to be present in the hearing;

- b. that the Tribunal wished to hear the experts as to excavations before the legal experts and experts on valuation and tax, but that otherwise the Parties were to attempt to agree the order in which they and other experts as to factual matters were heard;
 - c. that the expert witnesses would first give any evidence in chief and then be cross-examined by the opposing Party, under the control of the Tribunal, following which there would be witness conferencing.
- 1.109 By email dated 9 September 2011, the Respondent indicated that, in the light of the withdrawal by the Claimants of the evidence of the three witnesses, it wished to cross-examine one additional witness.
- 1.110 By further email dated 9 September 2011, pursuant to the provision made in Procedural Order No. 9 (above, paragraph 1.96), the Respondent submitted an additional witness statement, accompanied by exhibits, in response to the late filing by the Claimants of the second statement of Mr [redacted] and its annexes.
- 1.111 By email dated 12 September 2011, the Claimants took note of the Tribunal's ruling that Mr [redacted] was to give his evidence first, following the opening submissions, submitted that that option had not been canvassed during the pre-hearing review, and noted that if it had been, the Claimants would have opposed it. They nevertheless stated that they accepted the ruling, although they reserved the right to recall Mr [redacted] for additional questioning as the hearing progressed.
- 1.112 By letter dated 15 September 2011, the Claimants indicated, inter alia:
- a. that they had "been informed by Mr. [redacted] that he is not in a position to come to London", but that he "stands by and confirms" the witness statements submitted with the Memorial and Reply;
 - b. that notwithstanding his injury, it appeared that Mr [redacted] would be able to be present at the hearing;
 - c. that they intended to "ask Mr. [redacted] and Mr. [redacted] a few questions, independent of whether Respondent intends to cross examine them".
- 1.113 By letter dated 16 September 2011, the Respondent:
- a. expressed surprise that Mr [redacted] would not be attending, noting that he was a "very important witness", and observed that despite the Claimants' assertion that Mr [redacted] had stated that he stood by and confirmed his witness statements, the Claimants had not sought the leave of the Tribunal that his witness statements should stand in spite of the fact that he would not be giving evidence, with the result that, in principle those statements should be disregarded. It observed, however, that this would be unfair given that Mr [redacted] had made important admissions in his witness statements, and asserted that the Czech Republic had not intended to cross-examine him on those admissions. It submitted that his non-appearance should not prevent the Respondent from relying on those admissions, whilst other aspects of his statements, on which the

Respondent would not have the opportunity to cross-examine him, should be disregarded;

- b. submitted that, given that the written statements of witnesses were to stand as their direct evidence, it was improper for the Claimants to seek to elicit further evidence from Mr [redacted] and Mr [redacted] by direct examination at the hearing; in that regard, they noted that the Claimants had not submitted a second statement by Mr [redacted] with their Reply.

18. The London Hearing

1.114 A hearing on the objections to jurisdiction raised by the Respondent and the merits of the Claimants' claims was held at the International Dispute Resolution Centre at Fleet Street, London between 19 and 30 September 2011 ("the London Hearing").

1.115 On behalf of the Claimants, there attended:

Dr [redacted], (Partner, Norton Rose LLP), Counsel
Mr Arthur Marriott, QC, Counsel;
Ms Mahnaz Malik, Counsel
Mr [redacted], (Norton Rose LLP), Counsel
Mr [redacted] (Norton Rose LLP), Counsel
Mr [redacted] (Norton Rose LLP), Counsel
Ms [redacted] (Norton Rose LLP), Counsel

Mr [redacted] ECE

1.116 On behalf of the Respondent, there attended:

Mr [redacted] (Partner, Squire Sanders), Counsel
Mr Stephen P. Anway (Partner, Squire Sanders), Counsel
Ms [redacted] (European Partner, Squire Sanders), Counsel
Ms [redacted] (Associate, Squire Sanders), Counsel
Ms [redacted] (Associate, Squire Sanders), Counsel
Ms [redacted] (Associate, Squire Sanders), Counsel
Mr [redacted] (Partner, Hartmann Jelínek Fráňa a partneři), Counsel
Mr [redacted] (Senior Associate, Hartmann Jelínek Fráňa a partneři), Counsel

Mr [redacted] (Ministry of Finance, Czech Republic)
Ms [redacted] (Ministry of Finance, Czech Republic)
Ms [redacted] (Ministry of Finance, Czech Republic)

1.117 The Tribunal heard the evidence of the following witnesses of fact on behalf of the Claimants, who were cross-examined by Counsel for the Respondent:

Mr [redacted]
Mr [redacted]
Mr [redacted]

Mr .
Mr
Mr
Mr
Mr .
Ms .
Mr

1.118 The Tribunal likewise heard the evidence of the following witnesses of fact on behalf of the Respondent, who were cross-examined by Counsel for the Claimants:

Mr
Mr
Mr .
Mr
Mr .
Mr
Mr

1.119 In addition, the Tribunal heard the evidence of the following expert witnesses, who were subject to cross-examination by Counsel for the opposing party, followed by witness-conference during the course of which questions were put to them by the Tribunal:

- a. Dr Stanislav Kadečka (the Claimants' Czech law expert) and Dr Soňa Skulová (the Respondent's Czech law expert)
- b. Mr Tomas Drtina of Incoma (the Claimants' Real Estate expert) and Mr Přemysl Chaloupka and Mr Nick Powlesland of Knight Frank (the Respondent's Real Estate experts)
- c. Mr Thomas Grünh (Deloitte) (the Claimants' valuation expert) and Mr Sirshar Qureshi (PwC) (the Respondent's valuation expert).

In addition, by agreement of the Parties, the Tribunal conducted a session of witness conferencing involving Dr Dirk-Oliver Kaul (Deloitte) (the Claimants' tax expert) and Mr David Borkovec and Mr Jürgen Scheidsteger (both of PwC) (the Respondent's tax experts), without any prior cross-examination by the Parties.

19. Procedural Matters Arising During the London Hearing

1.120 During the course of the London Hearing, various procedural matters arose, and the Tribunal rendered a number of procedural rulings.

a. The Claimants' Request to Conduct Direct Examination of Certain Witnesses

- 1.121 First, in relation to the Claimants' indication contained in their letter of 15 September 2011 that they intended to ask Mr [redacted] and Mr [redacted] a number of questions by way of direct examination, and the Respondent's observations in that regard contained in its letter of 16 September 2011 (see above, paragraphs 1.112 and 1.113), the Tribunal heard the submissions of the Parties on the first day of the hearing, 19 September 2011.⁸ In order to assist with its consideration of the Claimants' proposal, the Tribunal invited the Claimants to provide as soon as possible a list of the issues which they were intending to cover with the witnesses.
- 1.122 By email sent during the evening of 19 September 2011, the Claimants provided a list of the issues they intended to cover with the witnesses, and explained why.
- 1.123 Counsel for the Respondent responded to the points made in the Claimants' email at the beginning of the hearing on the morning of 20 September 2011, and indicated that the Respondent continued to resist the Claimants' proposal.⁹
- 1.124 The Tribunal provided its ruling orally, indicating that it was prepared to allow some direct examination of Messrs [redacted] and [redacted], but that any such direct examination was to be kept to an absolute minimum, and limited to the points which the Claimants had argued had been newly introduced by the Respondent in the material accompanying its Rejoinder.¹⁰

b. Treatment of the Statements of Mr [redacted]

- 1.125 Second, as regards the approach to be taken in relation to the statements of Mr [redacted] given that he was not present at the hearing in order to be cross-examined (see above, paragraphs 1.112 and 1.113), the Tribunal likewise heard the arguments of the Parties on the first day of the hearing, 19 September 2011.¹¹ By way of elaboration on the position set out in their letter dated 15 September 2011, Counsel for the Claimants explained that Mr [redacted] had stated that, although he confirmed the contents of his statements, the partners in his company had objected to his appearance, on the basis that if he were to give evidence it would risk damaging the company's business.¹² The Claimants took the position that the Tribunal should grant leave for the witness statements of Mr [redacted] to stand despite the fact that he would not appear. The Respondent initially took essentially the same position as it had taken in its letter of 16 September 2011, suggesting that admissions made by Mr [redacted] should be allowed to stand but that the rest of his statements should be excluded.
- 1.126 The Tribunal expressed the view that the Claimants' position in effect involved the making of an application, and invited the Claimants to make that application in writing.¹³

⁸ T1/8:20 – 14:6.

⁹ T2/1:19 – 6:2.

¹⁰ T2/123:8 – 125.

¹¹ T1/14:10 – 21:4.

¹² T1/14:19-23; T1/19:12-14.

¹³ T1/22:24 – 23:18.

- 1.127 By email sent during the course of the evening of 19 September 2011, the Claimants made a formal application for leave that the witness statements of Mr [redacted] should remain on the record, and argued that the Respondent's position that only part of Mr [redacted] statements should be permitted to remain on the record should be rejected.
- 1.128 By email sent prior to the start of the hearing on 20 September 2011, the Respondent modified its position, and argued that, for the sake of simplicity, the statements of Mr [redacted] should be excluded in their entirety.
- 1.129 The Tribunal had decided that the witness statements by Mr [redacted] would be disregarded, for reasons set out by the Chairman orally during the course of the second day of the hearing.¹⁴

c. Issues Relating to the Evidence of Mr Drtina

- 1.130 On the eighth day of the London hearing, 28 September 2011, during the evidence of the Claimants' real estate expert, Mr Drtina, he produced and provided to the Tribunal copies of certain further materials relating to points raised by the Respondent's real estate expert, Knight Frank, in their second report, as filed with the Rejoinder. His evidence at various points also touched upon the matters dealt with in those materials.
- 1.131 After an initial discussion with the Parties, during which the Claimants indicated that they had no objection to the new material being introduced into the record, whilst the Respondent expressed its concern as to the late production of the material, which had not previously been provided to it, the Tribunal invited the Parties to revisit the issue during the course of the hearing on the next day.¹⁵
- 1.132 Thereafter, on the ninth day of the London hearing, 29 September 2011, the Respondent orally made an application that the Tribunal not admit the new documents produced by Mr Drtina, and in addition that certain passages of his oral evidence, in which he made reference to and/or explained the contents of those documents, be struck from the transcript. The Claimants opposed that application. The Tribunal indicated that it would reserve its decision, and that it would communicate its ruling on the Respondent's application to the Parties in due course.¹⁶
- 1.133 By email dated 3 October 2011, the Claimants made further (unsolicited) submissions in relation to certain of the arguments canvassed at the hearing as to whether the new evidence should be admitted and the transcript redacted. Those submissions in turn provoked communications in response from the Respondent.
- 1.134 By email dated 10 October 2011, the Tribunal communicated to the Parties its decision on the Respondent's application. Recalling the procedures laid down in Procedural Order No. 1 for the orderly introduction of documentary evidence, the Tribunal indicated that it saw no exceptional reasons justifying the admission of the new documents provided by Mr Drtina, with the result that they were not admitted into the record. Conversely, it took the view that there existed no exceptional reasons requiring the exclusion from the record of evidence which related directly to the issues resulting from the Parties' written pleadings, and on that basis

¹⁴ T2/126:10 – 127:25.

¹⁵ T8/200:14 – 202:2.

¹⁶ T9/163:19 – 174:6.

declined to make any order varying the contents of the transcript of the evidence for the eighth day of the hearing on 28 September 2011.

d. Site Visit and Additional Hearing in Prague

1.135 During the course of the London hearing, it was agreed that a further hearing would be convened in Prague on 13 October 2013 in order to hear the Parties' closing submissions, in combination with which the Tribunal would undertake a site visit to Liberec on 12 October 2013.

20. The Tribunal's List of Issues

1.136 By email dated 7 October 2011 from the Chairman of the Tribunal, the Tribunal circulated a list of issues as to which it would appreciate hearing the submissions of the Parties in their closing arguments. The issues identified were as follows:

"FACTS

A. In the light of the written and oral evidence, to what extent do either the Claimants or the Respondent maintain an allegation of corruption or similar wrongdoing, and if so in connection with what individual transactions and what relationships between specific persons?

B. To the extent that the Claimants' case depends upon an assertion of the breach of legitimate expectations protected by the BIT, what actions, by whom, and in what circumstances, are alleged to have given rise to such expectations? What actions, by whom, and in what circumstances, are alleged to have caused the failure of such expectations?

C. To the extent that the Claimants' case depends upon a claim of unlawful discrimination, what specifically were the elements in the treatment of the Forum project, by comparison with the Galerie project, that are alleged to constitute such discrimination?

D. Where does the burden of proof lie to establish, or to disprove, the factual basis for any of the above claims? Is more evidence required, and if so how much, to establish corruption or other wrongdoing? How should the Tribunal address allegations of wrongdoing against a private party (in casu Multi) which is not a party to the arbitration and which therefore has not been in a position to adduce any evidence in relation to the allegations made against it?

LAW

E. What is the relationship (in the specific circumstances of the present case) between breach of treaty and breach of local law by (i) the Respondent or its agencies or officers; (ii) the Claimant(s)? What is the threshold standard (i.e. how serious must the breach be)? May the threshold standard be met by cumulating separate breaches that do not reach this standard individually? What is the impact of the existence of, or exhaustion

or non-exhaustion of, local legal or other remedies? To what extent is the arbitral Tribunal itself a judge of local law? How is the Tribunal to deal with questions of local law that are unsettled or disputed?

F. How (if at all) do the actions of a private third party (in casu Multi) engage or affect the international responsibility of the Respondent State?

LIABILITY

G. What is the precise link between each of the above heads of claim and the specific protections guaranteed by the bilateral investment treaty?

DAMAGE

H. How are the damages claimed justified in relation to specific breaches of the specific protections guaranteed by the bilateral investment treaty? What principles of causation apply to link the specific damages claimed to the treaty breaches alleged? How in this connection should the Tribunal treat any delays that may be attributed to the Claimants in the permitting process?

I. What facts must be proved, by whom, and to what standard, in order to establish the specific damages claimed under each head?

J. What principles (if any) of mitigation of damage apply to the specific damages claimed?"

21. The Site Visit and Prague Hearing

- 1.137 On 12 October 2011, the Tribunal, accompanied by representatives of the Parties, visited the planned site of the Galerie project, the Multi shopping centre, and various locations in the immediate environs selected and agreed by the Parties.
- 1.138 On 13 October 2011, the Tribunal heard the Parties' closing submissions at the offices of Counsel for the Respondent ("the Prague Hearing").
- 1.139 During the course of the Prague Hearing, it was agreed that there would be no post-hearing briefs.

22. Correspondence Subsequent to the Prague Hearing

- 1.140 Subsequent to the Prague Hearing, the Parties addressed correspondence to the Tribunal on a number of matters which will be dealt with, so far as required, later on in this Award.

23. Costs Submissions

- 1.141 By letter dated 26 March 2013, the Tribunal requested the Parties to submit by 24 April 2013 schedules setting out the legal costs and disbursements claimed by them in the arbitration, gave directions as to the form and content of the schedules, and indicated that each Party would be provided the opportunity to submit comments on the other's claim within a period of 10 days.
- 1.142 The Parties filed their respective costs schedules on 24 April 2013.
- 1.143 By email dated 1 May 2013, the Claimants requested an extension until 8 May 2013 for the filing of their comments on the Respondent's costs schedule. The Tribunal granted the request.
- 1.144 By email dated 3 May 2013, the Respondent indicated that it did not intend to present comments on the Claimants' costs schedule, but sought the Tribunal's leave to file a response to the Claimants' comments on its own costs schedule.
- 1.145 By email dated 6 May 2013, the Tribunal indicated that it saw no good reason to vary the procedure set out in its directions of 26 March 2013, provided that, should the position change, it would inform the Parties without delay.
- 1.146 On 8 May 2013 the Claimants submitted their comments on the Respondent's costs claim.
- 1.147 By email dated 10 May 2013, the Tribunal authorized a further exchange of submissions limited to a number of specific points raised by the Claimants in their comments, with time limits of 17 May 2013 for the Respondent, and 24 May 2013 for the Claimants.
- 1.148 On 17 May 2013, the Respondent submitted its reply to the Claimants' comments.
- 1.149 By email dated 21 May 2013, the Claimants requested an extension until 29 May 2013 for the filing of their rejoinder, which the Tribunal granted by email on 21 May 2013.
- 1.150 By letter of 29 May 2013, the Claimants submitted their rejoinder to the Respondent's reply.

PART II FACTUAL BACKGROUND

A. INTRODUCTION

2.1 The ECE Group, of which the Claimants form part, are in the business inter alia of developing shopping centres, an area in which they have had notable success. Of relevance for the purposes of the present dispute, they had previously developed a number of other shopping centres within the Czech Republic, including Arkády Pankrác (Prague) and Galerie Vaňkovka (Brno).

2.2

2.3 Other entities within the ECE Group, in addition to the Claimants and ECE KG, also form a necessary part of the picture:-

- a. Tschechien 7 Immobilienkommanditgesellschaft k.s. ("**Tschechien 7**") is a limited partnership incorporated under the laws of the Czech Republic. Tschechien 7 was the principal vehicle used by the Claimants for the purposes of the Galerie project.

 - b. ECE Projektmanagement Praha s.r.o. ("**ECE Praha**") is a company incorporated under the laws of the Czech Republic.
-

The Claimants assert that ECE Praha acts as a service company for the investments of the ECE Group within the Czech Republic. As such it was responsible for development, planning, and pre-sales management, and for the conclusion of pre-lease contracts, for the Galerie Project. The Claimants further assert that had the Galerie Project come to fruition, and the shopping centre had been sold to investors, ECE Praha is the company which would have entered into the management agreement for Galerie

c. EKZ Tschechien 3 Immobiliengesellschaft s.r.o. (“**EKZ Tschechien 3**”) is a limited liability company incorporated under the laws of the Czech Republic.

d. EKZ Prag 1 Verwaltungsgesellschaft s.r.o. (“**EKZ Prag 1**”) is a limited liability company incorporated under the laws of the Czech Republic.

B. OVERVIEW OF THE PLANNING SYSTEM IN THE CZECH REPUBLIC

2.4 It should be noted at the outset that the applicable planning legislation changed during the course of the project. The 1976 Building Code (“**the Old Building Code**”)²¹ was in force until 31 December 2006, whilst the new legislation which replaced it (“**the New Building Code**”), which for the most part entered into force from 1 January 2007.²²

2.5 Under the transitional clauses in the New Building Code, save for certain exceptions not relevant for present purposes, the provisions of the Old Building Code continued to apply to

²¹ Old Building Code; Core 1/27 (Exhibit R-5).

²² Unnumbered provision, Part Seven, New Building Code, Core 6/197 (Exhibit R-4).

applications for planning permission that had been filed while the Old Building Code was still in force.²³ The Old Building Code therefore applied to the application for planning permission for the Galerie Project filed on 28 December 2006 (see further below). Conversely, the provisions of the New Building Code applied to the applications for Building Permits in relation to Galerie filed between January and March 2008, and the resulting proceedings.

1. Planning authorities

- 2.6 Under the Old Building Code, there were three relevant administrative levels for planning matters: in ascending order, municipalities, regions and, at the national level, the Ministry for Regional Development (“the Ministry”).²⁴ The position was maintained essentially unchanged under the New Building Code.²⁵
- 2.7 In the present case, the relevant authorities at sub-national level were, at the local level, the Building Office of the Municipal Authority of [redacted] (“the Building Office” or “MAL”) and, at the regional level, the Regional Authority of [redacted] (“RAL”). MAL, although formally a part of the administration of the municipality of [redacted] is nevertheless regarded under the scheme of Czech administrative law as being part of the centralized administration, rather than part of the decentralized areas of self-governance. RAL was the body with principal appellate competence in relation to decisions of the Building Office in planning matters.
- 2.8 As to the Ministry, although many of its functions may be exercised by officials, certain powers (in particular the final decision in relation to an appeal against a decision of a Ministry in an extraordinary review procedure (as to which see further below)) are, under the Code of Administrative Procedure (“CAP”), reserved to the Minister in person.²⁶

2. Planning Permits, Building Permits and Occupancy Approval

- 2.9 Under Czech planning and administrative law, the construction of a project such as Galerie Liberec consists of a number of distinct administrative phases.
- 2.10 First, it may be necessary as an initial step to apply for modification of the municipal zoning plan, so as to permit land use of the type required. Under the Old Building Code (which was still applicable at the relevant time for the present dispute), the zoning plan was maintained by the local municipality.²⁷
- 2.11 A planning permit is an administrative decision by which the competent authority approves the concept of a construction project, including its location and purpose, and verifies the feasibility of a project with respect to its access to utilities and roads; the planning permit may impose

²³ S. 190(3), New Building Code; Core 6/197 (Exhibit R-4).

²⁴ S. 12(1) Old Building Code; Core 1/27 (Exhibit R-5); in addition, although not relevant for the purposes of the present case, the Ministry of Defence constituted a planning authority for certain narrow, specified purposes in relation to military land.

²⁵ S. 5(1), New Building Code, Core 6/197 (Exhibit R-4).

²⁶ S. 152(2) CAP; Core 1/28 (Exhibit R-6).

²⁷ Ss 13 and 14, Old Building Code; Core 1/27 (Exhibit R-5).

conditions as to the connection of the building to transport, energy, water, sewage, and other infrastructure, and as to the preparation of detailed construction plans required for the application for a building permit.²⁸ In addition, under the Old Building Code, it appears that a planning permit could authorize an application to carry out certain ground formation works.²⁹

2.12 By contrast, under a Building Permit the relevant building office authorizes the construction of a building, and sets out specific terms and conditions as to the intended construction of the building and other constructions, for instance, roads, pavements and infrastructure connections.³⁰ Complex projects may result in the issue of several different building permits relating to different aspects of the project. Compliance with any conditions contained in the Building Permit is monitored and enforced by the relevant building authority.

2.13 Finally, once a structure is complete, it is necessary to apply for occupancy approval, which authorizes the intended use of the structure. The process consists of verification by the competent municipal building authority of compliance with applicable construction and safety regulations.³¹

a. Planning Permit Proceedings

2.14 Under the Old Building Code, once a complete application for planning permission was received, "planning proceedings" were opened.³² Upon the opening of the proceedings, all participants in those proceedings were to be notified by the relevant authority.³³ In the case of proceedings concerning "an especially extensive structure involving a particularly large number of parties" the opening of the proceedings was to be announced by a public notice.³⁴

2.15 So far as the location of a structure was concerned, participants in the planning proceedings included, in addition to the applicant and the municipality, "persons whose ownership or other rights to plots of land or structures located on them may be directly affected by such permission", including persons owning neighbouring (adjacent) plots of land and structures on them.³⁵ Mere lessees of flats or non-residential premises could not be party to planning permission proceedings.³⁶

2.16 Any individual or entity which was deemed to be a participant in planning permit proceedings had the right to raise objections to the grant of the planning permission. The relevant authority was authorized to proceed without holding a hearing where it was possible to deal with the application on the basis of the documentation, provided that it set a time-limit within which participants could file such objections.³⁷ Once the deadline for any objections had

²⁸ Ss. 32 and 39, Old Building Code; Core 1/27 (Exhibit R-5).

²⁹ Cf. s. 71(1), Old Building Code; Core 1/27 (Exhibit R-5).

³⁰ S. 115, New Building Code; Core 6/197 (Exhibit R-4).

³¹ S. 122, New Building Code; Core 6/197 (Exhibit R-4).

³² S. 35(1), Old Building Code; Core 1/27 (Exhibit R-5).

³³ S. 36(1), Old Building Code; Core 1/27 (Exhibit R-5).

³⁴ S. 36(4), Old Building Code; Core 1/27 (Exhibit R-5).

³⁵ S. 34(1), Old Building Code; Core 1/27 (Exhibit R-5).

³⁶ S. 34(4), Old Building Code; Core 1/27 (Exhibit R-5).

³⁷ S. 36(3), Old Building Code; Core 1/27 (Exhibit R-5).

passed, the relevant authority proceeded to decide whether or not to issue a Planning Permit. A decision to grant planning permission was to be notified to the parties.³⁸ The standard procedure for notification to participants of the grant of planning permission was by service by post. However, in cases of the kind described in paragraph 2.14 above, notification was by way of display of a public notice for a period of 15 days “in the manner which is usual in the locality”, with the last day of the period of display being deemed to be the day of service.³⁹

2.17 Under the generally applicable rules contained in the CAP, a decision to grant planning permission would only become legally effective after service on all participants and expiry of the deadline for any appeals.⁴⁰

b. Building Permit Proceedings

2.18 Under the New Building Code, the procedure for Building Permit proceedings was substantially the same as for Planning proceedings under the Old Building Code, with proceedings being opened following receipt of a complete application; there was provision for participants to submit observations and objections, following which the Building Authority would proceed to issue its decision.⁴¹

c. Time Limits

2.19 Under the CAP, decisions should, as a general rule, be issued within 30 days of the initiation of an administrative proceeding, although that period is extended to 60 days for complex matters.⁴² In addition, the time period is extended by the time required to prepare any expert report requested by the administrative authority.⁴³ Issuance of a decision occurs either on the date of its dispatch to participants, or on the date of its display on the notice board of the relevant authority, as appropriate.⁴⁴ The same period applies to the decision of appellate bodies, although time starts to run from the date on which the file is handed over to the superior administrative authority, which should occur within 30 days of receipt of an appeal by the lower authority.⁴⁵

2.20 Of particular relevance for the present dispute is the fact that administrative bodies have the power to stay proceedings. The effect of a stay is not entirely to suspend the proceedings, but rather to stop the running of time for the purposes of the time-limit within which the authority must reach its decision.⁴⁶ The adoption of a stay also stops time running for the purposes of calculation of the time period of 15 days within which notification of the opening of proceedings has to be displayed, as well as the period of 15 days within which participants in the proceedings are able to submit their comments and objections.

³⁸ S. 42(1), Old Building Code; Core 1/27 (Exhibit R-5).

³⁹ S. 42(2) Old Building Code; Core 1/27 (Exhibit R-5).

⁴⁰ Ss. 73 and 83 CAP; Core 1/28 (Exhibit R-6).

⁴¹ Ss. 112 and 114, New Building Code; Core 6/197 (Exhibit R-4).

⁴² S. 71(3)(a), CAP; Core 1/28 (Exhibit R-6).

⁴³ S. 71(3)(b), CAP; Core 1/28 (Exhibit R-6).

⁴⁴ S. 71(2), CAP; Core 1/28 (Exhibit R-6).

⁴⁵ S. 90(6), read with ss. 88 and 71, CAP; Core 1/28 (Exhibit R-6).

⁴⁶ Ss. 64 and 65, CAP; Core 1/28 (Exhibit R-6).

3. The System of Appeals in Planning Matters

2.21 Under Czech law, participants in planning and building proceedings had (and have) a number of options for bringing a challenge to a decision (or the failure to take a decision). The principal remedies available in building matters are:

- a. appeal to the superior administrative authority;⁴⁷
- b. the filing of a motion for extraordinary review proceedings with the superior administrative authority;⁴⁸
- c. the filing of a motion for failure to act under sectionf 80 CAP;⁴⁹
- d. judicial review.⁵⁰

2.22 An appeal to the territorially competent regional authority from a decision of a municipal authority has to be lodged with the municipal authority which adopted the decision within 15 days of delivery of the decision.⁵¹ The filing of such an appeal will generally have suspensory effect, such that the decision of the municipal authority would not enter into legal effect.⁵² The Old Building Code provided specifically that the suspensory effect of an appeal could not be excluded.⁵³ Following receipt of the appeal, the municipal authority is required to notify all other participants and invite comments.⁵⁴ Thereafter, the file is transferred to the relevant appellate authority; as noted above, transmission of the file should occur within 30 days of the receipt of the appeal.⁵⁵

2.23 The options open to the superior authority include upholding the challenged decision or modifying it; annulling the decision and remanding the case; and cancelling the decision and stopping the proceedings.⁵⁶ The decision on an appeal in planning or building proceedings becomes effective following delivery to the appellant and participants in the underlying proceedings.⁵⁷

2.24 A further remedy exists against decisions which have become legally effective, in the form of an application to the superior administrative authority for extraordinary review. Under the Code of Administrative Procedure, extraordinary review proceedings are designed to correct a misapplication of the law,⁵⁸ and can be initiated either *sua sponte* by the competent superior

⁴⁷ Ss. 81-93, CAP; Core 1/28 (Exhibit R-6).

⁴⁸ Ss. 94-99, CAP; Core 1/28 (Exhibit R-6).

⁴⁹ S. 80, CAP; Core 1/28 (Exhibit R-6).

⁵⁰ Ss. 65-78, Code of Administrative Justice; Core 2/45 (Exhibit R-7).

⁵¹ S. 83, CAP; Core 1/28 (Exhibit R-6).

⁵² Ss. 85(1) and 91(1), CAP, Core 1/28 (Exhibit R-6).

⁵³ S. 42(3), Old Building Code; Core 1/27 (Exhibit R-5).

⁵⁴ S. 85(2) CAP, Core 1/28 (Exhibit R-6).

⁵⁵ S. 88(1), CAP; Core 1/28 (Exhibit R-6).

⁵⁶ S. 90 CAP; Core 1/28 (Exhibit R-6).

⁵⁷ S. 91 CAP; Core 1/28 (Exhibit R-6).

⁵⁸ S. 94(1) CAP; Core 1/28 (Exhibit R-6).

authority, or pursuant to a motion filed by a participant in the proceedings.⁵⁹ A decision to commence extraordinary review proceedings is without any suspensive effect upon the validity of the underlying decision subject to review.⁶⁰ The superior authority may either annul or modify a decision which it finds to be unlawful.

- 2.25 However, under s. 94(4) CAP, a decision, even if found to be unlawful, cannot be annulled if the annulment would cause harm to rights acquired in good faith by any of the participants which would be disproportionate compared with the damage caused to other participants or to the public interest. If such disproportion is found, the administrative body is required to discontinue the proceedings.⁶¹
- 2.26 Decisions in Extraordinary Review proceedings are subject to appeal; where the decision was by the Ministry, the appeal lies to the Minister.⁶²
- 2.27 The third available remedy is a motion for failure to act pursuant to section 80 CAP, and may be filed with the superior administrative authority, which, if it finds the motion to be well-founded, may either order the subordinate authority to take a decision within a deadline, or transfer the file to a different subordinate authority, or take the decision itself.⁶³
- 2.28 Finally, administrative decisions may be challenged before the administrative courts provided that the claimant has exhausted any administrative remedies available within the administrative proceedings.⁶⁴ Actions may be brought either challenging an administrative decision,⁶⁵ or challenging delay.⁶⁶ The starting of proceedings challenging an administrative decision before the administrative courts does not have suspensive effect.⁶⁷

C. OVERVIEW OF THE ENVISAGED CONSTRUCTION OF THE GALERIE PROJECT

1. The Planning Scheme for the Galerie Project

- 2.29 The various elements which were to be undertaken for the construction of the Galerie project were divided into a number of “Constructions” for the purposes of making applications for building permits, some of which in turn comprised a number of discrete sub-elements:
- a. Construction I related to the excavation of the site and construction of the main building; it also comprised:
 - i. Construction I.a relating to waste water infrastructure;

⁵⁹ Ss. 94(1) and 95(1) CAP; Core 1/28 (Exhibit R-6).

⁶⁰ S. 94 and 95(5) CAP; Core 1/28 (Exhibit R-6).

⁶¹ S. 94(4) CAP; Core 1/28 (Exhibit R-6).

⁶² S. 95(6) and 152(3) CAP; Core 1/28 (Exhibit R-6).

⁶³ S. 80, CAP.

⁶⁴ Ss. 5 and 68(a), Code of Administrative Justice; Core 2/45 (Exhibit R-7).

⁶⁵ Ss. 65-78, Code of Administrative Justice; Core 2/45 (Exhibit R-7).

⁶⁶ Ss. 79-81, Code of Administrative Justice; Core 2/45 (Exhibit R-7).

⁶⁷ S. 73, Code of Administrative Justice; Core 2/45 (Exhibit R-7).

- ii. Construction I.b, relating to internal roads within the Galerie site itself, and their connection to outside, public roads;
- b. Construction II comprised works in relation to a public road owned by the City
- c. Construction III consisted of works changing the traffic layout on Street, including works in relation to its intersection with Street, both public roads owned by the City
- d. Construction IV comprised works in relation to the intersection between a number of public roads, owned by the City
 , located in the area separating the proposed site of Galerie from the site of the Forum retail centre to be constructed by Multi and adjoining the bus station. Construction IV was sub-divided into a number of sub-elements:
 - i. Construction IV.a related to construction of a new intersection and modification of the road layout between , and involved the creation of a new intersection and crossings to replace the existing roundabout;
 - ii. Construction IV.b related to the construction of a new intersection of Street.

2.30 The Parties were in dispute as to the cause of the decision to split the planning permission into various constructions, and to sub-divide them. This is again an issue to which the Tribunal will return.

2.31 The traffic intersection which was the subject of Construction IV.b gave rise to a number of problems, and assumed a particular prominence in the building permit proceedings owing to the fact that the area which was to be modified overlapped with works in relation to the intersection to be undertaken as part of Multi's project.

2. Acquisition of the project lands.

2.32 All of the lands on which the GALERIE retail centre was to be built ("the project lands") had previously been owned by third parties.

2.33 The actual transfer of title in the project lands to Tschechien 7 and other subsidiaries of the Claimants took place after the filing of the application for planning permission with MAL, although the evidence shows that sale and purchase agreements were in place at substantially earlier dates. In summary, the process of acquisition of the lands forming the main site on which the principal structure of the Galerie project was to be built was as follows:

a.

b.

c.

d.

2.34 In addition, the application for planning permission and subsequently the applications for building permits related to a certain number of plots of land which were not owned by Tschechien 7. In particular, the City owned the public roads which it was foreseen would be modified in order to integrate vehicle access to Galerie into the public road system. As discussed further below, the City substantially cooperated with Tschechien 7 in this regard, including by giving its consent to modification of the public roads. SIAL architektia inženýři spol. s r.o. (“SIAL”), the firm of architects which acted on behalf of Tschechien 7 in the planning and building permit proceedings, in a number of instances also acted on behalf of the City in filing applications for building permits in relation to land owned by the City, and in certain instances, filing appeals against decisions of MAL.

⁶⁸ Core 4/103 (Exhibit SQ-8).

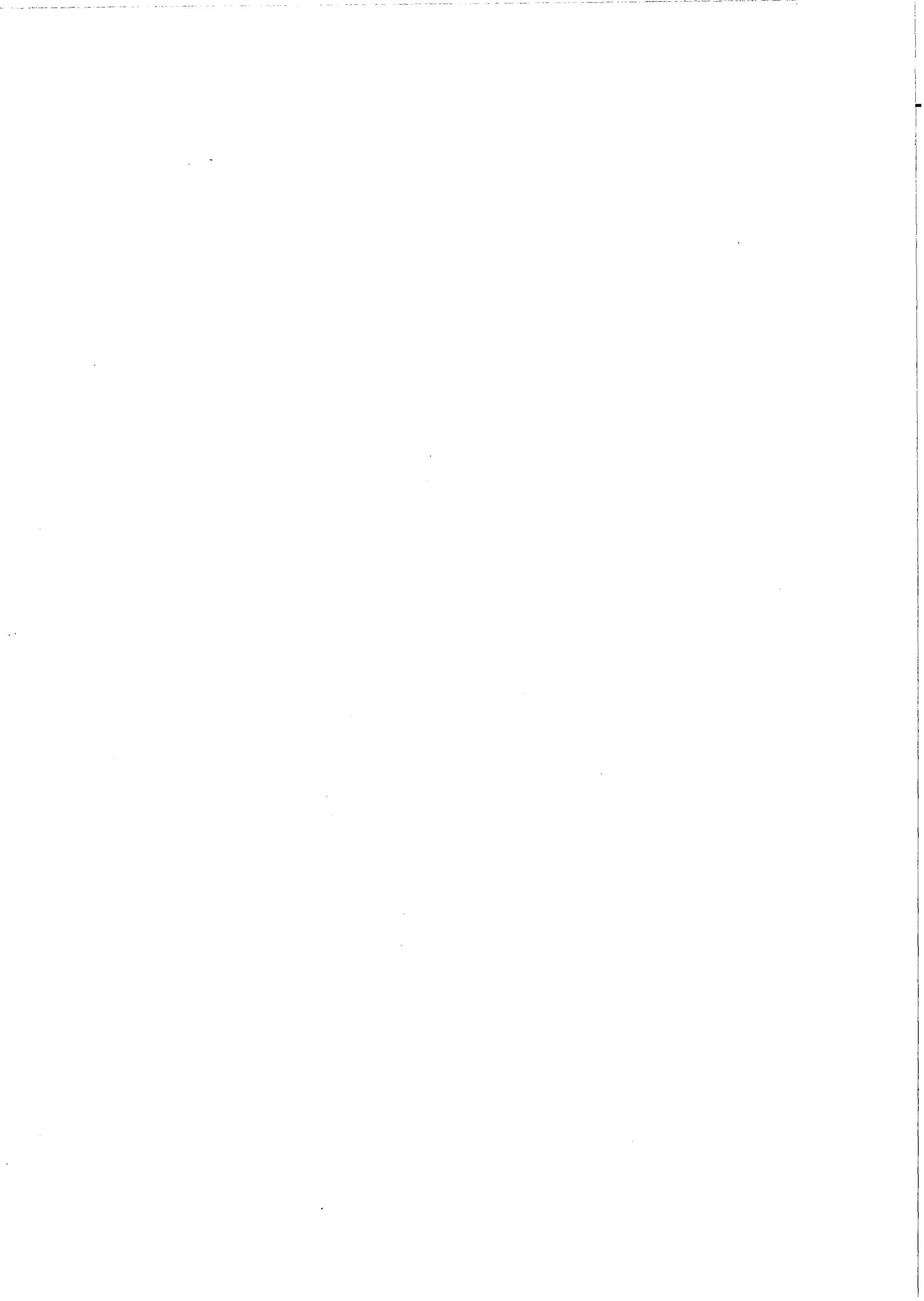
⁶⁹ Core 4/105 (Exhibit R-52).

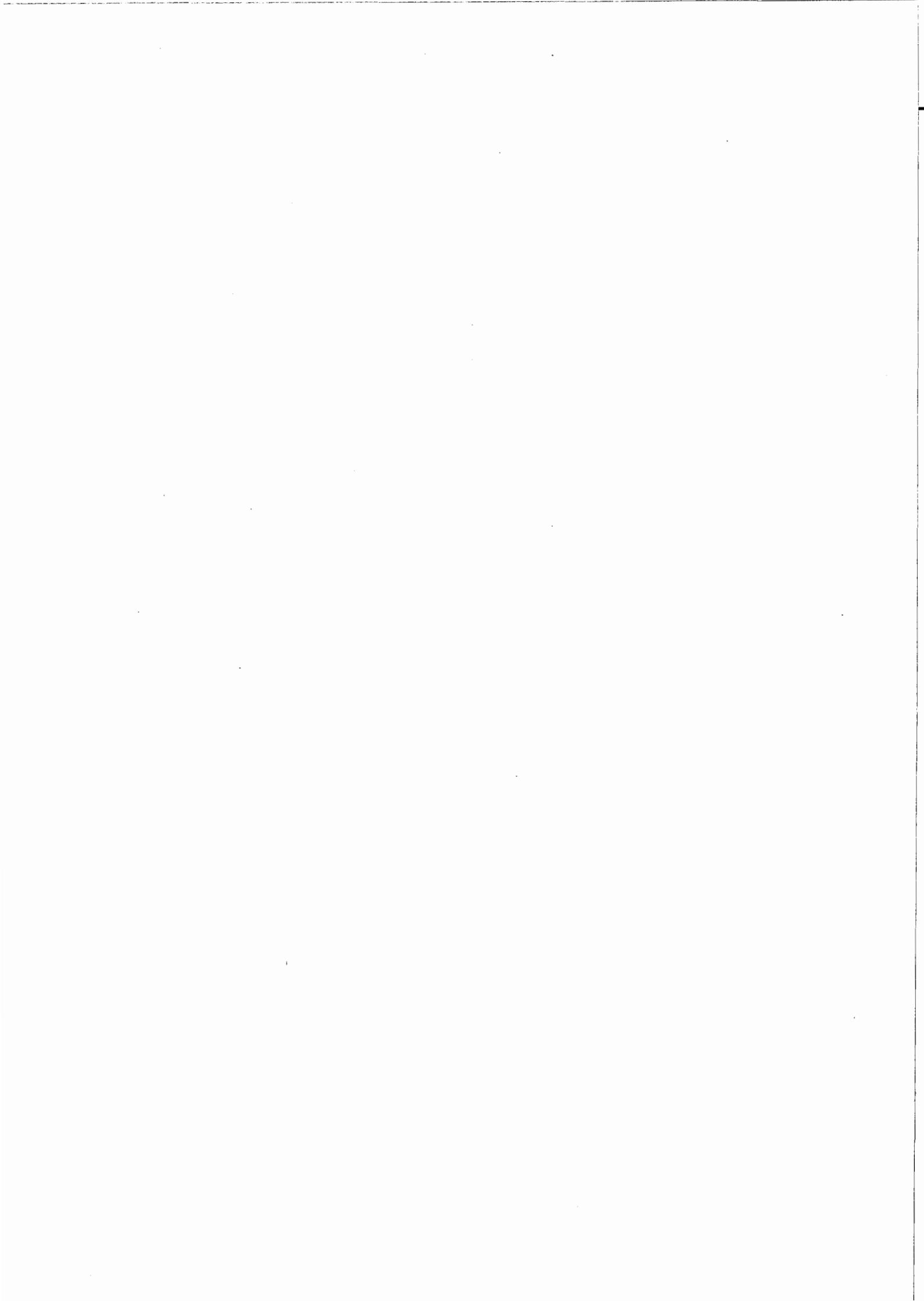
⁷⁰ Exhibit SQ-10.

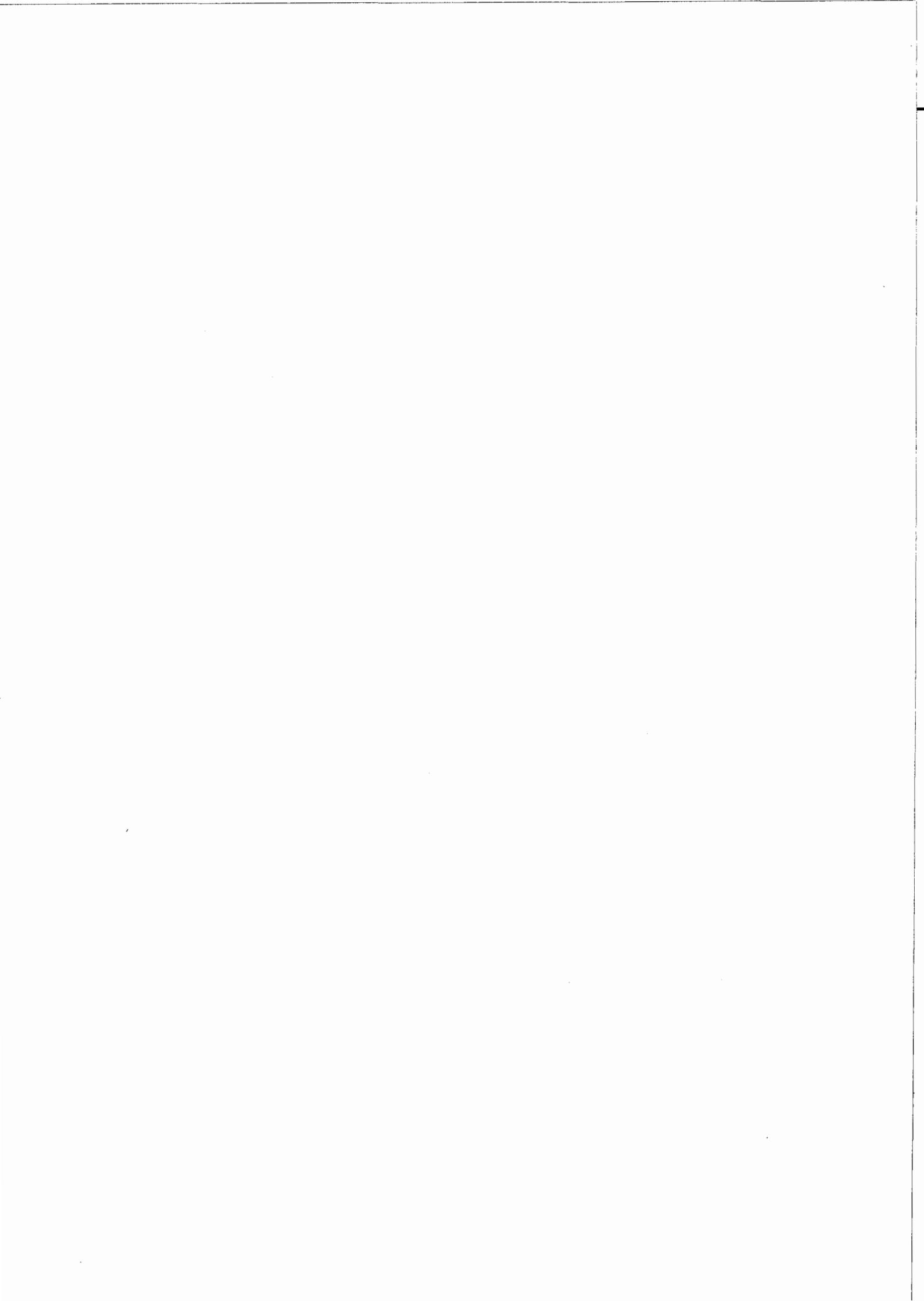
⁷¹ Core 4/102 (Exhibit SQ-7); Core 4/106 (Exhibit R-87).

D. ECE'S APPLICATION FOR THE PLANNING PERMIT FOR GALERIE AND THE PLANNING PERMIT PROCEEDINGS (INCLUDING THE EXTRAORDINARY REVIEW PROCEEDINGS)

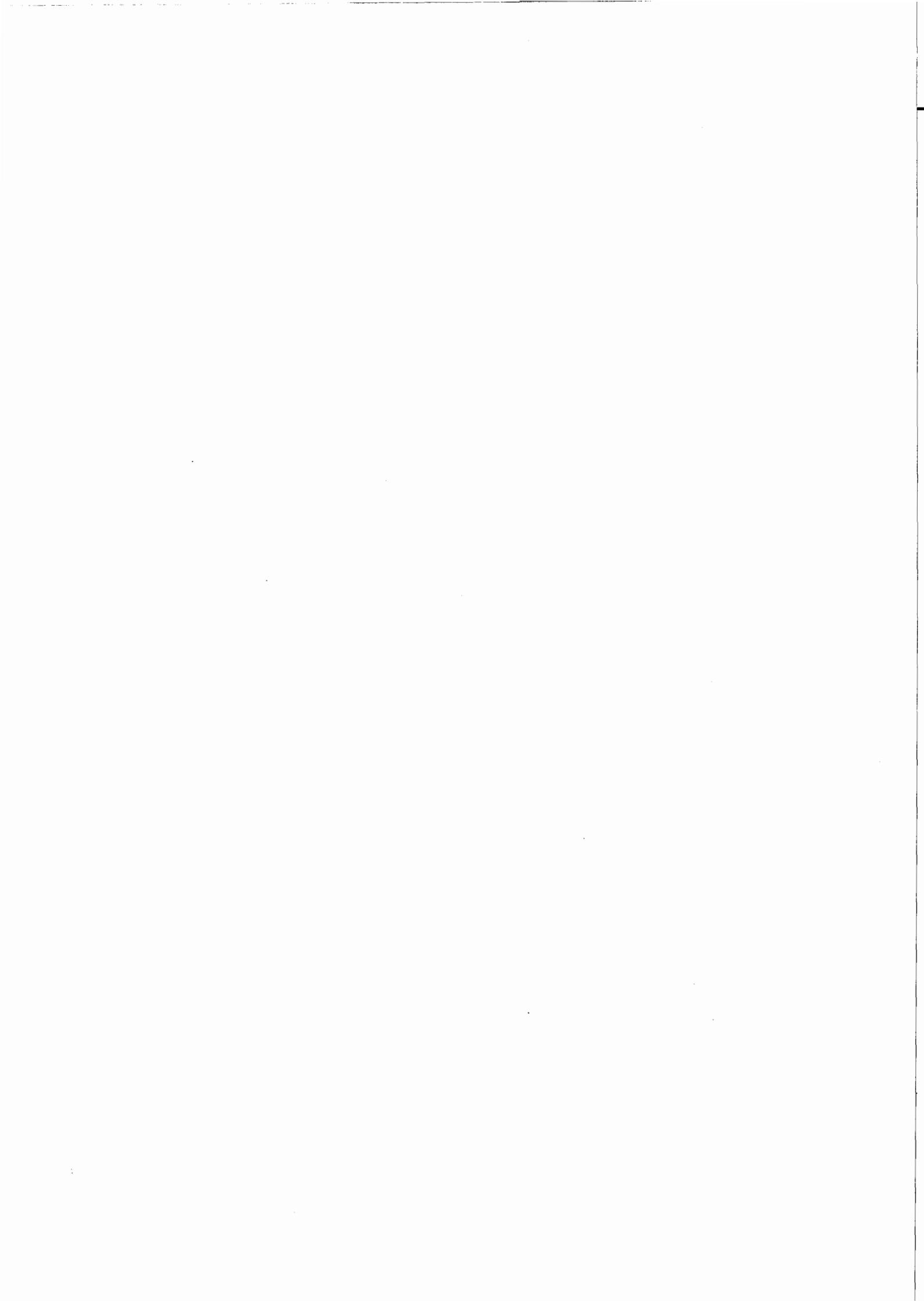
[The following text is extremely faint and largely illegible. It appears to be a multi-paragraph document, possibly a report or application, with several distinct sections separated by horizontal lines. The text is too light to transcribe accurately.]

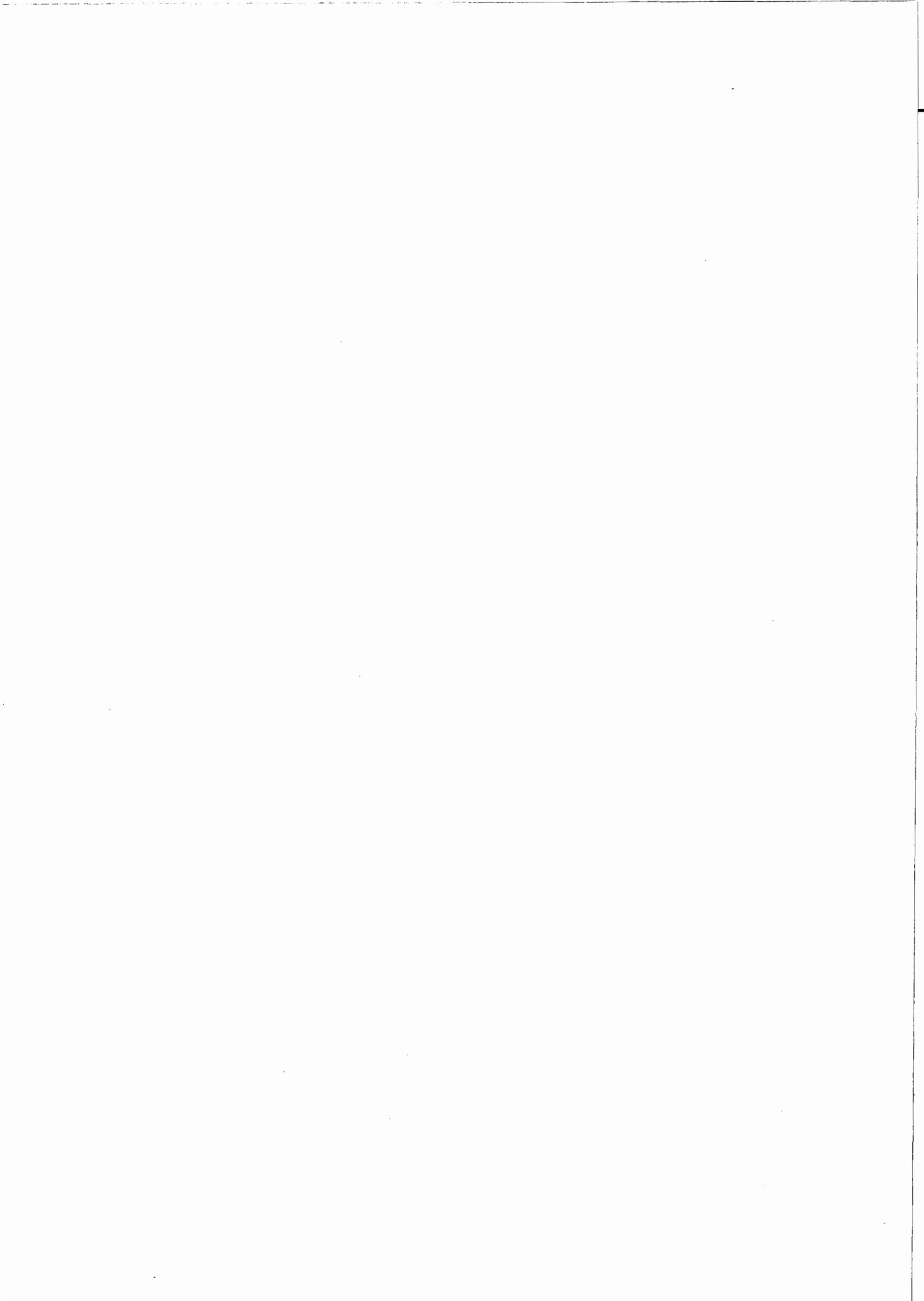


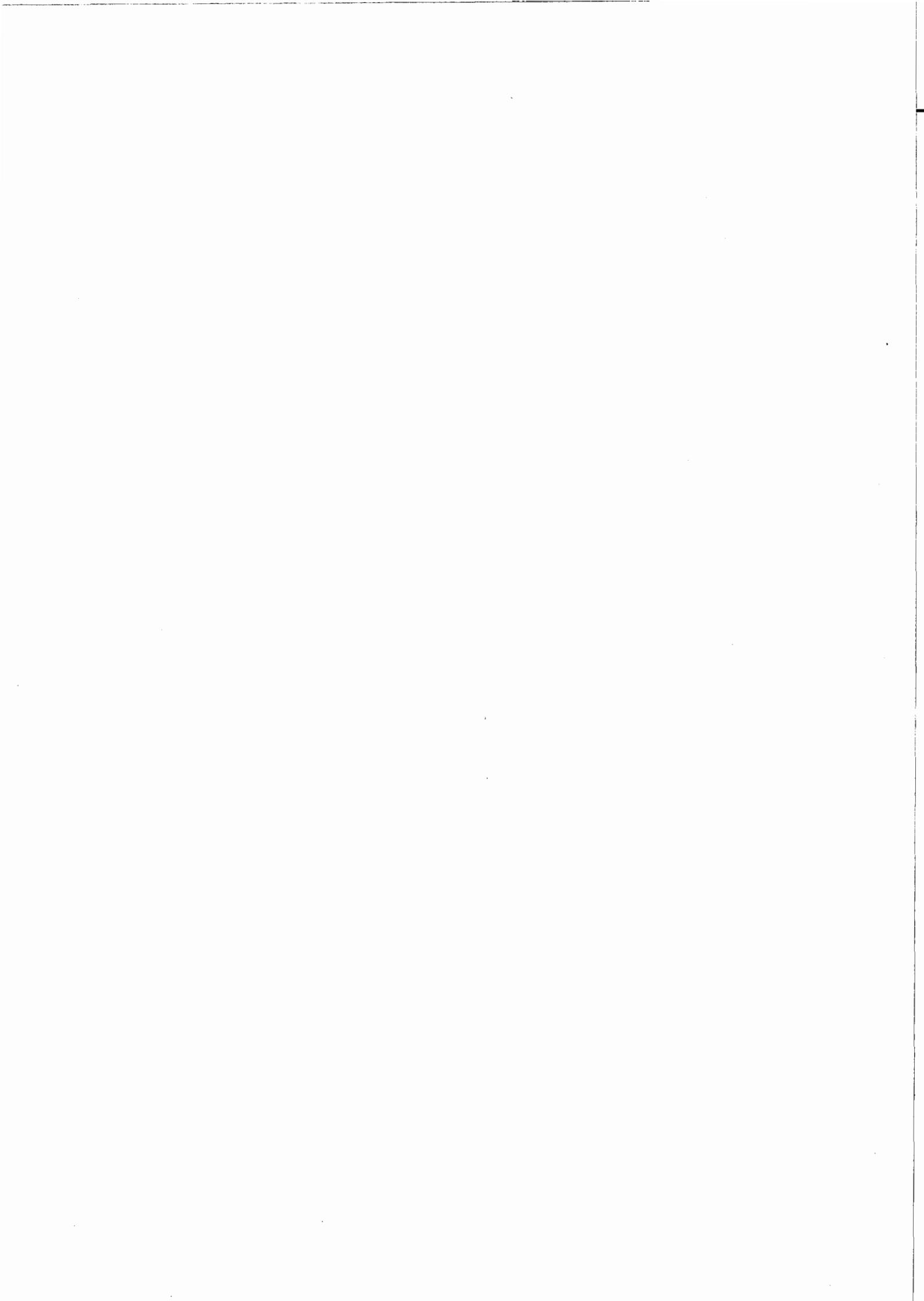




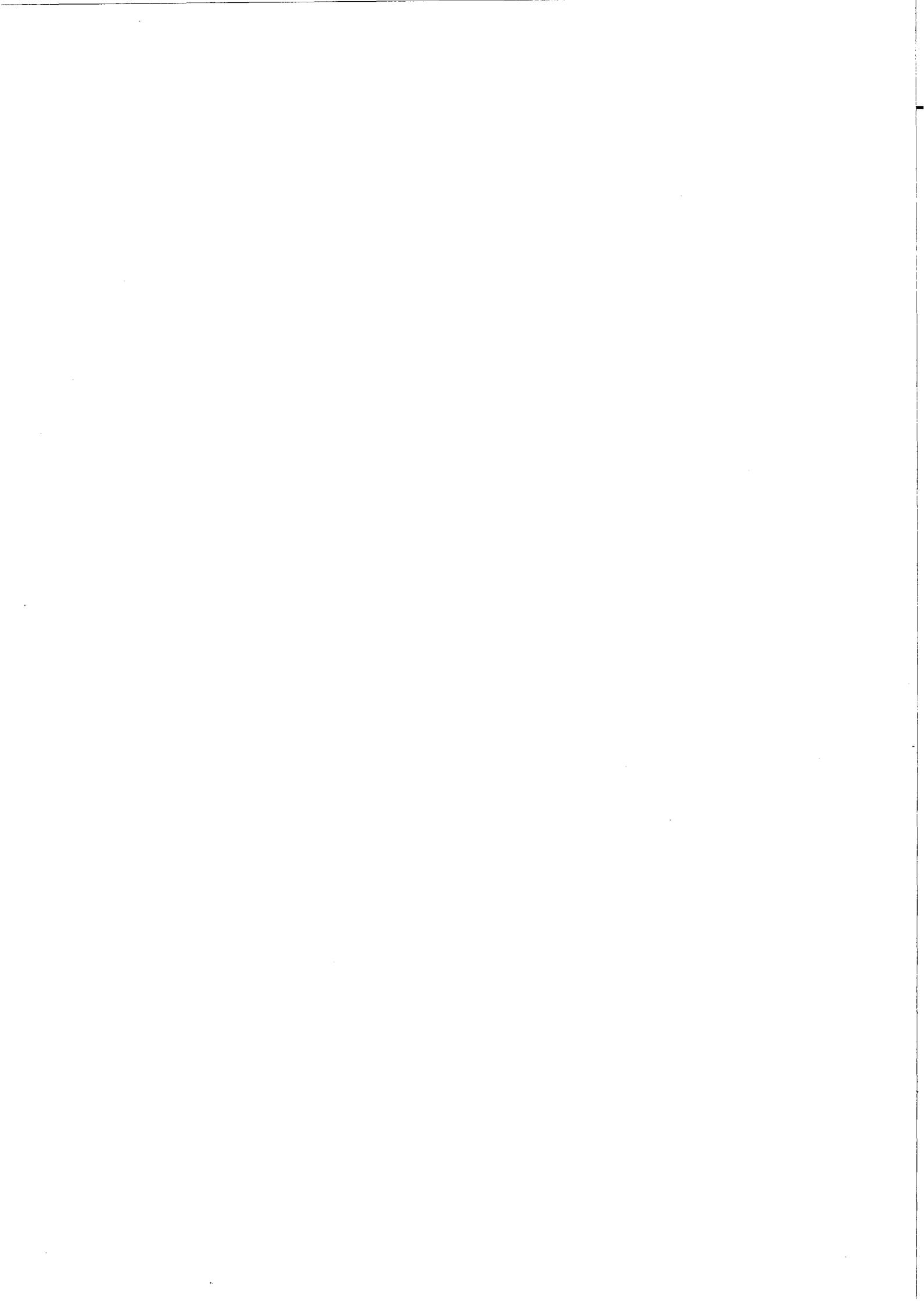


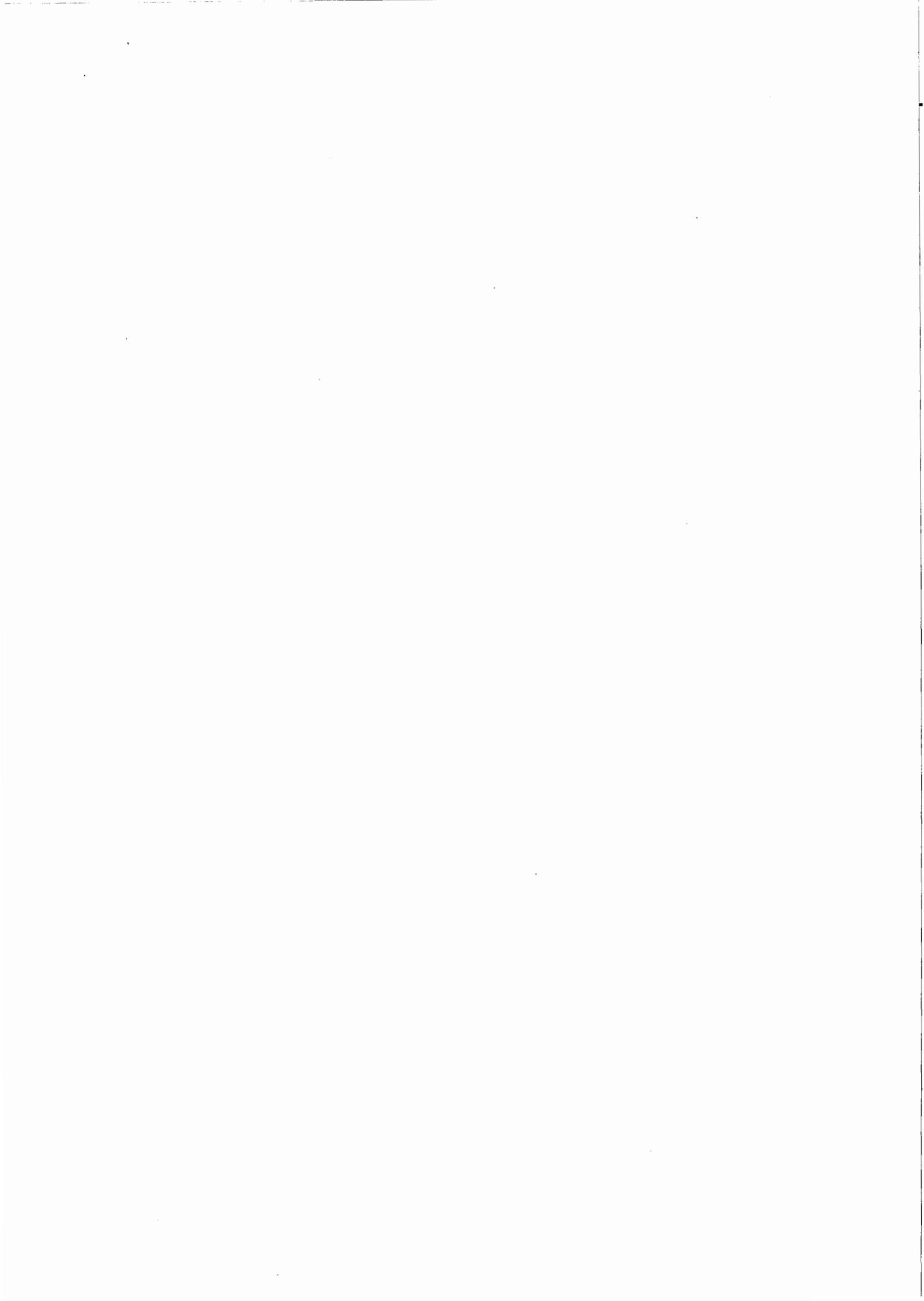












PART III
THE JURISDICTION OF THE TRIBUNAL

A. PROVISIONS OF THE BIT RELEVANT TO JURISDICTION

3.1 As set out above, Article 10 of the BIT, insofar as relevant for present purposes, provides (taking account of the competing translations into English advanced by the Parties):

1. [Claimants: *Differences of opinion regarding*; Respondent: *Disputes relating to*] investments 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 a [Claimants: *difference of opinion*; Respondent: *dispute*] cannot be settled within six months of the date when it was [Claimants: *raised*; Respondent: *notified*] by one of the parties in dispute, it shall, at the request of the investor of the other Contracting Party, be submitted to arbitration.
[...]

3.2 The definition of “investment” is contained in Article 1(1), which provides that it:

shall include every kind of asset [Claimants: *which has been invested*; Respondent: *contributed*] in conformity with domestic law, in particular:

a) *movable and immovable property as well as any other rights in rem such as mortgages, liens and pledges;*

b) *shares of companies and other kinds of interest in companies;*

c) *receivables and claims to money which has been used to create an economic value or claims to any performance which has an economic value and which relates to an investment;*

d) *intellectual property rights, in particular copyrights, patents, utility models, industrial designs or models, trademarks, trade names, technical processes, know-how and goodwill;*

e) *business concessions under public law, including concessions to search for, extract and exploit natural resources.*

3.3 “Investor” is also a defined term, being stipulated by Article 1(3) of the BIT to mean:

a natural person with permanent residence or a juridical person with its seat in the respective area of application of this Treaty, entitled to engage in investments.

B. THE JURISDICTIONAL BASIS ASSERTED BY THE CLAIMANTS IN THE REQUEST FOR ARBITRATION AND STATEMENT OF CLAIM

3.4 In their Request for Arbitration and Statement of Claim, the Claimants dealt briefly with the jurisdiction of the Tribunal, asserting that:

- a. both Claimants constituted German investors within the meaning of Article 1(3) of the BIT “as they have their seat in the Federal Republic of Germany, and are entitled to carry out investments”;¹⁸²
- b. the direct and indirect shareholdings of ECE International and PANTA in the Czech companies Tschechien 7 and ECE Praha qualified as “investments” within the meaning of Article 1(1) of the BIT insofar as they constituted “shares of companies and other kinds of interests in companies”; the Claimants asserted that ECE International indirectly held 100% of the shares in ECE Praha and 99% of the shares in PANTA, whilst PANTA held 99.999% of the shares in Tschechien 7.¹⁸³

3.5 In addition, the Claimants also asserted that those investments were made “in accordance with Czech law”, as required by Article 1(1) of the BIT,¹⁸⁴ and sought, preemptively, to rebut arguments that had previously been raised by the Respondent in the context of the negotiations with a view to reaching an amicable settlement pursuant to Article 10 of the BIT which took place between the Parties in February and March 2009 following the sending of the Claimants’ Trigger Letter of 7 November 2008. The matters raised during the negotiations related to:

- a. the scope of the groundworks carried out by Tschechien 7 at the project site following issuance of the Planning Permit;
- b. certain issues relating to the involvement of Ms [redacted] as legal representative on behalf of the ECE companies in the various proceedings; and
- c. the acquisition of certain of the project lands through the purchase by Tschechien 7 of the shares in Perštýn Plus, the owner of the plots, from a company registered in Cyprus.¹⁸⁵

3.6 Although the Respondent did not pursue the second matter as part of its Objections to Jurisdiction, the closely-connected question of the propriety of the actions of Mr [redacted] who by letter dated 13 February 2009 made a complaint to the Czech Bar Association, the relevant domestic professional body, in respect of the conduct of Ms [redacted] in the proceedings before MAL, was the subject of a number of procedural skirmishes between the Parties. Mr [redacted] was questioned on behalf of the Claimants on the subject at the hearing.¹⁸⁶

¹⁸² Request for Arbitration and Statement of Claim, para. 186.

¹⁸³ Request for Arbitration and Statement of Claim, para. 189.

¹⁸⁴ Request for Arbitration and Statement of Claim, para. 190.

¹⁸⁵ Request for Arbitration and Statement of Claim, paras. 191-207 (Section F.IV).

¹⁸⁶ T2/60:13 – 63:23.

- 3.7 The Tribunal is of the view that the questions raised in that regard are of no relevance to the matters in issue in the present dispute, and no more needs to be said about them here save to record that the complaint against Ms [redacted] was rejected as unfounded by the Inspection Board of the Czech Bar Association on 10 June 2009.¹⁸⁷
- 3.8 To the extent that the Respondent has relied upon the first and third matters as part of its Objections to Jurisdiction, the position taken by the Claimants' in their Request for Arbitration and Statement of Claim is summarized in what follows.

C. THE RESPONDENT'S OBJECTIONS TO JURISDICTION

1. Procedural context

- 3.9 As summarized in the Tribunal's Procedural Order 1, dated 19 March 2010, at the Preliminary Procedural Meeting held on 2 February 2010 it was agreed that there would be separate parallel pleadings on the merits of the Claimants' claims and on any objections to jurisdiction raised by the Respondent. It was further agreed, and Procedural Order No. 1 so recorded, that there would however be no bifurcation of the proceedings, and any objections to jurisdiction and/or admissibility raised by the Respondent would be heard together with the merits of the Claimants' claims.¹⁸⁸
- 3.10 In addition, as noted above, it was agreed, and the Tribunal so directed, that by way of initial response to the Claimants' Request for Arbitration and Statement of Claim, the Respondent should, in the first instance, file by 15 March 2010 an Answer to Statement of Claim, incorporating an outline of any objections to the jurisdiction of the Tribunal or the admissibility of the Claimants' claims. Procedural Order No. 1 expressly stipulated that the Answer to the Statement of Claim:

need not be a full pleading, but must, on the basis of the documents currently available to the Respondent, contain an outline of both the nature of its substantive defences and of any objections to jurisdiction or admissibility.

- 3.11 As noted above, provision was also made in Procedural Order No. 1 for the filing of further pleadings relating to any objections to jurisdiction or admissibility raised by the Respondent, it being stipulated that:
- a. the Claimant would, if necessary, file Observations on Jurisdiction and Admissibility in response to any objections raised by the Respondent together with its Answer to the Statement of Claim at the same time as its Memorial on the Merits;
 - b. thereafter, the Respondent would, if required, file a Reply on Jurisdiction and Admissibility at the same time as its Counter-Memorial on the Merits; and

¹⁸⁷ See Request for Arbitration and Statement of Claim, para. 174.

¹⁸⁸ Procedural Order No. 1, Article 9.1; and Annex C: Minutes of the Preliminary Procedural Meeting, 2 February 2010, at p. 7-8.

- c. again, if required, the Claimants would file a Rejoinder on Jurisdiction and Admissibility at the same time as its Reply on the Merits.

2. Overview of the Objections to Jurisdiction Raised by the Respondent

3.12 In its Objections to Jurisdiction duly filed on 15 March 2010 in accordance with Procedural Order No. 1 together with its Answer to the Statement of Claim, the Respondent raised four objections to the jurisdiction of the Tribunal:

- a. first, the Respondent argued that, to the extent that the Claimants made claims in respect of losses suffered by Tschechien 7 and ECE Praha, those claims did not relate to an “Investment” under Article 1(1) of the BIT, and were therefore outside the jurisdiction of the Tribunal (“the Respondent’s objection of no investment within the meaning of Article 1(1) of the BIT”);
- b. second, the Respondent argued that the underlying facts relating to the Claimants’ claims in relation to the abandonment of the Galerie Project “involved serious violations of Czech law”. On the one hand it initially alleged suspected violations of Czech law as regards the manner in which Tschechien 7 acquired a portion of the lands on which Galerie was to be built (although the objection on that basis was subsequently abandoned), and on the other hand it pointed to violations by Tschechien 7 of the terms of the Planning Permit as a result of the extent of the groundworks carried out (“the Respondent’s objection of illegality of the investment”);
- c. third, the Respondent argued that the Tribunal did not have jurisdiction *ratione materiae* over the Claimants’ claims for damages in respect of losses allegedly sustained by companies other than Tschechien 7 and ECE Praha (“the objection to jurisdiction *ratione materiae*”);
- d. finally, it was argued that the Tribunal did not have jurisdiction *ratione temporis* over any claims based on events which pre-dated the date of the making of the Claimants’ respective investments (the objection to jurisdiction *ratione temporis*).

3.13 Although the form of several of the objections underwent substantial modification during the course of the exchange of pleadings, the Respondent has formally maintained each of those objections to jurisdiction, and made express reference to them in opening at the hearing held in London in September 2012.¹⁸⁹

¹⁸⁹ T1/197:17 to 210:3.

D. THE POSITIONS OF THE PARTIES

1. The Respondent's Objection to Jurisdiction on the Basis of No "Investment" Within the Meaning of Article 1(1) of the BIT

3.14 The Respondent's first jurisdictional objection is based on the premise that the Claimant's claims are outside the jurisdiction of the Tribunal because the claims for the alleged losses of Tschechien 7 and ECE Praha do not relate to an "investment" as protected by the BIT.

a. The Respondent's Objections to Jurisdiction

3.15 In their Objections to Jurisdiction, the Respondent pointed to the fact that the definition of "investment" in Article 1(1) of the BIT does not define an "investment" as comprising every kind of asset directly or indirectly owned or controlled by an investor, and on that basis argued that so-called "derivative" claims brought by the shareholder of a company in respect of loss caused to that company do not fall within the scope of the BIT.¹⁹⁰

3.16 Instead, the Claimant asserted that the definition of investment refers to assets "contributed" by an investor. It placed reliance on the fact that the Czech version of the BIT uses the term "*vložení*", the correct translation of which it submitted is "contributed", rather than "invested", and noted that the equally authentic German text uses the term "*angelegt*", which can be translated as either "contributed" or "invested".¹⁹¹ In support of the assertion that the correct equivalent in Czech of the English term "invested" is "*investované*", it drew attention to two bilateral investment treaties entered into by the Czech and Slovak Republic roughly contemporaneously with the BIT at issue in the present case one of the authentic texts of which was, and which, in each case, render the term "invested" as some form of the verb "*investované*", rather than using the verb "*vložení*", as used in the BIT.¹⁹²

3.17 In further support of this argument, it argued that the context of Article 1(1) also dictated such an interpretation, insofar as Article 1(2) of the BIT contains a separate definition of "returns", and pursuant to Article 2(3), both investments and returns are protected under the BIT.¹⁹³

3.18 On that basis, the Respondent argued that the rights and assets of Tschechien 7 and ECE Praha (including the project land owned by Tschechien 7, and its rights to due process in the planning and building proceedings) did not constitute "investments" within the meaning of the BIT. It further argued that the Claimants' participatory rights in Tschechien 7 and ECE Praha likewise did not fall within the definition of protected investments under the BIT.¹⁹⁴

¹⁹⁰ Objections to Jurisdiction, paras. 8-10.

¹⁹¹ Objections to Jurisdiction, paras. 10-11.

¹⁹² Objections to Jurisdiction, note 2, referring to Article 1(a), Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, 29 April 1991 (Exhibit R-25); Article I(a), Agreement on Encouragement and Reciprocal Protection of Investments between the Government of Canada and the Czech and Slovak Federal Republic, 15 November 1990 (Exhibit R-26).

¹⁹³ Objections to Jurisdiction, para. 13.

¹⁹⁴ Objections to Jurisdiction, paras. 14-15.

- 3.19 The Respondent emphasized that, despite the Claimants' assertion in the Request for Arbitration and Statement of Claim,¹⁹⁵ that their investments were constituted by their respective shareholdings in Tschechien 7 and ECE Praha, Tschechien 7 was in fact a limited partnership, such that PANTA could have no shareholding in it. Rather, the Respondent argued that PANTA was a general partner in Tschechien 7, PANTA was contractually entitled to 99.999% of Tschechien 7's profit, and that, as a matter of Czech law, that right was regarded as contractual, rather than proprietary.¹⁹⁶
- 3.20 It further observed that, under Czech law, PANTA's participatory rights in Tschechien 7 as general partner were not contingent upon any contribution of capital. As a consequence, the Respondent argued that PANTA's participatory rights as general partner in Tschechien 7 did not constitute "contributions" for the purposes of the definition of "investment".¹⁹⁷
- 3.21 As for ECE International, the Respondent argued that the direct and indirect shareholding of that entity in ECE Praha had derived from a contribution of capital made by its legal predecessor, but that, given that the BIT does not contain a "change-of-form" provision, in the hands of ECE International the "the assets obtained in exchange for assets contributed" likewise did not constitute an investment within the meaning of Article 1(1) of the BIT.¹⁹⁸
- 3.22 The Respondent in any case observed that the Claimants' claims on the merits related only to the rights and assets of Tschechien 7, and emphasized that no allegation was made that the Respondent had taken any measures directed against the Claimants' contributions to Tschechien 7 and/or ECE Praha. The Respondent noted that, instead, the Claimants had alleged that the actions of the organs of the Respondent had violated the due process rights of Tschechien 7 in the building and planning proceedings, and that the Claimants' claim was that those alleged violations had resulted in a loss of value of the project land owned by Tschechien 7.¹⁹⁹
- 3.23 The Respondent further noted that, although the Claimants had argued that the alleged violations of Tschechien 7's procedural rights also caused actual damage and loss of profits to both Tschechien 7 and ECE Praha, as well as a number of other companies within the group, the Claimants did not specify what rights and assets of ECE Praha and those other companies had allegedly been affected.²⁰⁰ The Respondent observed that the Claimants asserted that the intention was that ECE Praha would become the management company for Galerie once it became operational, but that, since the project had been aborted prior to commencement of the construction phase, it appeared that ECE Praha had had no rights or assets in connection with

¹⁹⁵ Request for Arbitration and Statement of Claim, para. 188.

¹⁹⁶ Objections to Jurisdiction, paras. 15-16.

¹⁹⁷ Objections to Jurisdiction, paras. 16-17.

¹⁹⁸ Objections to Jurisdiction, para. 18.

¹⁹⁹ Objections to Jurisdiction, paras. 19-20.

²⁰⁰ Objections to Jurisdiction, para. 21. The Respondent further asserted that the Claimants "make no efforts to properly identify" the various other companies referred to by the Claimants at Request for Arbitration and Statement of Claim, para. 249 (EKZ Tschechien 3, EKZ Prag 1, EBP, Perštýn Plus and ECE Projektmanagement), and had not alleged that they constituted protected investments within the meaning of Article 1(1) of the BIT (ibid.).

the project, with the result that the dispute could not relate to the rights and assets of ECE Praha.²⁰¹

3.24 On that basis, the Respondent argued that the claims brought by the Claimants in relation to Tschechien 7 and ECE Praha fell outside the scope of its consent to arbitrate under Article 10 of the BIT. Specifically, the Respondent emphasized that, pursuant to Article 10, it had consented to arbitrate only “disputes relating to an investment”, and that given the narrow interpretation which it said should be given to the definition of “investment” in Article 1(1) as being limited to “contributions”, and the fact that the violations alleged by the Claimants related only to the rights and assets of Tschechien 7, the derivative claims brought by the Claimants did not constitute a dispute relating to the investment within the meaning of Articles 10 and 1(1) of the BIT.²⁰²

3.25 In particular, the Respondent argued: i) that the claims made by PANTA relating to the damage allegedly sustained by Tschechien 7 were not claims relating to an investment because PANTA’s participation in Tschechien 7 did not constitute an “investment” within the scope of the BIT “because they were not contributed by PANTA”; and ii) that those claims in any event related to the rights and assets of Tschechien 7, which likewise did not constitute an “investment” as they had not been contributed by PANTA.²⁰³

3.26 As regards the claims by ECE International in relation to the damage allegedly sustained by ECE Praha, the Respondent argued that those claims likewise did not constitute claims “relating to an investment” on the basis that i) ECE International’s shareholding in ECE Praha did not constitute an investment because it had not been “contributed” by ECE International; ii) the claims of ECE International did not relate to any existing rights or assets of ECE Praha; and iii) even if those claims did relate to existing rights or assets of ECE Praha, they would not constitute an “investment”, as they were not “contributed” by ECE International.²⁰⁴

b. The Claimants’ Memorial

3.27 In their Memorial (incorporating their Observations on Jurisdiction and Admissibility), the Claimants asserted that their “direct and indirect shareholdings and other interests in Tschechien 7 and ECE Praha qualified as investments under Article 1(1)(b) of the BIT”, disputed that the scope of the BIT was restricted by any requirement of a “contribution” by the investor; and argued that, to the contrary, the scope of the BIT was “very broad”.²⁰⁵

3.28 As to the first point, the Claimants noted that the Claimants held almost the full participatory rights in ECE Praha and Tschechien 7, and accordingly had assets in the form of shares within the meaning of Article 1(1)(b) of the BIT.²⁰⁶

²⁰¹ Objections to Jurisdiction, para. 22.

²⁰² Objections to Jurisdiction, para. 23.

²⁰³ Objections to Jurisdiction, para. 24.

²⁰⁴ Objections to Jurisdiction, para. 25.

²⁰⁵ Memorial, paras. 349-350.

²⁰⁶ Memorial, para. 351.

- 3.29 As regards the Respondent's assertion that solely the rights and assets of Tschechien 7 had been affected, rather than the Claimants' shareholdings or other interests in their other Czech subsidiaries, the Claimants noted that investors holding shares were permitted to bring a claim under investment treaties to recover losses due to the devaluation of the investor's shares or participatory interests in the directly owned domestic subsidiary, and that such claims had been permitted even in the case of indirect shareholdings. The Claimants emphasized that they did not seek to recover the losses suffered by Tschechien 7, but rather the reduction in value of their shares and participatory interests in their Czech subsidiaries.²⁰⁷
- 3.30 The Claimants dismissed the Respondent's reliance on the inclusion of "returns" in Article 1(2) of the BIT and the separate mention of "investments" and "returns" in its Article 2(3) as "not convincing".²⁰⁸ They explained that "returns" constituted a "different protected value separate from the investment definition of Article 1(1)", and that the notion referred to "the revenue out of a properly operating investment in the future".²⁰⁹ On that basis, they explained the relevance of Article 2(3) as clarifying that both an investment and the returns to be derived from it enjoyed protection under the BIT, and argued that the provision should be understood as expanding the scope of protection available to investors, rather than limiting it.²¹⁰
- 3.31 As regards the Respondent's suggestion, based on the supposedly different meaning of the terms used in the authentic Czech and German versions of the BIT, that Article 1(1) required a "contribution", the Claimants observed that the Respondent's argument was unclear both as to what should be understood to constitute a "contribution", and as to why the Claimants' shareholdings and interests in Tschechien 7 and ECE Praha did not in any case fall within that concept. The Claimants further denied that there was in fact any divergence in meaning between the two authentic versions of the BIT, and argued that even if there were, that divergence fell to be resolved by applying the general rules of interpretation.²¹¹
- 3.32 As to the supposed divergence between the Czech and German texts of the BIT, the Claimants argued that the German version of Article 1(1) could only be understood as meaning "every asset invested in accordance with domestic law", and claimed, relying on a German-English dictionary, that the German word "*angelegt*" could only be translated as "invested". In support of that assertion the Claimants made reference to other investment treaties concluded by the Federal Republic of Germany for which "official" English translations exist, and in which the word "*angelegt*" was likewise translated as "invested".²¹² The Claimants asserted that the German wording and the translation into English they proposed "represent a well known and frequently used phrase, that the investment is encompassing *every asset invested in accordance with host state law*",²¹³ observed that no justification had been put forward as to why Article 1(1) of the BIT should be understood as having the "exceptional" meaning of "contributed";

²⁰⁷ Memorial, para. 353.

²⁰⁸ Memorial, para. 354.

²⁰⁹ Memorial, para. 354.

²¹⁰ Memorial, para. 354.

²¹¹ Memorial, paras. 356-357.

²¹² Memorial, para. 360, referring to the translations in the United Nations Treaty Series of the bilateral investment treaties concluded with Socialist Federal Republic of Yugoslavia (10 July 1989) 1707 UNTS (Exhibit CLA 41) and the Republic of Poland (10 November 1989) 1708 UNTS 324 (Exhibit CLA 40).

²¹³ Memorial, para. 361 (emphasis in original).

and referred to the rule of interpretation enshrined in Article 31(4) of the Vienna Convention on the Law of Treaties, observing that a special meaning was to be attributed to a term only if “the parties’ intention to derogate from the normal meaning is clearly established.”²¹⁴

- 3.33 The Claimants’ further argued that the Czech word “*vložené*” could be translated either as “contributed”, or “invested”, and that there was no reason to focus on the possible meaning “contributed” when the meaning of “invested” was capable of reflecting both the Czech and German versions.²¹⁵
- 3.34 The Claimants submitted that such an approach was consistent with the approach proscribed by Article 33 of the Vienna Convention on the Law of Treaties in respect of interpretation of a treaty authenticated in two or more languages, in particular the rule in Article 33(1) that where a treaty is authenticated in two or more languages, neither prevails over the other in case of a difference, and the general presumption contained in Article 33(3) that the terms of treaties authenticated in different languages have the same meaning in each authentic text.²¹⁶
- 3.35 In the alternative, on the hypothesis of a divergence of meaning, the Claimants referred to Article 33(4) of the Vienna Convention, and argued that “any difference should first be removed by interpretation in accordance with Articles 31 and 32 of the Vienna Convention to give each notion of the BIT the content that better serves its purpose”.²¹⁷ They Claimants submitted that the meaning “which provides a broad scope of protection to the investor” should take priority, postulating that, in signing the BIT, “the parties to it intended a very high level of protection”.²¹⁸ To that end, they relied on the “prominent” invocation at the beginning of the preamble of the BIT of the role of “foreign direct investment as part of a general strategy to enhance mutual economic relations”, as well as the title of the BIT itself,²¹⁹ as well as making reference to the historical context in which the BIT was concluded.²²⁰
- 3.36 The Claimants further submitted that it would be contrary to the BIT’s purpose of guaranteeing “a high standard of protection” “to interpret the scope of jurisdiction restrictively by saying the investment has to be a contribution to limit the wide definition of covered investments”.²²¹ They relied on certain observations of the tribunal in *Saluka v Czech Republic* in interpreting the definition of “investment” contained in Article 1 of the Netherlands-Czech Republic BIT applicable in that case, and in particular the tribunal’s rejection of the suggestion that the term “investment” should be given “the meaning which that term might bear as an economic process, in the sense of making a substantial contribution to the local economy or to the well-being of a company operating within it”.²²²

²¹⁴ Memorial, para. 361.

²¹⁵ Memorial, para. 362.

²¹⁶ Memorial, para. 363.

²¹⁷ Memorial, para. 365.

²¹⁸ Memorial, para. 366.

²¹⁹ Memorial, paras. 367-368.

²²⁰ Memorial, para. 369.

²²¹ Memorial, para. 370.

²²² Memorial, para. 371, citing *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, para. 211.

c. The Respondent's Counter-Memorial

- 3.37 In responding to the Claimants' arguments in the Counter-Memorial (incorporating its Reply on Jurisdiction and Admissibility), the Respondent reiterated its position that the BIT did not "enable shareholders' derivative claims because it defines investments as assets 'contributed' rather than simply 'owned or controlled directly or indirectly' like most investment treaties, such as the Energy Charter Treaty".²²³
- 3.38 Having reiterated its position that the English term "invested" should be translated into the Czech language as "*investované*", rather than the term "*vložené*" used in Article 1(1) of the BIT, the Respondent apparently conceded that the German term "*angelegt*" was properly to be translated as "invested", and submitted that the first issue was rather "whether those terms are truly different".²²⁴ It submitted that the Claimants "essentially argue that the English expression 'invested' does not have any real meaning because it does not refer to an economic process", and argued that that position is incorrect insofar as tribunals interpreting the term "investment" in Article 25 ICSID Convention had stressed that the ordinary meaning of the terms "investment" and "invest" required various elements, including contribution.²²⁵ On that basis, the Respondent submitted that "[t]he real difference, therefore, is not between the ordinary meaning of 'invested' and 'contributed' but, rather, whether the word 'invested' has meaning (as the Czech Republic says) or has no meaning (as Claimants say)."²²⁶
- 3.39 The Respondent submitted that the second issue which arose was the reconciliation of the different meanings according to the rules of the Vienna Convention; in the Respondent's view, the meaning which best reconciled the two versions was "contributed", as only that meaning was common to both the Czech and German versions of the BIT. The Respondent argued that having regard to the object and purpose of the BIT was circular and of no assistance given that the purpose of the BIT was the protection of investments as defined in the BIT.²²⁷
- 3.40 The Respondent argued instead that the submitted divergence in meanings had to be resolved by reference to the context of Article 1(1), including in particular the fact that Article 1(2) immediately followed Article 1(1) and contained a separate definition of "returns". The Respondent noted that the Claimants recognized that "returns" constituted "a different protected value", and argued that that difference was confirmed by the fact that Article 2(3) expressly provided that both "investments" and "returns" were fully protected by the BIT. As a consequence, the Respondent argued that the notion of "investment" had to be interpreted as not including "returns", since otherwise Article 2(3) would be redundant, and that that conclusion was consistent with the narrower definition of "investment" as meaning assets contributed, rather than invested, by an investor.²²⁸
- 3.41 On that basis, the Respondent maintained its position that the rights and assets of Tschechien 7 and ECE Praha, and the Claimants' participatory rights in those companies, did not constitute

²²³ Counter-Memorial, para. 223.

²²⁴ Counter-Memorial, para. 223.

²²⁵ Counter-Memorial, para. 223.

²²⁶ Counter-Memorial, para. 224.

²²⁷ Counter-Memorial, paras. 225-226.

²²⁸ Counter-Memorial, para. 227.

protected investments. As to the respective participations of the Claimants in Tschechien 7 and ECE Praha, the Respondent repeated its arguments that they did not constitute investments because they were not contributions, and noted that the Claimants had not responded to those arguments in its Memorial.²²⁹

d. The Claimants' Reply

3.42 In their Reply (incorporating their Rejoinder on Jurisdiction), the Claimants maintained their position that their respective participations in Tschechien 7 and ECE Praha constituted an investment within the meaning of Article 1(1)(b) of the BIT.

3.43 The Claimants observed that the Respondent had put forward no proof, including no citation to any dictionary definition, in support of its view that the German term "*angelegt*" could be translated as "contributed", and argued that the German "*angelegt*" "does not mean *contributed*".²³⁰ They dismissed the Respondent's allusion to Article 25 of the ICSID Convention as misleading, given that the ICSID Convention was inapplicable in the present case.

3.44 The Claimants further argued, *ex abundanti cautela*, that even if there were some requirement of "contribution", the participation of the Claimants in Tschechien 7 and ECE Praha was sufficient to meet any such requirement.²³¹ They pointed to contributions by PANTA to the capital of Tschechien 7 both at the time it became general partner of Tschechien 7, and subsequently.²³² As regards ECE International's shareholding in ECE Praha and the Respondent's argument based on the lack of any "change of form" provision in the BIT, the Claimants observed that "it remains unclear how this transfer of title should affect the qualification of an asset as an investment".²³³

2. The Respondent's Objection to Jurisdiction Based on Alleged Serious Violations of Czech Law

3.45 The Respondent's second objection was that the Claimants' claims are barred by the requirement of Article 1(1) of the BIT that any investment had to be made "in conformity with domestic law" because Tschechien 7 conducted the Galerie project in violation of Czech law.

a. The Claimants' Request for Arbitration and Statement of Claim

3.46 As noted above, the Claimants anticipated certain of the Respondent's objections in the Request for Arbitration and Statement of Claim.

3.47 Specifically as regards the legality of the excavation work, the Claimants argued that the allegedly excessive and illegal scope of the groundworks carried out by Tschechien 7 "does

²²⁹ Counter-Memorial, paras. 228-230.

²³⁰ Reply, para. 376 (emphasis in original).

²³¹ Reply, para. 377.

²³² Reply, para. 378.

²³³ Reply, para. 379.

not change the fact Claimants have invested assets in accordance with Czech law”.²³⁴ They argued first, that the scope of the groundworks was “entirely irrelevant” because the investment at issue was the Claimants’ shareholdings in Tschechien 7 and ECE Praha, and not the operations carried out by them, and the Respondent had not taken the position that the fact of the shareholdings as such violated Czech law.²³⁵

- 3.48 Second, the Claimants claimed that although the securing works carried out by Tschechien 7 had involved excavation in excess of the volume permitted under the Planning Permit, they had nevertheless been in accordance with Czech law as they had been required in order to secure the site. They submitted that following completion of the authorized volume of groundworks, it became apparent that the slopes thereby created were not stable, and that there was a risk of landslides capable of causing severe damage or casualties. They relied on the expert reports by Jokl Appraisal v.o.s. and ²³⁶ and noted that the Claimants had challenged MAL’s order of 15 August 2008.²³⁷
- 3.49 The Claimants had earlier submitted that the risk of landslides had been aggravated by the delays in the course of the administrative proceedings, and that Tschechien 7 had therefore been obliged to resort to securing works “that explain the whole difference between the volume of groundworks permitted under the Planning Permit and the actual volume of groundworks”.²³⁸
- 3.50 Third, the Claimants argued that even if safety considerations had not justified the groundworks in excess of those permitted under the Planning Permit, in light of the object and purpose of the BIT, which they submitted included fostering and protecting investors and their investments, the BIT should be interpreted such that not every “formal breach of domestic law disqualifies an investment from BIT protection that it would otherwise have had”.²³⁹ Rather, citing the decision in *Desert Line v. Yemen*, the Claimants submitted that it was only “fundamental breaches” of the law of the host State that should have such an effect,²⁴⁰ and noted that it had not been argued that the development of retail centres was per se unlawful,²⁴¹ nor that the groundworks themselves were per se unlawful.²⁴²
- 3.51 The Claimants argued that the volume of groundworks was permissible, and had in fact been permitted by MAL when it issued the Building Permit for the main construction on 26 November 2008.²⁴³ The Claimants had earlier relied on the fact that MAL itself had instructed Tschechien 7 to perform securing works on 19 September 2008,²⁴⁴ as well as suggesting that if,

²³⁴ Request for Arbitration and Statement of Claim, para. 192.

²³⁵ Request for Arbitration and Statement of Claim, para. 193.

²³⁶ Exhibits C-22 and C-25.

²³⁷ Request for Arbitration and Statement of Claim, para. 195.

²³⁸ Request for Arbitration and Statement of Claim, para. 147; Exhibit C-22.

²³⁹ Request for Arbitration and Statement of Claim, para. 196.

²⁴⁰ Request for Arbitration and Statement of Claim, para. 196, citing *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award of 6 February 2008, para. 104.

²⁴¹ Request for Arbitration and Statement of Claim, para. 197.

²⁴² Request for Arbitration and Statement of Claim, para. 198.

²⁴³ Request for Arbitration and Statement of Claim, para. 198.

²⁴⁴ Request for Arbitration and Statement of Claim, para. 148.

following the allegedly improper interference by the Ministry of Finance, MAL had not improperly stayed the appeal proceedings in relation to the building permit, the main building permit would have become final and Tschechien 7 would have become entitled to carry out the groundworks it had in fact performed.²⁴⁵

3.52 On that basis, the Claimants submitted that the most that the Respondent could argue was that the Galerie project had been “temporarily in a formally unlawful status”. However, the Claimants submitted that this would nevertheless not exclude their investment from the scope of protection under the BIT.²⁴⁶

3.53 As regards the anticipated objection to jurisdiction based on the manner in which Tschechien 7 had acquired certain of the project land previously owned by Perštýn Plus, the Claimants explained the mechanism by which Perštýn Plus was first purchased from the Cypriot company, Helier Trading Limited, and its assets merged into those of Tschechien 7.²⁴⁷ The Claimants argued that that process “obviously does not create any concerns with regard to the BIT protection of the Claimants’ investment”.²⁴⁸

b. The Respondent’s Objections to Jurisdiction

3.54 In the Objections to Jurisdiction, the Respondent relied on two matters as constituting illegality by Tschechien 7 which it argued deprive the Tribunal of jurisdiction over the Claimants’ claims.

3.55 First, the Respondent set out its position (which, pending disclosure, it at that stage put as no more than suspicion) that the process by which Tschechien 7 acquired a substantial portion of the project land on which Galerie was to be built from Perštýn Plus had been in violation of Czech law. Given however, that this objection was not ultimately pursued,²⁴⁹ the Tribunal sees no reason to set out in detail the Respondent’s position in this regard.

3.56 Second, the Respondent relied on the fact that Tschechien 7 had violated Czech construction and planning law, in particular insofar as it proceeded to excavate a quantity of earth and rock far in excess of the 170,000 m³ authorized in the Planning Permit. The Respondent alleged that, by November 2008, Tschechien 7 had in fact excavated more than 290,000 m³, some 80% more than was authorized under the Planning Permit.²⁵⁰

3.57 As regards the Claimants’ argument made in the Request for Arbitration that the excess excavation had subsequently been authorized by the Main Building permit, and that consequently the project was only “temporarily in a formally unlawful status”,²⁵¹ the Respondent countered that the Main Building permit had not become legally effective because

²⁴⁵ Request for Arbitration and Statement of Claim, paras. 149-152.

²⁴⁶ Request for Arbitration and Statement of Claim, para. 199.

²⁴⁷ Request for Arbitration and Statement of Claim, para. 206.

²⁴⁸ Request for Arbitration and Statement of Claim, para. 207.

²⁴⁹ See below, para. 3.73.

²⁵⁰ Objections to Jurisdiction, para. 31.

²⁵¹ Above, paras. 3.51 to 3.52.

it was the subject of an appeal,²⁵² and that in any case, the violation in question was far from being a mere formality, but rather breached the “fundamental principle [of] Czech construction law that construction work requires *prior* authorization”.²⁵³

3.58 In response to the Claimants’ argument that the requirement that an investment should be made “in conformity with domestic law” contained in Article 1(1) of the BIT related only to the acquisition of an investment, and that its investment was constituted by its participation in Tschechien 7, which it acquired prior to the excavation works, the Respondent responded that, all of PANTA’s claims were derivative claims for damage to Tschechien 7 allegedly arising in relation to the construction of Galerie, and that Tschechien 7’s first step in the realization of the project had been constituted by the excavation works, in violation of the planning permit. As a result, the Respondent took the position that “[t]he realization of the Galerie project thus was from the very beginning in severe violation of Czech law”, and argued that “[t]he integrity of investment arbitration systems requires that the legality requirement in Article 1(1) be interpreted in a manner that bars claims for projects that violate the law of the host state regardless of whether the investor’s involvement in the illegality is direct or indirect”.²⁵⁴

c. The Claimants’ Memorial

3.59 At the outset of their Memorial, the Claimants emphasized that the Respondent had taken “advantage of Claimants’ good faith settlement negotiations under the BIT to gather data and evidence to influence the course of this arbitration”,²⁵⁵ and submitted that the Ministry of Finance had improperly attempted to influence the Groundworks Removal Proceedings in order to create the impression that the Claimants had acted illegally. The Claimants concluded that as a result, the Respondent “should be precluded from raising an objection against the Arbitral Tribunal’s jurisdiction in that regard on the basis of the unclean hands doctrine”.²⁵⁶

3.60 As a general matter, the Claimants disputed that the alleged illegality of the Claimants’ actions in respect of Tschechien 7’s acquisition of the project lands and the alleged violation of the planning permit by reason of the volume of the excavation works affected the jurisdiction of the Tribunal. Rather, they argued that those issues of legality concerned “whether a Claimant is entitled to the substantive protections offered by a BIT”,²⁵⁷ relying in that regard on observations of the tribunal in *Plama v. Bulgaria*, and the dissenting opinion in *Fraport v. Philippines*.²⁵⁸

3.61 In that regard, the Claimants postulated that “[a]t least in a case as this, where the question of the legality of the excavation works is inextricably interwoven with questions of the merits, the

²⁵² Objections to Jurisdiction, para. 33.

²⁵³ Objections to Jurisdiction, para. 34 (emphasis in original).

²⁵⁴ Objections to Jurisdiction, para. 35.

²⁵⁵ Memorial, para. 10.

²⁵⁶ Memorial, para. 10.

²⁵⁷ Memorial, paras. 379.

²⁵⁸ Memorial, paras. 379 and 380, citing *Plama Consortium Limited v. Republic of Bulgaria*, (ICSID Case No. ARB/03/24), Award of 27 August 2008, para. 112 and the Dissenting Opinion of Bernardo M. Cremades in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), 16 August 2007

problem must be dealt with in the merits”, explaining that the question requires “profound knowledge of Czech administrative law”.²⁵⁹ In that regard they relied upon observations of the tribunal in *Phoenix Action v. Czech Republic*, in which a distinction had been drawn between “obvious cases of illegality and less obvious cases of illegality, whereby the latter cases should be dealt with at the merits stage”.²⁶⁰

- 3.62 The Claimants disputed that they had violated Czech law. That position was taken on the basis, already anticipated in the Request for Arbitration and Statement of Claim, that until June 2008, the volume of the excavations had been within the amount permitted by the planning permit, and that from July 2008 it had become apparent that the geotechnical conditions of the site were complicated and that securing works had been required in order to protect individuals and property, such securing works being required under Czech law.²⁶¹
- 3.63 The Claimants further submitted that the Respondent should be barred from relying on any illegality which might have occurred insofar as the Respondent had taken advantage of the Claimants’ participation in good faith settlement negotiations in order to obtain data of any illegal behaviour by the Claimants, and that it had subsequently used that information in order to advance its claim of illegality.²⁶² The Claimants submitted that the conduct of the Respondent in obtaining the evidence which it relied upon in alleging illegality “violates the unclean hands doctrine”²⁶³ and that as a consequence, the Respondent should not be permitted to rely on the fruits of its bad faith behaviour.²⁶⁴
- 3.64 The Claimants further argued that the objective of the BIT meant that the relevant words of Article 1(1)²⁶⁵ should in any case be given a restrictive interpretation, such that only investments “that violate fundamental principles of law and that were made in bad faith” should be excluded from the scope of protection.²⁶⁶
- 3.65 Although admitting that “the ordinary meaning of the words in the BIT connote that if an investment is made in violation of Czech law, such an investment is not entitled to protection”,²⁶⁷ the Claimants argued that the object and purpose of the BIT of encouraging foreign investment and promoting economic cooperation had to be taken into consideration.²⁶⁸ On that basis, the Claimants argued that Article 1(1) was to be read restrictively and that as a result, only if three criteria were fulfilled should an investment be held to fall outside the scope of protection of the BIT, namely that:

²⁵⁹ Memorial, para. 381.

²⁶⁰ Memorial, para. 381, citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award of 15 April 2009, para. 147.

²⁶¹ Memorial, para 384, referring to Request for Arbitration and Statement of Claim, para. 147.

²⁶² Memorial, para. 385.

²⁶³ Memorial, para. 385.

²⁶⁴ Memorial, paras. 385 and 390-391.

²⁶⁵ Although the Claimants had initially argued that the words “in conformity with domestic law,” should be translated as “in accordance with host state law”, (Memorial, para. 392) it apparently did not subsequently insist upon that translation in the agreed English translation of the BIT.

²⁶⁶ Memorial, para. 392.

²⁶⁷ Memorial, para. 393.

²⁶⁸ Memorial, para. 393.

- a. first, on a subjective level, there had to be an element of intent or fraud on the part of the investor; the Claimants posited that only investments made in good faith could benefit from protection;²⁶⁹
 - b. second, from an objective perspective, only violations of fundamental principles of the law of the host State, if not criminal conduct or a violation of international public policy, would exclude protection, such that not every minor irregularity would deprive the investor of protection;²⁷⁰
 - c. third, only violations of the law of the host State concerning the establishment of the investment were relevant, insofar as the BIT imposed no ongoing obligation to comply with the law of the host State, a violation of which would result in loss of protection of the BIT.²⁷¹
- 3.66 The Claimants took the position that none of those three criteria were fulfilled. As regards the supposed “subjective” element, they argued that contrary to the situation in cases such as *Phoenix Action*, *Inceysa*, *Fraport* and *Plama*, in which the tribunals had found either bad faith or fraud on the part of the investor in reaching the conclusion that their investments were not protected by the applicable bilateral investment treaties, the Claimants in the present case had acted with “the best of intentions”, and had not acted fraudulently, but in good faith.²⁷² In particular, the Claimants argued that up until July 2008, the Claimants believed that the volume of excavation works was covered by the Planning Permit, whilst after July 2008, they acted to secure the site, referring in that connection to section 177 of the Building Act.²⁷³
- 3.67 As regards the supposed “objective” element, the Claimants characterized the provisions which the Respondent alleged had been violated as a result of the groundworks as constituting “regular administrative law provisions”, and argued that there had been no violation of any “fundamental principles” of Czech law, that no crime (whether fraud or corruption) had been

²⁶⁹ Memorial, paras. 395 and 398-402, citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award of 15 April 2009, paras. 106 et seq; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award of 2 August 2006, para. 242; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007, para. 396; and *Plama Consortium Limited v. Republic of Bulgaria*, (ICSID Case No. ARB/03/24), Award of 27 August 2008, para. 143.

²⁷⁰ Memorial, paras. 396 and 406-413, citing *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award of 2 August 2006, paras. 245 et seq; *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award of 6 February 2008, paras. 104 and 106; *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction of 29 April 2004, para. 86; *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/05/3), Decision on Jurisdiction of 12 July 2006, para. 83(iii); *World Duty Free Company Limited v. Republic of Kenya* (ICSID Case ARB/00/7), Award of 4 October 2006, paras. 136 et seq

²⁷¹ Memorial, paras. 397 and 417-418, citing *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007, paras. 287 and 345; and *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award of 2 August 2006, para. 237.

²⁷² Memorial, para. 403.

²⁷³ Memorial, paras. 404-405. In addition, relying on the decision in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007, para. 396, the Claimants further argued that mistakes as to the interpretation of domestic law might be made in good faith, and accordingly, even if section 177 of the Building Act did not justify the volume of the excavation works, the provision was subject to different good faith interpretations (Memorial, paras. 401 and 405).

committed by the Claimants, and that there had been no contravention of international public policy.²⁷⁴

- 3.68 The Claimant further argued that even if the later stages of the groundworks were held to constitute a violation of the law, they could have been legalized by the issuing of the building permit itself, that the excavation would have been permitted under any building permit, that any violation which occurred was a question essentially of timing, and that the comparative lack of gravity of any violation was demonstrated by the fact that the fine imposed in the New Administrative Offence Proceedings had amounted only to approximately € 8,000.²⁷⁵
- 3.69 As regards the question of the timing of any violation, the Claimants argued that the alleged illegality in relation to the excavation “did not occur until very late in the project and was not in the least related with the establishment of the investment”,²⁷⁶ which, they reiterated, was constituted by the shares and other participatory interests of the Claimants in the project companies.²⁷⁷
- 3.70 Finally, the Claimants argued that the Respondent was estopped from raising an objection based on alleged illegality in relation to the groundworks as it had waived its right to do so.²⁷⁸ First, the Claimants alleged that the Respondent itself had required further excavation works in order to secure the site, thus creating a legitimate expectation that further excavation works were legal; they submitted that, by issuing the order to conduct security works, the Respondent had “induced Claimants to rely on the legality of the excavation works”.²⁷⁹
- 3.71 Second, it was argued that by issuing the main building permit on 26 November 2008, the Respondent had legalized the excavation. The Claimants submitted, invoking the principle *nemo auditur propriam turpitudinem allegans*, that a State cannot take advantage of its own wrongful acts to exclude protection of an investment, and took the position that it was irrelevant that the main building permit was not legally effective, as, under Czech law, the relevant authorities were bound to issue a building permit without delay.²⁸⁰
- 3.72 As regards the suspected irregularities raised by the Respondents in relation to the acquisition of the project lands, the Claimants in the Memorial on the Merits and Observations on

²⁷⁴ Memorial, para. 414.

²⁷⁵ Memorial, para. 414.

²⁷⁶ Memorial, para. 416.

²⁷⁷ Memorial, para. 416.

²⁷⁸ Memorial, para. 419.

²⁷⁹ Memorial, paras. 420-424, citing, inter alia, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007, para. 346; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006, para. 474; and *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction of 6 July 2007, paras. 191 et seq.

²⁸⁰ Memorial, paras. 425-427, citing *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction of 6 July 2007, paras. 182 et seq.

Jurisdiction and Admissibility limited themselves to the observation that the Respondent had asserted those suspicions “without any evidence or facts”.²⁸¹

d. The Respondent’s Counter-Memorial

- 3.73 At the outset, the Respondent made clear that it was no longer pursuing the objection based on illegality in the acquisition of the project land, and stated that it only maintained the argument as to lack of jurisdiction based on the “Claimants’ deliberate decision to violate the basic principle of Czech construction law that excavations require prior authorization.”²⁸²
- 3.74 In that latter regard, the Respondent asserted that the evidence showed that the Claimants had intentionally violated Czech construction law, and that the decision to continue excavations once the volume authorized by the Planning Permit had been reached had been deliberate;²⁸³ in particular, the Respondent pointed to the fact that in June 2008, the Board of ECE had more than doubled the budget for excavation works from €3.2 million to €7.8 million, a sum asserted to correspond roughly to the price for the entire volume of excavations, and at the same time had stated that the increased budget would permit Galerie to be opened early, in Spring 2010, rather than in Autumn 2010.²⁸⁴
- 3.75 The Respondent alleged that the Claimants had been fully aware of the necessity that they be in possession of a Building Permit authorizing the additional excavations over and above the volume authorized by the Planning Permit and submitted that the Claimants had “wilfully and deliberately decided to violate an essential principle of Czech construction law”.²⁸⁵
- 3.76 On that basis, the Respondent disputed the veracity of the Claimants’ claims that excavation conducted after July 2008 was dictated by the need to carry out securing works, as well as the Claimants’ assertion that up until July 2008, the Claimants had believed that the excavation was covered by the Planning Permit, and that after July 2008, the Claimants acted with “good intentions” to secure the site.²⁸⁶ The Respondent highlighted that the decision to continue excavations was in fact made on 18 June 2008, that it was apparent from the site diary that the only securing works carried out in fact took place between 6 and 15 August 2008 in relation to 1,455m³ of rock on a plot next to the main construction pit, whilst excavation continued unabated in the main pit, and that no legitimate securing works could have required the excavation of the additional 120,000m³ of rock in excess of the authorized volume.²⁸⁷
- 3.77 As to the effect of the alleged breach of Czech law, the Respondent argued that the requirement of “conformity with domestic law” in Article 1(1) of the BIT constituted a substantive element of the definition of an investment under the BIT, and that therefore legality

²⁸¹ Memorial, para. 428. As noted above at paragraph 3.55, the Respondent subsequently did not pursue the objection to jurisdiction on this basis.

²⁸² Counter-Memorial, para. 231.

²⁸³ Counter-Memorial, para. 232.

²⁸⁴ Counter-Memorial, para. 232.

²⁸⁵ Counter-Memorial, para. 233.

²⁸⁶ Counter-Memorial, paras. 234-235.

²⁸⁷ Counter-Memorial, para. 236.

was a jurisdictional matter.²⁸⁸ In response to the Claimants' suggestion that legality was a matter for the merits, the Respondent sought to distinguish the decisions in *Plama* and *Inceysa* relied upon by the Claimants on the basis that the relevant instruments in those cases did not include the requirement of conformity with domestic law in the definition of investment,²⁸⁹ and relied on the assertion of the tribunal in *Fraport* that, where the requirement of legality is contained in the definition of "investment", illegal behaviour on the part of an investor goes to jurisdiction *ratione materiae*.²⁹⁰ As to the Claimants' reliance on *Phoenix Action* for the proposition that, where the issue of illegality is inextricably interwoven with the question of merits, it should be addressed on the merits, the Respondent submitted that the Claimants' argument confused two issues, and that what that tribunal in that case had in fact been discussing was whether, in such a situation, there should be bifurcation.²⁹¹

- 3.78 As regards the Claimants' reliance on the doctrine of "unclean hands", the Respondent, in addition to disputing that the doctrine constituted an established doctrine of public international law, further submitted in reliance on the decision of the tribunal in the *Guyana v. Suriname* arbitration that the doctrine operated solely to prevent a party from claiming a breach of a party's obligation if it had itself breached an identical obligation.²⁹² By contrast, the Respondent characterized the objection raised by the Claimants as involving "at best, an issue of alleged inadmissibility of evidence".²⁹³ It submitted that it was telling that the Claimants had not identified the information allegedly obtained by the Czech Republic during the settlement negotiations, and further, that they had never explained what legal rule would prevent the Czech Republic from using that information.²⁹⁴
- 3.79 Finally, the Respondent noted that the excessive excavation was an objective fact "that is readily apparent to the naked eye"; that it was noticed by MAL in July 2008; that it has been admitted at least in part by Tschechien 7; and that the Claimants' intention to violate Czech law and the exact volume of unauthorized excavations were revealed by documents that the Claimants had been required to produce in the context of disclosure in the present arbitration, including in particular the site diary, and the Minutes of the Advisory Board of ECE.²⁹⁵
- 3.80 As to the effect of the alleged breach of Czech law constituted by the excessive excavation, the Respondent observed that the Claimants' argument that more than "simple" illegality was required was supported only by isolated *dicta* from a few awards under instruments which

²⁸⁸ Counter-Memorial, paras. 237-238.

²⁸⁹ Counter-Memorial, para. 239.

²⁹⁰ Counter-Memorial, para. 240, citing *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007, para. 404. The Respondent also noted that the *ad hoc* Committee in *Fraport*, although granting annulment on other grounds, rejected the claim that the Tribunal had committed a manifest excess of powers by denying jurisdiction (Counter-Memorial, para. 241, referring to *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (ICSID Case No. ARB/03/25), Decision on the Application for Annulment of 23 December 2010).

²⁹¹ Counter-Memorial, para. 242.

²⁹² Counter-Memorial, para. 243, citing *Guyana v. Suriname*, Award of 17 September 2007, paras. 417 and 421.

²⁹³ Counter-Memorial, para. 244.

²⁹⁴ Counter-Memorial, para. 245.

²⁹⁵ Counter-Memorial, para. 246.

were differently worded, and argued that any such restrictive interpretation was inapplicable in relation to Article 1(1) of the BIT.²⁹⁶

- 3.81 The Respondent noted that the Claimants accepted that, on the ordinary meaning of the text of Article 1(1), the words “in conformity with Czech law” were not qualified in any way, and took issue with the Claimants’ suggestion that the object and purpose of the BIT in some way required that the BIT should be held to apply to investments that were not in conformity with Czech law.²⁹⁷ The Respondent submitted that the Parties could “obviously have no interest in granting Treaty protections to investments that are not in conformity with their laws”, and that “it cannot be seriously argued that the object and purpose of the [BIT] is to protect *illegal* investments”.²⁹⁸ On that basis, the Respondent submitted that “even if considerations of the object and purpose of the BIT could prevail over the ordinary meaning of the text of Article 1(1), there is no reason why the requirement of legality should be interpreted restrictively”.²⁹⁹
- 3.82 As to the Claimants’ reliance on a “subjective” limitation, requiring conduct involving an element of intent and bad faith, the Respondent observed that that proposition was not supported by any authority, and in particular did not follow from the terms of Article 1(1) or any of the decisions relied upon by the Claimants.³⁰⁰ The Respondent disputed the correctness of the Claimants’ assertion that “only an investment made in bad faith is deprived protection under a BIT”, and noted that the tribunal in *Phoenix Action*, in which the investment had been formally legal under Czech law but had been made in bad faith, had regarded bad faith as an additional bar to jurisdiction in addition to illegality.³⁰¹ On that basis, the Respondent argued that “the clear disjunction between legality and good faith actually shows that the illegality requirement is an objective one and does not depend on the presence of bad faith or fraud.”³⁰² The Respondent similarly sought to distinguish the decisions in *Inceysa*, *Fraport* and *Plama* as all involving illegality that involved both intent and bad faith, such that the treatment of the issue in those cases was not apposite to the question of whether illegal conduct which was nevertheless committed in good faith might bar jurisdiction.³⁰³
- 3.83 The Respondent in any case submitted that the issue was moot, in light of the clear evidence that the Claimants had acted intentionally and in bad faith insofar as the Advisory Board of ECE had deliberately decided to continue the excavations in full on 18 June 2008.³⁰⁴
- 3.84 As to the “objective” limit submitted by the Claimants, namely that only a breach of fundamental principles of law would bar jurisdiction, the Respondent observed that any such limit found no support in the text of Article 1(1) of the BIT.³⁰⁵

²⁹⁶ Counter-Memorial, paras. 247-248.

²⁹⁷ Counter-Memorial, paras. 249-250.

²⁹⁸ Counter-Memorial, para. 250 (emphasis in original).

²⁹⁹ Counter-Memorial, para. 250.

³⁰⁰ Counter-Memorial, para. 251.

³⁰¹ Counter-Memorial, para. 252.

³⁰² Counter-Memorial, para. 252.

³⁰³ Counter-Memorial, para. 253.

³⁰⁴ Counter-Memorial, para. 254.

³⁰⁵ Counter-Memorial, para. 255.

- 3.85 The Respondent moreover submitted that the violation of the requirement of prior authorization of excavations, at least of such a volume, did constitute a breach of a fundamental principle of Czech construction law, which “protects a vital public interest and security in planning and construction and represents the *raison d’être* of construction permits”.³⁰⁶
- 3.86 The Respondent further disputed the Claimants’ suggestion that the requirement of authorization constituted a mere formality, as well as their suggestion that it did not matter whether the work was carried out before or after the issuance of the relevant permit, or that the volume excavated had to be permitted in any case.³⁰⁷ It observed that, if that were the case, Czech construction law would be unenforceable and noted that the Claimants had not put forward any expert witness who supported their theory.³⁰⁸ The Respondent further noted that the Claimants’ conduct had been inconsistent with the position they now took, insofar as they had applied for all permits required.³⁰⁹
- 3.87 The Respondent also observed that the sanction for the illegality indicated the seriousness of the violation. It pointed to the order issued by MAL on 4 February 2010, by which the removal of the unauthorized works had been ordered, albeit also recognizing that the order had subsequently been quashed “on purely formal grounds”.³¹⁰
- 3.88 As to the time element, the Respondent disputed the Claimants’ suggestion that the requirement of conformity with domestic law was limited to the establishment of the investment, again, arguing that the wording of Article 1(1) of the BIT provided no support for any such limitation.³¹¹
- 3.89 The Respondent noted that the leading decision cited by the Claimants in support of their position was the decision in *Fraport*, but observed that the language of the treaty in issue in that case was different from Article 1(1) of the BIT, insofar as it referred to investments “accepted in conformity with” domestic law, and submitted that that fact should be taken as explaining the focus by the *Fraport* tribunal on the making of the investment.³¹²
- 3.90 In light of the different language contained in Article 1(1) of the BIT, the Respondent submitted that the appropriate conclusion was that an “investment” “must be in conformity with domestic law throughout its whole duration”.³¹³
- 3.91 The Respondent also took issue with the Claimants’ suggestion that any illegality had to relate to the Claimants’ participatory interests in Tschechien 7 and ECE Praha as their purported

³⁰⁶ Counter-Memorial, para. 256.

³⁰⁷ Counter-Memorial, para. 257.

³⁰⁸ Counter-Memorial, para. 257.

³⁰⁹ Counter-Memorial, para. 258.

³¹⁰ Counter-Memorial, para. 259.

³¹¹ Counter-Memorial, para. 260.

³¹² Counter-Memorial, para. 261.

³¹³ Counter-Memorial, para. 262.

investment, relying in particular on the Claimants' own assertion in the Memorial that the development of the Project was an "inseparable part" of its investment.³¹⁴

- 3.92 The Respondent also relied upon the rejection by the ad hoc Committee in *Fraport* of the investor's criticism of that tribunal's decision, insofar as it had refused to accept the argument that its investment should be regarded as split,³¹⁵ as well as the decision of the tribunal in *AES Summit Generation v. Hungary*.³¹⁶ The Respondent submitted that, as a matter of economic reality, an investment "cannot be artificially separated into the moment of its making and its subsequent life because additional investments are made when additional funds are spent",³¹⁷ and submitted that this was precisely what occurred in the present case, including in particular by reason of the authorization of additional funds by the Advisory Board on 18 June 2008.³¹⁸
- 3.93 On that basis, the Respondent submitted that even if the requirement of legality only applied to the making of the Claimants' investment, the jurisdiction of the Tribunal would still be barred in relation to the period after 18 June 2008.³¹⁹
- 3.94 Finally, the Respondent disputed the Claimants' assertion that it was estopped from raising the objection of illegality on the grounds that none of the requisites for an estoppel were present. In particular, it relied on the decision of the tribunal in *East Kalimantan v. PT Kaltim* in arguing that in order for an estoppel to arise: i) there had to be a clear and unambiguous statement of fact; ii) the statement of fact had to have been made voluntarily, unconditionally and to have been authorized; and iii) there had to be reliance in good faith upon the statement, involving either detriment to the party relying, or advantage to the party making the statement. The Respondent further argued that the burden was on the Claimants to demonstrate that all those elements were present.³²⁰
- 3.95 The Respondent first disputed that it ever told the Claimants, let alone told them clearly, unambiguously, voluntarily and unconditionally that the excavation works in excess of those authorized under the Planning Permit were legal.³²¹ In particular, it disputed that MAL's order of 19 September 2008 to carry out securing works fulfilled that test, and emphasized that the securing works permitted by MAL's order were limited to those works up to 359m above sea level, whilst additional excavation was permitted only in the volume of 2,920m³.³²²
- 3.96 Similarly, the Respondent disputed that the issuance of the building permits could result in the legalization of the excess excavation works which had been carried out by the Claimants, both

³¹⁴ Counter-Memorial, para. 263, citing Claimants' Memorial, para. 551.

³¹⁵ Counter-Memorial, para. 264, quoting *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (ICSID Case No. ARB/03/25), Decision on the Application for Annulment of 23 December 2010), para. 113.

³¹⁶ Counter-Memorial, para. 265, quoting *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22), Award of 23 September 2010, para. 9.3.16.

³¹⁷ Counter-Memorial, para. 266.

³¹⁸ Counter-Memorial, para. 266.

³¹⁹ Counter-Memorial, para. 267.

³²⁰ Counter-Memorial, para. 268, quoting *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others* (ICSID Case No. ARB/07/3), Award on Jurisdiction of 28 December 2009, paras. 211-213.

³²¹ Counter-Memorial, para. 269.

³²² Counter-Memorial, para. 269.

on the basis that the building permits had still not acquired legal force, and on the basis that they were incapable of doing so. In that latter regard, the Respondent explained that as a matter of Czech law, excavation works could only be regularized in the Groundworks Removal Proceedings on the basis of an express request by the builder, including a detailed description of the scope of the unauthorized excavations. The Respondent noted that Tschechien 7 had neither filed any such request, nor provided detailed information as to the actual scope of the unauthorized excavations.³²³

3.97 On that basis, the Respondent denied that MAL had ever assured the Claimants that the excess excavations were in compliance with Czech law, and emphasized that, to the contrary, MAL had taken enforcement action in the form of the Groundworks Removal Proceedings and Administrative Offence Proceedings in order to investigate the illegal conduct of the Claimants. Further, the Respondent argued that the various prior decisions relied upon by the Claimants (*Fraport*, *ADC Affiliate* and *Kardassopoulos*) were distinguishable as concerning completely different factual and legal issues, and were therefore of no assistance to the Claimants.³²⁴

3.98 Second, the Respondent argued that even if there had been the necessary clear and unambiguous representation, the Claimants had not alleged that they had relied in good faith upon that statement, either to their own detriment or to the advantage of the Respondent.³²⁵

3.99 Finally, the Respondent argued that the Claimants' invocation of the principle that a State may not rely on its own domestic law to escape its duties under international law was inapposite insofar as the Claimants appeared to be saying that the issuance of the building permit and the illegality of the excavation were two separate issues. The Respondent argued that the Claimants' argument presupposed that the Respondent had an obligation under either Czech or international law to regularize the excessive excavation; the Respondent denied that any such obligation existed.³²⁶

e. The Claimants' Reply

3.100 In the Reply, the Claimants maintained their position that any illegality related to the excavation did not affect the jurisdiction of the Tribunal, on the basis that the excess excavations were but a "negligible breach of the law", which had resulted in a comparatively small fine, and which could in any case have been legalized by the issue of the Building Permit.³²⁷ The Claimants noted that, as a precaution, they had in the meantime applied for legalization of the excavation works.³²⁸ They likewise maintained their position that the Respondent could not rely on the evidence produced in support on the basis that it had been obtained in bad faith, and that the Respondent was in any case estopped from raising any

³²³ Counter-Memorial, para. 270.

³²⁴ Counter-Memorial, para. 271.

³²⁵ Counter-Memorial, para. 272.

³²⁶ Counter-Memorial, para. 273.

³²⁷ Reply, para. 382.

³²⁸ Reply, para. 382.

objection based on illegality due to the fact that it ordered securing works, and because of the issue of the Main Building Permit.³²⁹

- 3.101 The Claimants first asserted that the alleged illegality constituted by the groundworks had no bearing on the Tribunal's jurisdiction, and submitted that illegality should be resorted to as a ground for denying jurisdiction "only restrictively".³³⁰
- 3.102 They argued that there was a "high threshold to deny jurisdiction" on the basis of breaches of domestic law by investors.³³¹ They argued that the requirement that an investment be "in conformity with domestic law" in Article 1(1) of the BIT "works in a restrictive fashion. It does not lead to an exclusion of jurisdiction in cases of good faith violations, minor violations or violations after the initiation of an investment".³³² Relying on the observations of the tribunal in *Tokios Tokelés*, the Claimants reiterated that that interpretation of Article 1(1) of the BIT was supported by the purpose of the BIT, in particular insofar as they argued that the BIT was intended to promote investment. For the Claimants, if the BIT was to be interpreted as resulting in the risk of loss of protection as a result of a minor breach of domestic law, that would not be conducive to the required security of investors, and therefore would be contrary to the purpose of the BIT.³³³
- 3.103 In response to the Respondent's argument that the wording of Article 1(1) did not support their position, the Claimants observed that tribunals "have regularly found that 'in conformity with domestic law' clauses do not cover all kinds of illegality".³³⁴
- 3.104 As for the "objective" limitation upon the exclusion of jurisdiction on the basis of illegality, according to which minor breaches of the domestic law of the host State are irrelevant, the Claimants essentially reprised their previous arguments. They reiterated that the breach in question had been "minor" or "insignificant", again pointing to the fact that the fine imposed in the New Administrative Offence Proceedings amounted to only €8,000, adding that the relevant authorities had in fact invited the Claimants to apply for a permit.³³⁵
- 3.105 As to the latter matter, the Claimants noted that on 17 January 2011, they had applied for a permit without admitting liability, and that the proceedings on that application were pending.³³⁶ The Claimants also added that there was no binding order to remove the allegedly excessive groundworks, insofar as the decision of MAL of 4 February 2010³³⁷ had subsequently been quashed by RAL on 2 June 2010.³³⁸ They further disputed the Respondent's assertion that that order had been quashed on "purely formal grounds", and noted that instead the basis for the

³²⁹ Reply, para. 383.

³³⁰ Reply, para. 384.

³³¹ Reply, section heading prior to para. 385.

³³² Reply, para. 385.

³³³ Reply, paras. 386-387, citing *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction of 29 April 2004, para. 86.

³³⁴ Reply, para. 388.

³³⁵ Reply, paras. 391-392.

³³⁶ Reply, para. 393.

³³⁷ Reply, para. 394.

³³⁸ Core 10/357 (Exhibit

quashing of the order had been RAL's findings that MAL had not assessed, documented and appropriately justified the feasibility of returning the area to its previous state and had not addressed the objections made by the Claimants.³³⁹

- 3.106 By way of supplement to the cases previously relied upon as supporting their position that jurisdiction was not affected in the case of a minor breach of the law, and that it was only breaches relating to fundamental principles of domestic law or international public policy which have a bearing on a tribunal's jurisdiction, the Claimants also invoked the decision on jurisdiction in *Metalpar S.A. and Buen Aire S.A. v. Argentina* that the failure by the investor in that case, in breach of the applicable domestic law, to register its investment did not preclude the jurisdiction of the tribunal.³⁴⁰ The Claimants noted that the tribunal in that case had held that it would have been disproportionate to punish the investor for its omission by denying jurisdiction, and in that connection had taken account of the fact that the applicable domestic law had provided for other sanctions to address the illegality.³⁴¹
- 3.107 The Claimants argued that, similarly, the relevant Czech legislation provided for sanctions of breaches of the type alleged, and noted that a fine had in fact been imposed, as well as observing that the Groundworks Removal Proceedings also addressed their allegedly illegal acts. On that basis they submitted that there was no need to punish them by denying protection under the BIT.³⁴² Finally, the Claimants rejected the suggestion by the Respondent that their position was that there was no requirement to abide by Czech law, and affirmed that their position was that the excavation beyond the scope of the permission granted was not a sufficiently severe breach of Czech law to result in the denial of jurisdiction by the Tribunal.³⁴³
- 3.108 The Claimants further relied on a temporal limitation on illegality, repeating their argument that the Tribunal should exercise jurisdiction on the basis that the alleged illegality occurred only after initiation of the investment, in particular insofar as the volume of the excavation exceeded the volume allowed under the Planning Permission only in June 2008, by which time they had already legally initiated their investment within the meaning of the BIT.³⁴⁴
- 3.109 The Claimants referred in this connection to the decision in *Saba Fakes v. Turkey*, including the observation of the tribunal in that case, in relation to what the Claimants asserted was a comparably worded clause in the applicable Netherlands-Turkey BIT, to the effect that the clause required only "compliance with the host State's domestic laws governing the admission of investment in the host State".³⁴⁵ In addition they invoked that tribunal's reliance on the object and purpose of the BIT applicable in that case in support of its finding that "unless specifically stated" a State was not able to rely on violations of its own domestic law "beyond

³³⁹ Reply, para. 395.

³⁴⁰ Reply, para. 398, citing *Metalpar S.A. and Buen Aire S.A. v. Argentina*, Decision on Jurisdiction of 27 April 2006, para. 84.

³⁴¹ Reply, para. 398,

³⁴² Reply, para. 399.

³⁴³ Reply, para. 400.

³⁴⁴ Reply, para. 401.

³⁴⁵ Reply, para. 402, citing *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award of 14 July 2010, para. 119.

the sphere of investment regime” in order to escape the substantive obligations imposed upon it by the BIT.³⁴⁶

- 3.110 The Claimants also placed reliance on the decisions of the tribunals in *Fraport* and *Hamester* in suggesting that a distinction was to be drawn between illegality in the initiation of an investment, and illegality in its subsequent life or performance, with the latter not affecting jurisdiction under a BIT, although they admitted that it could well be of relevance in relation to the substantive merits of a claim.³⁴⁷
- 3.111 As to the Respondent’s attempt to distinguish the decision in *Fraport* on the basis that the relevant treaty provision had been differently worded, the Claimants observed that the Respondent had not explained why the difference in wording should dictate a different result in the present case, and in particular why Article 1(1) of the BIT should be interpreted as requiring that an investment be in conformity with domestic law throughout its whole duration.³⁴⁸ They invoked the observations of the *Fraport* tribunal, specifically endorsed by the tribunal in *Hamester*, to the effect that “the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment”.³⁴⁹
- 3.112 As to the Respondent’s arguments based on the continuous character of investments, the Claimants disputed that that implied that investments had continuously to comply with domestic law in order for a tribunal to have jurisdiction, on the basis that any other approach would mean that investors could not act safe in the knowledge that their investment was protected, and that this would inhibit investment. Whilst not as such disputing the continuous character of investments, the Claimants noted that no tribunal had ever relied upon that factor in order to hold that an investor had to comply with domestic law at all times in order for there to be jurisdiction, and emphasized that the tribunal in *Fraport*, in which a number of separate acquisitions over time had been held to constitute a single investment, nevertheless had held that it was sufficient that the overall investment had been in conformity with domestic law at its initiation.³⁵⁰
- 3.113 As for the Respondent’s reliance on *AES Summit Generation v. Hungary* as authority for the continuous character of investments, the Claimants noted that the tribunal in that case had in fact relied upon a theory of discontinuity, and treated the investor’s related business activities as two separate investments, and that it had done so in the context of consideration of the investor’s asserted legitimate expectations, rather than as regards any issue of illegality. The Claimants further noted that if the Tribunal were to adopt an approach based on discontinuity of investments, that would not change matters insofar as all other parts of the Claimants’

³⁴⁶ Reply, para. 402.

³⁴⁷ Reply, paras. 404-405, referring to *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007, para. 345 and *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award of 18 June 2010, paras. 127-128.

³⁴⁸ Reply, paras. 406-407.

³⁴⁹ Reply, para. 408, citing *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007, para. 345 and *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award of 18 June 2010, para. 128.

³⁵⁰ Reply, para. 409, citing *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007, para. 262.

investment activities not connected with the excavation would constitute separate investments which would be within the jurisdiction of the Tribunal.³⁵¹

- 3.114 On the basis of the decisions in *Fraport* and *Hamester*, the Claimants took the position that, at most, any illegality after the initiation of an investment could only be relevant as a substantive defence to the merits of a claim, and made the new point that the Respondent could not justify any of the alleged violations of the substantive standards of protection contained in the BIT asserted by reliance on the allegedly illegal acts of the Claimants. The Claimants argued that none of the matters in relation to which they made complaint had anything to do with the groundworks, in particular, asserting that none of the decisions adopted by the relevant authorities after June 2008, including in particular the various decisions to stay the Building Permit Proceedings, made any mention of the excavations; on that basis, argued that any excessive excavation could not serve as a defence to the merits of their claims.³⁵²
- 3.115 The Claimants maintained their position that the Respondent was precluded from relying on the evidence in order to substantiate the illegality of the groundworks due to the fact that it had been obtained in bad faith during the course of the settlement discussions.³⁵³
- 3.116 By way of supplement to the arguments previously raised in reliance on the principle of *nemo auditur propriam turpitudinem allegans*, which they asserted had been accepted by investment arbitration tribunals to constitute a general principle of international law,³⁵⁴ the Claimants asserted that the Respondent was precluded from relying upon the evidence obtained in the wake of the report by YBN Consult, as the Respondent would profit from its own bad faith if it were allowed to introduce it.³⁵⁵
- 3.117 As a separate matter, the Claimants also maintained their argument based on the proposition that the “unclean hands” doctrine constituted a general principle of international law, arguing that the principle was not only applicable to substantive obligations, as had been submitted by the Respondent, but that it was also relevant to questions of procedure, including the admissibility of evidence.³⁵⁶
- 3.118 The Claimants likewise maintained their argument that the Respondent was estopped from relying on the alleged illegality relating to the groundworks on the basis of the fact that MAL had ordered securing works, and the issue of the Main Building Permit, and asserted that they had relied in good faith upon the legality of the excavation works, such that the Respondent could no longer assert their illegality.³⁵⁷ In addition, as regards the Main Building Permit, they asserted that it had authorized the construction as planned, including the full extent of

³⁵¹ Reply, para. 410.

³⁵² Reply, paras. 411-412.

³⁵³ Reply, para. 413.

³⁵⁴ Reply, para. 414, referring to *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award of 2 August 2006, paras. 225 et seq; 229, 240 et seq and *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 August 2008, paras. 141 and 143.

³⁵⁵ Reply, para. 414.

³⁵⁶ Reply, para. 415-416.

³⁵⁷ Reply, paras. 417-419

necessary excavations envisaged, and that “[c]onsequently, the Building Permit also incidentally contained the determination that the complete excavation works are legal”.³⁵⁸

3.119 The Claimants disputed that the fact that Building Permit had not become legally effective was of any relevance, and submitted that the Respondent in its Counter-Memorial had not addressed the Claimants’ arguments that the relevant authorities were legally obliged to issue the Building Permit, and that the Respondent could not rely on its own breaches of its own domestic law.³⁵⁹

3.120 Finally, the Claimants argued that the Respondent’s understanding of the doctrine of estoppel, based on the decision in *East Kalimantan v. PT Kaltim*, was unduly narrow and was restricted to the situation where the estoppel arose on the basis of a prior statement of fact. The Claimants noted that in the Memorial they had relied on authorities, including in particular the observations of the tribunal in *Fraport*, which had espoused a more general understanding of estoppel and waiver, and that the Respondent had not sought to address those authorities.³⁶⁰

3. The Respondent’s Objection to Jurisdiction *Ratione Materiae*

3.121 The Respondent’s third objection to jurisdiction was that the Tribunal does not have jurisdiction insofar as the Claimants make claims in relation to damages allegedly sustained by companies other than Tschechien 7 and ECE Praha.

a. The Respondent’s Objections to Jurisdiction

3.122 In its Objections to Jurisdiction, the Respondent noted that the Claimants, in the Request for Arbitration and Statement of Claim, had made clear that their claim for damages included sums in respect of damages allegedly suffered by various companies within the ECE Group other than Tschechien 7 and ECE Praha, (namely EKZ Tschechien 3, EKZ Prag 1, EBP, Perštýn Plus a.s. and ECE Projektmanagement), and observed that the Claimants “make no efforts and do not even allege that they constitute protected investments under Article 1(1) of the Treaty”.³⁶¹

3.123 The Respondent further observed that the Claimants had not explained what rights or assets of those companies had allegedly been affected by the measures adopted by the Respondent, and argued that, as a consequence, the Tribunal lacked jurisdiction *ratione materiae* over the Claimants’ claims in respect of those companies.

b. The Claimants’ Memorial

3.124 In response, the Claimants argued that whether or not they were to be compensated for the damages in the form of obsolete expenses was not a matter of jurisdiction, but a matter of the

³⁵⁸ Reply, para. 419.

³⁵⁹ Reply, para. 420.

³⁶⁰ Reply, para. 421, referring to Memorial, paras. 422 et seq, and quoting *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007, para. 346.

³⁶¹ Objections to Jurisdiction, para. 37.

merits.³⁶² They explained that they had not claimed damages as an investor in EKZ Prag 1, EKZ Tschechien 3, Perštýn Plus and EBP, but rather as investors only in Tschechien 7 and ECE Praha, and that the costs and expenses incurred by other companies in the ECE Group “merely contribute to the loss which Claimants suffered as a consequence of their investment in Tschechien 7 and ECE Praha” as set out in the later section of the pleading on damages.³⁶³ The Claimants argued that “it is not necessary that the damage must itself constitute an investment” and that it was sufficient that “the injured party made an investment in the host state and that it had suffered loss by a breach of the BIT.”³⁶⁴

c. The Respondent’s Counter-Memorial

3.125 In its Counter-Memorial, the Respondent maintained in part its argument that the Tribunal does not have jurisdiction over the Claimants’ claims for obsolete expenses incurred by companies other than Tschechien 7 and ECE Praha, dealing with that argument in conjunction with its objection that the Tribunal does not have jurisdiction *ratione temporis* in relation to claims based on events that pre-dated the Claimants’ respective investments.

3.126 As reformulated, the Respondent’s objection was that “the Tribunal does not have jurisdiction over Claimants’ claims for Obsolete Expenses incurred prior to Claimants’ respective investments in the Subsidiaries that incurred those expenses”.³⁶⁵

3.127 The Respondent submitted that, “[w]hen applied to the Claimants’ claims for damages, both objections relate to the same issue – Claimants disregard the limitations due to their relatively late and sequenced acquisition of the subsidiaries whose expenses they now claim”.³⁶⁶

3.128 In that connection, the Respondent relied on the decision in *Saluka v. Czech Republic*, in relation to what it asserted was a similar issue, explaining that “the Tribunal only has jurisdiction to hear and decide the Claimants’ claims for damages regarding expenses (or loss of value) that were incurred by Claimants’ subsidiaries – and not ECE International’s parent ECE KG – after their acquisition by Claimants”.³⁶⁷ The Respondent took the position that the Tribunal only had jurisdiction with respect to claims relating to:

- a. expenses (or loss of value) incurred by EKZ Tschechien 3 and EKZ Prag 1, after 10 July 2008;
- b. expenses (or loss of value) incurred by Tschechien 7 and Perštýn Plus, after 1 July 2007; and
- c. expenses (or loss of value) incurred by ECE Praha, after 11 January 2007;

³⁶² Memorial, para. 374.

³⁶³ Memorial, para. 375

³⁶⁴ Memorial, para. 376

³⁶⁵ See the title of Counter-Memorial, Section III.C. (p. 70).

³⁶⁶ Counter-Memorial, para. 274.

³⁶⁷ Counter-Memorial, paras. 275-276, citing *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, para. 244.

those being the relevant dates on which the Claimants had acquired their interests in those companies.³⁶⁸

d. The Claimants' Reply

3.129 In response, the Claimants in their Reply maintained their position that the issue was not one which went to the jurisdiction of the Tribunal. They dismissed the Respondent's reliance on *Saluka v. Czech Republic* as being of no relevance insofar as it had not concerned the issue of whether damage suffered by an affiliate company were within the jurisdiction of the Tribunal.³⁶⁹ In accordance with that position, the Claimants' claims in respect of obsolete expenses incurred by companies other than Tschechien 7 and ECE Praha were dealt with later on in the Claimants' Reply in the section relating to damages.

4. The Respondent's Objection to Jurisdiction *Ratione Temporis*

3.130 The Respondent's fourth objection to the jurisdiction of the Tribunal was an objection that the Tribunal has no jurisdiction over the Claimants' claims to the extent that they are based on events pre-dating the date of their respective investments.

a. The Respondent's Objections to Jurisdiction

3.131 In its Objections to Jurisdiction, the Respondent asserted that it was clear from the Czech Company Register that PANTA had become the general partner in Tschechien 7 on 1 July 2007, and submitted that the Claimants had asserted that the conduct of the Respondent prior to that date resulted in a violation of the BIT.³⁷⁰ It argued that an investor could only raise claims based on events occurring after the making of its investment, and that any dispute relating to events prior to that date would not constitute a dispute relating to an investment within the meaning of Article 10 of the BIT. On that basis, the Respondent took the position that, even if the Tribunal were to conclude that PANTA's participation in Tschechien 7 qualified as a protected investment, any claim by PANTA based on conduct of the Respondent in relation to Tschechien 7 prior to PANTA's acquisition of Tschechien 7 on 1 July 2007 would be outside the Tribunal's jurisdiction *ratione temporis*.³⁷¹

3.132 The Respondent further observed that PANTA made claims for the alleged loss of value of the project land owned by Tschechien 7 as constituting an asset of Tschechien 7, rather than in respect of PANTA's participation in Tschechien 7. On that basis, it likewise argued that, even if the Tribunal were to find that the land acquired by Tschechien 7 constituted a protected investment of PANTA, given that Tschechien 7 acquired the land between August 2007 and March 2008, its claims for alleged loss of value insofar as they were based on events pre-

³⁶⁸ Counter-Memorial, para. 276.

³⁶⁹ Reply, paras. 380-381.

³⁷⁰ Objections to Jurisdiction, para. 38.

³⁷¹ Objections to Jurisdiction, paras. 39-40.

dating the acquisition of the land by Tschechien 7 would also be outside the scope of the Tribunal's jurisdiction *ratione temporis*.³⁷²

b. The Claimants' Memorial

3.133 The Claimants observed that the Respondent's objection to jurisdiction on the basis that, in order to be protected, an investment must have been made before the breach of the BIT "states the obvious", but submitted that "it remains unclear how this finding should relate to the present case".³⁷³

3.134 In the Claimants' submission, although the Respondent had submitted that the Claimants had no standing in relation to breaches committed prior to 1 July 2007 (the date on which the Claimants' investment in Tschechien 7 was made), they had not alleged any breach before that date and "the first in the series of wrongs committed by Respondent in the administrative proceedings occurred on 6 July 2007, when the planning permit should have been issued [...]".³⁷⁴

3.135 As for the Respondent's argument that the Tribunal had no jurisdiction to hear claims with respect to land acquired after the alleged chain of violations of the BIT had commenced, the Claimants countered that the argument was flawed, insofar as it presupposed that the relevant investment for the purposes of Article 1(1) of the BIT was the purchase of the land itself. The Claimants reiterated that their investment was constituted by the participation of the Claimants in Tschechien 7 "and the other subsidiaries set up" for the purpose of the Galerie project.³⁷⁵

c. The Respondent's Counter-Memorial

3.136 As noted above, in its Counter-Memorial the Respondent dealt with its objection to the jurisdiction *ratione temporis* of the Tribunal in the context of its discussion of its objection to jurisdiction in relation to claims in respect of damage alleged suffered by companies other than Tschechien 7 or ECE Praha prior to the Claimants' investments.³⁷⁶

3.137 In addition, in the light of the position taken by the Claimants in their Memorial, the Respondent noted that there was agreement between the Parties that the Claimants "cannot claim based on events pre-dating their respective investments," and noted the Claimants' affirmation that the first violation of the BIT alleged had taken place on 6 July 2007, and acknowledged that this addressed its objection to jurisdiction *ratione temporis* as regards conduct affecting Tschechien 7.³⁷⁷

d. The Claimants' Reply

3.138 The Claimants made no separate mention of the Respondent's objection to jurisdiction *ratione temporis* in their Reply.

³⁷² Objections to Jurisdiction, para. 41.

³⁷³ Memorial, para. 429.

³⁷⁴ Memorial, para. 430.

³⁷⁵ Memorial, para. 431.

³⁷⁶ Counter-Memorial, paras. 274-276; see above, paras. 3.125-3.128.

³⁷⁷ Counter-Memorial, para. 277.

E. THE TRIBUNAL'S FINDINGS ON THE RESPONDENT'S OBJECTIONS TO JURISDICTION

3.139 By way of introduction to the Tribunal's consideration of the issues relating to its jurisdiction to hear the current dispute, the Tribunal notes that Article 10 of the BIT confers jurisdiction upon it in relation to "differences of opinion regarding investments" (Claimants' translation) or "disputes relating to investments" (Respondent's translation) "between either Contracting Party and an investor of the other Contracting Party". As noted above at paragraph 1.17, it is not in dispute that the Respondent succeeded to the rights and obligations under the BIT as originally entered into by the Czech and Slovak Federal Republic and that ECE International and PANTA each constitutes a juridical person with its seat in the area of application of the BIT as those terms are used in Article 1(3) of the BIT.

3.140 The Respondent's objections to jurisdiction differ in their character. Whilst the first and second objections based, respectively, on no investment within the meaning of the BIT, and on illegality under Czech law, are presented as going to the jurisdiction of the Tribunal to hear the dispute as a whole, the third and fourth objections (i.e. the objections *ratione materiae* and *ratione temporis*) do not have such a far-reaching effect. Rather, in the case of the objection *ratione materiae*, its effect if established, would be to exclude certain of the claims for damages made by the Claimants on behalf of subsidiaries of the ECE Group. Similarly, the objection *ratione temporis* has as its aim solely to exclude claims based on events prior to the date of the making of the Claimants' respective investments.

1. The Respondent's Objection to Jurisdiction on the Basis of "No Investment" Within the Meaning of Article 1(1) of the BIT

3.141 As regards the Respondent's objection to jurisdiction based on the asserted lack of any "investment" on the part of the Claimants, within the meaning of that term as defined in Article 1(1) of the BIT, it is useful to set out again the terms of that provision. Article 1(1) of the BIT provides:

the term "investments" shall include every kind of asset [Claimants: which has been invested; Respondent: contributed] in conformity with domestic law, in particular:

- a) movable and immovable property as well as any other rights in rem such as mortgages, liens and pledges;*
- b) shares of companies and other kinds of interest in companies;*
- c) receivables and claims to money which has been used to create an economic value or claims to any performance which has an economic value and which relates to an investment;*
- d) intellectual property rights, in particular copyrights, patents, utility models, industrial designs or models, trademarks, trade names, technical processes, know-how and goodwill;*

e) *business concessions under public law, including concessions to search for, extract and exploit natural resources.*

- 3.142 The Claimants allege that the relevant investment is comprised of their shareholding or other form of participation in companies incorporated under Czech law: Tschechien 7 (in the case of PANTA) and ECE Praha (in the case of ECE International). Although also making claims in respect of the obsolete expenses incurred by other companies within the wider ECE Group, they put forward their claims for damages primarily on the basis of the reduction of value of their shareholdings or other participation in those companies.
- 3.143 Article 1(1) defines “investments” as including “every kind of asset” invested/contributed in conformity with domestic law, and provides a non-exhaustive list of the types of assets which are to be regarded as constituting “investments”.
- 3.144 The Tribunal is of the view that, other things being equal, and leaving to one side for one moment the question of the correct translation of the word rendered by the Parties as “contributed” and “invested”, respectively, on the ordinary meaning of the terms of Article 1(1) the shareholding or participation of the Claimants in Tschechien 7 and ECE Praha, respectively, qualify in material terms as ‘investments’ inasmuch as they clearly fall within the literal meaning of “every kind of asset ... in particular ... shares of companies and other kinds of interest in companies”.
- 3.145 The dispute between the Parties as to whether the Claimants can be held to have an investment thus turns exclusively on the correct interpretation of Article 1(1) of the BIT, and in particular of the words “*vložení*” and “*angelegt*” used respectively in the Czech- and German-language versions of Article 1(1) of the BIT.
- 3.146 The question which arises is whether the concept those two words are intended to represent is to be understood as limiting the scope of application of the BIT solely to assets “contributed” by an investor, as is submitted by the Respondent.
- 3.147 As became clear during the exchange of written pleadings between the Parties, that question in fact breaks down into two questions, namely, first: whether the concept denoted by the words *vložení/angelegt* in the Czech and German languages is properly to be translated into English as having the meaning “contributed”, rather than “invested”; and second, whether, as a result, the relevant term is to be understood as imposing any requirement that assets otherwise falling within the terms of the definition must have in fact have been “contributed” by the investor in order to qualify as an investment.
- 3.148 As to the first question, the Tribunal notes that the Respondent initially asserted in its Objections to Jurisdiction that the Czech word “*vložení*” in the Czech version of the BIT was to be translated as “contributed”, and that the German word “*angelegt*” could be translated as either “contributed or invested”.
- 3.149 The Tribunal regards it as significant that the Respondent did not dispute the Claimants’ assertion in its Observations on Jurisdiction that “*vložení*” is capable of being translated either as “contributed” or as “invested”. Further, the sole basis put forward by the Respondent for its assertion that the Czech-language word “*vložení*” is to be translated as “contributed” in

response in its Reply on Jurisdiction remained the argument that in other treaties concluded contemporaneously by the Czech and Slovak Federal Republic, and which had an authentic English text, the Czech-language counterpart for the word “invested” was the different term “*investované*”.

- 3.150 The Tribunal is of the view that little assistance as to the meaning of the word “*investované*” can be derived from the bilateral investment treaties entered into by the Czech and Slovak Federal Republic with the Netherlands and Canada roughly contemporaneously with the BIT at issue in the present case. The fact that the English word “invested” in the authentic English version of those treaties is rendered as “*investované*” in the equally authentic Czech-language version sheds little light upon the correct interpretation of the different term “*vložené*” used in the authentic Czech version of the BIT at issue, which has no authentic English language version. It is often the case that a number of synonyms, whether or not having subtle differences or shades of meaning, may be used to translate a single word from one language into another. The fact that in these treaties “*investované*”, rather than “*vložené*” is used as the counterpart of the English word “invested” is not determinative of the question of whether the term “*vložené*” is properly translated as “invested” or “contributed”.
- 3.151 The Tribunal also regards it as significant that in its Reply on Jurisdiction the Respondent did not seek to counter the assertion made by the Claimants in their Observations on Jurisdiction, in reliance on a German-English dictionary, that the German word “*angelegt*” was properly translated as “invested”, and indeed appeared to accept that the Claimants’ position was correct insofar as they stated that the term could not be translated as “contributed”. Rather than maintaining its position that the proper translation of the word “*angelegt*” could be either “contributed” or “invested”, the Respondent instead queried whether the meaning of the two terms “are truly different”,³⁷⁸ and submitted that the real question was whether “the word ‘invested’ has meaning”.³⁷⁹
- 3.152 Again, an issue arises as to the reliance by the Claimants on the bilateral investment treaties entered into by the Federal German Republic with the Socialist Federal Republic of Yugoslavia and the Republic of Poland. However, the issue is a slightly different one than that just discussed in relation to the Respondent’s invocation of bilateral investment treaties concluded by it with third States: although the term “*angelegt*” is translated as “invested” in what the Claimants referred to as the “official” English versions of the treaties invoked by them, in the case of neither of the treaties does the translation relied upon constitute an authentic version of the relevant treaty. Rather, the authentic texts of the treaties were in German and Serbo-Croat in the case of the treaty with the SFRY, and German and Polish in the case of the treaty with Poland. The supposedly “official” English translations relied upon by the Claimants are those published in the United Nations Treaty Series. However, in the absence of it being established that the Parties to those treaties agreed that those English translations were to be regarded as authentic,³⁸⁰ the Tribunal is of the view that those texts can be of only marginal relevance in interpreting the provisions of the BIT at issue in the present case, and in identifying the meaning of its terms.

³⁷⁸ Counter-Memorial, para. 223.

³⁷⁹ Counter-Memorial, para. 224.

³⁸⁰ Cf. Article 33(2), VCLT.

- 3.153 The BIT stipulates in its final clause that it was authenticated in both the Czech and German languages. The Tribunal is thus faced with two versions of the same term in the two authentic language versions of the BIT which, on the positions adopted by the Parties, are capable of meaning both “invested” and “contributed” in the case of the Czech-language word “vložené”, and solely “invested” in the case of the German word “angelegt”.
- 3.154 Article 33 of the Vienna Convention on the Law of Treaties makes specific provision as to the basis on which the interpretation of treaties authenticated in two or more languages is to be approached; it provides:

Article 33

Interpretation of treaties authenticated in two or more languages

1. *When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.*
2. *A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*
3. *The terms of the treaty are presumed to have the same meaning in each authentic text.*
4. *Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*

- 3.155 In accordance with Article 33(1), the two authentic texts are thus to be regarded as equally authoritative. Further, in accordance with the rule of interpretation embodied in Article 33(3), the terms of the treaty are to be presumed to have the same meaning in both authentic texts. Finally, under Article 33(4), when comparison of the authentic texts reveals a difference in meaning that cannot be resolved through application of the normal methods of interpretation contained in Articles 31 and 32 the solution is to be found in the meaning which, in the light of the object and purpose of the treaty, best reconciles the texts.
- 3.156 Approaching the question on that basis, the two terms are to be presumed to have the same meaning. In light of the fact that, in the end, the Respondent did not dispute that the German word “angelegt” can only properly be translated as “invested”, whilst the Parties appear to be in agreement that the Czech-language term “vložené” can bear the meaning either of “invested” or “contributed”, in application of the presumption contained in Article 33(3) VCLT, and in the context of the surrounding provisions of Article 1(1), the Tribunal concludes that the appropriate translation into English is that, in order to constitute an “investment”, an asset must have been “invested” in the ordinary sense of that term.

- 3.157 As to the second question, the Respondent appeared to suggest in its Reply on Jurisdiction that, even if the word “*vložení*” was properly to be understood as having the meaning in English of “invested”, rather than “contributed”, nevertheless there was still a requirement that the relevant assets had been “invested” in some meaningful sense by an investor, and that this was not the case in the present case insofar as neither of the Claimants could be taken to have “invested” in their shareholding or participatory rights in Tschechien 7 and ECE Praha.
- 3.158 The Tribunal does not believe that the Respondent’s reliance on the fact that the BIT makes separate provision as regards “returns” as forming part of the context for the interpretation for Article 1(1) is of any assistance in determining the scope and meaning of the term “investment” in the BIT. Whether or not separate provision is made in relation to “returns” and particular protections are provided in that regard does not govern the scope of the meaning of “investment”.
- 3.159 Conversely, the Tribunal does not consider that the Claimants’ invocation of the Preamble to the BIT, as containing an indication that the BIT’s object and purpose was to promote foreign investment, takes matters much further. It agrees with the Respondent that this argument begs the question of whether or not a particular asset constitutes a protected investment.
- 3.160 Rather, the question is whether, in light of the Tribunal’s conclusion that Article 1(1) of the BIT is to be properly translated as encompassing every kind of asset which has been “invested”, the Claimants’ shareholding or other participatory interests in Tschechien 7 and ECE Praha are properly to be regarded as falling within that definition.
- 3.161 The Tribunal has no doubt that this is indeed the case, and that, on the ordinary meaning of the terms of Article 1(1), in particular given its express reference to “shares of companies and other kinds of interest in companies” in Article 1(1)(b), the Claimants’ shareholdings or other participatory interests in Tschechien 7 and ECE Praha do indeed constitute “assets”, and therefore “investments” within the scope of that provision, and sees no basis for imposing a requirement that those assets should in some additional way have been “contributed”.
- 3.162 Further, the Tribunal sees no basis for excluding “derivative claims” by shareholders or other participants in companies which constitute investments, not least for the reason that the Protocol states *Ad* Article 4 that “An investor is also entitled to compensation where a measure set out in Article 4(2) harms the investment by affecting an undertaking in which the investor has an interest”
- 3.163 On that basis, the Tribunal rejects the Respondent’s objection that the Claimants do not have an “investment” within the meaning of Article 1(1) of the BIT.

2. The Respondent’s Objection to Jurisdiction Based on Illegality

- 3.164 As to the Respondent’s objection to jurisdiction based on the illegality of the Claimants’ conduct, the Tribunal notes that although originally put forward on the basis of both the suspected illegality in the acquisition of the plots of project land and the illegality of the groundworks conducted by the Claimants, in its Counter-Memorial the Respondent disclaimed any reliance on the former, and the objection was based solely upon the alleged illegality of the

groundworks (above, paragraph 3.73). The Tribunal need not therefore address any further the circumstances of the acquisition of the project land, and whether it involved any illegality.

- 3.165 The Tribunal notes that the definition of “investment” in Article 1(1) of the BIT expressly requires that the assets constituting the investment should have been invested “in conformity with domestic law”. As such, the Tribunal is of the view that under the BIT applicable in the present case compliance with domestic law constitutes an express requirement of an investment.
- 3.166 However, on the ordinary meaning of the terms, whatever the position may be under other, differently worded BITs, the Tribunal agrees with the Claimants that that requirement cannot be interpreted as conditioning the existence of an investment within the meaning of Article 1(1) upon compliance by the investor with all applicable rules of domestic law throughout the life of the investment. This should not however be taken as denying the obligation of an investor to comply with domestic law during the lifetime of an investment, or as implying that a failure to do so may have consequences for the merits of that investor’s claim.
- 3.167 Further, the Tribunal does not accept the Respondent’s argument that the making of the investment in this case was an ongoing process, and that, given the illegality of the excavations after 18 June 2008, the Tribunal’s jurisdiction is in any event excluded after that date. The Tribunal notes in this regard that the “investment” relied upon by the Claimants is their shareholding or other participatory interests in Tschechien 7 and ECE Praha.
- 3.168 The Tribunal is therefore of the view that the assessment of whether the Claimants’ investment was made “in conformity with domestic law” for the purposes of Article 1(1) of the BIT falls to be made at the inception of the investment, i.e. at the point at which the Claimants acquired their relevant rights in the project companies, and is limited to whether the way in which the Claimants acquired their investment was in conformity with Czech law. The Respondent raised no criticism that the acquisition by the Claimants of their investment was not in all material respects in conformity with Czech law, and as noted above, in the event further disclaimed any reliance on the suggestion that the manner in which the project lands had been acquired by Tschechien 7 involved any illegality.
- 3.169 The Parties debated at some length the extent to which illegality connected with an investment might affect the jurisdiction of a Tribunal to rule upon a claim more generally, even in the absence of express language in the relevant bilateral investment treaty requiring compliance with domestic law. However, the cases in which tribunals have found that they are without jurisdiction on the basis of illegality, on analysis, have all concerned illegality of a particularly serious nature connected with the initial making of the investment, such as corruption, or fraud.
- 3.170 In the present case, the relevant illegality relied upon by the Respondent consists of a violation of Czech administrative law relating to excavations in excess of the amounts permitted by the planning permit obtained in relation to the Galerie project. Although the Tribunal does not doubt that the rules of Czech law relating to planning and pre-authorization of construction work are of central significance in the overall scheme of Czech planning law, those rules cannot be characterized as being of the same order of gravity as the rules outlawing corruption or fraud.

- 3.171 In these circumstances, the Tribunal is of the view that breach of those provisions, even if established, and even if committed deliberately by an investor (a question to which the Tribunal will return later in the context of its discussion of the merits of the claims), is incapable of affecting its jurisdiction. At most, the breach by the Claimants of the relevant rules of Czech law is relevant to the merits of the Claimants' claims.
- 3.172 On that basis, the Tribunal is of the view that whatever illegality may have occurred in the context of the excavation works connected with the Galerie project does not affect the jurisdiction of the Tribunal to rule on the Claimants' claims, and on that basis rejects the Respondent's objection.
- 3.173 In these circumstance it is not necessary for the Tribunal to address, for the purposes of establishing its own jurisdiction, either the argument that the Respondent is precluded from relying on the alleged illegality in consequence of what is alleged to be its improper conduct in gathering evidence in relation to the alleged illegality of the groundworks following the sending of the Trigger Letter by the Claimants, or in the alternative that the Respondent is estopped from relying on the illegality of the excessive groundworks.

3. The Respondent's Objections to Jurisdiction *Ratione Materiae* and *Ratione Temporis* in Respect of Obsolete Expenses

- 3.174 Given the manner in which the Respondent reformulated its objections to jurisdiction *ratione materiae* and *ratione temporis* in relation to obsolete expenses in its Counter-Memorial, it is convenient to deal with the two objections together.
- 3.175 The Tribunal notes that, as originally formulated, the objection *ratione temporis* consisted of a general objection that the Claimants were not entitled to raise a complaint under the BIT in respect of any action of the Respondent occurring prior to the Claimants' acquisition of their respective investments consisting of their shareholding or other participation in Tschechien 7 and ECE Praha.
- 3.176 Had the Claimants sought to rely on any conduct prior to acquisition of their respective investments as constituting a breach of the BIT, the objection would in principle have been well-founded; however, in light of the Claimants' confirmation that they did not in fact rely on any conduct of the Respondent prior to their acquisition of their investments in Tschechien 7 and ECE Praha as constituting a breach of the BIT, the objection to jurisdiction becomes moot. It retains its life only to the extent that the Tribunal will, in its treatment of the merits, pay particular attention to assuring itself that the claims for adjudication do relate exclusively to conduct falling properly with the scope of the BIT *ratione temporis*.
- 3.177 As reformulated, the objection to jurisdiction *ratione temporis* seems to the Tribunal to be closely connected to the objection to jurisdiction *ratione materiae*. Both objections are of limited scope, and go to the question of the extent to which the Tribunal has jurisdiction over the claims made by the Claimants in respect of losses allegedly suffered as the result of obsolete expenses incurred by subsidiaries of the Claimants within the ECE Group other than ECE Praha and Tschechien 7.

- 3.178 As explained by the Respondent, the point arises due to the “relatively late and sequenced acquisition” by the Claimants of the subsidiaries whose obsolete expenses it claims.³⁸¹ In its *ratione materiae* form, the objection is that the Claimants cannot claim for damages in respect of obsolete expenses incurred by subsidiaries except to the extent that those subsidiaries were owned by the Claimants, and therefore constituted their investments within the meaning of Article 1(1) of the BIT. In its *ratione temporis* version, the objection is that the Tribunal has no jurisdiction over Claimants’ claims for damages for obsolete expenses incurred by their subsidiaries save insofar as the latter actually represented investments of the Claimants at the time those expenses were said to have been incurred.
- 3.179 In the opinion of the Tribunal the argument underlying these objections is in principle valid. That does not however automatically mean that it is an argument of a preliminary character going to jurisdiction itself, in the strict sense. Under Article 10(2) of the BIT, read in conjunction with Article 10(1), the Respondent has given its consent to the submission to arbitration by this Tribunal of [disputes relating to]³⁸² investments between either Contracting Party and an investor of the other Contracting Party. Taken literally and in isolation, this phrase could be read as encompassing any dispute between the parties so identified, so long as the dispute had some relationship with an ‘investment’, and without regard, that is, to whether the subject of the dispute was an allegation by that particular investor that the host State had breached the investor’s specific rights, as guaranteed under the BIT, in respect of that specific investment. To read Article 10 in this way would not however make good sense, and would not, in the Tribunal’s view, be in accordance with the regime for interpretation laid down in the Vienna Convention, which lays down as the fundamental rule that the search for the proper interpretation of treaty language must always view the natural meaning of the words in their context, and in the light of the treaty’s object and purpose. Many bilateral investment treaties are drawn in terms rather more specific than those used in Article 10. The Tribunal is nevertheless in no doubt that, if one looks at the text of the BIT as a whole in the light of its overall purpose, the less precise text of Article 10 was intended to achieve the same result. The universe of possible disputes that would fall within the ‘jurisdiction’ of an arbitral tribunal, in the formal sense of its competence to adjudicate on them, is thus coextensive with the universe of possible claims in respect of which an investor could properly seek a substantive remedy from an arbitral tribunal for the breach of its rights under the treaty as a result of the host State’s treatment of its investment.
- 3.180 That conclusion having once been reached, it becomes immaterial whether the point raised by the Respondent in the present case is understood as a strictly ‘jurisdictional’ objection in the narrow sense, or as a broader plea of inadmissibility which the Tribunal ought to dispose of as a preliminary matter, or as a matter going to the merits, since in either of the first two cases the objection would be so closely tied up with the substantive content of the Claimants’ claims that a tribunal would properly join it to the merits. It had however, been established from the outset in the Tribunal’s Procedural Order No. 1 that preliminary objections and substantive merits should be argued in parallel with one another.

³⁸¹ Counter-Memorial, para. 274; above, paragraph 3.127.

³⁸² The Respondent’s wording for the translation of the paragraph, but the point here discussed is independent of the disagreement between the Parties over the translation.

3.181 Although, as noted above, the Claimants specified that they make no claim of breach of the BIT in respect of the conduct of the Respondent prior to 6 July 2007, and implicitly accept that PANTA had no investment in Tschechien 7 prior to 1 July 2007 and that ECE International had no investment in ECE Praha prior to 11 January 2007, this does not touch the Tribunal's competence to have regard to relevant events prior to the earliest of these dates insofar as those events constitute part of the background against which it must rule upon the allegations over which it does have jurisdiction.

4. Conclusions on Jurisdiction

3.182 In the light of the above, the Tribunal:

- a. holds that the Claimants' respective shareholdings and other participatory interests in Tschechien 7 and ECE Praha constitute investments within the meaning of Article 1(1) of the BIT and rejects the Respondent's objection to jurisdiction based on the Claimants' lack of an investment;
- b. rejects the Respondent's objection to jurisdiction on the basis of illegality;
- c. joins to the merits the Respondent's objections to jurisdiction *ratione materiae* and *ratione temporis* as reformulated in the Respondent's Counter-Memorial.

3.183 The Tribunal will therefore proceed to consider the arguments of the Parties on the merits of the dispute.

PART IV
THE MERITS OF THE CLAIMANTS'
CLAIMS OF BREACH OF THE BIT

A. INTRODUCTION

- 4.1 The core of the Claimants' claims in the present arbitration is that improper delays in the administrative proceedings relating to the necessary Planning and Building Permits for the construction of the Galerie project resulted in their being forced to abandon the project.
- 4.2 More specifically, the Claimants' case is:
- a. that the various decisions of the Respondent's authorities resulted in delays which violated the standards laid down in the BIT;
 - b. that the consequence of those delays was that the opening date for the Galerie project had to be pushed back;
 - c. that as a result, anchor tenants were lost; and
 - d. that in turn the loss of key tenants, combined with the continued uncertainty over the opening date had so severe an effect on the profitability of the project that the Claimants had no alternative but to abandon it.
- 4.3 The Claimants' claims are thus premised not only upon showing a breach of one or more of the relevant standards of protection contained in the BIT, but also in showing that the breach or breaches caused the abandonment of the project and the consequential loss.
- 4.4 An essential element in this context, without which the allegedly key importance of the opening date for the Claimants' Galerie project cannot be understood, is the existence of the rival shopping centre project being constructed by Multi, in very close proximity to the Galerie project. The Multi project, Forum, would not only have been in direct competition with the Claimants' Galerie project for customers in the event that both opened, but was also, during the period of permitting and construction relevant to the dispute, in fierce competition with the Claimants to secure tenants in advance of their respective anticipated openings.
- 4.5 The Respondent's essential position is that the administrative proceedings were conducted in an entirely proper manner and that none of the decisions adopted by the relevant authorities resulted in a breach of the BIT. The Respondent argues further that the great majority of the delays were caused by the Claimants' failure to file complete and timely applications with the relevant authorities. The Respondent also takes issue with the Claimants' assertion that they were forced to terminate the project because of the delays in the permitting proceedings, the loss of anchor tenants, and the alleged uncertainty, and suggest that the real reason why the Claimants aborted the project was due to "their own bad business judgment, poor local

management and the effect of the worldwide crisis in the real estate market in Central and Eastern Europe”.³⁸³

4.6 There is thus a substantial dispute between the Parties not only as to whether anything done by the relevant authorities of the Respondent breached the BIT, but also as to whether there is any causal link between any such breach of the BIT (if established) and the decision of the Claimants’ to abandon the project (and, indeed, when that decision was actually taken), and thus as to whether any loss suffered by the Claimants resulted from the breaches alleged.

4.7 In the present Part, the Tribunal examines the merits of the Claimants’ claims of breach of the BIT, without examining in detail the added layer of complication resulting from the dispute between the Parties as to what was in fact the cause of the abandonment of the project, and as to when the decision to abandon was taken. Nevertheless, given that they are fundamentally intertwined, the positions of the Parties on the merits of the Claimants’ claims and as to the reasons for abandonment and causation are set out together in the following section. The Tribunal’s decision as to the date and cause of the abandonment and the issues of causation is then addressed separately in Part V below.

B. POSITIONS OF THE PARTIES.

1. The Claimants’ Request for Arbitration and Statement of Claim

a. Alleged Breach of the Fair and Equitable Treatment Standard (Article 2(1) BIT)

4.8 In the Request for Arbitration and Statement of Claim, the Claimants put forward their case of breach of the fair and equitable treatment standard on two fronts. First, they recalled that the Tribunal in *Tecmed* had held that the fair and equitable treatment standard required States to provide to investments treatment that does not affect the basic expectations that were taken into account by the foreign investor in making its investment. Second, relying on the decisions in *Metalclad*, *Occidental*, and *Waste Management*, they argued that the concept of due process “concretizes the principle of fair and equitable treatment with regard to administrative proceedings and requires that the host state acts transparently and predictably vis-à-vis foreign investors and, therefore, permits them to plan and organize their investments.”³⁸⁴ The Claimants’ position was that in general terms the breach by a State of its own laws both violated the requirement of predictability under the fair and equitable treatment standard, and was *per se* unfair.

4.9 As to the facts of the present case, the substance of the Claimants’ allegation of breach of the BIT under the heading of the fair and equitable treatment standard was that the relevant authorities had repeatedly failed to comply with the applicable rules of Czech administrative

³⁸³ See e.g., Answer to Statement of Claim, para. 3.

³⁸⁴ Request for Arbitration and Statement of Claim, para. 213, citing *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, para. 99; *Occidental Exploration and Production Company v. Republic of Ecuador* (LCIA Case No. UN3467), Final Award of 1 July 2004, para. 183; and *Waste Management Inc. v. United Mexican States (No. 2)* (ICSID Case No. ARB(AF)/00/3), Final Award of 30 April 2004, para. 98.

law, and had thereby created “a significant delay that prevented Claimants from enjoying the benefits of their investment”.³⁸⁵ In support of this, multiple allegations of violation of applicable Czech administrative law were made in relation to both the Planning Permission Proceedings (with particular emphasis being placed upon the delays in the extraordinary review proceedings), the Building Proceedings (including in particular as regards the Third Stay adopted by MAL), and the conduct of the Groundworks Removal Proceedings.

4.10 The Claimants argued that “the complete lack of transparency and the lack of adherence to Respondent’s own laws, which led to the temporary revocation of a lawfully rendered Planning Permit and to an unlawful stay of the building permit proceedings for several months, manifestly offends judicial propriety”,³⁸⁶ and that “the Respondent’s conduct during the Planning and the Building Permit Proceedings, which was undisputedly unlawful under Respondent’s own laws, violated Claimants’ fair expectations to receive from Respondent fair and equitable treatment” and that therefore there had been a violation of the fair and equitable treatment standard contained in Article 2(1) of the BIT.³⁸⁷

b. Alleged Breach of the Prohibition of Impairment of Investments by Arbitrary or Discriminatory Measures (Article 2(2) BIT)

4.11 Second, the Claimants asserted, relying on Article 2(2) of the BIT, that the “erratic and unexplainable conduct” of the administrative authorities “violated Claimants’ legitimate expectation to be protected against arbitrary measures”.³⁸⁸

4.12 The Claimants asserted that the Respondent “impaired Claimants’ enjoyment of its investment in Tschechien 7 through the arbitrary measures of its authorities i.e. MAL, the Ministry and the Minister”, invoking in particular:

- a. the fact that, despite the underlying facts not having changed, the Ministry in the First Ministry Decision decided to remand the case back to RAL, but thereafter in the Second Ministry Decision decided to revoke the planning permit entirely with the consequence that the proceedings in relation to Tschechien 7’s application for planning permission would have had to be recommenced from the beginning;³⁸⁹
- b. the fact that the Minister, despite the underlying facts and parties being identical, decided the same case in different ways in the First and Second Minister Decisions.³⁹⁰ The Claimants referred also to the fact that the Minister acted in contradiction of the opinion of the Advisory Committee;³⁹¹
- c. MAL’s various decisions to stay the building permit proceedings; in particular as regards the Third Stay, the Claimants invoked the fact that the decision to stay was so

³⁸⁵ Request for Arbitration and Statement of Claim, para. 214

³⁸⁶ Request for Arbitration and Statement of Claim, para. 215.

³⁸⁷ Request for Arbitration and Statement of Claim, para. 216.

³⁸⁸ Request for Arbitration and Statement of Claim, para. 217-218.

³⁸⁹ Request for Arbitration and Statement of Claim, para. 220.

³⁹⁰ Request for Arbitration and Statement of Claim, para. 220.

³⁹¹ Request for Arbitration and Statement of Claim, para. 220.

obviously unlawful that RAL “felt it necessary to explicitly stress in writing on several occasions that it was impossible to legally defend the position MAL had taken”.³⁹²

4.13 On that basis, it was asserted that the Claimants’ investment had been “frustrated” by a “multitude of violations of administrative legal provisions on the adherence to which Claimants had relied when making their investments”. The conduct of the Ministry and Minister for Regional Development in the extraordinary review proceedings was qualified as “erratic”, and that conduct was said to have been “completed” by MAL’s conduct in adopting the Third Stay.³⁹³

4.14 Finally, the Claimants pointed to the fact that the Ministry for Regional Development “intervened” in the Groundworks Removal Proceedings and Administrative Offence Proceedings as confirming “Respondent’s preparedness to act arbitrarily when it serves its purposes”.³⁹⁴ They emphasized that the Ministry had had no competence under Czech law to interfere in the administrative proceedings, and submitted that it did so in an attempt to create an “obstacle” for the present proceedings, and had also sought to place pressure on officials within MAL.³⁹⁵

c. Alleged Breach of the Obligation to Admit Investments (Article 2(1) BIT)

4.15 The Claimants in addition claimed that the conduct by the agencies of the Respondent of the Planning Permit and Building Permit Proceedings violated not only the Respondent’s own domestic law, but also the obligation under Article 2(1) of the BIT to admit the Claimants’ investments “in accordance with its legislation”.³⁹⁶

4.16 The Claimants asserted that the Second Minister decision confirmed that both the First and Second Ministry Decisions had been unlawful, and that, regardless of any flaws in RAL’s decision to dismiss appeals against the Planning Permit, under the applicable legislation, the rights acquired by the Claimants under the Planning Permit and its reliance thereon were such as to override any concerns as to the lawfulness of the Planning Permit. The Claimants asserted that the First Minister decision “should have come to that conclusion, rendering also the First Minister Decision unlawful.”³⁹⁷

4.17 In addition, the Claimants asserted that, as confirmed by the decisions of RAL in relation to the appeals against the Third Stay adopted by MAL, the Third Stay of the Building Permit Proceedings was unlawful as the fact that the Extraordinary Review Proceedings were pending did not affect the final and binding status of the Planning Permit.³⁹⁸

³⁹² Request for Arbitration and Statement of Claim, para. 221.

³⁹³ Request for Arbitration and Statement of Claim, para. 222.

³⁹⁴ Request for Arbitration and Statement of Claim, para. 223.

³⁹⁵ Request for Arbitration and Statement of Claim, para. 223.

³⁹⁶ Request for Arbitration and Statement of Claim, para. 225.

³⁹⁷ Request for Arbitration and Statement of Claim, para. 228.

³⁹⁸ Request for Arbitration and Statement of Claim, para. 229.

d. Alleged Breach of the Prohibition of Expropriation (Article 4 BIT)

4.18 Fourth, the Claimants asserted that the conduct of the Respondent's agencies in the Planning Permit and Building Permit Proceedings amounted to "a measure tantamount to expropriation" for the purposes of the prohibition of expropriation, nationalization and measures having effects tantamount thereto contained in Article 4(2) of the BIT.

4.19 Relying on the observations of the *Metalclad* tribunal that the prohibition of expropriation (under Article 1110 NAFTA) extended to "incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property",³⁹⁹ the Claimants noted that the intended use of the property as a retail centre was legitimate and that the Planning Permit was lawful and binding; alleged that the Respondent prevented the Claimants "from their intended use" because the Planning Permit was revoked during the Extraordinary Review Proceedings ; and argued that the delays caused by the administrative proceedings "created a situation in which Claimants could no longer pursue their intention to develop, sell and manage the retail centre", such that the Claimants could "no longer reap the intended economic benefits from their property".⁴⁰⁰

4.20 The Claimants argued that the interference by the Respondent with the Claimants' rights was of sufficient "intensity" to qualify as indirect expropriation; they stated that the

*classic case of a sufficiently severe violation of an investor's rights is where the host state violates an investor's legitimate expectations through lawful, but modified conduct. The current situation is significantly worse: Claimants' legitimate expectations, and their decision to set up Tschechien 7 as a project company for the Galerie project, were based on adherence of Respondent's organs to their domestic laws. But Respondent undisputedly violated its domestic laws on several occasions, but during the Planning Permit and the Building Permit Proceedings. In terms of restricting an already acquired legal position, the most severe violation of Claimants' legitimate expectations was the Second Ministry Decision, which de facto took away from Claimants the planning security already acquired through a binding planning permit. In such a situation, Claimants could no longer implement their business plan – and cannot do so in the future.*⁴⁰¹

4.21 Finally, whilst acknowledging that they remained in possession of the land constituting the project site on which the Galerie project was to be developed, and had the requisite permits and approvals, the Claimants asserted that the land plots were worthless to Claimants because "their concept for development of a retail centre can no longer be pursued. The business opportunity related to Galerie is forever gone, which is tantamount to a taking of the rights arising from Claimants' investment."⁴⁰²

³⁹⁹ Request for Arbitration and Statement of Claim, para. 235, quoting *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, para. 103.

⁴⁰⁰ Request for Arbitration and Statement of Claim, para. 236.

⁴⁰¹ Request for Arbitration and Statement of Claim, para. 237.

⁴⁰² Request for Arbitration and Statement of Claim, para. 238.

e. **“Non-Discrimination”**

4.22 In addition, although not formally alleging a breach in this regard, the Claimants stated in general terms that they had “reason to believe that Respondent has also breached its duty of non-discrimination under the BIT”, and reserved their rights to “submit further facts, evidence and legal conclusions, including through requests for document production.”⁴⁰³

2. The Respondent’s Answer to the Statement of Claim

a. **Overview and Factual Matters**

4.23 At the outset of its Answer to the Statement of Claim, the Respondent asserted that the Claimants’ claim constituted a “thinly-veiled attempt by Claimants to use the [BIT] as an insurance policy against their bad business judgment and poor local management”.⁴⁰⁴

4.24 The Respondent charged that the Claimants had misrepresented the conduct of the relevant administrative proceedings; omitted to inform the Tribunal of their contribution to the delay of the proceedings; asserted with no supporting evidence that the alleged delays caused the abandonment of the project; and “asserted a damage claim seemingly from thin air.”⁴⁰⁵

4.25 As regards the third matter, the issue of causation of the abandonment of the project, the Respondent emphasized that the burden lay with the Claimants to establish that actions of the Respondent had in fact caused them to abandon their project.⁴⁰⁶

4.26 The Respondent explained that 10 of the 22 months between December 2006, when the application for a Planning Permit was made, and October 2008, the point in time at which the Claimants asserted that they abandoned the project, was attributable to delays caused by the actions of Tschechien 7.⁴⁰⁷ The Respondent further argued that it had been impossible for the Galerie Liberec project to open in the Autumn of 2009 as the Claimants assert they had originally expected, and that, as a result of the delays, the earliest the Claimants could have expected the opening of the Galerie Liberec centre was February 2011.⁴⁰⁸

4.27 As to the cause of the supposed delays, the Respondent pointed first to the filing of the incomplete application for planning permission in late December 2006, which was only remedied in May 2007, resulting in a delay of five months before the Planning Permit Proceedings effectively began.⁴⁰⁹ The Respondent further highlighted that the Planning Permit was thereafter issued on 16 July 2007, and having been confirmed on appeal by RAL, became effective on 21 December 2007.⁴¹⁰ In that connection, the Respondent emphasized that the

⁴⁰³ Request for Arbitration and Statement of Claim, para. 239.

⁴⁰⁴ Answer to Statement of Claim, para. 3.

⁴⁰⁵ Answer to Statement of Claim, para. 11.

⁴⁰⁶ Answer to Statement of Claim, para. 14.

⁴⁰⁷ Answer to Statement of Claim, paras. 15-18.

⁴⁰⁸ Answer to Statement of Claim, paras. 19-20.

⁴⁰⁹ Answer to Statement of Claim, para. 16.

⁴¹⁰ Answer to Statement of Claim, para. 17.

effectiveness of the Planning Permit was not affected by the Extraordinary Review Proceedings before the Ministry for Regional Development, and that the Claimants were able, and in fact did, proceed with their applications for the Building Permits.⁴¹¹

4.28 Second, the Respondent highlighted that the Claimants did not in fact complete the application for the Building Permit until the end of May 2008, a further five months after the Planning Permit had become effective.⁴¹²

4.29 As to the effect of the delays, the Respondent argued that in light of the relevant statutory rules applicable to the conduct of administrative proceedings and Tschechien 7's own estimates as to the time necessary for construction, at least 40 months were required between the submission of a complete application for a planning permit and the opening of the centre.⁴¹³ That position was taken on the basis that:

- a. taking account of the relevant statutory time-limits and requirements as to the display of notices, and assuming that there would be appeals against the decision of MAL, at least six and a half months (195 days) was required from the filing of a complete application for planning permission, and the entry into legal effect of the Planning Permit;⁴¹⁴
- b. a period of at least two months was normally required between the issue of an effective building permit and the submission of a complete application for building permits, given the complexity of the detailed construction plans and documents required, and the need to comply with any specific terms contained in the Planning Permit;⁴¹⁵
- c. again taking account of relevant statutory time-limits and requirements as to the display of notices, and again assuming that there were appeals against the decision of the municipal authority, at least a further six and a half months (195 days) was required from the filing of a complete application for a Building Permit, and the coming into legal effect of a Building Permit;
- d. the Claimants themselves had estimated that the actual construction phase of the project would take 23 months;⁴¹⁶
- e. the issuing of Occupancy Approvals would take at least 45 days, even assuming that no major issues were identified which required rectification. On that basis, the Respondent estimated that two months was a reasonable provision for the final issuance of Occupancy Approvals.⁴¹⁷

⁴¹¹ Answer to Statement of Claim, para. 17.

⁴¹² Answer to Statement of Claim, para. 18.

⁴¹³ Answer to Statement of Claim, paras. 19 and 70.

⁴¹⁴ Answer to Statement of Claim, paras. 58.

⁴¹⁵ Answer to Statement of Claim, para. 66.

⁴¹⁶ Answer to Statement of Claim, para. 68.

⁴¹⁷ Answer to Statement of Claim, para. 69.

- 4.30 As such, the Respondent submitted that an opening in Autumn 2009 would only have been possible if Tschechien 7 had filed a complete application for planning permission towards the beginning of the Summer of 2006, rather than in May 2007.⁴¹⁸ Given that the complete planning permit application had in fact been filed in May 2007, the Respondent asserted that the earliest possible opening, assuming the speedy filing of an application for a building permit would have been early Autumn 2010; however, given the fact that a period of five months elapsed before a complete application for the main Building Permit was filed, the Respondent asserted that the earliest possible opening date became February 2011.⁴¹⁹
- 4.31 On that basis, the Respondent asserted that the Claimants' claims that the project had to be abandoned in October 2008 as a result of the anchor tenants withdrawing because a Spring 2010 opening was not possible were false.⁴²⁰
- 4.32 By way of summary of its case on the merits, the Respondent asserted that, even assuming Claimants' factual allegations were true, the claim would nevertheless fail on the law, given that all of the Claimants' claims related to allegations that the Czech administrative bodies issued incorrect decisions and caused unjustifiable delays in administrative proceedings, and were therefore, in reality, disguised claims for denial of justice.⁴²¹ The Respondent noted that the Claimants had not discussed issues of exhaustion of local remedies, and asserted that this was because all of the decisions of which complaint was made were either successfully appealed, appeals were lodged, but out of time, or no appeal was filed at all. The Respondent argued that although the Claimants had put forward claims as to breaches of a number of provisions of the BIT, analysis of the real nature of the claims disclosed that they were in reality claims for denial of justice, and that the applicable standard for denial of justice under international law required dismissal of the Claimants' claims.⁴²²
- 4.33 The Respondent further argued that the Claimants' claims in any case failed on the merits, on the basis that:
- a. insofar as the Claimants alleged violation of their legitimate expectations, the Respondent never made any representations, and the Claimants' alleged estimates as to timing were unrealistic;
 - b. a mere violation of procedural rules did not *ipso facto* result in a violation of the fair and equitable treatment standard;
 - c. relying on the decision of the International Court of Justice in *ELSI*, a first instance decision which has been quashed cannot be held to be *ipso facto* arbitrary;
 - d. insofar as the Claimants made complaint as to the admission of their investments, there was no dispute that the Claimants acquired their interests in Tschechien 7 and ECE Praha without any interference; and

⁴¹⁸ Answer to Statement of Claim, para. 19.

⁴¹⁹ Answer to Statement of Claim, para. 20.

⁴²⁰ Answer to Statement of Claim, para. 21.

⁴²¹ Answer to Statement of Claim, para. 22.

⁴²² Answer to Statement of Claim, para. 22-23

- e. there was no indirect expropriation, insofar as the Claimants retained full ownership and control over both Tschechien 7 and ECE Praha, and over the project land owned by Tschechien 7.⁴²³
- 4.34 The Respondent also criticized the Claimants' conduct subsequent to the supposed decision to abandon the project, which they noted the Claimants claimed was reached in October 2008. In particular, the Respondent noted that the Claimants had at no point informed the building authorities that it was no longer interested in completing the project, nor had it withdrawn the applications for building permits.⁴²⁴ The Respondent further criticized the conduct of Tschechien 7 in filing an appeal against the Building Permit for the Main Construction, as well in not appealing the decision by RAL to stay the appellate proceedings in relation to the Building Permits.⁴²⁵ The Respondent submitted that the Claimants' "dilatatory conduct" had been intended to cause further delay in the hope of creating support for their investment claims.⁴²⁶
- 4.35 In the context of its discussion of events subsequent to the date on which the Claimants allegedly abandoned the project, the Respondent also laid down a general marker that, on the basis of the Claimants' claims, events subsequent to the alleged date of abandonment in October 2008 could not have been causative of the supposed forced abandonment, and were therefore of no relevance for assessment of the Claimants' claims of breach of the BIT.⁴²⁷
- 4.36 In addition, the Respondent criticized Tschechien 7's conduct in the Planning and Building Proceedings as being inconsistent with the Claimants' asserted expectation that the opening date of Galerie would be in Spring 2010,⁴²⁸ making reference in particular to:
- a. the delay between December 2006 and May 2007 in providing the complete documentation supporting the application for a Planning Permit, with the result the Respondent asserted, that, already at that stage, the opening date could have been no earlier than September 2010;⁴²⁹
- b. the delay in submitting complete applications for the various Building Permits, the complete documentation only having been submitted on May 2008, with the result that, so the Respondent asserted, the opening date would have had to have been pushed back to, at earliest February 2011.⁴³⁰
- 4.37 The Respondent argued in summary that the various proceedings were, overall, conducted in a manner which was favourable to the Claimants, and were throughout conducted in a timely, fair and transparent manner, with Tschechien 7 having the opportunity to seek redress for any

⁴²³ Answer to Statement of Claim, para. 24.

⁴²⁴ Answer to Statement of Claim, para. 100

⁴²⁵ Answer to Statement of Claim, paras. 101-102

⁴²⁶ Answer to Statement of Claim, para. 103

⁴²⁷ Answer to Statement of Claim, para. 103.

⁴²⁸ Answer to Statement of Claim, paras. 114.

⁴²⁹ Answer to Statement of Claim, para. 114.

⁴³⁰ Answer to Statement of Claim, para. 115.

correct decisions or delay.⁴³¹ By way of amplification, the Respondent noted that, although the Galerie project resulted in vigorous opposition from a variety of quarters, the appeals by individual residents (supported by Čistá Města), as well as by Multi, ultimately were all rejected.⁴³² Further, the Respondent submitted that the authorities on a number of occasions acted of their own motion to Tschechien 7's benefit; in particular, referring to MAL's decision of 29 October 2008 to recommence the Building Proceedings, it noted that despite the fact that the appeals by Tschechien 7 had been filed late, and were dismissed by RAL on that basis, MAL in effect gave relief of the form sought by Tschechien 7 in its appeals.⁴³³

b. Merits of the Claimants' claims

4.38 As to the merits of the Claimants' claims of breach of the BIT, the Respondent characterized all of the various claims as essentially relating to the allegation that the Czech authorities issued incorrect decisions and caused delays in the administrative proceedings, and submitted that all of those claims were in reality disguised claims for denial of justice.⁴³⁴ On that basis it submitted that the Claimants' claims did not rise to the elevated standard required for a finding of breach on that basis.⁴³⁵ In the alternative, even if the standards of denial of justice were held not to apply, the Respondent's position was that the Claimants' claims in any case failed on the merits.⁴³⁶

i. Denial of Justice

4.39 As to the assertion that the Claimants' claims were in reality disguised denial of justice claims, the Respondent, relying on the decision in *Amco Asia*, argued that the standards of denial of justice applied equally to administrative proceedings as they do to proceedings before judicial or quasi-judicial bodies.⁴³⁷ On that basis, it argued that the Claimants' claims failed because the Claimants did not complain of any measure which went unredressed by the mechanisms available under Czech administrative law, and, in any case, the conduct of the relevant Czech authorities had not risen to the level required in order to find a denial of justice.⁴³⁸

4.40 By way of amplification of the first issue, the Respondent pointed to the normal requirement under international law in relation to a claim for denial of justice that available local remedies must be exhausted, and argued that the finality of the decision challenged constitutes a substantive element of the standard.⁴³⁹ The Respondent argued that Czech Republic could not be held to have caused a denial of justice unless it had been given the "opportunity to remedy the alleged wrongdoing by the operation of its domestic system of remedies",⁴⁴⁰ and referring

⁴³¹ Answer to Statement of Claim, paras. 117 and 118.

⁴³² Answer to Statement of Claim, para. 117.

⁴³³ Answer to Statement of Claim, para. 118.

⁴³⁴ Answer to Statement of Claim, para. 119.

⁴³⁵ Answer to Statement of Claim, para. 121.

⁴³⁶ Answer to Statement of Claim, para. 121.

⁴³⁷ Answer to Statement of Claim, para. 123, citing *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case ARB/81/1), Award in Resubmitted Proceeding of 5 June 1990, para. 59.

⁴³⁸ Answer to Statement of Claim, para 125.

⁴³⁹ Answer to Statement of Claim, para. 126.

⁴⁴⁰ Answer to Statement of Claim,, para. 126

to the decision in *Jan de Nul*, argued that it was only if the system as a whole had been tested and the initial wrongful decision had remained uncorrected (or there were no effective remedy available, or any remedy would have had no reasonable prospect of success), that the State could be held liable.⁴⁴¹ Relying upon the observations of the tribunal in *Jan de Nul*, the Respondent further argued that a single unfair first instance decision cannot per se constitute a breach of the fair and equitable treatment standard.⁴⁴²

- 4.41 As to the merits of the claims, assessed against the denial of justice standard, the Respondent took the position that every single decision of which the Claimants complained was either successfully appealed, the appeal was lodged after the relevant statutory time limit had expired, or no efforts were made to lodge an appeal.⁴⁴³ In this regard, it emphasized that:
- a. the First and Second Ministry Decisions had ultimately been overturned by the Minister in the Second Minister Decision;
 - b. Tschechien 7 had not appealed MAL's decisions constituting the Third Stay within the applicable time limit; and
 - c. Tschechien 7 had not appealed RAL's decision to stay the appellate proceedings in relation to the main building permit (Construction I).⁴⁴⁴

In addition, the Respondent pointed to the fact that Tschechien 7 at no point made use of the remedies available as regards a failure to act under section 80 CAP.⁴⁴⁵

- 4.42 On that basis, the Respondent asserted that “none of the alleged bases for the claimed denial of justice satisfies the requirement of finality and exhaustion of local remedies. That alone is fatal to all of Claimants’ claims”.⁴⁴⁶
- 4.43 As to the second issue in relation to denial of justice, the Respondent posited that the applicable standard for a denial of justice was a high one.⁴⁴⁷ It referred to the decision in *Loewen* for the proposition that a finding of denial of justice requires a conclusion that there has been “manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”,⁴⁴⁸ as well as invoking Paulsson’s suggestion that the standard requires that “the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice”.⁴⁴⁹ It further noted, relying on *Jan de Nul* and on *Pantechniki*, that “mere unlawfulness or error in the interpretation of domestic law cannot

⁴⁴¹ Answer to Statement of Claim, para. 127, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award of 6 November 2008, paras. 258-259.

⁴⁴² Answer to Statement of Claim, para. 128.

⁴⁴³ Answer to Statement of Claim, para. 129.

⁴⁴⁴ Answer to Statement of Claim, paras. 129-131.

⁴⁴⁵ Answer to Statement of Claim, para. 132.

⁴⁴⁶ Answer to Statement of Claim, para. 133.

⁴⁴⁷ Answer to Statement of Claim, para. 134.

⁴⁴⁸ Answer to Statement of Claim, para. 134, citing *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003, para. 132.

⁴⁴⁹ Answer to Statement of Claim, para. 134, citing J. Paulsson, *Denial of Justice in International Law* (CUP, 2005), p. 60.

amount to a breach of due process or a denial of justice if there was no breach of the investor's fundamental rights to participate and defend itself in the proceedings."⁴⁵⁰

4.44 As regards the facts, the Respondent argued that, even assuming the Claimants' claims to be true, the alleged irregularities in the planning and building proceedings fell well below the requisite level.⁴⁵¹ The Respondent noted that Claimants had made no allegation of fundamental breach of procedural rights, of any lack of transparency, that Tschechien 7 did not have access to all relevant files, or that Tschechien 7 was in any way deprived of its opportunity to be heard.⁴⁵²

4.45 The Respondent further argued that the overall length of the Planning and Building Proceedings did not rise to the level of a denial of justice, noting that both MAL and RAL had delivered their decisions within the relevant statutory time periods.⁴⁵³ It further argued that minor delays, such as that resulting from the early removal of the notification of opening of the Planning Proceedings, and the short delay in the transmission of the file from MAL to RAL following the appeals against the Planning Permit, could not be said to rise to the level of a denial of justice.⁴⁵⁴ More generally, it observed that the Planning Permission and Building Proceedings related to a complex matter, involving major excavation works and connection to existing roads.⁴⁵⁵

ii. Merits of the Claimants' Claims of Breach of the BIT

4.46 Quite apart from its arguments as to denial of justice, the Respondent also disputed that the Claimants' claims as pleaded amounted to a violation of the substantive standards of treatment contained in the BIT.⁴⁵⁶

Alleged breach of the fair and equitable treatment standard (Article 2(1) BIT)

4.47 As to the Claimants' claims of breach of the fair and equitable treatment standard, the Respondent noted that the Claimants had asserted a violation of the general requirement of fair and equitable treatment, as well as arguing that the conduct of the authorities in relation to the Planning Permission and Building Proceedings frustrated their legitimate expectations of due process due to violations of Czech law, thus resulting in a lack of predictability and transparency.⁴⁵⁷

4.48 In response, the Respondent emphasized that breaches of domestic law did not *ipso facto* give rise to a violation of the fair and equitable treatment standard.⁴⁵⁸ In support of that position, the

⁴⁵⁰ Answer to Statement of Claim, paras. 135-136, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award of 6 November 2008, para. 206 and *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21), Award of 30 July 2009, para. 94.

⁴⁵¹ Answer to Statement of Claim, para. 137.

⁴⁵² Answer to Statement of Claim, para. 137.

⁴⁵³ Answer to Statement of Claim, para. 139.

⁴⁵⁴ Answer to Statement of Claim, para. 139.

⁴⁵⁵ Answer to Statement of Claim, para. 141.

⁴⁵⁶ Answer to Statement of Claim, para. 143.

⁴⁵⁷ Answer to Statement of Claim, para. 143.

⁴⁵⁸ Answer to Statement of Claim, para. 144.

Respondent relied on a number of authorities, including in particular the observations of the tribunal in *Continental Casualty* and the decision of the Chamber of the International Court of Justice in *ELSI*.⁴⁵⁹ Referring to the decision of the NAFTA tribunal in *ADF Group*, the Respondent took the position that something more than alleged unlawfulness under domestic law was required in order to give rise to violation of the fair and equitable treatment standard.⁴⁶⁰

4.49 As to the Claimants' claim based on legitimate expectations, the Respondent emphasized that the expectations protected under international law were those that the investor took into account in making its investment;⁴⁶¹ argued, relying on the decision in *Duke Energy Electroquil v. Ecuador*, that the reasonableness of expectations had to be assessed in the light of "all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State";⁴⁶² and that legitimate expectations could only be based on specific assurances given to the investor by the host State, rather than upon domestic legislation.⁴⁶³

4.50 The Respondent highlighted that the Claimants had not asserted that they had received any specific commitment from the Respondent at the time of making their investment, and submitted that the Claimants could not have reasonably assumed that the period for the permitting and construction phases of Galerie would take anything less than 40 months from submission of a complete application for planning permission, or 31.5 months from the making of a full application for the requisite building permits.⁴⁶⁴ The Respondent noted that the ECE Group had previous experience of development of retail centres in the Czech Republic, including its development of Arkády Pankrác in Prague, which had taken close to seven years to open.⁴⁶⁵

4.51 On that basis, and given that the application for Planning Permission had been completed only in May 2007, the Respondent concluded that the Claimants could not reasonably have expected that there was any possibility that Galerie would open at any time prior to September 2010.⁴⁶⁶ It further noted that whatever estimates the Claimants may have made were irrelevant, insofar as the Respondent had made no specific assurances and those expectations were not therefore protected under the BIT.⁴⁶⁷

⁴⁵⁹ Answer to Statement of Claim, paras. 14-146, citing, inter alia, *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Award of 5 September 2008, para. 281 and *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at p. 74 (para. 124).

⁴⁶⁰ Answer to Statement of Claim, para. 148, citing *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of 9 January 2003, para. 190.

⁴⁶¹ Answer to Statement of Claim, para. 151, referring to *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award of 18 August 2008, para. 340; and *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009, para. 219.

⁴⁶² Answer to Statement of Claim, para. 151, quoting *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award of 18 August 2008, para. 340.

⁴⁶³ Answer to Statement of Claim, para. 152.

⁴⁶⁴ Answer to Statement of Claim, para. 154.

⁴⁶⁵ Answer to Statement of Claim, para. 155.

⁴⁶⁶ Answer to Statement of Claim, para. 156.

⁴⁶⁷ Answer to Statement of Claim, para. 157.

Alleged breach of the prohibition of impairment of investments by arbitrary or discriminatory measures (Article 2(2) BIT)

4.52 As to the Claimants' claims of violation of the prohibition of impairment by arbitrary measures, the Respondent's principal defence, relying on the decision in *ELSI*, was that the claim failed insofar as it rested on the premise that the measures in question were arbitrary because they were unlawful under Czech law.⁴⁶⁸ The Respondent submitted that the relevant test of arbitrariness was that proposed by the Chamber in *ELSI*:

*Arbitrariness is not so much something opposed to a rule of law, but something opposed to the rule of law. [...] It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.*⁴⁶⁹

4.53 Approaching the Claimants' claims on that basis, the Respondent argued that the two Ministry Decisions adopted in the extraordinary review proceedings could not be considered to be arbitrary as they had been overturned by the two Minister Decisions.⁴⁷⁰ It further observed that the Minister, although agreeing with the Ministry that the Planning Permit had been issued in violation of Czech law, only disagreed with the conclusions of the Ministry in the Second Ministry Decision on the question of whether the quashing of the Planning Permit would constitute a disproportionate interference with Tschechien 7's rights acquired in good faith compared with the public interest considerations. The Respondent submitted that the application of the proportionality test was "one on which minds can reasonably differ" but that the Ministry's conclusion was not one which satisfied the test enunciated by the ICJ in *ELSI* of constituting a "willful disregard of due process of law", or which could be said to shock or surprise a sense of judicial propriety.⁴⁷¹

4.54 As for the claim that the First Minister Decision was arbitrary because the Minister had chosen to quash the First Ministry Decision and remand the case to the Ministry, and the connected suggestion that the remand was unlawful, the Respondent first disputed that the Minister's decision to remand was unlawful.⁴⁷² In its submission, the Minister's decision to remand was entirely proper given that he deemed it appropriate that further factual investigation be conducted, in particular as regards the scope and extent of any rights acquired in good faith by Tschechien 7 as a result of the Planning Permission.⁴⁷³ In addition, the Respondent asserted that, in any case, any unlawfulness affecting the First Minister Decision under Czech law arising from the decision to remand to the Ministry, rather than terminate the extraordinary

⁴⁶⁸ Answer to Statement of Claim, paras. 158-159, citing *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at p. 74 (para. 124).

⁴⁶⁹ Answer to Statement of Claim, para. 160, citing *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at p. 76 (para. 128).

⁴⁷⁰ Answer to Statement of Claim, para. 163.

⁴⁷¹ Answer to Statement of Claim, para. 164.

⁴⁷² Answer to Statement of Claim, para. 166.

⁴⁷³ Answer to Statement of Claim, para. 166.

review procedure, would not necessarily mean that the decision should be treated as arbitrary.⁴⁷⁴

4.55 In relation to the claim that the Third Stay of the Building Proceedings imposed by MAL in July 2008 was arbitrary because unlawful under Czech law, the Respondent likewise disputed that this was sufficient to justify a conclusion that the decision was arbitrary, and submitted that the decision fell below the relevant threshold.⁴⁷⁵ The Respondent emphasized that although MAL realized its mistake, it was prevented from rectifying it by reason of the fact that Tschechien 7 had in the meantime appealed the Third Stay to RAL, with the result that the file had to be transferred, and that MAL acted *sua sponte* to resume the proceedings as soon as RAL had dismissed the appeal.⁴⁷⁶

4.56 Finally, the Respondent rejected the Claimants' claim that the Ministry of Finance acted arbitrarily in "intervening" in the Groundworks Removal Proceedings, on the basis that the "intervention" was "a mere exchange of information with MAL" consequent upon receipt by the Ministry of the Claimants' Trigger Letter.⁴⁷⁷ The Respondent argued that such an exchange of information was entirely appropriate in circumstances in which a claim was raised in connection with ongoing administrative proceedings, and observed that the Claimants did not attempt to specify how the "intervention" was arbitrary.⁴⁷⁸ In a footnote, the Respondent also recalled that the "intervention" took place in 2009, and therefore could not have had any effect upon the Claimants' decision to abandon the project in 2008.⁴⁷⁹

Alleged breach of the obligation to admit investments (Article 2(1) BIT)

4.57 As regards the Claimants' claim that the Respondent breached its obligation under Article 2(1) of the BIT to admit the Claimants' investment in accordance with its legislation because of the failure to issue the Planning and Building Permits in accordance with the relevant statutory deadlines under Czech law, the Respondent took the position that the obligation was only relevant to the initiation of an investment, which the Claimants claimed was their participation in Tschechien 7 and ECE Praha.⁴⁸⁰

4.58 The Respondent observed in this connection that there had been no interference in the acquisition by the Claimants of those participatory rights, and that admission of the Claimants was entirely unconnected with the administrative proceedings for the Galerie project.⁴⁸¹

Alleged breach of the prohibition of expropriation (Article 4(2) BIT)

4.59 The Respondent, at the outset of its discussion of the Claimants' claims of indirect expropriation observed that the Claimants' "articulation of this claim is difficult to follow",

⁴⁷⁴ Answer to Statement of Claim, para. 166.

⁴⁷⁵ Answer to Statement of Claim, para. 167.

⁴⁷⁶ Answer to Statement of Claim, para. 167.

⁴⁷⁷ Answer to Statement of Claim, para. 168.

⁴⁷⁸ Answer to Statement of Claim, para. 168.

⁴⁷⁹ Answer to Statement of Claim, note 171.

⁴⁸⁰ Answer to Statement of Claim, para. 171.

⁴⁸¹ Answer to Statement of Claim, para. 171.

and noted that the Claimants “seem to argue that the Czech Republic indirectly expropriated their investment based on the alleged delay in the administrative proceedings”.⁴⁸²

- 4.60 The Respondent took the position that expropriation required: i) action by the State constituting a taking of property rights; ii) having a substantially severe impact on an investor’s investment as a whole, and which iii) did not fall into any of the categories of permissible and non-compensable expropriation (such as bona fide regulatory action). It submitted that the Claimants had failed to establish any of those elements.⁴⁸³
- 4.61 As to the required “taking”, the Respondent noted that the only measure specifically identified as expropriatory by the Claimants was the supposed revocation of the Planning Permit by the Second Ministry Decision. It observed that, given that the Second Ministry Decision never became legally effective (i.e. due to the filing of Tschechien 7’s appeal and the subsequent quashing of the Second Ministry Decision by the Second Minister Decision), the Claimants were wrong insofar as they suggest that the Planning Permit had been revoked.⁴⁸⁴
- 4.62 In the alternative, the Respondent argued that, even if the Planning Permit had been revoked, that would have constituted a valid exercise of regulatory powers and thus could not constitute a compensable taking, and again emphasized that the conclusion of the Extraordinary Review proceedings was that the Planning Permit had been issued unlawfully, although the Second Minister Decision had declined to quash it.⁴⁸⁵
- 4.63 Foreshadowing its arguments on causation, the Respondent briefly noted that, on the Claimants’ case, the decision to abandon the project was taken in October 2008, approximately two months after the Second Minister Decision, at a point at which the global financial and real estate crisis had been at its peak.⁴⁸⁶
- 4.64 The Respondent further noted that the Claimants had not specified what property right was allegedly expropriated.⁴⁸⁷ It noted that even as regards the supposed revocation of the Planning Permit, the only right which was said by the Claimants to have been taken away was the “planning security” resulting from the Planning Permit, to which the Respondent’s answer was that the mere issue of a Planning Permit provided no guarantee of “planning security” since it provided no guarantee that the Building Permits would subsequently be issued, or any assurance that they would be issued within any given time frame. It added that “planning security” did not constitute a legal right, and could not be expropriated.⁴⁸⁸
- 4.65 As to the Claimants’ assertion that the project land had become worthless and that the business opportunity was “forever gone”, the Respondent noted that this allegation was unsupported by evidence, but that in any case, on the basis of voluminous authority, there could be no expropriation in circumstances in which the investor retained full ownership and control over

⁴⁸² Answer to Statement of Claim, para. 173.

⁴⁸³ Answer to Statement of Claim, para. 174.

⁴⁸⁴ Answer to Statement of Claim, para. 175.

⁴⁸⁵ Answer to Statement of Claim, para. 175.

⁴⁸⁶ Answer to Statement of Claim, para. 177.

⁴⁸⁷ Answer to Statement of Claim, para. 178.

⁴⁸⁸ Answer to Statement of Claim, para. 178.

the investment and its day-to-day operations.⁴⁸⁹ The Respondent noted that the Claimants maintained full ownership and control over their investments (Tschechien 7 and ECE Praha), and further that Tschechien 7 retained full ownership and control over the project land. Although acknowledging that use of the land to build a retail centre was contingent upon obtaining the necessary legally effective building permits, the Respondent observed that that had always been the case since Tschechien 7's acquisition of the lands, and that Tschechien 7 otherwise was able to use, enjoy or dispose of the project lands.⁴⁹⁰

iii. Causation

- 4.66 Finally, the Respondent argued that even if it had been found to have violated the BIT, the Claimants' claims still failed on the basis that "their causation theory is legally flawed and unsupported by any evidence".⁴⁹¹ In particular, the Respondent asserted that the Claimants had failed to show that the alleged delays in the administrative proceedings caused the failure of the Galerie Liberec project, and submitted that the decision to abandon the project in October 2008 was Claimants' own decision and the claim that they were forced to take that decision was unfounded.⁴⁹²
- 4.67 The Respondent emphasized that Tschechien 7 had acquired the majority of the project land between November 2007 and March 2008, and that the Planning Permit had become legally effective on 21 December 2007. The Respondent drew the inference that the Claimants must have been generally satisfied with the planning proceedings and their outcome, since otherwise Tschechien 7 would not have continued to purchase the parcels of land.⁴⁹³
- 4.68 The Respondent further pointed to the fact that it was not until May 2008 that all information required in order to start the building permit proceedings had been filed, and that Tschechien 7 must have been aware at that point that, in light of the applicable deadlines, as a result it was likely that the building permits would not be issued earlier than the end of 2008.⁴⁹⁴
- 4.69 The Respondent disputed the Claimants' assertion that the abandonment of the project in October 2008 was caused by the loss of anchor tenants once it became apparent that it was unable to guarantee an opening in Spring 2010; it observed that, in light of the time needed for permitting and the estimated period for the construction works, a Spring 2010 opening could never have been a realistic option.⁴⁹⁵ Given that the completion of the application for the Planning Permit occurred in May 2007, and that a complete application for the building permits was completed only in May 2008, the Respondent asserted that it should have been evident at the time of the completion of the applications for the Building permits that an

⁴⁸⁹ Answer to Statement of Claim, paras. 179-181.

⁴⁹⁰ Answer to Statement of Claim, para. 182.

⁴⁹¹ Answer to Statement of Claim, para. 183.

⁴⁹² Answer to Statement of Claim, para. 184.

⁴⁹³ Answer to Statement of Claim, para. 185.

⁴⁹⁴ Answer to Statement of Claim, para. 186.

⁴⁹⁵ Answer to Statement of Claim, para. 187.

opening prior to February 2011 was not feasible, and that a Spring 2010 opening would not have been possible should have been evident by the Summer of 2007.⁴⁹⁶

- 4.70 The Respondent also attacked the Claimants' case on causation on the basis that it was unsupported by any evidence, including as to the existence of secured anchor tenants for substantial periods, that if they existed, the anchor tenants were entitled to withdraw, or were otherwise released in the event of delays, or that the anchor tenants did in fact withdraw because of the alleged delays. The Respondents further added that no evidence had been provided to substantiate the assertion that if the retail centre had been completed, ECE Praha would have been able to manage it for 25 years and thus earn the management fees.⁴⁹⁷
- 4.71 The Respondent further criticized as incredible what they characterized as the Claimants' "fall back" case in relation to causation, namely that, but for the alleged violations of the BIT, the Claimants would have been able to achieve an opening in Autumn 2009, on the basis that this would have required the making of a complete application for a planning permit at some point during Summer 2006.⁴⁹⁸
- 4.72 The Respondent further noted that the Claimants' claim for damages appeared "to be based on the allegation that the [Respondent]'s purported violations of the Treaty prevented Claimants from selling the project to a final investor on 15 December 2007", and observed that the Claimants had provided no evidence either that an investor had been secured, or that any investor withdrew as a consequence of the alleged delays in the proceedings.⁴⁹⁹ The Respondent in addition submitted that the Claimants' position was in tension with their acceptance that the Planning Permit Proceedings had been "almost regular" and with the duration of the planning permit proceedings of some seven months once the complete application had been filed.⁵⁰⁰
- 4.73 The Respondent submitted that the "obvious flaws" in the Claimants' case on causation indicated that the real reason for the decision of the Claimants to abandon the project had been different, and had in fact been the crisis in the Czech real estate market, which was well under way by October 2008, and which had an impact on expected rentals, and sales prices, , as a result of a tightening in the availability of credit, and heightened interest rates.⁵⁰¹
- 4.74 The Respondent added that the Claimants' project was ill-conceived from the beginning, in circumstances in which had experienced a swift growth in the number of retail centres, and, as at the initial planned opening date of Autumn 2009, already had a near-saturated retail market. On that basis, it submitted that a contributing cause of the Claimants' decision to abandon the project was its original bad decision to embark upon the development of the retail centre, which had then been exacerbated by the general real estate crisis.⁵⁰²

⁴⁹⁶ Answer to Statement of Claim, paras. 188-189.

⁴⁹⁷ Answer to Statement of Claim, para. 190.

⁴⁹⁸ Answer to Statement of Claim, para. 191.

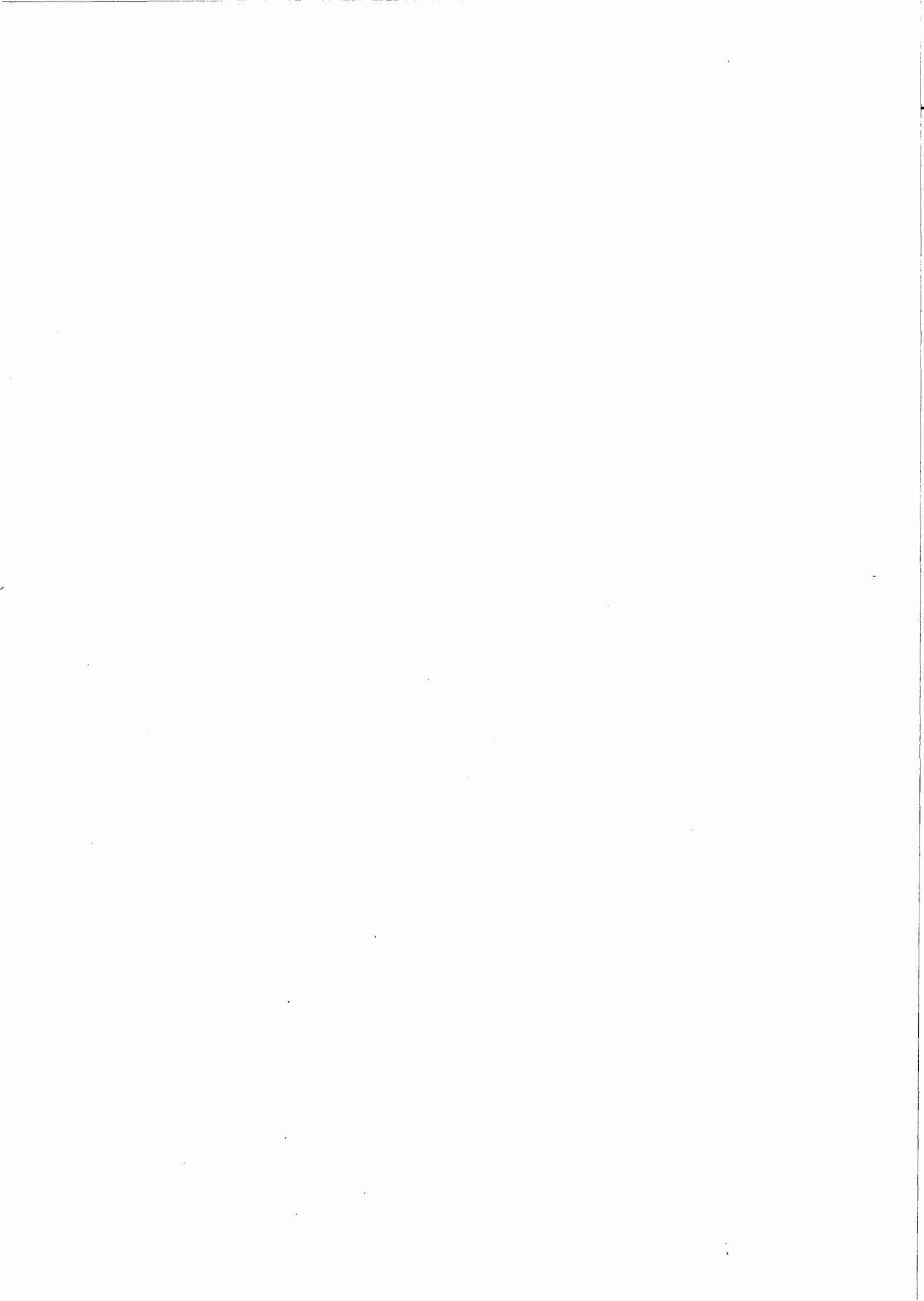
⁴⁹⁹ Answer to Statement of Claim, para. 192.

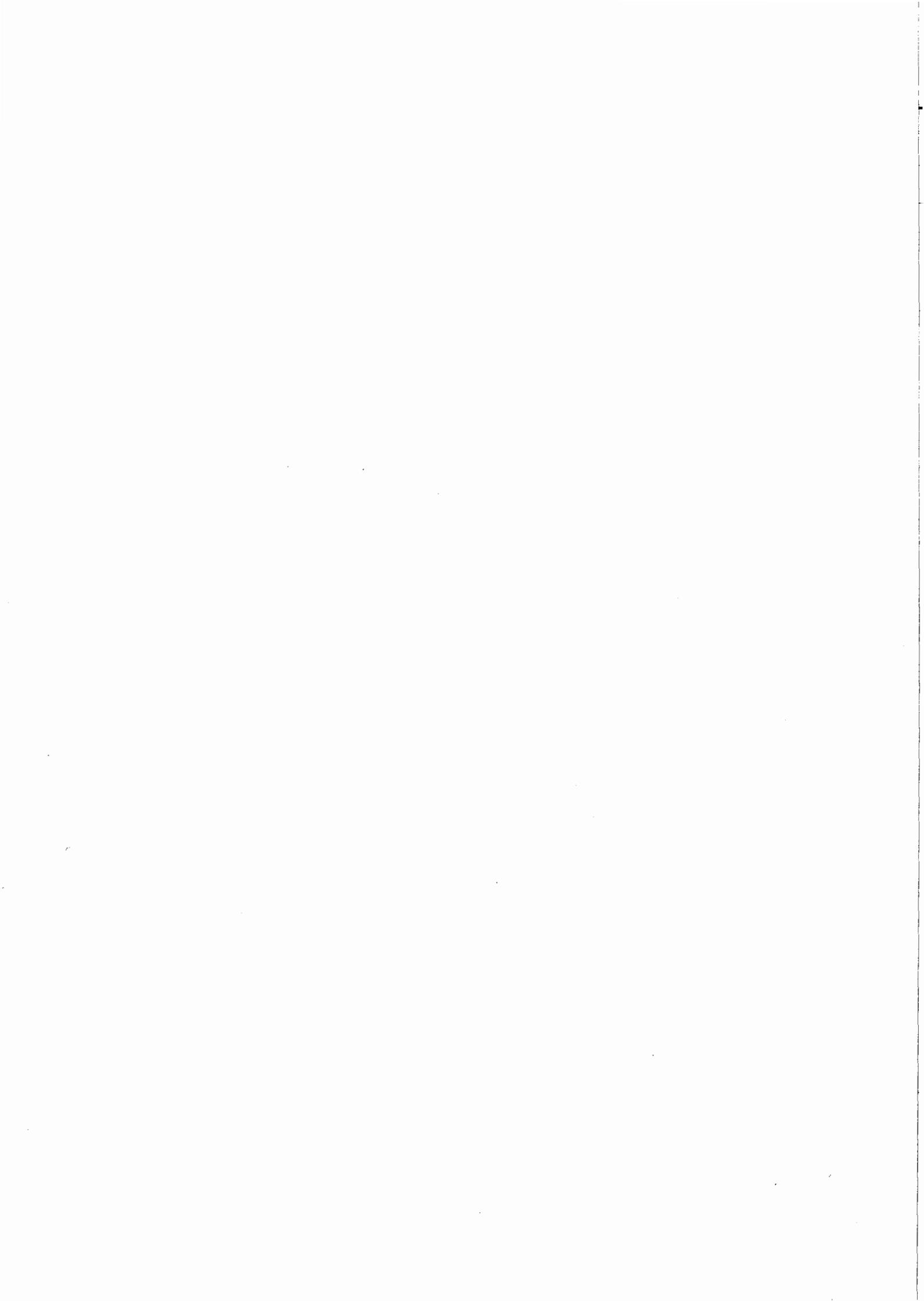
⁵⁰⁰ Answer to Statement of Claim, para. 193.

⁵⁰¹ Answer to Statement of Claim, para. 194.

⁵⁰² Answer to Statement of Claim, para. 196.















4.121

b. Merits of the Claimants' Claims of Breach of the BIT

4.122 By way of general introduction of its discussion of their claims on the merits under the various standards of protection contained in the BIT, the Claimants emphasized, having quoted the decision in *Azurix v. Argentina*, that the specific standards of protection contained in the BIT must not be confused with the “considerably lower standard of protection in customary international law”, and that there existed “autonomous concepts of the substantive standards within the treaty framework that need to be assessed by interpretation of the treaty provisions”.⁶⁰¹ They further submitted, relying on the Preamble to the BIT, that the Parties to the BIT had “intended a very high level of protection”, and that the standard of protection it enshrined went “far beyond what Respondent argues it to be”.⁶⁰²

i. Denial of Justice

4.123 The Claimants rejected the Respondent’s suggestion that their claims necessarily involved an allegation of denial of justice. In that regard, they argued that

*the obstruction of the administrative proceedings constitutes a violation of the BIT in several respects. Claimants’ claims relate to a whole variety of unlawful acts of Respondent’s administration, which violate various standards of the BIT. Whether the requirements of denial of justice are fulfilled has no bearing on whether there have been violations of other BIT standard.*⁶⁰³

⁵⁹⁷ Memorial, para. 282.

⁵⁹⁸ Memorial, paras. 283-284.

⁵⁹⁹ Memorial, para. 285.

⁶⁰⁰ Memorial, para. 286.

⁶⁰¹ Memorial, paras. 433-435, quoting *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 372.

⁶⁰² Memorial, para. 436.

⁶⁰³ Memorial, para. 440.

- 4.124 In support of that argument, they argued that the Respondent's approach was flawed, in that it implied that a given set of facts could only fall into one box or standard.⁶⁰⁴ The Claimants however pointed to the fact that "in arbitral practice, a given set of facts may well constitute a violation of several treaty standards",⁶⁰⁵ and submitted that the same principle was applicable to the relationship between the standard of denial of justice and other treaty obligations.⁶⁰⁶
- 4.125 The Claimants also sought to distinguish the authority relied upon by the Respondent in support of its position as to denial of justice.⁶⁰⁷ They argued that in *Jan de Nul v. Egypt*, the tribunal had explicitly contemplated that the denial of justice standard was not exclusive with respect to other treaty standards, insofar as it had applied the fair and equitable treatment standard to the relevant conduct alleged to constitute a breach other than judicial acts.⁶⁰⁸ They similarly argued that the decision in *Amco v. Indonesia* was not authority for the proposition that the denial of justice standard was exclusive in relation to administrative proceedings, emphasizing that the tribunal in *Amco* had merely decided *whether* the denial of justice was applicable to such proceedings.⁶⁰⁹
- 4.126 In further support of their position that their claims did not fall to be assessed against the standard of denial of justice, the Claimants submitted that the approach advocated by the Respondent involving exclusivity of the denial of justice standard would have "alarming consequences", insofar as every other standard of protection would be rendered "almost completely meaningless".⁶¹⁰ The Claimants observed that States typically act through their administrative bodies, and that if the Respondent were correct, given that "any act of State follows from some kind of 'proceeding'", "almost every investment dispute would have to be exclusively treated as a claim for denial of justice".⁶¹¹ They further submitted that the exclusivity of the denial of justice standard would allow States a mechanism by which to circumvent the standards of protection contained in investment protection treaties merely by taking action through flawed proceedings.⁶¹²
- 4.127 The Claimants submitted that rather the denial of justice standard was confined to situations in which an investor has "chosen to resort to the host state's courts before initiating arbitral proceedings under the BIT",⁶¹³ and that, in such cases, the denial of justice standard was exclusive due to the need to respect the host state's judiciary; they submitted that such restraint had "never been applied to situations where the administrative acts have not been judged by the domestic courts".⁶¹⁴ They relied on the observations of the tribunals in *Mondev v. USA* and

⁶⁰⁴ Memorial, paras. 442-444.

⁶⁰⁵ Memorial, para. 442; and see para. 443.

⁶⁰⁶ Memorial, paras. 442 and 444.

⁶⁰⁷ Memorial, paras. 445-446.

⁶⁰⁸ Memorial, paras. 447-449, quoting *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award of 6 November 2008, paras. 190-191.

⁶⁰⁹ Memorial, para. 450, referring to *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case ARB/81/1), Award in Resubmitted Proceeding of 5 June 1990, para. 44 et seq.

⁶¹⁰ Memorial, para. 452.

⁶¹¹ Memorial, para. 452.

⁶¹² Memorial, para. 453.

⁶¹³ Memorial, para. 454.

⁶¹⁴ Memorial, para. 455.

Azinian v. Mexico, and submitted that the quotations from authorities relied upon by the Respondent in support of its position as to the priority of the denial of justice standard were all taken from cases in which the tribunals had reviewed court decisions.⁶¹⁵

- 4.128 Although rejecting the position of the Respondent as to the exclusivity or priority of the denial of justice standard, the Claimants argued that the “overall conduct in the administrative proceedings” in any case amounted to a denial of justice.⁶¹⁶ They relied on the decision in *Amco* for the proposition that a denial of justice may result from “a combination of improper acts”.⁶¹⁷
- 4.129 The Claimants asserted that the conduct of the Respondent satisfied the test for a denial of justice, insofar as it “shocks a sense of impropriety” [sic] and is adequately described by the term ‘egregious’. They added that it even “goes beyond a combination of improper acts, but adds up to a tainted scheme”.⁶¹⁸
- 4.130 By way of example, the Claimants relied upon the fact that the authorities had “initiated ancillary proceedings which were used to interrupt the building permit proceedings”, and referred to:
- a. the allegedly unlawful reliance by MAL upon the Extraordinary Review Proceedings to stay the building permit proceedings in the Second and Third Stays in April and July 2008;⁶¹⁹
 - b. the way in which the Groundworks Removal Proceedings had allegedly been used to block the appeal proceedings in relation to the main Building Permit in March 2009;⁶²⁰
 - c. the conduct of the Administrative Offence Proceedings in relation to the excessive groundworks, and in particular the splitting of those proceedings into two, purportedly solely to keep the proceedings alive and avoid any decision constituting *res judicata* being adopted; the Claimants emphasized that the proceedings were split despite the fact the underlying question was the same one of whether Tschechien 7 had excavated too much earth;⁶²¹

⁶¹⁵ Memorial, paras. 456-458, quoting *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 126 and *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award of 1 November 1999, para. 99.

⁶¹⁶ Memorial, para. 459.

⁶¹⁷ Memorial, para. 461, citing *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case ARB/81/1), Award in Resubmitted Proceeding of 5 June 1990, para. 58.

⁶¹⁸ Memorial, para. 462.

⁶¹⁹ Memorial, para. 463.

⁶²⁰ Memorial, para. 463.

⁶²¹ Memorial, para. 464.

d. the conduct of the Extraordinary Review Proceedings, insofar as the Minister had “deviated from well-founded administrative practice without a justification, only to keep the proceedings alive and to obstruct the Claimants project”.⁶²²

4.131 The Claimants further submitted that, together with those specific examples, account was to be taken of the other irregularities in the proceedings, including the fact that “the relevant authorities exceeded the maximum statutory deadline in almost every case”, that they had “lured Tschechien 7 into ... separate filing of permits by the promise of a prompt decision on the main building permit”, and had “asked for splittings and new filings of permits without any comprehensible reason”.⁶²³

4.132 The Claimants argued that these various matters “go way beyond the breach of a rule of law” and constituted rather a “breach of *the* rule of law and hence a denial of justice”.⁶²⁴

ii. Exhaustion of Local Remedies

4.133 As to the Respondent’s arguments that the Claimants had not exhausted all available local remedies, such that their claims (if subject to the denial of justice standard) were barred, the Claimants at the outset emphasized that they had filed fifteen appeals, as well as various motions, objections and statements, and recalled that they had made complaints to a number of Ministries, the Prime Minister, and the German Ambassador. In addition, they drew attention to the fact that the Respondent had submitted that the appeal filed against the Third Stay had in fact delayed the progress of the proceedings.⁶²⁵

4.134 As to the substance of the Respondent’s argument, the Claimants argued that:

- a. an investor was not in any event required by the BIT to exhaust all local remedies;
- b. that this was particularly the case in circumstances in which the wrong complained of was delay in judicial and quasi-judicial proceedings;
- c. that there was no requirement to resort to remedies which were ineffective; and
- d. that the Claimants had in any case resorted to all remedies which were reasonable and effective.⁶²⁶

4.135 As to the first point, the Claimants emphasized, relying on the decisions in *Mondev* and *Waste Management (No. 2)*,⁶²⁷ that the rule of customary international law requiring exhaustion of local remedies was not incorporated into the BIT, whether as a procedural prerequisite to arbitration, nor as a substantive requirement of a claim of denial of justice.⁶²⁷

⁶²² Memorial, para. 465.

⁶²³ Memorial, para. 466.

⁶²⁴ Memorial, para. 467.

⁶²⁵ Memorial, paras. 469-470.

⁶²⁶ Memorial, para. 471.

⁶²⁷ Memorial, paras. 472-475, referring to *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 96 and *Waste Management Inc. v. United Mexican States (No. 2)*

- 4.136 As regards the second proposition, the Claimants invoked the observation of the Tribunal in *Jan de Nul*, that “the requirements of exhaustion of local remedies would not have been a bar to a claim of denial of justice on the basis of excessive delays in the judicial proceedings had such delays been deemed a treaty breach”.⁶²⁸
- 4.137 In relation to the third point, the Claimants relied upon the decision of the International Court of Justice in *ELSI* and its judgment on preliminary objections in *Diallo*, emphasizing that those decisions made clear that the relevant question was whether any supposedly available local remedy was reasonable and effective, as well as submitting that the burden of proof to show the existence of such remedies was upon the State which argued that there had existed effective remedies in its legal system that had not in fact been exhausted.⁶²⁹
- 4.138 The Claimants argued that none of the remedies referred to by the Respondent had in fact been effective:
- a. as regards the possibility of appealing against the Third Stay of the Building Permit proceedings adopted by MAL, it was emphasized that even the Respondent did not consider such a remedy to be effective insofar as it had argued that the filing of an appeal had prevented MAL from resuming the proceedings *sua sponte*. The Claimants further argued that the possibility of appealing against a decision to impose a stay could not be considered a remedy for the purposes of the exhaustion rule, insofar as a stay did not constitute a final decision;⁶³⁰
 - b. in relation to the possibility of appealing against RAL’s decision of 12 March 2009 to stay the appeal proceedings in relation to the Main Building Permit, the Claimants argued that such an appeal would have been ineffective insofar as the project had by that stage already been abandoned;⁶³¹
 - c. as to the suggestion that resort should have been had to a motion for failure to act under section 80 CAP, the Claimants emphasized that the delays had not resulted only from inactivity, but predominantly from the allegedly unlawful decisions to stay the proceedings and unreasonable remands, such that an action to compel the taking of a decision was not an available remedy.⁶³² In relation to those instances where the authorities had been inactive, such that the remedy had in principle been available, the Claimants emphasized that the remedy would have not been effective insofar as, under the relevant legislation, the options open to the supervising authority were restricted to making an order requiring the subordinate to adopt a decision within a particular period, itself taking a decision, authorizing another body to conduct the

(ICSID Case No. ARB(AF)/00/3), Decision on Mexico’s Preliminary Objection concerning the Previous Proceedings of 26 June 2002, para. 30.

⁶²⁸ Memorial, para. 476, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award of 6 November 2008, para. 256.

⁶²⁹ Memorial, para. 479, referring to *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at pp. 46-48 (paras. 61-63) and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, ICJ Reports 2007, p. 582, at p. 600 (para. 44).

⁶³⁰ Memorial, para. 480.

⁶³¹ Memorial, para. 481.

⁶³² Memorial, para. 482.

proceedings, or extending the statutory time-limits for the adoption of the decision.⁶³³ Further, the Claimants emphasized that, in any case, the harm had already been done insofar as the proceedings had already been delayed, and resort to a motion for failure to act would have resulted in further delay insofar as it would have been necessary for the supervising authority to familiarize itself with the case, and then to adopt a decision.⁶³⁴

4.139 Finally, the Claimants argued that they had done everything in their power to prevent abandonment of the project through pursuing numerous remedies. They submitted that it was unsurprising that, given the number of proceedings, they might have missed or miscalculated some of the deadlines for taking particular procedural steps.⁶³⁵

iii. Alleged Breach of the Fair and Equitable Treatment Standard (Article 2(1) BIT)

4.140 The Claimants' claim under the fair and equitable treatment standard was put forward on a variety of bases, namely:

- a. violation of the right to due process;
- b. failure to provide a transparent, predicatable and stable legal framework, in violation of the Claimants' legitimate expectations; and
- c. violation of specific legitimate expectations created during the initial phase of the project.⁶³⁶

4.141 By way of preface to its discussion of its claims, the Claimants accepted that a violation of domestic law did not *ipso facto* result in a violation of international law, and that breach of the fair and equitable treatment standard had to be ascertained in accordance with international law.⁶³⁷ However, the Claimants stressed that they did not rely solely upon the domestic illegality of the actions of the Respondent's actions, but rather upon the Respondent's overall behaviour, consisting of the alleged obstruction of the Claimants' project whilst favouring the competing Forum project, which had forced them to abandon their project.⁶³⁸

4.142 The Claimants relied in that respect on the decision in *ADF* for the proposition that where there was "something more than simple illegality or lack of authority under the domestic law of a State", this could give rise to a violation of the fair and equitable treatment standard.⁶³⁹ They further submitted that the decisions in *ELSI* and *Continental Casualty* invoked by the Respondent, as well as the decision in *Metalclad* indicated that, although domestic illegality

⁶³³ Memorial, para. 483.

⁶³⁴ Memorial, para. 484.

⁶³⁵ Memorial, para. 485-486.

⁶³⁶ Memorial, para. 488.

⁶³⁷ Memorial, para. 489.

⁶³⁸ Memorial, para. 490.

⁶³⁹ Memorial, para. 491, citing *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of 9 January 2003, para. 190.

did not automatically translate to international unlawfulness, a violation of domestic law might be relevant in ascertaining whether there had been a breach of international law.⁶⁴⁰

Due Process and Procedural Propriety

4.143 The first way in which the Claimants put their claim of breach of the fair and equitable treatment standard was under the heading “Due Process and Procedural Propriety”; they asserted that the Respondent had “continuously obstructed the administrative proceedings concerning Galerie in numerous individual irregular decisions”, and that, compared to the “preferential treatment” accorded to the Forum project, “the background of these obstructions was to hinder Claimants from entering the market in ...”.⁶⁴¹

4.144 As to the applicable standard in relation to due process and procedural propriety, the Claimants invoked the decision in *Waste Management* to the effect that

*The minimum standard of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct [...] involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.*⁶⁴²

4.145 They argued that that “threshold is significantly lower than Respondent claims it to be”, and invoked the discussion by the tribunal in *Mondev v. USA* of the dicta of the International Court in *ELSI* as demonstrating that “the ICJ’s findings in *ELSI* are only a starting point for examining what is fair and equitable, but that the threshold in modern times is a lot lower”.⁶⁴³ To that end, they invoked the formulation of the standard put forward by the tribunal in *Mondev* that

*In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.*⁶⁴⁴

⁶⁴⁰ Memorial, paras. 492-494; citing *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at p. 74 (para. 124); *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Award of 5 September 2008, para. 281; and *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, para. 97. As regards the decision in *Continental Casualty*, the Claimants highlighted that the observations of the tribunal relied upon by the Respondent had been made in the context of a claim of indirect expropriation, and not of breach of the fair and equitable treatment standard (Memorial, para. 493).

⁶⁴¹ Memorial, para. 496.

⁶⁴² Memorial, para. 497, quoting *Waste Management Inc. v. United Mexican States (No. 2)* (ICSID Case No. ARB(AF)/00/3), Final Award of 30 April 2004), para. 98 (text as quoted by the Claimants).

⁶⁴³ Memorial, para. 498.

⁶⁴⁴ Memorial, para. 498, quoting *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 116.

They further highlighted that the *Mondev* tribunal had emphasized that “in modern times, what is unfair and inequitable need not equate with the outrageous or the egregious”.⁶⁴⁵

- 4.146 Applying that standard to the facts of the case, the Claimants asserted that “in numerous illegal concerted irregularities of the administrative authorities, the intention of Respondent was to obstruct Claimants’ project in favour of the competing project”.⁶⁴⁶
- 4.147 More particularly, they submitted that the Respondent, “being aware that time was a critical factor for Claimants, remained “frequently inactive without any justifiable reason or unnecessarily delayed the necessary decisions”.⁶⁴⁷ In support of that assertion, reference was made to both the Building Permit proceedings and the Extraordinary Review Proceedings.
- a. as regards the Extraordinary Review Proceedings, attention was drawn in particular to the fact that:
- i. the Minister had delayed his decisions;
- ii. the First Minister Decision had been rendered late, and had resulted in a remand which had meant the process had had to start again; and
- iii. whilst the First Minister Decision had resulted in a remand, the Second Minister Decision had resulted in termination, despite the fact that the neither the law nor the facts had changed.⁶⁴⁸
- b. As regards the Building Permit proceedings, reliance was placed in particular on the frequent stays of those proceedings by MAL, on the basis of what were alleged to be pretexts.⁶⁴⁹
- 4.148 The Claimants alleged a further violation of due process due to the alleged attempt to deprive them of their right to be heard due to the decision of the Ministry that Tschechien 7 was not a party to the proceedings preceding the First Ministry Decision.⁶⁵⁰
- 4.149 The Claimants also invoked further alleged irregularities following their abandonment of the project, pointing in particular to:
- a. the alleged efforts to gather data and evidence under the pretext of settlement negotiations;
- b. the complaint made against Counsel who had acted for the Claimants domestically;
- c. the alleged efforts by the Ministry of Finance to unduly influence the continuing proceedings before the relevant administrative authorities; and

⁶⁴⁵ Memorial, para. 499, referring to *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 116.

⁶⁴⁶ Memorial, para. 500.

⁶⁴⁷ Memorial, para. 500.

⁶⁴⁸ Memorial, paras. 501-502.

⁶⁴⁹ Memorial, para. 501.

⁶⁵⁰ Memorial, para. 503.

d. the Administrative Offence Proceedings, which were alleged to have been “artificially kept alive to overstate Claimants’ alleged illegality”.⁶⁵¹

4.150 The Claimants submitted that an overall assessment of these various matters led to the conclusion that in sum they “amount to a violation of due process”, and are “improper and discreditable having regard to generally accepted standards of the administration of justice”.⁶⁵²

Transparency and Predictability

4.151 The Claimants further argued that the alleged “violations of due process and rules of procedural propriety equally conflict with the obligation to provide a transparent and predictable business environment in which an investor can plan its business activities”⁶⁵³

4.152 As to the applicable standard in that connection, the Claimants invoked the observations of the tribunal in *Tecmed* that

*The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.*⁶⁵⁴

4.153 The Claimants submitted that the present case was “a prime example where the investor could not rely on a predictable and transparent business environment”.⁶⁵⁵ They submitted that they had carefully planned the project on the basis of “reasonable time schedules, relying on the statutory time-limits in Respondent’s domestic legal order, assuming that Respondent would act within these time limits and in accordance with its own law”,⁶⁵⁶ and further emphasized that “time was of the essence”, as it dictated the feasibility of the project from a business perspective.⁶⁵⁷

4.154 The core of the Claimants’ complaint was that the Respondent had “repeatedly disregarded its own codified timeframes and acted in an unpredictable manner in repeated violation of the

⁶⁵¹ Memorial, para. 504.

⁶⁵² Memorial, para. 505

⁶⁵³ Memorial, para. 506.

⁶⁵⁴ Memorial, para. 507, quoting *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003, para. 154.

⁶⁵⁵ Memorial, para. 508.

⁶⁵⁶ Memorial, para. 508.

⁶⁵⁷ Memorial, para. 508.

law”;⁶⁵⁸ that was argued to have undermined the Claimants’ “careful planning”, with the result that they had had to abandon their original time schedule, and, due to the delays and the effect that they had had on the planned opening of the shopping centre, ultimately had had to abandon the project.⁶⁵⁹

4.155 Quite apart from the alleged lack of predictability and transparency of the Respondent’s overall behaviour, the Claimants alleged that the same was true of numerous individual actions, giving as examples the fact that the Minister for Regional Development had departed from the usual practice by refusing to follow the opinion of the Advisory Committee, and the fact that MAL had allegedly departed from its normal practice of requesting additional documents informally by instead imposing stays accompanying formal requests for the provision of the documents.⁶⁶⁰

4.156 In conclusion, the Claimants argued that the Respondent’s “disregard of its statutory timeframes, legal provisions and established administrati[v]e practice, the arbitral [sic] change of policy and the discrimination towards competitors constitute a breach of Respondent’s duty to provide a predictable business climate”.⁶⁶¹

Legitimate expectations

4.157 Third, the Claimants asserted that “[w]ith regard to the favourable behaviour of the City of [redacted] in the initial phase of Galerie [redacted], Respondent’s subsequent behaviour also violated the concept of protection of legitimate expectations.”⁶⁶²

4.158 The Claimants accepted that “the concept of legitimate expectations created by statements of the host state requires two elements to establish a claim: (i) the existence of government representations and assurances and (ii) the reliance of the investor on such assurances to make its investment”.⁶⁶³

4.159 As to the existence of representations or assurances on the part of the Respondent, the Claimants argued, relying on the decisions in *Azurix v. Argentina* and *Saluka v. Czech Republic*, that such assurances need not be made explicitly, but could also be made implicitly.⁶⁶⁴ They pointed to the assurances allegedly provided by the conduct of the City of [redacted] through changing its zoning plan, which they alleged “created the impression that the City of [redacted] and thereby Respondent [was] supportive of the project”,⁶⁶⁵ and further submitted that that impression was reinforced when the City [redacted] agreed with Claimants to apply for the permits for the external roads and water, allegedly “in the joint hope that Multi

⁶⁵⁸ Memorial, para. 508.

⁶⁵⁹ Memorial, para. 509.

⁶⁶⁰ Memorial, para. 510.

⁶⁶¹ Memorial, para. 511.

⁶⁶² Memorial, para. 512.

⁶⁶³ Memorial, para. 512.

⁶⁶⁴ Memorial, para. 513, citing *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 318; and *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, paras. 351 et seq.

⁶⁶⁵ Memorial, para. 514.

would not appeal a permit applied for by the City of _____ itself”.⁶⁶⁶ Finally, and more generally, they argued that the City _____ had promised to provide equal treatment to both Forum and Galerie, and submitted that that was “sufficient to qualify at least as an implicit assurance”.⁶⁶⁷

4.160 They submitted that they “could rely on these assurances to the extent that their investment would be supported and be treated on an equal footing with the competing developers”.⁶⁶⁸

4.161 The Claimants accepted that an investor could only rely on assurances or representations “if the expectations are reasonable”, and further accepted the Respondent’s position, based on the decision in *Duke Energy Electroquil v. Ecuador* that “in order to have a reasonable expectation an investor has to take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State”.⁶⁶⁹

4.162 However, they disputed the conclusion drawn in that respect by the Respondent. They asserted that the Claimants had been entitled to pay attention to the level of development of the Respondent, and that in light thereof, “an investor generally should not have to expect serious shortcomings in the [Respondent’s] legal system”.⁶⁷⁰ In particular the Claimants argued that the Respondent had been a member of the European Union since 2004, “thereby claiming that its administration will in any respect comply with the standards of good governance”,⁶⁷¹ and that, as a result, the Claimants “did not have to expect any risky investment and did not have to be prepared for a discriminatory, contradictory and obstructive behavior”.⁶⁷² More generally, the Claimants submitted that, although investors investing in States with a low stage of development should expect and may have to accept certain risks, “if an investor invests in a member state of the European Union, he should not have to expect serious shortcomings”.⁶⁷³

iv. Alleged Breach of the Prohibition of Impairment of Investments by Arbitrary or Discriminatory Measures (Article 2(2) BIT)

Impairment by arbitrary measures

4.163 As to their claim of breach of the prohibition of impairment by arbitrary measures by reason of the adoption by the authorities of the Respondent of arbitrary measures, the Claimants argued that the Respondent had denied having breached the standard “by seeking to raise the bar for a

⁶⁶⁶ Memorial, para. 514.

⁶⁶⁷ Memorial, para. 514.

⁶⁶⁸ Memorial, para. 515.

⁶⁶⁹ Memorial., para. 516, quoting *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award of 18 August 2008, para. 340; cf. Answer to Statement of Claim, para. 151.

⁶⁷⁰ Memorial, para. 517.

⁶⁷¹ Memorial, para. 517.

⁶⁷² Memorial, para. 517.

⁶⁷³ Memorial, para. 518.

violation of the standard to a level high enough so that the misconduct of its authorities would remain unremedied”.⁶⁷⁴

- 4.164 The Claimants took issue with the Respondent’s approach on three levels, arguing that
- a. the substantive threshold for arbitrariness submitted by the Respondent, relying on the *ELSI* case, was “in no way consistent with the BIT at hand”;
 - b. that when the correct threshold was applied, the Respondent’s acts were arbitrary;
 - c. that even if the supposedly higher threshold from the *ELSI* case relied upon by the Respondent were to be applied, “it would need to discharge itself from the presumption of arbitrariness”.⁶⁷⁵
- 4.165 As to the first point, the Claimants rejected the Respondent’s reliance on the decision in *ELSI* to the effect that the standard requires conduct which may be classified as “a willful disregard of the due process of law”, or which “shocks, or at least surprises, a sense of judicial propriety”.⁶⁷⁶ They submitted that that standard was “inappropriate” insofar as it had been elaborated in the context of the 1948 US-Italy FCN Treaty, signed at a time “when the expectations as to investment protection were significantly lower than they are today”.⁶⁷⁷ Rather, the Claimants preferred the understanding of “arbitrary” elaborated by the tribunal in *Lauder v Czech Republic*, and relied upon in subsequent decisions, as meaning “depending on individual discretion [...] founded on prejudice or preference rather than on reason or fact”.⁶⁷⁸
- 4.166 As to the second point, the Claimants submitted that the conduct of the Respondent met that standard, insofar as it had not been “based on reason or fact, but on prejudice and preference” and:
- a. pointed to the differences in the permitting process applicable to Forum and Galerie;⁶⁷⁹
 - b. submitted that “in numerous concerted irregularities of the administrative authorities, the intention of the Respondent was to obstruct the Claimants’ project in favour of the competing project”,⁶⁸⁰ and in particular that the relevant authorities, despite having been “aware that time was a critical factor for Claimants, remained frequently inactive without any justifiable reason or unnecessarily delayed the necessary decisions”⁶⁸¹ in both the Building Permit proceedings and the Extraordinary Review Proceedings;

⁶⁷⁴ Memorial, para. 519.

⁶⁷⁵ Memorial, para. 520.

⁶⁷⁶ Memorial, para. 521.

⁶⁷⁷ Memorial, para. 522.

⁶⁷⁸ Memorial, para. 523-524, quoting *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award of 3 September 2001, para. 221.

⁶⁷⁹ Memorial, para. 526.

⁶⁸⁰ Memorial, para. 527.

⁶⁸¹ Memorial, para. 528.

- c. recalled its earlier submissions that the First and Second Minister decisions in the Extraordinary Review Proceedings had been contradictory, and submitted that that only confirmed “the Minister’s intentions to delay the proceedings”;⁶⁸²
 - d. asserted that “a further violation of due process was Respondent’s attempt to deprive Claimants’ from the right to be heard” in the process leading to the First Ministry Decision;⁶⁸³
 - e. relied on the alleged interference by the Ministry of Finance in the administrative proceedings following the sending of the Trigger Letter, suggesting that “incompetent authorities unduly influenced the competent authorities to arrive at conclusions favourable for the state”.⁶⁸⁴
- 4.167 In summary, the Claimants asserted that the relevant behaviour could not be regarded as having been “based on reason or fact. Quite to the contrary, *prima facie* there seems to have been a preference for the competing project.”⁶⁸⁵
- 4.168 In relation to the third point, whilst acknowledging that the International Court in *ELSI* had observed that “without more, unlawfulness cannot be said to amount to arbitrariness”, the Claimants placed particular reliance on the Court’s further statement that “a finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary”.⁶⁸⁶
- 4.169 Relying on academic commentary, they submitted that it was “not for Claimants to prove that there has been ‘something more’ than plain unlawfulness”, and that rather, once the Claimants had established “a *prima facie* case of arbitrariness with serious consequences”, it was for the Respondent to provide “evidence which mitigates or explains the conduct which resulted in such arbitrariness”.⁶⁸⁷ They argued that such an analysis was consistent with the decision in *ELSI*, insofar as the Court had “denied arbitrariness despite proven unlawfulness of one of its officials, but only because Italy could prove that the official acted innocently and had reasonable and comprehensible motives”.⁶⁸⁸
- 4.170 On that basis, the Claimants asserted that despite the unlawful acts of the Respondent being *prima facie* arbitrary “yet Respondent has never explained why its authorities acted contrary to the law persistently”, and that “[u]nless Respondent provides a comprehensible explanation in this regard, these acts must therefore be considered as arbitrary”.⁶⁸⁹

⁶⁸² Memorial, para. 529.

⁶⁸³ Memorial, para. 530.

⁶⁸⁴ Memorial, para. 531 (emphasis in original).

⁶⁸⁵ Memorial, para. 532.

⁶⁸⁶ Memorial, para. 533, referring to *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at p. 74 (para. 124).

⁶⁸⁷ Memorial, para. 534, citing Grierson-Weiler and Laird in Muchlinski et al (eds.) *The Oxford Handbook of International Investment Law* (OUP, 2008), p. 287.

⁶⁸⁸ Memorial, para. 535.

⁶⁸⁹ Memorial, para. 536.

Impairment by discriminatory measures

- 4.171 Relying on the decision in *Saluka v. Czech Republic*, the Claimants further asserted that the prohibition of impairment had been breached by the Respondent in that “Respondent undertook not to discriminate against the investments of German investors”, yet the Forum project had been treated in a much more favourable way than the Galerie project “without any reasonable justification and although both projects are in every way comparable”.⁶⁹⁰
- 4.172 By way of elaboration, the Claimants explained that the two projects had been alike in every aspect relevant for the administrative proceedings, and in particular that they had been of similar size and located in neighbouring locations, separated by only a single road, had been aimed at the same clients, and were to be developed over much the same period.⁶⁹¹
- 4.173 As to the difference in treatment, the Claimants made reference in particular to the difference in length of the respective administrative proceedings, and submitted that this resulted primarily from the fact that Multi had been required to apply for only one building permit, whilst the Claimants had been required to apply for four. Reliance was also placed on the difference in treatment in respect of the overlapping planning permits, as well as the Respondent’s “responsiveness” in relation to motions for extraordinary review, insofar as the Claimants’ application for extraordinary review of Multi’s building permit was “ignored”.⁶⁹²
- 4.174 The Claimants asserted that there had existed no reasonable or justifiable grounds for the alleged difference in treatment, and relying on the decision in *Nykomb v. Latvia*, submitted that the burden of proving the existence of any such justification, and that no discrimination has taken place, fell on the Respondent.⁶⁹³

v. Alleged Breach of the Obligation to Admit Investments (Article 2(1) BIT)

- 4.175 The Claimants maintained their claim of breach of the obligation to admit lawful investments, although apparently in the light of their response to the Respondent’s objections to jurisdiction, they accepted that the investment was the shares and other participatory rights in Tschechien 7 and ECE Praha and that the Galerie project had been “abandoned leaving the ownership of the shares untouched”.⁶⁹⁴
- 4.176 As to the scope of the relevant obligation, the Claimants argued that the concept of admission in the present case was “not limited to the initial acquisition of participatory rights” in the two companies.⁶⁹⁵ They noted that Tschechien 7 had been merely a special purpose vehicle for the development of Galerie, and that Tschechien 7 and ECE Praha had been “an inseparable part of the Galerie project, which was denied admission”.⁶⁹⁶

⁶⁹⁰ Memorial, para. 537-538.

⁶⁹¹ Memorial, para. 539-540.

⁶⁹² Memorial, para. 542-546.

⁶⁹³ Memorial, para. 547-548, citing *Nykomb Synergetics Technology Holding AB v. Republic of Latvia (SCC)*, Award of 16 December 2003, para. 128.

⁶⁹⁴ Memorial, para. 549.

⁶⁹⁵ Memorial, para. 550.

⁶⁹⁶ Memorial, paras. 550-551.

- 4.177 The Claimants further explained that “the establishment of Tschechien 7 and its value is connected to the ability to realize Galerie . . .”; submitted that it would be “artificial” to separate the investment into, on the one hand, the creation of Tschechien 7, and on the other, the project as such; and posited that in the case of a “complex investment” such as the Galerie . . . project “which necessarily consist of several interconnected parts”, “an investment can be seen as admitted only if the investor was able to realize his business goal”.⁶⁹⁷
- 4.178 The Claimants submitted that the passage from *Fraport* relied upon by the Respondent in its Answer to the Statement of Claim was not to the point, as it related “only to the implications of illegal investor behavior and the relevant timeframe in which illegality had to exist”.⁶⁹⁸
- 4.179 As to the substance of the claim, the Claimants took the position that the allegedly illegal withholding of the necessary permits amounted “*de facto* to a denial of admission of the investment”, on the basis that the building permit, if granted, would “be useless, because due to the saturation of the market and the opening of Forum, no shopping center as originally planned can open. The realization of Galerie . . . was only possible in this short time frame until 2010 or not at all”.⁶⁹⁹

vi. Alleged Breach of the Prohibition of Expropriation (Article 4(2), BIT)

- 4.180 The Claimants also maintained their claim that the conduct of the Respondent constituted “a measure tantamount to expropriation” within the meaning of Article 4(2) of the BIT, suggesting that the overall conduct in the administrative proceedings amounted to “a taking of sufficient intensity”, and that it did not fall within the exception for regulatory takings and police powers.⁷⁰⁰
- 4.181 As to the alleged taking, the Claimants submitted that “[a]ll illegal acts of the Czech authorities delaying and disrupting the administrative proceedings and thereby impeding the realization of Galerie . . . together constitute the taking, in particular the withholding of the building permits”,⁷⁰¹ asserted that the cumulative effect of the various measures had the same effect as a single act and argued that it was well accepted that a “creeping” expropriation can take place through a series of acts.⁷⁰²
- 4.182 In support, the Claimants invoked previous decisions, including the decisions in *Metalclad v. Mexico*, *Goetz v. Burundi* and *Middle East Cement Shipping v. Egypt*, which it submitted were all cases in which “necessary permits such as construction permits were withheld, incapacitating the investor to pursue its business”, and in which tribunals had found an indirect expropriation as a result.⁷⁰³

⁶⁹⁷ Memorial, para. 551.

⁶⁹⁸ Memorial, para. 552.

⁶⁹⁹ Memorial, para. 553.

⁷⁰⁰ Memorial, para. 554.

⁷⁰¹ Memorial, para. 555.

⁷⁰² Memorial, para. 555.

⁷⁰³ Memorial, para. 556-559.

- 4.183 The Claimants accepted that the required intensity of any taking had to be substantial insofar as it must “deprive the foreign investor of fundamental rights of ownership or interfere with the investment for a substantial period of time”.⁷⁰⁴ They argued that the required intensity was present, insofar as there had been a “severe impact on the investment as a whole, as Claimants were deprived to make economic benefits of their investment.”⁷⁰⁵
- 4.184 They explained that the conduct of the Respondent had had a “severe economic impact” insofar as the Claimants had been forced to abandon the project, leaving them with participatory interests in a company “the only asset of which is the economically worthless formal ownership of the property. The use, enjoyment and management of the business has thereby been rendered useless for Claimants”.⁷⁰⁶
- 4.185 As to the possibility that the building permit might still be issued at some point in the future, the Claimants emphasized that that would be of little value, as, due to the opening of Forum, the retail market has been saturated, “thereby invalidating any chances of interesting an investor and realising a shopping center as originally envisaged”.⁷⁰⁷ As a result, the Claimants submitted that they were no longer able “to pursue their business”, and asserted that, in the circumstances of the present case, a late building permit “is equivalent to no building permit at all”.⁷⁰⁸
- 4.186 The Claimants also stressed that, whilst they were still in possession of the land plots on which Galerie was to be built, those plots, even if accompanied by the necessary permits, would be “worthless for Claimants, because their concept for a retail center can no longer be pursued”.⁷⁰⁹ They made clear that a building permit was only now necessary to enable a sale of the plots, insofar as, if a building permit were in place for a shopping centre, it made it more likely that a purchaser would be able to build a different project on the land.⁷¹⁰
- 4.187 The Claimants submitted that the authorities made clear that the fact that they retained the formal ownership and control over the land was irrelevant, as what was important was the deprivation of economic benefit.⁷¹¹ They distinguished the decisions in *Pope & Talbot v. Canada*, *Feldman v. Mexico*, and other authorities relied upon by the Respondent on the basis that they all concerned situations in which, on the facts, the investor had not been deprived of the economic benefit of its investment, but had only suffered a diminution in the amount of profits it was able to earn.⁷¹²
- 4.188 They invoked *Middle East Cement Shipping v. Egypt*, as an example of a case in which a tribunal had accepted the possibility of expropriation of particular rights forming part of a

⁷⁰⁴ Memorial, para. 560.

⁷⁰⁵ Memorial, para. 560.

⁷⁰⁶ Memorial, para. 561.

⁷⁰⁷ Memorial, para. 562.

⁷⁰⁸ Memorial, para. 562.

⁷⁰⁹ Memorial, para. 563.

⁷¹⁰ Memorial, para. 563.

⁷¹¹ Memorial, para. 564.

⁷¹² Memorial, paras. 565-568.

wider business operation, without examining the question of whether the investor retained control over the entire investment.⁷¹³

4.189 Finally, although accepting that the exercise of general regulatory powers in the public interest “do not constitute an expropriation”,⁷¹⁴ the Claimants disputed that the Respondent’s actions constituted “general non-discriminatory measures” of the type required.⁷¹⁵ Rather, the Claimants asserted, the relevant conduct had been “directed individually against Claimants in a discriminatory manner”.⁷¹⁶

4. The Respondent’s Counter-Memorial

a. Overview and Preliminary Points

4.190 At the outset of its Counter-Memorial, the Respondent placed emphasis upon:

- a. the unrealistic nature of Claimants’ alleged expectations as to the time it would take to secure the Planning and Building Permits;
- b. the procedural mistakes of Tschechien 7, including its repeated failure properly to appeal the decisions now complained of by the Claimants; they argued that the failure to exhaust local remedies barred the claims that those decisions breached the treaty;
- c. the illegal nature of the excessive excavations; the excessive excavations directly resulted in the Groundworks Removal Proceedings, which in turn resulted in the suspension of the appellate proceedings in relation to the Building Permit.⁷¹⁷

4.191 The Respondent further underlined that the failure to appeal the relevant decisions precluded any international claim, and argued that, although the procedural requirement to exhaust local remedies was not applicable, in the case of a denial of justice claim the requirement was substantive.⁷¹⁸ They reiterated their argument that the Claimants’ claims were all disguised claims for denial of justice insofar as they sought to challenge the relevant administrative decisions, and asserted that the Claimants “either failed to appeal or successfully appealed almost all of the decisions” now challenged, the only exception being the First Minister decision, against which no remedies had been available, which they submitted fell far short of the threshold for denial of justice.⁷¹⁹

⁷¹³ Memorial, para. 569, referring to *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award of 12 April 2002, paras. 101, 105, 107 and 127.

⁷¹⁴ Memorial, para. 571.

⁷¹⁵ Memorial, para. 571.

⁷¹⁶ Memorial, para. 571.

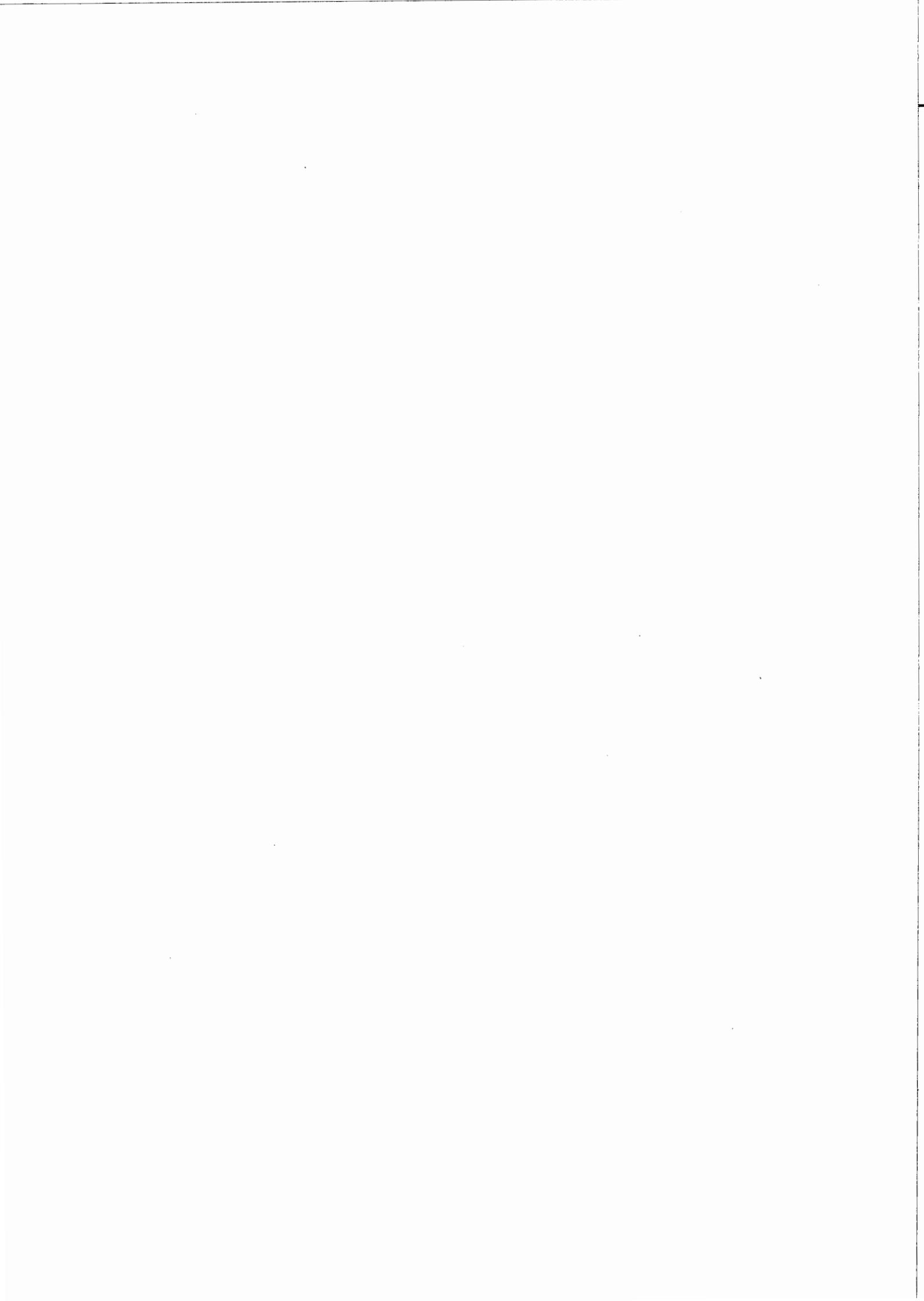
⁷¹⁷ Counter-Memorial, paras. 2-6.

⁷¹⁸ Counter-Memorial, paras. 7-8.

⁷¹⁹ Counter-Memorial, paras. 9-10.



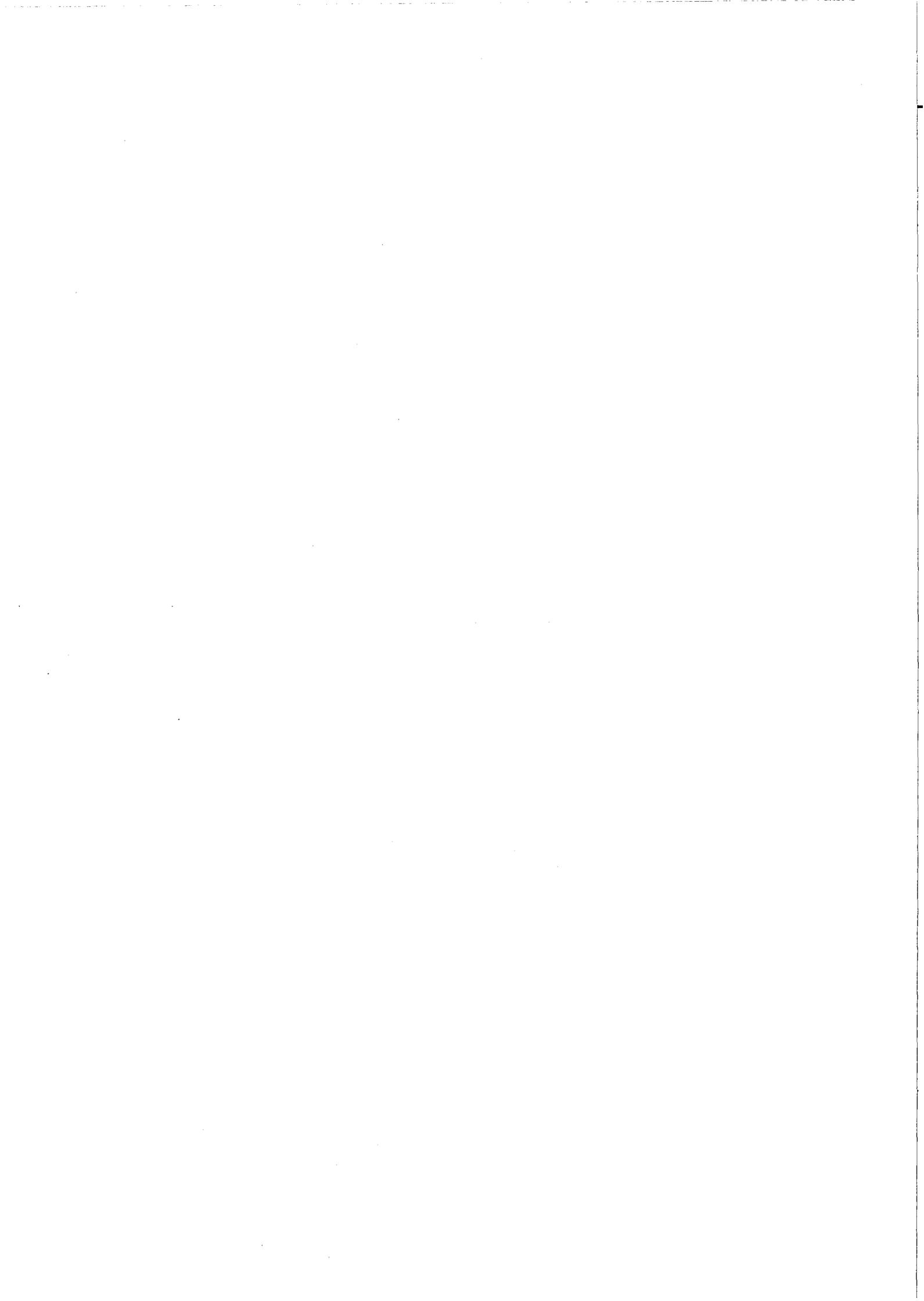


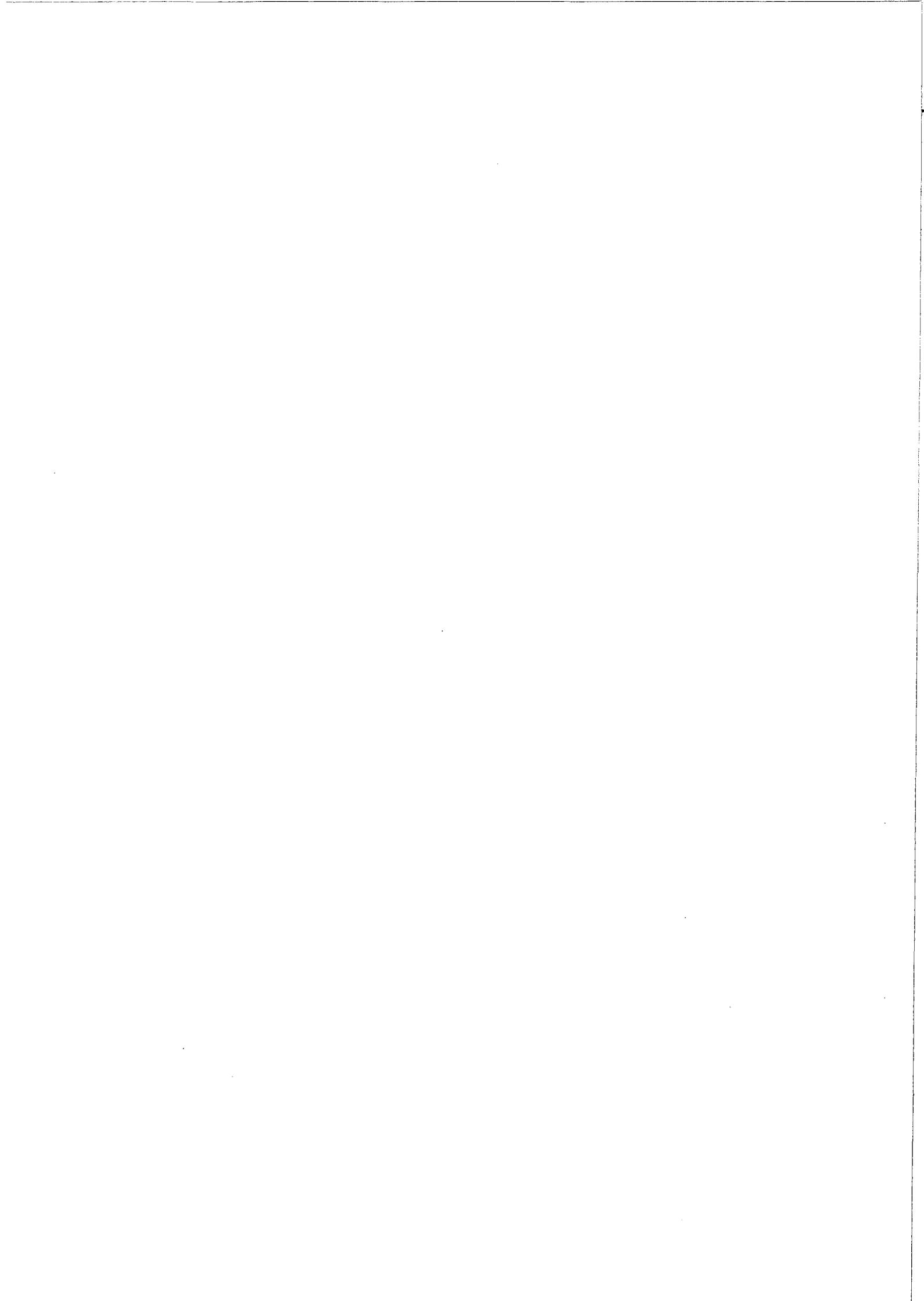














c. Merits of the Claimants' Claims of Breach of the BIT

4.251 As regards the merits of the Claimants' claims, the Respondent noted as a preliminary point that there existed a time-limitation, insofar as the Claimants had claimed that they abandoned their project in mid-October 2008, and claimed the damages allegedly sustained as a result of that abandonment. Relying on "basic principles of causation", the Respondent argued that any breach had to precede the occurrence of damage, with the result that the Respondent could only be liable for the damages claimed if the Claimants were able to establish a breach of the BIT prior to mid-October 2008.⁸³⁷

4.252 On that basis, the Respondent rejected as irrelevant any reliance by the Claimants on events after mid-October 2008, including the Claimants' reliance on the fact that the Building Permit for the main building had still not been issued; in addition, it noted that the Claimants' claim that the Respondent had violated the BIT by the entirety of its conduct, rather than by individual measures, was similarly temporally limited.⁸³⁸

i. Denial of Justice

4.253 The Respondent repeated the argument made in its Answer to the Statement of Claim that the essence of the Claimants' claims was that the Czech authorities had issued incorrect decisions and caused delays, and that those claims were in essence disguised claims for denial of justice.⁸³⁹

4.254 It emphasized that the Claimants had complained only of alleged procedural mistakes and had not alleged that any final decision was substantively incorrect, and asserted that "the only effect of these procedural decisions was that Tschechien 7 did not obtain a final and binding building permit for the main building at a time when Tschechien 7 (erroneously) expected its issuance".⁸⁴⁰

4.255 Further, it reiterated its argument that denial of justice claims could only be brought where there had been exhaustion of local remedies, and observed that, although the Claimants had complained of first-instance decisions, those decisions had either been corrected on appeal, or not validly appealed (either because no appeal was lodged, or any appeal was filed out of time).⁸⁴¹

4.256 On that basis, the Respondent repeated its argument that, although the Claimants' claims had been formulated as breach of substantive treaty standards, they were to be assessed against the

⁸³⁶ Counter-Memorial, para. 217.

⁸³⁷ Counter-Memorial, para. 283.

⁸³⁸ Counter-Memorial, para. 284-285.

⁸³⁹ Counter-Memorial, para. 278.

⁸⁴⁰ Counter-Memorial, para. 279.

⁸⁴¹ Counter-Memorial, para. 280.

principles underlying the standard of denial of justice, and measured against that standard, they were without merit and were to be rejected.⁸⁴²

- 4.257 By way of expansion of those points, it first argued that the principles embodied in the standard of denial of justice specifically addressed the interplay between the responsibility of States under international law and their decision-making in multi-level administrative or judicial proceedings. It submitted that denial of justice could thus be seen as *lex specialis* governing state liability in such matters, despite the existence of other, more general standards of protection.⁸⁴³
- 4.258 Relying on the decision in *Loewen*, the Respondent submitted that, “a low-level administrative or judicial decision can constitute an international delict only if no effective remedy is available or if the aggrieved party’s applications for remedy do not lead to redress”,⁸⁴⁴ and reiterated its position that a State should only be judged by the final product of its decision-making processes, and “will only be held liable if the overall process of its decision-making is erroneous”.⁸⁴⁵
- 4.259 It submitted that those specific principles were “embodied in the standard of denial of justice”, and that the Claimants’ claims should be assessed against that standard; it relied in that respect on the decisions in *Amco v. Indonesia* and *Jan de Nul v. Egypt*, as examples of cases in which tribunals had applied the denial of justice standard to court and administrative proceedings.⁸⁴⁶
- 4.260 In relation to the Claimants’ argument that the tribunal in *Jan de Nul* had applied both the denial of justice and fair and equitable treatment standards, the Respondent responded that the Claimants had overlooked the fact that the tribunal had applied those standards to different facts, noting in particular that the conduct of Egypt in multi-level decision-making proceedings had been assessed against the denial of justice standard, whilst only conduct outside those proceedings had been assessed against the fair and equitable treatment standard.⁸⁴⁷
- 4.261 The Respondent further argued that, in any case, even where similar claims had been assessed against the substantive standards of protection relied upon by the Claimants, tribunals had nevertheless “applied the principles underlying the standard of denial of justice”; it relied upon the observations of the ad hoc Committee on annulment in *Helnan v. Egypt*, which it submitted were “consistent with the traditional principles that a lower-level decision can constitute an international delict only if it was not redressed upon appeal or if such appeal would have been futile”.⁸⁴⁸

⁸⁴² Counter-Memorial, para. 282.

⁸⁴³ Counter-Memorial, para. 287.

⁸⁴⁴ Counter-Memorial, para. 289, citing *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003, para. 154.

⁸⁴⁵ Counter-Memorial, para. 289.

⁸⁴⁶ Counter-Memorial, para. 290.

⁸⁴⁷ Counter-Memorial, para. 291, referring to *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award of 6 November 2008, para. 191.

⁸⁴⁸ Counter-Memorial, paras. 292-294, citing *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision of the *ad hoc* Committee of 14 June 2010, paras. 48-50.

- 4.262 It also invoked the observations of the ICJ in *ELSI* that a measure which has been quashed by a higher court or authority cannot be said to be arbitrary in the sense of international law as reflecting the “traditional principle of the standard of denial of justice that an incorrect decision does not constitute an international delict if it was remedied by a superior authority”.⁸⁴⁹
- 4.263 In the alternative, the Respondent argued that the Claimants had failed to respond to the substance of its argument based on denial of justice; it submitted that the Claimants had attempted to sidestep that argument, and had not explained why first-instance decisions of the Czech administrative authorities had breached the BIT. Rather, the Respondent submitted, the Claimants had concentrated on “a mostly academic discussion” of whether the BIT granted a high level of protection, and had attempted to “dress up” their denial of justice claims as alleged breaches of provisions of the BIT.⁸⁵⁰
- 4.264 The Respondent disputed the Claimants’ assertion that the BIT provides for a high level of protection, and that the standards under the BIT are higher than those under customary international law and NAFTA:⁸⁵¹
- a. first, it took the position, relying on a passage from *Mondev*, that investment treaties should be interpreted neither expansively or restrictively;⁸⁵²
 - b. second, it argued that the treaty “is an instrument of public international law and must be interpreted in accordance with such principles, including customary law”,⁸⁵³ and that the standards of protection in the BIT, even if autonomous, must be interpreted against the relevant background, including the fact that many of the standards were first introduced by Treaties on Commerce and Navigation. The Respondent emphasized that the use of the term “arbitrary” must be understood as having its ordinary meaning under international law.⁸⁵⁴
 - c. third, the Respondent complained that it was disingenuous of the Claimants to argue that the Respondent was attempting artificially to lower the standard of protection under the BIT by reference to NAFTA and the customary international law standard, since on its terms that criticism was only even arguably applicable to the fair and equitable treatment standard; it asserted that the Claimants’ argument was in any case incorrect,⁸⁵⁵
 - d. fourth, the Respondent characterized the Claimants’ argument, based on the historical context, that the Parties intended a high level of protection, as “pure speculation”,

⁸⁴⁹ Counter-Memorial, para. 295, citing *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at p. 74 (para. 124).

⁸⁵⁰ Counter-Memorial, para. 298.

⁸⁵¹ Counter-Memorial, para. 299.

⁸⁵² Counter-Memorial, para. 301, citing *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 43.

⁸⁵³ Counter-Memorial, para. 302.

⁸⁵⁴ Counter-Memorial, para. 302.

⁸⁵⁵ Counter-Memorial, para. 303.

which was not supported by the *travaux préparatoires* or other contemporaneous documentary evidence;⁸⁵⁶

- e. fifth, the Respondent denied that the supposed high level of protection under the BIT allegedly intended by the Parties could be derived from its object and purpose, or the preamble; it pointed out that Germany had more or less contemporaneously concluded a bilateral investment treaty with Poland having the same object and purpose and an almost identical preamble, yet the protection offered was considerably lower insofar as the offer of arbitration extended only to disputes relating to expropriation or free transfer.⁸⁵⁷

4.265 As regards the Claimants' suggestion that the denial of justice standard was non-exclusive, and its argument that, if the Respondent's argument were to be accepted, almost every investment dispute would have to be treated as a claim for denial of justice, the Respondent responded that its argument was far narrower; its position was merely that "liability for alleged procedural mistakes in the conduct of administrative proceedings that were remediable by ordinary appeals must be assessed against the standard of denial of justice".⁸⁵⁸ The Respondent in any case took issue with the premise underlying the Claimants' argument, emphasizing that breaches of an investment treaty could arise from acts of a State which did not involve any "proceeding", most notably the passage of legislation and the acts of the highest executive bodies, and submitted that "only a small minority" of investment cases concerned decisions in administrative proceedings.⁸⁵⁹

4.266 The Respondent further attacked as misconceived the Claimants' argument that the denial of justice standard was limited to cases in which the investor sought redress before the domestic courts. It argued that the reliance by the Claimants on the decision in *Mondev* was misplaced, insofar as the relevant passage did not relate to the standard for denial of justice, but rather reiterated the principle that investment tribunals are not courts of appeal, and that their role is not to review the decisions of domestic courts on questions of domestic law.⁸⁶⁰ The Respondent further observed that the *Mondev* tribunal had been careful to stress that its willingness to review administrative decisions was limited to "unremedied acts", on that basis submitted that the decision in *Mondev* did not support the Claimants' position, and asserted that the same was true of the decision in *Azinian*.⁸⁶¹ Finally, the Respondent submitted that investment tribunals should "exercise restraint when reviewing highly complex and technical matters of domestic law", and invoked the observations of the tribunal in *Generation Ukraine*, which had observed, inter alia, that in that case,

the only possibility [...] for the series of complaints relating to highly technical matters of Ukrainian planning law to be transformed into a BIT violation would have been for the Claimant to be denied justice before the

⁸⁵⁶ Counter-Memorial, para. 304.

⁸⁵⁷ Counter-Memorial, para. 305.

⁸⁵⁸ Counter-Memorial, para. 308.

⁸⁵⁹ Counter-Memorial, para. 309.

⁸⁶⁰ Counter-Memorial, paras 310-311, referring to *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 126.

⁸⁶¹ Counter-Memorial, para. 312.

*Ukrainian courts in a bona fide attempt to resolve these technical matters.*⁸⁶²

- 4.267 The Respondent further observed that the Claimants had introduced a new claim for denial of justice in their Memorial, and observed that the Claimants appeared to be arguing that “the Czech Republic’s overall conduct constituted denial of justice, even though its individual decisions did not”.⁸⁶³ It noted that the Claimants had disregarded the temporal limitation on their claims resulting from the fact that the damage claimed was alleged to have occurred in mid-October 2008.⁸⁶⁴
- 4.268 The Respondent further attacked the Claimants’ denial of justice claim on the basis that that standard could only be violated by a final and binding measure which was not or could not have been remedied upon appeal, which it referred to as a “substantive” requirement of exhaustion of local remedies; it submitted that that approach had been generally applied by international tribunals both under the denial of justice standard, and other substantive standards.⁸⁶⁵ It distinguished the substantive requirement of exhaustion from the procedural requirement of exhaustion under customary international law (and which it noted was applicable as a condition of admissibility before some international bodies, including the European Court of Human Rights), which it recognized was not provided for in the BIT, and emphasized that it had not argued that any procedural requirement was applicable. It submitted that the Claimants confused these two concepts.⁸⁶⁶
- 4.269 The Respondent argued:
- a. that the substantive requirement of exhaustion in relation to claims of denial of justice was necessary in order to preserve the integrity of its multi-level administrative system,⁸⁶⁷
 - b. that nothing in the BIT submitted that the Parties had intended to allow investors to bypass the domestic system of remedies, and seek international justice in order to challenge first-instance administrative decisions;⁸⁶⁸
 - c. relying on the decisions in *Jan de Nul* and *Chevron v Ecuador*, as well as upon the writings of Paulsson, that the substantive requirement of exhaustion in the context of denial of justice was well-accepted,⁸⁶⁹ the Respondent emphasized that the Claimants

⁸⁶² Counter-Memorial, para. 313, quoting *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of 16 September 2003, para. 20.33.

⁸⁶³ Counter-Memorial, paras. 314-315.

⁸⁶⁴ Counter-Memorial, para. 316.

⁸⁶⁵ Counter-Memorial, para. 319.

⁸⁶⁶ Counter-Memorial, paras. 320-321.

⁸⁶⁷ Counter-Memorial, para. 322.

⁸⁶⁸ Counter-Memorial, para. 323.

⁸⁶⁹ Counter-Memorial, para. 324, referring to *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award of 6 November 2008, para. 191; *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (UNCITRAL/PCA), Partial Award on the Merits of 30 March 2010, para. 321; and J. Paulsson, *Denial of Justice in International Law* (CUP, 2005), pp. 100 et seq.

had provided no authority in support of their position that the substantive requirement did not apply, save from an isolated academic commentator;⁸⁷⁰

- d. that the reliance by the Claimants on the decision in *Mondev* was misplaced, insofar as in the relevant passage quoted by them the tribunal was merely explaining that the claimants in that case had not been required to bring proceedings before the domestic court (i.e. that there was no procedural requirement of exhaustion under NAFTA), but that once they had done so, they could only bring a claim for denial of justice;⁸⁷¹
- e. that the reliance by the Claimants on the decision on jurisdiction in *Waste Management* likewise demonstrated their confusion of the substantive and procedural requirements of exhaustion, insofar as the tribunal in that case had not dealt with denial of justice at all, but had rather simply stated that there was no procedural requirement of exhaustion under NAFTA.⁸⁷²

4.270 The Respondent further disputed the suggestion by the Claimants that the requirement of exhaustion of local remedies did not apply in cases of delay, and argued that it clearly did apply where an effective remedy against delay existed. It asserted that such a remedy had existed in the present case. In support of its argument on the point of principle, it again referred to the decisions in *Jan de Nul* and *Chevron v. Ecuador*.⁸⁷³ Referring to the latter decision, it also emphasized that any failure to exhaust available local remedies was in any case relevant insofar as it constituted a contributing cause of any delay.⁸⁷⁴

4.271 In addition, the Respondent noted that the situations at issue in both *Jan de Nul* and *Chevron* related to “delays resulting from inactivity rather than formal procedural decisions”,⁸⁷⁵ and that, in contrast, the Claimants complained of specific decisions to suspend the proceedings relating to the Building Permits which were subject to appeal, and would not have become binding unless upheld upon a timely appeal. On that basis, the Respondent asserted that the Claimants had failed to exhaust remedies which had been significantly better than those available to the claimants in those two cases.⁸⁷⁶

4.272 In relation to the Claimants’ position that exhaustion was not required in relation to procedural decisions to stay proceedings, even if they were subject to appeal, the Respondent noted that such an argument was “patently incorrect”.⁸⁷⁷ The Respondent submitted that if an investor sought to hold a State liable for incorrect procedural decisions, then the State had to be given

⁸⁷⁰ Counter-Memorial, para. 324.

⁸⁷¹ Counter-Memorial, para. 325.

⁸⁷² Counter-Memorial, para. 326.

⁸⁷³ Counter-Memorial, paras. 327-330, quoting *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award of 6 November 2008, para. 256, and *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (UNCITRAL/PCA), Partial Award on the Merits of 30 March 2010, para. 326.

⁸⁷⁴ Counter-Memorial, para. 331, quoting *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (UNCITRAL/PCA), Partial Award on the Merits of 30 March 2010, para. 327.

⁸⁷⁵ Counter-Memorial, para. 332.

⁸⁷⁶ Counter-Memorial, para. 332.

⁸⁷⁷ Counter-Memorial, para. 334.

the opportunity to “speak the last word on those procedural issues”;⁸⁷⁸ it submitted that the Claimants could not, on the one hand, complain that procedural decisions were sufficiently serious to constitute a denial of justice, whilst on the other, suggesting that they were not serious enough to require exhaustion of local remedies.⁸⁷⁹ It relied on the observation of the tribunal in *Chevron v. Ecuador* that resort to remedies for delay was required “in the same manner as in other contexts”.⁸⁸⁰

- 4.273 In support of its position that the requirement of exhaustion of local remedies was applicable, the Respondent submitted that the Claimants’ subsidiaries had had a reasonable and effective remedy (in the form of an administrative appeal) against every decision as to which complaint was made, with the exception of the First Minister Decision.⁸⁸¹
- 4.274 Although accepting that the burden of proof was upon the Respondent to show that remedies existed, relying on the decision in *Chevron v. Ecuador*, it submitted that it was for the Claimants to show that any such remedies were either ineffective, futile, or unsuccessful.⁸⁸²
- 4.275 The Respondent reiterated that, under the relevant provisions of the Code of Administrative Procedure, the subsidiaries of the Claimants had had:
- a. a right to appeal each first-instance administrative decision, including the two Ministry Decisions, as well as the procedural decisions of RAL in the appellate proceedings. It pointed out that the effect of an appeal was that the decision challenged would not become legally binding unless and until it was upheld by the superior body;⁸⁸³ and
 - b. the right to file a motion for failure to act so as to request the superior authority to take action against delay once the statutory time-limit had been exceeded.⁸⁸⁴
- 4.276 In addition, the Respondent noted that final and binding administrative decisions which had been appealed within administrative proceedings could in any case be challenged before the Czech administrative courts, and that in such proceedings, the courts could order that an administrative decision be issued within a fixed time-limit.⁸⁸⁵
- 4.277 The Respondent observed that the Claimants had not disputed the existence of those remedies, although they had disputed their effectiveness. As to the Claimants’ arguments as to the effectiveness of the available remedies:

⁸⁷⁸ Counter-Memorial, para. 333.

⁸⁷⁹ Counter-Memorial, para. 335.

⁸⁸⁰ Counter-Memorial, para. 336, citing *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (UNCITRAL/PCA), Partial Award on the Merits of 30 March 2010, para. 326.

⁸⁸¹ Counter-Memorail, para. 337.

⁸⁸² Counter-Memorial, para. 337, citing *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (UNCITRAL/PCA), Partial Award on the Merits of 30 March 2010, para. 329.

⁸⁸³ Counter-Memorial, para. 338.

⁸⁸⁴ Counter-Memorial, para. 339; in addition, it noted the availability in certain circumstances of various types of extraordinary review proceedings, although making clear that it did not rely on the non-exhaustion of those remedies: *ibid.*, para. 340.

⁸⁸⁵ Counter-Memorial, para. 341.

- a. first, the Respondent asserted that the Claimants had grossly mischaracterized its position insofar as they had submitted that the Respondent itself did not regard the appeal to RAL against the Third Stay as effective since it prevented MAL from resuming the proceedings *sua sponte*. The Respondent emphasized that the relevant appeals against the Third Stay had been filed out of time, and had therefore obviously been ineffective, but submitted that a timely appeal would have been effective. In support, it pointed to the Claimants' success on their appeal against the Third Stay insofar as it concerned the water-management proceedings.⁸⁸⁶ In addition, it argued that the failure to appeal against the Third Stay in a timely manner as regards the other proceedings prevented the Claimants from arguing that the Third Stay had breached the BIT.⁸⁸⁷
- b. second, the Respondent rejected Claimants' argument that an appeal against RAL's decision of 12 March 2009 to stay the proceedings in relation to the appeal against the Building Permit in respect of the main construction "would not have changed anything", pointing out that an appeal could have been filed against that decision with the Ministry, which, if upheld, would have meant that the stay would not have become final and RAL would have had to continue the appellate proceedings, and that remedy would therefore have been effective.⁸⁸⁸ The Respondent accepted that such an appeal would not have changed matters, given that the project had already been abandoned, but submitted that this did not go to the effectiveness of the appeal, but rather indicated that events after mid-October 2008 could provide no basis for the Claimants' claims.⁸⁸⁹
- c. as for the Claimants' suggestion that a motion for failure to act was not applicable to a decision to stay proceedings, the Respondent accepted that this was the case, but asserted that it had never submitted otherwise, and that its position was rather that a decision to stay could have been appealed;⁸⁹⁰
- d. finally, as regards the Claimants' challenge to the effectiveness of a motion for failure to act on the basis that the superior body required time in order to review the matter, and that it could in any case merely set a further deadline within which the decision was to be taken, the Respondent submitted that this highlighted the Claimants' misunderstanding of Czech administrative law, and the role of international law. In particular, it explained that Czech law did not make compliance with statutory deadlines a condition of the legality of the decision, and argued that, similarly, delays in the issuing of a decision raised no issues under international law. It submitted that, on the Claimants' case, any incorrect first-instance decision would violate international law, insofar as it had to be appealed and thereby created delay, which by definition would be unremediable; it argued that, on the Claimants' case, the BIT would become a guarantee that the relevant authorities would issue substantively

⁸⁸⁶ Counter-Memorial, paras. 342-344.

⁸⁸⁷ Counter-Memorial, para. 345.

⁸⁸⁸ Counter-Memorial, para. 346.

⁸⁸⁹ Counter-Memorial, para. 347.

⁸⁹⁰ Counter-Memorial, para. 348.

correct decisions within the relevant time limits, failing which they would breach the BIT.⁸⁹¹ It further argued that the approach advocated by the Claimants would negate the requirement of exhaustion, since the delay inherent in pursuit of any remedy would *per se* violate the BIT.⁸⁹²

4.278 Finally, the Respondent rejected the Claimants' suggestion that they had done "everything in their power", and:

- a. emphasized that the relevant question was not the total number of appeals filed, but whether appeals had been filed against the decisions of which complaint was made, and pointed out that no appeal had been filed against the First Stay; that the appeal against the Second Stay had been withdrawn following the lifting of the stay, and that the appeal against the Third Stay had been filed late (although it noted that the stay was in any case lifted by MAL in the light of RAL's indication that it was improper);⁸⁹³ and
- b. rejected any reliance on the complaints made to the Prime Minister and the Minister or the approach made to the German Ambassador as being in any way relevant to the question of exhaustion.⁸⁹⁴

4.279 As to the standard for denial of justice, the Respondent adopted the formulation put forward by the *Loewen* tribunal of "manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety";⁸⁹⁵ it also relied upon the observations of the *Chevron v. Ecuador* tribunal that the threshold for denial of justice is high, and that while the standard was objective and did not require a showing of bad faith "it nevertheless requires the demonstration of 'a particularly serious shortcoming' and egregious conduct that 'shocks, or at least surprises, a sense of judicial propriety'".⁸⁹⁶

4.280 Further, relying on Paulsson, the Respondent also argued that the factual situation had to be "egregious",⁸⁹⁷ and that a mere violation of domestic law did not in and of itself constitute a denial of justice, a proposition for which it also relied on *Jan de Nul*.⁸⁹⁸ It further invoked the comments of the Tribunal in *Pantechniki v. Albania* to the effect that, although the general rule was that a mere error in the interpretation of domestic law would not as such involve responsibility, a wrongful application of the law could nevertheless provide "elements of proof

⁸⁹¹ Counter-Memorial, paras. 350-352.

⁸⁹² Counter-Memorial, para. 353.

⁸⁹³ Counter-Memorial, para. 355.

⁸⁹⁴ Counter-Memorial, para. 356.

⁸⁹⁵ Counter-Memorial, para. 359, quoting *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003, para. 132.

⁸⁹⁶ Counter-Memorial, para. 359, quoting *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (UNCITRAL/PCA), Partial Award on the Merits of 30 March 2010, para. 244.

⁸⁹⁷ Counter-Memorial, para. 360-361, quoting J. Paulsson, *Denial of Justice in International Law* (CUP, 2005), pp. 60, 73 and 76.

⁸⁹⁸ Counter-Memorial, para. 361, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award of 6 November 2008, para. 206

of a denial justice”, but that the test in that regard was stringent insofar as it requires that “the error must be of a kind which no ‘competent judge could reasonably have made’”.⁸⁹⁹

4.281 As to the merits of the Claimants’ claims of denial of justice, the Respondent asserted that “no measure complained of by the Claimants, or any combination of measures, comes even remotely close to egregious conduct or a particularly serious shortcoming”⁹⁰⁰ constituting a denial of justice, and submitted that all that the Claimants had complained of were alleged procedural errors in the application of Czech administrative law.⁹⁰¹ It submitted that in the majority of cases, there had in fact been no error, and that where errors had occurred, they had been remedied on appeal.⁹⁰²

4.282 As to the Extraordinary Review Proceedings, the Respondent:

- a. asserted that the initiation of the review proceedings by the Ministry was appropriate because the Ministry had reasonably determined that the Planning Permit had “serious deficiencies”, and noted that the Claimants had offered no evidence supporting the assertion that the Extraordinary Review Proceedings had been initiated in order to interrupt the Building Permit proceedings;⁹⁰³
- b. recalled that in the Answer to the Statement of Claim, it had stated its position that the First Ministry Decision and the Second Ministry Decision could not constitute a denial of justice insofar as they had been successfully appealed by Tschechien 7, and accordingly had never become legally effective. The Respondent noted that the Claimants appeared to have accepted that that was the case insofar as they had not asserted in the Memorial that either decision constituted a denial of justice;⁹⁰⁴
- c. asserted that the First Minister Decision had not constituted a denial of justice; the Respondent denied, as “unsupported as a matter of both fact and law”, the Claimants’ assertions both that the Minister had deviated from normal administrative practice without justification by not following the advice of the advisory committee and remanding the case, and that the motivation for doing so was to keep the proceedings alive and obstruct the Claimants’ project.⁹⁰⁵ It asserted that there existed no administrative practice according to which a Minister must always follow the advice of an Advisory Committee, and noted that, as a matter of law, a Minister was not bound to do so.⁹⁰⁶ It further asserted that the First Minister Decision had not been improperly motivated, and noted that no evidence had been put forward showing that the Minister had intended to obstruct the project; it observed that if the Minister had in fact desired to obstruct the project, he would have upheld the First Ministry

⁸⁹⁹ Counter-Memorial, para. 362, citing *Pantehniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21), Award of 30 July 2009, para. 94.

⁹⁰⁰ Counter-Memorial, para. 363.

⁹⁰¹ Counter-Memorial, para. 363.

⁹⁰² Counter-Memorial, para. 363.

⁹⁰³ Counter-Memorial, para. 364.

⁹⁰⁴ Counter-Memorial, para. 365.

⁹⁰⁵ Counter-Memorial, para. 366.

⁹⁰⁶ Counter-Memorial, para. 366.

Decision rather than quashing it and remanding the matter. Relying on expert evidence, it further took the position that the decision to remand was correct as a matter of law. Finally, it argued that even if the decision to remand had been incorrect, the difference between remand and reversal and termination of the proceedings was a “subtle point of Czech administrative procedure that *prima facie* cannot meet the high threshold for denial of justice”;⁹⁰⁷

- d. finally, noted that the basis for Tschechien7’s application to discontinue the proceedings before the Municipal Court in Prague for review of the First Minister Decision was its acknowledgement that the First Minister Decision had been remedied by the Second Minister Decision.⁹⁰⁸

4.283 As to the Building Permit proceedings, the Respondent likewise submitted that there had been no denial of justice. In particular, as regards the Third Stay:

- a. although admitting that MAL’s decision had been incorrect, the Respondent recalled that, in its Answer to the Statement of Claim, it had argued that Tschechien 7 had failed to appeal the relevant decisions in a timely manner and that that fact barred the Claimants’ claim of denial of justice, but that the Claimants in their Memorial had merely repeated their claim without joining issue in that regard;⁹⁰⁹
- b. the Respondent noted that the evidence of Mr [redacted] as that he had been motivated to adopt the Third Stay by the fear that if the Building Permits had been issued but the Planning Permit had subsequently been cancelled in the Extraordinary Review Proceedings, the Building Permits would then likewise have had to be cancelled;⁹¹⁰
- c. the Respondent asserted that, although not in accordance with the principle of the correctness of administrative acts under Czech law, Mr [redacted] decision had been reasonable, and that, even if the Claimants’ claim in that regard was not barred by reason of failure to exhaust domestic remedies, that decision fell far short of the high threshold for denial of justice.⁹¹¹ It further recalled that following RAL’s rejection of Tschechien 7’s appeal as out of time, MAL had nevertheless resumed the proceedings although not obliged to do so, with the result that the Third Stay was ultimately reversed on 29 October 2008.⁹¹²

4.284 In relation to the Second Stay:

- a. the Respondent recalled that Tschechien 7 had filed an appeal, which it had subsequently withdrawn following resumption of the proceedings by MAL, and submitted that that fact barred any claim of denial of justice in that regard;⁹¹³ it further

⁹⁰⁷ Counter-Memorial, para. 367.

⁹⁰⁸ Counter-Memorial, para. 368, referring to Core 9/333 (Exhibit R-27).

⁹⁰⁹ Counter-Memorial, para. 369.

⁹¹⁰ Counter-Memorial, paras. 370.

⁹¹¹ Counter-Memorial, paras. 370-371.

⁹¹² Counter-Memorial, paras. 371-372.

⁹¹³ Counter-Memorial, para. 373.

argued that the Second Stay had been fully justified as a matter of Czech law insofar as it was based on grounds in addition to the pendency of the Extraordinary Review Proceedings, in particular, Tschechien 7's application for partial withdrawal of the Planning Permit,⁹¹⁴

- b. in the alternative, the Respondent argued that, again, the question was a "subtle" question of Czech administrative procedure and thus not capable of constituting a denial of justice;⁹¹⁵
- c. the Respondent characterized the Claimants' suggestion that the Czech authorities had improperly requested splitting of the Building Permit proceedings as "baseless", on the ground that no such request had ever been made; it argued that any such request would have had to have been made in writing, and that the Claimants had provided no evidence in support of their allegation.⁹¹⁶ It submitted that the evidence was rather that the splitting of the permits had been agreed between the Claimants and the City in its capacity as owner of the parcels on which the relevant streets and crossings were built; it submitted that the Claimants had agreed to that approach in the hope that this would prevent Multi from becoming party to the building proceedings in relation to the main building (Construction I), since Multi owned no plots of land neighbouring the plots on which Galerie was to be built, whilst the City had agreed based on the Claimants' belief that Multi would not attempt to disrupt permit proceedings where the applicant was the City.⁹¹⁷ The Respondent further noted that the Claimants had put forward no evidence in support of their allegation that the relevant authorities had promised that the building permits would be delivered more quickly if the applications were split.⁹¹⁸

4.285 On that basis, the Respondent argued that there had been no denial of justice prior to the Claimants' decision to abandon the project. It noted that, to the extent any statutory deadline was exceeded, it was by a matter of days, and that the proceedings related to a complex construction project. It noted that the tribunal in *Jan de Nul* had considered that even a delay of 10 years did not meet the threshold for denial of justice where the matters were complex, highly technical and involved extensive expert reports.⁹¹⁹

4.286 The Respondent noted that the Claimants had complained of only one incorrect decision (the Third Stay), and observed that decision had not been appealed in a timely fashion, but it had in any case been remedied *sua sponte*. It took the position that the delay of 3.5 months for the position to be remedied could not constitute a denial of justice.⁹²⁰

⁹¹⁴ Counter-Memorial, para. 374.

⁹¹⁵ Counter-Memorial, para. 375.

⁹¹⁶ Counter-Memorial, para. 376.

⁹¹⁷ Counter-Memorial, para. 377.

⁹¹⁸ Counter-Memorial, para. 378.

⁹¹⁹ Counter-Memorial, para. 379, referring to *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award of 6 November 2008, para. 204.

⁹²⁰ Counter-Memorial, para. 380.

- 4.287 It further took the position that the First and Second Ministry Decisions in the review proceedings did not constitute a denial of justice as they had been quashed by the First and Second Minister decisions, respectively.⁹²¹
- 4.288 Quite apart from this, the Respondent noted that the Extraordinary Review Proceedings had had no impact on the Claimants' rights, and submitted that their only relevance was that their existence had "indirectly" caused MAL to issue the Third Stay. It noted that the Ministry had immediately confirmed that the review proceedings did not justify the Third Stay, and submitted that that was evidence that the Ministry did not intend the review proceedings to obstruct the Building Permit proceedings, and that MAL's decision had been an "isolated mistake".⁹²²
- 4.289 Finally, the Respondent took the position that the conduct post-dating the Claimants' decision to abandon the Galerie project did not constitute a denial of justice. It emphasized that any events after the abandonment could not justify the Claimants' claim for damages, but stated that it would nevertheless respond to the Claimants' allegations as regards the period post-2008 "for the sake of completeness".⁹²³
- 4.290 As regards MAL's decision in March 2009 to stay the appellate proceedings in relation to the Building Permit for the main building (Construction I) whilst the Groundworks Removal Proceedings were pending, the Respondent:
- a. noted that the Claimants had had the right to appeal the decision, but had failed to do so; the Respondent submitted that that fact in and of itself precluded any claim for denial of justice;⁹²⁴
 - b. argued that, in any event, as a matter of Czech law the stay was entirely legal insofar as the state of the site did not correspond to the situation envisaged in the Building Permit, which assumed that only the excavations foreseen in the Planning Permit had been carried out;⁹²⁵
 - c. submitted that the issue was in any case a red herring, insofar as if the Claimants' position was that its business opportunity to construct the shopping centre had already been lost, it made no sense for them to continue with the Building Permit proceedings.⁹²⁶
- 4.291 As regards the Administrative Offence Proceedings, and the Claimants' suggestion that the relevant authorities had intentionally sought to avoid a situation in which a decision having the

⁹²¹ Counter-Memorial, para. 381.

⁹²² Counter-Memorial, para. 382.

⁹²³ Counter-Memorial, para. 383.

⁹²⁴ Counter-Memorial, para. 384.

⁹²⁵ Counter-Memorial, para. 385.

⁹²⁶ Counter-Memorial, para. 386.

force of *res judicata* arose, the Respondent likewise denied that any denial of justice had occurred.⁹²⁷ It noted that:

- a. the the use of MAL of the terms “misdemeanour” (a term used for offences committed by natural persons) and “administrative offence” (the term used for offences committed by legal entities) was an entirely formalistic matter, which had had no effect in substance;⁹²⁸ and
- b. the Claimants’ argument that RAL’s decision to close the proceedings based on MAL’s mislabelling had *res judicata* effect was baseless as a matter of Czech administrative law.⁹²⁹

4.292 In addition, the Respondent observed that in their Memorial, the Claimants had put forward a “brand new theory that the Czech authorities somehow conspired to set up a tainted scheme to obstruct Claimants’ project”.⁹³⁰ The Respondent rejected that theory as lacking credibility and:

- a. noted that the Claimants had put forward no evidence at all to support their accusations;⁹³¹
- b. submitted that the evidence showed that the authorities had harboured no ill-will against the Claimants’ project, relying in particular on:
 - i. the actions of the City in agreeing to allow construction to be carried out in relation to the external roads.⁹³² The Respondent emphasized that the City had gone further than necessary by agreeing that the applications could be made in its name on the basis that the Claimants hoped that that would discourage appeals by Multi;⁹³³
 - ii. the actions of MAL in
 - (1) holding on 19 June and 7 July 2008 that and one of the Multi companies were not parties to the Building Permit proceedings in relation to the main building (Construction I), a decision which was subsequently overturned by RAL on 18 August 2008;⁹³⁴
 - (2) resuming the Building Permit proceedings *sua sponte* on 29 October 2008; .

⁹²⁷ Counter-Memorial, para. 387.

⁹²⁸ Counter-Memorial, para. 387.

⁹²⁹ Counter-Memorial, para. 388.

⁹³⁰ Counter-Memorial, para. 389.

⁹³¹ Counter-Memorial, para. 390.

⁹³² Counter-Memorial, para. 391.

⁹³³ Counter-Memorial, para. 392.

⁹³⁴ Counter-Memorial, para. 393.

- iii. the actions of RAL, which, although it rejected Tschechien 7's appeal against the Third Stay as untimely by its decision of 8 October 2008, made clear its view that the Third Stay was improper;⁹³⁵
- iv. the action of the Ministry in confirming, in its letter of 28 July 2008, that the Third Stay was not justified on the basis of the pendency of the Extraordinary Review Proceedings⁹³⁶
- v. the action of the Minister in not confirming the First and Second Ministry Decisions; the Respondent observed that the decisions depended on an assessment of whether Tschechien 7 had acquired rights in good faith, and whether revocation of those rights would be proportionate,

and submitted that those were issues that could easily have been decided against Tschechien 7.⁹³⁷

ii. Alleged Breach of the Fair and Equitable Treatment Standard (Art. 2(1) BIT)

4.293 As regards the claims of breach of the fair and equitable treatment standard, the Respondent submitted that the Claimants' claims failed:

- a. first, because the conduct of the proceedings had been, on balance, fair and equitable in the circumstances, and
- b. second, because, as with the standard of denial of justice, the fair and equitable treatment standard was concerned with the overall process of decision-making, with the result that first-instance decisions could only violate the standard if remedies were either futile or unsuccessful.⁹³⁸

Relation of the Fair and Equitable Treatment Standard to the Customary International Minimum Standard

4.294 The Respondent first submitted that violation of the fair and equitable treatment standard required a high threshold, on the basis that the standard in the BIT was substantially identical to the current minimum standard under customary international law.⁹³⁹

4.295 As to the interpretation of the "fair and equitable" standard contained in the BIT, having noted that the ordinary meaning of the words "fair and equitable" was of little assistance,⁹⁴⁰ the Respondent took issue with the Claimants' argument that, in light of the fact that the purpose of the BIT was the encouragement and reciprocal protection of investments, this militated in

⁹³⁵ Counter-Memorial, para. 394.

⁹³⁶ Counter-Memorial, para. 395.

⁹³⁷ Counter-Memorial, para. 396.

⁹³⁸ Counter-Memorial, para. 398, referring to *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision of the *ad hoc* Committee of 14 June 2010, para. 148.

⁹³⁹ Counter-Memorial, para. 400.

⁹⁴⁰ Counter-Memorial, para. 401, referring to *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, para. 297.

favour of a high standard of protection. The Respondent noted that the purpose of all investment protection treaties was the same, and, relying on the decision in *Saluka*, submitted that that purpose did not imply that the encouragement of investments would be best served by an “exaggerated” standard of protection.⁹⁴¹

4.296 The Respondent also submitted that, on the basis of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, account should be taken of the current international minimum standard, and in that connection made reference to the decision of the tribunal in *Bayindir v. Pakistan*.⁹⁴² It further submitted that a number of tribunals had held that the treaty standard of fair and equitable treatment is “materially identical” to the customary international minimum of treatment.⁹⁴³

4.297 As to the Claimants’ suggestion, relying on the decision in *Azurix v. Argentina*, that there was a “fundamental distinction” between the customary international law standard, and an autonomous treaty standard, the Respondent submitted that the tribunal in *Azurix* had in fact held exactly the opposite.⁹⁴⁴ It further observed that whether or not the Treaty standard was “autonomous” was irrelevant insofar as it was not interpreted as stricter than the customary international minimum standard.⁹⁴⁵ It noted that the tribunal in *Biwater Gauff v. Tanzania* had adopted this approach and concluded that the fair and equitable treatment standard imposed a high threshold.⁹⁴⁶

The Claimants’ Claims of Breach

4.298 As to whether there had been a breach of the fair and equitable treatment standard, the Respondent first reiterated its position that mere breaches of domestic law did not *ipso facto* result in a violation of the fair and equitable standard. It noted that the Claimants had accepted that this was so in their Memorial, and had modified their case so as to suggest that the allegedly unlawful decisions of the authorities had been adopted in order to discriminate against the Claimants, to the benefit of Multi.⁹⁴⁷ However, it took the position that those allegations were entirely unsupported by any evidence.⁹⁴⁸

⁹⁴¹ Counter-Memorial, para. 402-403, citing *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, para. 300.

⁹⁴² Counter-Memorial, paras. 404-405, citing *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award of 27 August 2009, para. 176.

⁹⁴³ Counter-Memorial, para. 406, citing *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award of 18 August 2008, paras. 332-337; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 361; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 284; and *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008, paras. 591-592.

⁹⁴⁴ Counter-Memorial, para. 407, citing *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 361.

⁹⁴⁵ Counter-Memorial, para. 408.

⁹⁴⁶ Counter-Memorial, para. 409, citing *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008, para. 597.

⁹⁴⁷ Counter-Memorial, paras. 410-411.

⁹⁴⁸ Counter-Memorial, para. 412.

- *Legitimate Expectations*

- 4.299 The Respondent denied that the conduct of the various proceedings had frustrated the Claimants' legitimate expectations. It emphasized that the Claimants' alleged expectations as to the duration of the proceedings had not been reasonable, and that they had not been based on any assurances by the Respondent. On that basis, it submitted that the alleged expectations did not qualify for protection under the fair and equitable treatment standard.⁹⁴⁹
- 4.300 As to the reasonableness of the alleged expectations, the Respondent emphasized that the Claimants had not specified on what assurance the alleged expectations were based. It noted that the only specific expectation alleged was the promise allegedly made by the City of equal treatment of the Galerie and Forum projects, and submitted that that specific promise had been fulfilled.⁹⁵⁰
- 4.301 As to the alleged legitimate expectation as to the duration of the administrative proceedings, the Respondent argued that the Claimants unjustifiably relied upon a hope that no remedies would be pursued by third parties. It pointed to various internal documents from ECE which had made clear that the time projections given were reasonable estimates only on the assumption that no appeals would be filed, and submitted that the Claimants had been fully aware that any appeals would affect their expectations as to the duration of the proceedings, which were, in effect, a best-case scenario. On that basis it claimed that the asserted expectation had not been reasonable, and could not therefore have been a 'legitimate expectation'.⁹⁵¹
- 4.302 The Respondent further argued that the Claimants' time expectations could not in any case be regarded as reasonable in the light of their previous experience with other developments in the Czech Republic. In particular, it pointed to the fact that at least one other development previously undertaken by the Claimants, the Arkády Pankrac centre in Prague, had been subject to severe delays in the permitting process as the result of objections and appeals filed by NGOs and neighbours, which had meant that in excess of five years had been required from the date of application for a planning permit in December 2001 to the Building Permit finally becoming legally effective in June 2007.⁹⁵²
- 4.303 The Respondent submitted that that episode meant that the Claimants must have been aware that third party appeals were not uncommon, and could affect the duration of the proceedings, and that incorrect first instance decisions could result in issues being remanded. It observed that the time estimates for the Galerie project had nevertheless not in any way reflected the possibility of appeals or remands, but rather had proceeded on the basis that all permits would be issued within three months. Accordingly, it argued, those expectations had been unrealistic, and inconsistent with the Claimants' prior experience, and could thus not be regarded as legitimate.⁹⁵³

⁹⁴⁹ Counter-Memorial, para. 413.

⁹⁵⁰ Counter-Memorial, paras. 414-415.

⁹⁵¹ Counter-Memorial, paras. 416-417.

⁹⁵² Counter-Memorial, paras. 418-422.

⁹⁵³ Counter-Memorial, paras. 423-424.

4.304 As to the existence of assurances provided by the Czech Republic, the Respondent noted that the Claimants had accepted that only expectations based on a State's assurances upon which the investor had relied when making its investment benefited from protection, and reiterated its position that legitimate expectations "can only be based on specific – rather than implicit – assurances given to the investor by the host state".⁹⁵⁴

4.305 The Respondent emphasized that the Claimants had not (and did not claim to have) received any assurances, whether implicit or explicit, as to the duration of the administrative proceedings, but rather claimed to have received implicit assurances from the conduct of the City in: i) changing the zoning plan in February 2007; ii) entering into the Cooperation Agreement dated 30 April 2008; and iii) the general promise to provide equal treatment to the Galerie and Forum projects.⁹⁵⁵

4.306 The Respondent attacked each of those asserted sources of implicit assurance as not giving rise to any legitimate expectation attracting protection under the fair and equitable treatment standard:

- a. in relation to the change of zoning plan, the Respondent noted that that conduct could give rise to no protected legitimate expectation, insofar as it only affected the permitted use of the land plots, and contained no assurance as to the conduct, duration and/or success of the proceedings. The Respondent further emphasized that the City as a body of "local self-government", was in any case not in a position to provide any assurances in that regard since those matters were not within its competence, but rather within the sphere of competence of the central government;⁹⁵⁶
- b. the Respondent likewise noted that the Cooperation Agreement was of no relevance to the duration or success of the proceedings, and that the City had in any case been acting in its capacity of owner of the relevant plots of land on which the relevant roads and traffic intersections were situated;⁹⁵⁷
- c. as to the promise of equal treatment, the Respondent reiterated that the City had in fact provided equal treatment.⁹⁵⁸

4.307 In conclusion, the Respondent asserted that the Claimants had received no assurances on which they could base a claim for frustration of legitimate expectations.⁹⁵⁹

- *Due Process and Procedural Propriety*

4.308 As regards the Claimants' claims of denial of due process, the Respondent noted that although the requirements of due process and procedural propriety were included in the standard of denial of justice, the Claimants had discussed some of those allegations separately.⁹⁶⁰

⁹⁵⁴ Counter-Memorial, para. 425.

⁹⁵⁵ Counter-Memorial, paras. 426-427.

⁹⁵⁶ Counter-Memorial, para. 428.

⁹⁵⁷ Counter-Memorial, para. 429.

⁹⁵⁸ Counter-Memorial, para. 430.

⁹⁵⁹ Counter-Memorial, para. 431.

- 4.309 The Respondent submitted that, given the inclusion of notions of due process and procedural propriety in the denial of justice standard, its observations relating to denial of justice were equally applicable to the Claimants' claims of violation of the fair and equitable standard on that basis. It submitted that the applicable threshold was demanding, and that the duty to provide due process and ensure procedural propriety could only be violated "by procedural conduct that was confirmed upon timely recourse to local remedies or where no local remedies were available".⁹⁶¹
- 4.310 The Respondent submitted that, in an attempt to downplay the demanding nature of the standard, the Claimants had mischaracterized the relevant case law:
- a. first, it submitted that the tribunal in *Waste Management* had not, as submitted by the Claimants, taken the position that an investor can rely on any statutory administrative provisions and proceedings, or that the threshold for a violation of due process and procedural propriety was low.⁹⁶² It emphasized that the relevant passage from the decision in *Waste Management* referred to "*grossly unfair conduct, manifest failure of natural justice in judicial proceedings, or a complete lack of transparency and candor in an administrative process*",⁹⁶³ and argued that it was thus clear that the tribunal was of the view that the threshold for a finding of breach of the fair and equitable treatment standard was demanding;⁹⁶⁴
 - b. second, the Respondent took issue with the Claimants' suggestion that the tribunal in *Mondev* had stated that the findings of the International Court in *ELSI* constituted "a starting point for what is fair and equitable but that the threshold in modern times is a lot lower"; it argued that the *Mondev* tribunal rather had "expressly agreed with the conclusion in *ELSI* and applied it in the context of a claim for denial of justice, i.e. also to claims for a violation of the duty of due process and procedural propriety";⁹⁶⁵
 - c. on that basis, the Respondent submitted that there was "widespread agreement on the demanding threshold for a violation of the duty to guarantee due process and procedural propriety".⁹⁶⁶
- 4.311 As to the merits of the Claimants' claims of violation of due process, the Respondent asserted that the Claimants' main argument was that the administrative authorities had committed numerous procedural irregularities with the intent to obstruct the Galerie project and favour Forum, and rejected that argument as baseless.⁹⁶⁷ It asserted that "the Czech Republic never had an intention to obstruct the Claimants' project. Similarly, its administrative bodies never

⁹⁶⁰ Counter-Memorial, para. 432.

⁹⁶¹ Counter-Memorial, para. 433.

⁹⁶² Counter-Memorial, para. 434.

⁹⁶³ Counter-Memorial, para. 435 (emphasis in original), with reference to *Waste Management Inc. v. United Mexican States (No. 2)* (ICSID Case No. ARB(AF)/00/3), Final Award of 30 April 2004, para. 98.

⁹⁶⁴ Counter-Memorial, para. 435.

⁹⁶⁵ Counter-Memorial, para. 435, referring to Memorial, para. 498 and *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 127.

⁹⁶⁶ Counter-Memorial, para. 436.

⁹⁶⁷ Counter-Memorial, para. 437.

engaged in any improper conduct,” and again emphasized that the Claimants had put forward no evidence in support of their accusations.⁹⁶⁸

4.312 It noted that the Claimants had relied upon a handful of incorrect first-instance decisions that had been remedied upon appeal or *sua sponte*, and observed that that was not sufficient to justify a claim for lack of due process or procedural propriety.⁹⁶⁹ In particular, it asserted:

- a. although the Claimants had submitted that the Building Permit proceedings had been “frequently delayed”, in fact the proceedings in relation to Construction Ib, II and III and IVa had been stayed only twice, once due to the incompleteness of the applications, and once (incorrectly) by reference to the ongoing Extraordinary Review proceedings (i.e. the First and Third Stays);⁹⁷⁰
- b. the proceedings in relation to the Building Permit for the main building Permit (Construction I) had been stayed three times:
 - i. as to the First and Second Stays, the Respondent repeated its position that they had been justified due to the incompleteness of the application, and the application by Tschechien 7 for modification of the Planning Permit;
 - ii. whilst admitting that the Third Stay was incorrect, the Respondent emphasized that the MAL had rectified that decision *sua sponte*, despite Tschechien 7’s belated appeal,⁹⁷¹ and submitted that the circumstances were insufficient to constitute a violation of due process.⁹⁷²

4.313 The Respondent also denied any violation of due process in the context of the Extraordinary Review Proceedings:

- a. whilst observing that the Claimants had not been a party to the proceedings resulting in the First Ministry Decision, it noted that such a course was expressly permitted in expedited Extraordinary Review proceedings using the summary procedure;⁹⁷³
- b. in any case, it noted that a decision in expedited Extraordinary Review proceedings only became legally effective if it was not appealed within the relevant period, and that this provided adequate protection to an affected party. It emphasized that Tschechien 7 had appealed the First Ministry Decision which had been quashed by the First Minister Decision and had thus never become legally effective.⁹⁷⁴
- c. the Respondent submitted that the First Minister Decision had been perfectly appropriate in the circumstances, and that there was nothing unusual about remand if a matter was complex and required additional fact-finding, as, it submitted, was

⁹⁶⁸ Counter-Memorial, para. 438.

⁹⁶⁹ Counter-Memorial, para. 439.

⁹⁷⁰ Counter-Memorial, para. 440.

⁹⁷¹ Counter-Memorial, para. 441.

⁹⁷² Counter-Memorial, para. 442.

⁹⁷³ Counter-Memorial, para. 443.

⁹⁷⁴ Counter-Memorial, para. 444.

necessary in relation to the issue of whether Tschechien 7 had acquired rights in good faith under the Planning Permit;⁹⁷⁵

- d. the Respondent denied that there had been any contradiction between the First and Second Minister Decisions. In that connection, it submitted that there would have been contradiction only if the Second Minister Decision had confirmed the cancellation of the Planning Permit. By contrast, it noted that the only difference between the First and Second Minister Decisions was that the First Minister Decision had quashed the First Ministry Decision whilst remanding the matter, whilst the Second Minister Decision had quashed the Second Ministry Decision and terminated the proceedings.⁹⁷⁶ It further explained that:
- i. the reason for the difference between the First and Second Minister Decisions was that the Minister had been satisfied on the second occasion that the Ministry's fact-finding "did not reveal any evidence that Tschechien 7 had acquired the rights under the Planning Permit in bad faith. Therefore, its good faith had to be presumed".⁹⁷⁷
 - ii. upon considering the balance between Tschechien 7's good faith as "against the public interest in cancelling the illegal Planning Permit", he had considered that cancellation would not be proportionate.⁹⁷⁸
 - iii. the Claimants had agreed that the Second Minister Decision was correct.⁹⁷⁹
- e. Finally, the Respondent again reiterated that the Extraordinary Review Proceedings had caused no harm to the Respondent insofar as the outcome had been that the Planning Permit was not cancelled, and the Claimants had never lost, even temporarily, the rights granted by the Planning Permit. It repeated its position that the existence of the proceedings had affected the Claimants "only indirectly" insofar as MAL had incorrectly stayed the Building Permit proceedings on the basis of their pendency; however, it noted that that error related only to MAL's decision imposing the Third Stay, rather than the Extraordinary Review Proceedings.⁹⁸⁰ Referring to the decision in *Waste Management*, the Respondent argued that the fair and equitable treatment standard could only be violated by conduct that actually harmed the investor, and submitted that the "alleged delays and purported irregularities" in the Extraordinary Review Proceedings had had no harmful effects on the Claimants, and therefore could not have violated due process even if they had been improper.⁹⁸¹

⁹⁷⁵ Counter-Memorial, para. 445.

⁹⁷⁶ Counter-Memorial, para. 446.

⁹⁷⁷ Counter-Memorial, para. 447.

⁹⁷⁸ Counter-Memorial, para. 447.

⁹⁷⁹ Counter-Memorial, para. 447.

⁹⁸⁰ Counter-Memorial, para. 448.

⁹⁸¹ Counter-Memorial, para. 449, referring to *Waste Management Inc. v. United Mexican States (No. 2)* (ICSID Case No. ARB(AF)/00/3), Final Award of 30 April 2004, para. 98.

4.314 In relation to events subsequent to the alleged abandonment of the project, and in particular the Claimants' allegations relating to the conduct of the Ministry of Finance during the settlement negotiations, the Respondent submitted that the allegations were untrue and in any case unrelated to the due process claim. It denied that the Ministry of Finance had collected evidence improperly, arguing that the Claimants themselves had decided to allow the site inspection in early February 2009, without even proposing a non-disclosure agreement, such that the Ministry of Finance was accordingly not constrained in the use of the evidence obtained during the inspection or during the negotiations.⁹⁸²

4.315 The Respondent further denied that the Ministry of Finance had influenced the commencement of the administrative offence proceedings, which it submitted had been commenced in December 2008, well before the Ministry of Finance had started to investigate the excessive excavations.⁹⁸³ The Respondent noted that, in any case, the Claimants had failed to specify what procedural rights had been violated by the conduct of the Ministry of Finance.⁹⁸⁴

- *Transparent and predictable business environment*

4.316 As regards the Claimants' claim of breach of the fair and equitable treatment standard as the result of failing to provide a transparent and predictable business environment for their investment, the Respondent argued that what was required was "a transparent, predictable and stable regulatory framework",⁹⁸⁵ covering both generally applicable regulations and specific permits required for the operation of the investment. The Respondent took the position that that requirement did not target potential irregularities in specific administrative proceeding, which were better dealt with in the context of denial of justice or lack of due process.⁹⁸⁶

4.317 As to the merits of the claim, the Respondent argued that the relevant applicable regulatory framework had been entirely transparent, and the Claimants had known of all the rules that would govern their investment, which had not materially changed since the time at which the investment had been made. In particular, the Respondent emphasized that the Claimants had been aware that the Galerie project had required planning and building permits, as well as various ancillary permits and authorizations, and noted that the Claimants had not disputed that they had been aware of the permitting process, and had not complained of any regulatory changes.⁹⁸⁷

4.318 The Respondent further noted that no permits had ever been revoked, repeating that, although the Ministry had considered that it was necessary to revoke the Planning Permit, the Minister had on appeal chosen not to confirm its decision, such that the Planning Permit had remained effective at all times.⁹⁸⁸

⁹⁸² Counter-Memorial, para. 450.

⁹⁸³ Counter-Memorial, para. 452.

⁹⁸⁴ Counter-Memorial, para. 453.

⁹⁸⁵ Counter-Memorial, para. 454 (emphasis in original).

⁹⁸⁶ Counter-Memorial, para. 454.

⁹⁸⁷ Counter-Memorial, para. 455.

⁹⁸⁸ Counter-Memorial, para. 456.

- 4.319 The Respondent characterized the Claimants' claim as being that the permitting process had been unpredictable because it had taken longer than expected. It rejected that complaint as baseless, insofar as the fair and equitable treatment standard was concerned with the predictability of the business and regulatory framework, rather than the ability of the Claimants to predict the length of specific administrative proceedings. It reiterated that the Claimants' estimates had been overly optimistic insofar as the Claimants had not budgeted for appeals.⁹⁸⁹
- 4.320 As for the Claimants' allegations of violation of long-standing administrative policies relating to i) the failure of the Minister to follow the recommendation of the Advisory Committee; and ii) MAL's decision to stay proceedings on the basis of missing documentation, rather than requesting the necessary materials informally, the Respondent replied that both the Minister and MAL had acted in strict compliance with Czech administrative law,⁹⁹⁰ and disputed that either of the supposed "administrative practices" existed.⁹⁹¹
- 4.321 Finally, the Respondent disputed the Claimants' claim that there had been a violation of the fair and equitable standard on the basis of the overall conduct of the parties:
- a. first, it rejected the Claimants' suggestion of a concerted effort to obstruct the Galerie project in favour of Forum as having no basis in the evidence;⁹⁹²
 - b. second, it again emphasized that the Extraordinary Review Proceedings had had no effect upon the legal effectiveness of the Planning Permit as a result of the quashing of the First and Second Ministry Decisions;⁹⁹³
 - c. third, although accepting that the adoption of the Third Stay by MAL had been "erroneous", the Respondent submitted that this was the only irregularity, and an isolated error, as evidenced by the willingness of the Ministry to provide its opinion that the stay was not justified, RAL's denunciation of the error, and MAL's subsequent decision to revoke the stay *sua sponte*;⁹⁹⁴
 - d. fourth, the Respondent sustained that the splitting of the building proceedings had not come about as the result of pressure by MAL, but had been mutually agreed upon by the Claimants and the City.⁹⁹⁵
 - e. fifth, whilst noting that the Claimants in their Memorial appeared not to have pursued their complaints as to delays set out in the Request for Arbitration and Statement of Claim, the Respondent noted that in any case the periods by which the statutory time-

⁹⁸⁹ Counter-Memorial, para. 457.

⁹⁹⁰ Counter-Memorial, para. 458.

⁹⁹¹ Counter-Memorial, para. 459.

⁹⁹² Counter-Memorial, para. 461.

⁹⁹³ Counter-Memorial, para. 462.

⁹⁹⁴ Counter-Memorial, para. 463.

⁹⁹⁵ Counter-Memorial, para. 464.

limits had been exceeded were measured in days, and could not have contributed to the failure of the project;⁹⁹⁶

- f. sixth, the Respondent argued that the only reason why the Claimants had not yet obtained a legally effective Building Permit for the main building was due to the Claimants' wilful decision to engage in the illegal excavations, which had triggered the Groundworks Removal Proceedings, which in turn had resulted in the stay of the appellate proceedings before RAL in relation to the Building Permit for the main construction. The Respondent noted in this connection that RAL had confirmed all the other Building Permits, which were not affected by the excessive excavations.⁹⁹⁷ The Respondent further noted that the Claimants had chosen not to apply for regularization of the excessive excavations, and submitted that the motivation in that regard had been an attempt to bolster their position in the present arbitration.⁹⁹⁸

iii. Alleged Breach of the Prohibition of Impairment of Investments by Arbitrary and Discriminatory Measures (Article 2(2) BIT)

- 4.322 The Respondent noted that, in response to its refutation of the Claimants' claims of breach of the prohibition of impairment by arbitrary measures contained in its Answer, the Claimants in their Memorial had criticized the applicability of the observations of the International Court of Justice in *ELSI* and repeated their previous accusations, whilst adding an allegation that the authorities had intended to obstruct the Galerie project and favour Forum.⁹⁹⁹

Impairment by arbitrary measures

- 4.323 In relation to the Claimants' claim of breach of the prohibition by arbitrary measures, as regards the applicable test for arbitrariness, the Respondent
- a. maintained its position that the decision in *ELSI* constituted the leading authority as to the standard for arbitrariness, and submitted that this was particularly so as regards judicial or administrative decisions;
- b. took the position that arbitrariness could not be assumed; and
- c. denied that, on the evidence, the relevant conduct had arbitrarily impaired the Claimants' investment.¹⁰⁰⁰
- 4.324 As to the first point, i.e. the applicable standard of arbitrariness under international law, the Respondent submitted that *ELSI* remained the leading authority, and that the observations of the International Court of Justice in that case were particularly apposite for the present case as

⁹⁹⁶ Counter-Memorial, para. 465.

⁹⁹⁷ Counter-Memorial, para. 466.

⁹⁹⁸ Counter-Memorial, para. 467.

⁹⁹⁹ Counter-Memorial, para. 468.

¹⁰⁰⁰ Counter-Memorial, para. 469.

the decision specifically concerned “administrative process and the consequences of the quashing of an incorrect first-instance decision by a superior authority”.¹⁰⁰¹

- 4.325 The Respondent disputed the Claimants’ suggestion that the “modern” test for arbitrariness was to be found in the observations of the tribunal in *Lauder*, noting that the tribunal had merely made reference to a dictionary definition of the term “arbitrary”, and argued that the *ELSI* decision remained a “significantly better authority for the interpretation of the same term” contained in the BIT which had been concluded subsequent to the decision of the Court.¹⁰⁰² The Respondent further drew attention to decisions in which tribunals had referred to and applied the decision in *ELSI*, which it submitted confirmed that that decision remained the undisputed leading authority for the legal test of arbitrariness.¹⁰⁰³
- 4.326 In relation to the second point, in response to the Claimants’ suggestion that the burden of proof should be shifted and that the Tribunal should assume the arbitrariness of the relevant conduct based on the fact that it was unlawful under Czech law, the Respondent disputed that the relevant conduct was unlawful, and noted that in any case such a shifting of the burden of proof would be “unprecedented”.¹⁰⁰⁴
- 4.327 The Respondent further disputed the accusation by the Claimants that it had provided no explanation “why its authorities acted contrary to the law persistently”, noting that it had provided a detailed explanation of the relevant conduct of the administrative conduct in its Answer to the Statement of Claim.¹⁰⁰⁵ It submitted that, by contrast, the Claimants had provided only “conclusory and generalized statements of fact and law”.¹⁰⁰⁶
- 4.328 Third, the Respondent rejected the Claimants’ various accusations of breach of the prohibition of impairment by arbitrary measures, namely that it had:
- a. withheld or withdrew permits for the Galerie project;
 - b. frequently remained inactive or delayed decisions in the Building Permit proceedings and the Extraordinary Review Proceedings ;
 - c. issued contradictory decisions in the Extraordinary Review Proceedings;
 - d. denied Claimants the right to be heard in the proceedings prior to the First Ministry Decision; and

¹⁰⁰¹ Counter-Memorial, para. 470.

¹⁰⁰² Counter-Memorial, paras. 472-474.

¹⁰⁰³ Counter-Memorial, paras. 475-477, referring to *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), para. 176; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006, paras. 156-157 and 162; and *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007, para. 318.

¹⁰⁰⁴ Counter-Memorial, para. 478.

¹⁰⁰⁵ Counter-Memorial, para. 479, quoting Memorial, para. 536.

¹⁰⁰⁶ Counter-Memorial, para. 479.

- e. had influenced the competent authorities, in particular as a result of the supposed attempts by Mr [redacted] to influence RAL to stay the appellate proceedings in relation to the Building Permit for the main building.¹⁰⁰⁷
- 4.329 The Respondent submitted that it was significant that those accusations were copied verbatim from the Claimants' discussion of their claims of breach of other standards of protection, and argued that the claims were flawed insofar as the Claimants had not attempted to explain how each of those measures had impaired its investment.¹⁰⁰⁸ Relying on the decision of the tribunal in *CMS v. Argentina*, it argued that the BIT did not prohibit arbitrariness as such, but only arbitrary measures that actually impaired the management, maintenance, use or enjoyment of the Claimants' investment.¹⁰⁰⁹
- 4.330 It submitted that most of the measures complained of did not (and could not) impair the Claimants' investment in any way;¹⁰¹⁰ specifically, it asserted that:
- a. no permits had ever been withdrawn, the cancellation of the Planning Permit by the Second Ministry Decision never having become legally effective due to the appeal filed by Tschechien 7 and the quashing of that decision by the Second Minister Decision;¹⁰¹¹
 - b. no permits had been withheld; as regards the main Building Permit, which was the only permit which the Claimants had applied for and not yet received, the Respondent again underlined that the proceedings in that regard had been stayed as a result of the illegal excavations deliberately undertaken by the Claimants. It reiterated its position that the stay was appropriate, and recalled that it had not been appealed;¹⁰¹²
 - c. the Extraordinary Review Proceedings had never caused any impairment of the Claimants' investment, insofar as the Planning Permit had never been cancelled nor its legal effectiveness at any point even temporarily suspended, and the Claimants' subsidiaries had not been denied due process. Further, the Respondent took the position that even if it were to be assumed that the procedural rights of the Claimants' subsidiaries had been denied, there had been no impairment of the Claimants' investment insofar as Tschechien 7's rights under the Planning Permit had never been cancelled and there had been no adverse effect upon Tschechien 7's assets;¹⁰¹³
 - d. as regards the Third Stay, the Respondent argued that MAL's error had in fact been remedied *sua sponte*, and would have been remedied by RAL if an appeal had been filed in time. Invoking the observations of the International Court of Justice in *ELSI*, the Respondent submitted that it would be "absurd if this remedied incorrect first-

¹⁰⁰⁷ Counter-Memorial, para. 480.

¹⁰⁰⁸ Counter-Memorial, para. 480-481.

¹⁰⁰⁹ Counter-Memorial, para. 481-482, referring to *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 292.

¹⁰¹⁰ Counter-Memorial, para. 483.

¹⁰¹¹ Counter-Memorial, para. 484.

¹⁰¹² Counter-Memorial, para. 485.

¹⁰¹³ Counter-Memorial, para. 486.

instance decision qualified as arbitrary under international law”.¹⁰¹⁴ It further observed that, in any case, MAL’s decision had been adopted on the basis of a reasoned decision “albeit a mistaken one due to an erroneous interpretation of the law”,¹⁰¹⁵ It reiterated that MAL had had a reasonable concern that, if the Planning Permit were to be cancelled in the Extraordinary Review Proceedings, it would have had to re-open the proceedings and cancel any Building Permits it had granted in the meantime, albeit recognizing that such a concern had been misplaced given the presumption under Czech administrative of the regularity of administrative acts.¹⁰¹⁶

- e. the Respondent denied the allegation of an attempt by Mr of the Ministry of Finance to influence the administrative authorities to the detriment of the Claimants, noting that no binding orders had been issued, and that the Ministry of Finance had not in any case been in a position to do so. It further observed that, in any case, the alleged conduct had occurred after the decision by the Claimants to abandon the project, and thus could not have impaired the management, maintenance, use or enjoyment of the Claimants’ investment, and could not have constituted, or contributed to the alleged violation of the prohibition of non-impairment.¹⁰¹⁷

Impairment by discriminatory measures

4.331 The Respondent noted that in their Memorial the Claimants had introduced an entirely new claim, found nowhere in their Request for Arbitration and Statement of Claim, to the effect that the Respondent had treated the Claimants’ investment less favourably than the Forum project. It further noted that the Claimants had gone so far as to suggest that the Respondent had intentionally obstructed the project as part of a scheme to favour Forum, although it observed that there was no evidence to support that allegation.¹⁰¹⁸ The Respondent submitted that the late introduction of that claim “speaks volumes about its lack of support. Indeed the credibility of this last-minute addition is readily apparent from Claimants’ failure to support it with *any* documentary evidence”.¹⁰¹⁹

4.332 The Respondent noted that the Claimants’ claims of discrimination were put forward on four bases, namely that:

- a. the permitting process for the Forum project had been far shorter than that for Galerie;
- b. Multi had only been required to apply for a single building permit, whilst the Galerie project had required four;

¹⁰¹⁴ Counter-Memorial, para. 487, referring to *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at p. 76 (para. 128).

¹⁰¹⁵ Counter-Memorial, para. 487.

¹⁰¹⁶ Counter-Memorial, para. 487.

¹⁰¹⁷ Counter-Memorial, para. 488.

¹⁰¹⁸ Counter-Memorial, para. 490.

¹⁰¹⁹ Counter-Memorial, para. 491.

- c. only the Claimants had been adversely affected as a result of the overlap between the Planning Permits for the two projects; and
 - d. Multi's motion for extraordinary review of the Planning Permit in relation to Galerie had been granted, whilst the Claimants' application for extraordinary review of the grant of the Building Permit in relation to the Forum project had not.¹⁰²⁰
- 4.333 The Respondent rejected each of those claims as baseless.¹⁰²¹
- 4.334 As an initial point, in relation to the applicable standard, it argued that the prohibition of impairment by discriminatory measures would only be violated where:
- a. Galerie and Forum had been treated differently;
 - b. that different treatment had occurred in like circumstances;
 - c. the difference in treatment had not been justified; and
 - d. the different treatment had impaired the management, maintenance, use or enjoyment of the Claimants' investment.¹⁰²²
- 4.335 The Respondent submitted that although the Claimants had submitted four instances of differential treatment, which were submitted to have occurred in "like circumstances", and without justification, they had not attempted to explain how the alleged differential treatment had impaired their investment, and submitted that the claim should fail on that basis alone.¹⁰²³
- 4.336 Second, the Respondent disputed that the administrative proceedings for Galerie and Forum had been comparable from a legal perspective. It referred to the decision in *Bayindir v. Pakistan*, and the rejection by the tribunal in that case of an argument that the domestic competitors of the claimant in that case had been in a similar situation simply because they had performed works for an identical project in the same sector. In particular, the Respondent relied on the tribunal's explanation that the requirement of comparability related to the contractual relationship with Pakistan, rather than the mere fact that the companies had operated in the same sector.¹⁰²⁴ On that basis, the Respondent took the position that the Claimants' reliance on the similar size, neighbouring locations, same target clients and duration of the developments were not sufficient to establish comparability.¹⁰²⁵
- 4.337 Third, the Respondent argued that a finding of discrimination presupposed that any difference in treatment could not be justified by objective reasons. The Respondent invoked in that

¹⁰²⁰ Counter-Memorial, para. 492.

¹⁰²¹ Counter-Memorial, para. 493.

¹⁰²² Counter-Memorial, para. 494.

¹⁰²³ Counter-Memorial, para. 495.

¹⁰²⁴ Counter-Memorial, para. 496-497, referring to *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award of 27 August 2009, para. 402.

¹⁰²⁵ Counter-Memorial, para. 498.

connection the decision of the tribunal in *Consortium R.F.C.C v. Morocco*,¹⁰²⁶ and observed that the Claimants had failed to analyse whether any of the differences in treatment of which complaint was made could be justified.¹⁰²⁷

4.338 As to the Claimants' specific claims of discrimination, it submitted that in fact the differences in the proceedings had been justified as a result of "basic objective parameters of the administrative proceedings regarding the two competing projects".¹⁰²⁸

4.339 In particular, as to the length of the proceedings, although admitting that the proceedings in relation to Forum had been shorter than those in relation to Galerie, the Respondent submitted that the projects had had a number of basic parameters which were radically different:

- a. the different technical parameters to be assessed by MAL, including that:
 - i. the Galerie project was to be constructed on a steep slope, and would involve extensive excavations, whilst the Forum project was to be constructed on a relatively flat site; and
 - ii. the Galerie project would involve extensive reconstruction of two streets and a major crossing in order to make it accessible by car, whilst Forum was situated next to a major road and only needed the construction of short connecting roads,¹⁰²⁹
- b. the different procedural context, in particular:
 - i. the fact that Forum had not been opposed by neighbours and NGOs, whilst Galerie had actively opposed by third parties, including Multi, which had filed a number of appeals on procedural and substantive matters, including the motion for Extraordinary Review; the Respondent noted that the result was that those objections had had to be addressed by MAL at first instance, and subsequently by RAL on appeal, both of which had taken time,¹⁰³⁰
 - ii. the large number of participants in the proceedings relating to Galerie, which meant that the decision had had to be delivered by display on the notice board, which again took longer. By contrast, the proceedings in relation to Forum had had a smaller number of participants with the result that decisions could be notified to them by post;¹⁰³¹

¹⁰²⁶ Counter-Memorial, para. 499, citing *Consortium R.F.C.C. v. Kingdom of Morocco* (ICSID Case No. ARB/00/6), Award of 22 December 2003, p. 51.

¹⁰²⁷ Counter-Memorial, para. 500.

¹⁰²⁸ Counter-Memorial, para. 501.

¹⁰²⁹ Counter-Memorial, para. 503.

¹⁰³⁰ Counter-Memorial, paras. 504-505.

¹⁰³¹ Counter-Memorial, para. 506.

- iii. the Third Stay, which had occurred in a procedural context which had not existed in the proceedings relating to Forum;¹⁰³²
- iv. the issues resulting from the fact that the Claimants had violated the law by deliberately undertaking unauthorized excavations. The Respondent submitted that, as a result, the stay of the appellate proceedings in relation to the Building Permit for the main construction likewise occurred in a context which had not existed in the proceedings relating to Forum.¹⁰³³

4.340 The Respondent further submitted that, where the proceedings had in fact been comparable, they had been treated in a similar fashion; in particular, it pointed to the fact that the timeframes for the respective first-instance proceedings in relation to the applications for Planning Permits had been similar, with the Planning Permit for Galerie being issued in approximately six weeks, whilst that for Forum had taken one month. It explained the small difference by reason of the fact that the proceedings in relation to Galerie had been more complex, with MAL having to rule on three objections.¹⁰³⁴

4.341 In relation to the claim that four Building Permits had been required for Galerie, whilst only one had been required for Forum, the Respondent first disputed the factual premise of the Claimants' claim, repeating that MAL had not required division of the building proceedings, but that rather the splitting of the applications had been decided by the Claimants' subsidiaries and the City in an attempt to minimize the likelihood appeals by Multi.¹⁰³⁵

4.342 Second, the Respondent noted that the Claimants themselves had admitted that the splitting of the permits had not impaired their investment.¹⁰³⁶ It further noted that the supporting documentation which would have had to be submitted would have been identical even if an application for a single Building Permit had been made, and that MAL in any case had in fact treated the various applications as a single proceeding. As a consequence, it submitted that no harmful effect had been caused by the splitting of the proceedings.¹⁰³⁷

4.343 Third, it noted that the fact that Forum had been issued with a single Building Permit covering both the main construction and the connecting roads had been fully in compliance with Czech law. It noted that the Building Office within MAL dealt with both general and local road construction, and denied as erroneous the Claimants' suggestion that local road constructions were handled by the traffic department.¹⁰³⁸

4.344 As regards the Claimants' claim of discrimination in relation to the overlap of the planning permits, and in particular that the relevant authorities "only took action to the detriment of Claimants",¹⁰³⁹ the Respondent explained that the overlap issue related to Construction IVb of

¹⁰³² Counter-Memorial, para. 506.

¹⁰³³ Counter-Memorial, para. 507.

¹⁰³⁴ Counter-Memorial, para. 508.

¹⁰³⁵ Counter-Memorial, para. 510.

¹⁰³⁶ Counter-Memorial, para. 511, quoting Memorial, para. 261.

¹⁰³⁷ Counter-Memorila, para. 511.

¹⁰³⁸ Counter-Memorial, para. 512.

¹⁰³⁹ Counter-Memorial, para. 514, quoting Memorial, para. 545.

Galerie, which involved the reconstruction of a major intersection, changing it from a roundabout to a normal intersection with traffic lights, and that the overlap related to the fact that both Planning Permits covered a land plot adjacent to the crossing, with Forum's Planning Permit envisaging the preservation of the status quo, whilst the Galerie Planning Permit foresaw the creation of a new turning lane so as to permit vehicles turning right to avoid the intersection. It noted that the issue had been resolved by the decision not to apply for the Building Permit in relation to Construction IVb.¹⁰⁴⁰

- 4.345 The Respondent admitted that the overlap issue had been one of the reasons underlying the Second Stay, although it submitted that this was so "only very indirectly". It explained that the Second Stay had been adopted, *inter alia*, on the basis of Tschechien 7's motion for partial withdrawal, which had been treated as an application for a modification of the Planning Permit, which required a stay until the motion was resolved. It noted that the motion had subsequently been withdrawn by Tschechien 7, at which point the proceedings had resumed.¹⁰⁴¹
- 4.346 On that basis, the Respondent submitted that MAL had taken no action detrimental to the Claimants, but rather had only stayed the Building Permit proceedings as a consequence of the Claimants' request for modification of the Planning Permit, and that the resumption of the proceedings, despite the fact that the overlap issue remained, demonstrated that the existence of the overlap had not hindered the Building Permit proceedings.¹⁰⁴²
- 4.347 It further observed that the Claimants had not submitted what action MAL should have taken in relation to Forum; it observed that the overlap issue had arisen due to the grant of the Planning Permit for Galerie, and submitted that it would have been unfair to resolve the issue to the detriment of Forum, noting that the principle of acquisition of rights in good faith applied equally to Multi's rights under the Forum Planning Permit.¹⁰⁴³ It noted that MAL had in fact of its own motion initiated review proceedings in relation to the planning permit for Forum in December 2007, but that those proceedings had been terminated in June 2008 after the overlap issue had been resolved as a result of the decision by Tschechien 7 not to apply for the Building Permit in relation to Construction IVb.¹⁰⁴⁴
- 4.348 Finally, the Respondent noted that the Claimants had not sought to establish how their investment had been impaired by the overlap.¹⁰⁴⁵
- 4.349 In response to the Claimants' claim of discrimination in relation to the non-initiation of Extraordinary Review proceedings in relation to the Forum Building Permit, as compared to Multi's motion for Extraordinary Review of the Galerie Planning Permit, which was granted, the Respondent noted that Multi's motion had been filed in a timely fashion and raised serious issues regarding the lawfulness of the Galerie Planning Permit. By contrast, it emphasized that

¹⁰⁴⁰ Counter-Memorial, para. 515.

¹⁰⁴¹ Counter-Memorial, para. 516.

¹⁰⁴² Counter-Memorial, para. 517.

¹⁰⁴³ Counter-Memorial, para. 518.

¹⁰⁴⁴ Counter-Memorial, para. 519.

¹⁰⁴⁵ Counter-Memorial, para. 520.

the Claimants' motion had been filed out of time, and in any case, had not been justified on the merits.¹⁰⁴⁶ The Respondent

- a. noted that MAL was competent to act both as a general and special building authority the building permit for Forum, and had therefore been able to decide on the application for both the main construction and the connecting roads in a single proceeding; it argued that the only technical defect in the building permit for Forum was that MAL had failed to state explicitly that it was acting as both a general and special building authority;¹⁰⁴⁷
- b. noted that even if Extraordinary Review Proceedings had been opened, the rights acquired by Multi in good faith would have had to have been protected, and it was thus unlikely that the building permit for Forum would have been cancelled;¹⁰⁴⁸
- c. emphasized that the Galerie Planning Permit had had serious deficiencies, including that Multi had been denied the status of party to the proceedings, and that it had improperly authorized excavations;¹⁰⁴⁹
- d. further highlighted that whilst Multi's motion for review had been filed immediately after RAL's appellate decision in relation to the Galerie Planning Permit, the Claimants' letters alleging irregularity in Multi's Building Permit had been submitted after the lapse of the one-year deadline for review proceedings.¹⁰⁵⁰

4.350 Finally, the Respondent likewise argued that the Claimants had failed to explain how the failure to initiate review proceedings in relation to the Forum Building Permit had impaired their investment, and noted that even if extraordinary review proceedings had been initiated, the Building Permit would have remained legally effective until such time as it was quashed, an outcome it submitted was unlikely.¹⁰⁵¹

iv. Alleged Breach of the Obligation to Admit Investments (Article 2(1) BIT)

4.351 As regards the Claimants' claim that the Respondent had failed to admit the Claimants' investment in accordance with its legislation due to the fact that it had allegedly withheld the necessary permits for the Galerie project, and their argument in that context that "an investment can be seen as admitted only if the investor was able to realize its business goal", the Respondent responded that BIT was not "a guarantee against business risk" and that it was under "no positive duty to guarantee that investors will be able to realize their business goals".¹⁰⁵²

¹⁰⁴⁶ Counter-Memorial, paras. 522-523.

¹⁰⁴⁷ Counter-Memorial, para. 524.

¹⁰⁴⁸ Counter-Memorial, para. 525.

¹⁰⁴⁹ Counter-Memorial, para. 526.

¹⁰⁵⁰ Counter-Memorial, para. 527.

¹⁰⁵¹ Counter-Memorial, para. 528.

¹⁰⁵² Counter-Memorial, para. 529.

- 4.352 In the alternative, the Respondent in any case denied that it had withheld any necessary permits, noting that the authorities had issued the Planning Permit, that all but one of the Building Permits required for construction of the Galerie project had been issued and become legally effective, and that the sole reason for the fact that the the Building Permit for the main construction was still not legally effective had been the Claimants' illegal behaviour. It submitted that, but for the excessive excavation, RAL would not have stayed the appellate proceedings in relation to the Building Permit for the main construction, and the Building Permit would, in all probability, have become effective in early 2009.¹⁰⁵³
- 4.353 Finally, the Respondent again pointed out that the Claimants could only claim damages for alleged violations occurring prior to the decision to abandon the project, such that there could be no claim of violation of the obligation to admit investments on the basis that the Building Permit for the main construction had still not become legally effective.¹⁰⁵⁴

v. Alleged Breach of the Prohibition of Expropriation (Article 4(2) BIT)

- 4.354 As an initial point in response to the Claimants' claim of indirect expropriation, the Respondent asserted that the claim must fail on the basis that there had been no taking. Relying on observations of the tribunals in *Bayindir v. Pakistan* and *Generation Ukraine v. Ukraine*, the Respondent submitted that the starting point for analysis of any claim of expropriation was to identify what had been taken, and observed that the Claimants at no point identified what had allegedly been taken from them.¹⁰⁵⁵
- 4.355 The Respondent noted that the Claimants had not in fact identified the property rights which they said been expropriated, but had rather attempted to sidestep the issue by suggesting that "where necessary permits such as construction permits were withheld [...] arbitral tribunals allowed the investor to rely on indirect expropriation".¹⁰⁵⁶ It further disputed that the authorities relied upon by the Claimants as support for that position were apposite; it observed that the decision in *Goetz v. Burundi* had concerned the revocation of the status of a free export company, and argued that it was this revocation of previously granted rights which was held to constitute an indirect expropriation because it forced the company to stop any activity.¹⁰⁵⁷ Similarly, it submitted that the decision in *Middle East Cement Shipping v. Egypt* concerned a prohibition of the exercise of existing rights granted to the investor under a licence.¹⁰⁵⁸ As such, it distinguished those cases from the present case on the basis that the Claimants and their subsidiaries had not had any previously granted rights revoked or cancelled.¹⁰⁵⁹

¹⁰⁵³ Counter-Memorial, para. 530.

¹⁰⁵⁴ Counter-Memorial, para. 531.

¹⁰⁵⁵ Counter-Memorial, paras. 532-534, quoting *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award of 27 August 2009, para. 442 and *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of 16 September 2003, para. 6.2.

¹⁰⁵⁶ Counter-Memorial, para. 535, quoting Memorial, para. 556.

¹⁰⁵⁷ Counter-Memorial, para. 536, referring to *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3), Award of 10 February 1999 (First Part; Decision of 2 September 1998), para. 124.

¹⁰⁵⁸ Counter-Memorial, para. 537, referring to *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award of 12 April 2002, para. 107.

¹⁰⁵⁹ Counter-Memorial, para. 538.

- 4.356 The Respondent further submitted that the Claimants had mischaracterized the decision in *Metalclad v. Mexico*, emphasizing that the claimant in that case had obtained the federal permits necessary for construction and operation of a landfill site, and had been assured by federal officials that a municipal permit was not necessary. It argued that it was the denial by the municipality, which the tribunal found had acted outside its competence, of the municipal construction permit which had resulted in the claimant losing the rights it had been granted under the federal permits, and that it was this which had been found to be a taking.¹⁰⁶⁰ The Respondent emphasized that, by contrast, in the present case, the Claimants had always known which permits were needed, that the issuance of the Planning Permit was not a guarantee of the grant of the Building Permits, and that the permits granted had never been revoked.¹⁰⁶¹
- 4.357 The Respondent asserted that the crux of the dispute was that the “applications for Building Permits were not issued quickly enough in accordance with Claimants’ overly optimistic time estimates”, and that it was on that basis that the Claimants had decided to abandon the project.¹⁰⁶² However, it observed that pendency of an application, let alone pendency for less than nine months (including delays caused by the incompleteness of the Claimants’ application), could not constitute a taking.¹⁰⁶³ In support of that position, it relied on the rejection of what it asserted was a similar expropriation claim by the tribunal in *Walter Bau v. Thailand*, noting that the tribunal in *Walter Bau*, in turn relying on the decision in *PSEG Global v. Turkey*, had held that there had been no deprivation to a sufficient degree of the investor’s control of its investment.¹⁰⁶⁴ On that basis, it submitted that the Claimants could not seriously argue that they had had any rights that had been taken.¹⁰⁶⁵
- 4.358 The Respondent further argued that there had been no taking of a sufficient intensity. It observed that the Claimants’ case was that because the Building Permits had not been issued in line with their expectations, their project had become economically unsustainable and their ownership of the project land “became formal and economically worthless”.¹⁰⁶⁶ The Respondent noted that the legal status of the land as at the time of the abandonment had been no different than when it had been acquired by the Claimants, insofar as at neither point in time was there a valid Building Permit, so that “nothing has changed”; they observed that, at most, the Claimants had lost “their hope to realize the project with a profit”, but that “that hope never materialized into a legal right or asset.”¹⁰⁶⁷ On the basis that the Claimants had not lost any previously granted rights, the Respondent took the position that the non-realization of the project could not qualify as a taking, but submitted that even if it could, it would not have reached the required intensity for a finding of expropriation.¹⁰⁶⁸ It referred to the observations of the tribunal in *Generation Ukraine v. Ukraine* to the effect that the fact that an investment

¹⁰⁶⁰ Counter-Memorial, para. 539.

¹⁰⁶¹ Counter-Memorial, para. 540.

¹⁰⁶² Counter-Memorial, para. 541.

¹⁰⁶³ Ibid.

¹⁰⁶⁴ Counter-Memorial, para. 542, quoting *Walter Bau v. Thailand* (UNCITRAL), Award of 1 July 2009, paras. 10.16-10.18, in turn quoting, inter alia, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award of 19 January 2007, para. 278.

¹⁰⁶⁵ Counter-Memorial, para. 543.

¹⁰⁶⁶ Counter-Memorial, para. 544, referring to Memorial, paras. 561-563.

¹⁰⁶⁷ Counter-Memorial, para. 545.

¹⁰⁶⁸ Counter-Memorial, para. 545.

had become worthless did not without more mean that there was an expropriation; that it was not sufficient for an investor merely to point to “some governmental initiative or inaction, which might have contributed to his ill fortune”; and that it was not enough for an investor to rely upon an act of maladministration, abandon the investment without efforts to remedy the administrative default, and then claim an “uncompensated virtual expropriation”.¹⁰⁶⁹

- 4.359 Relying on a variety of authority, including most prominently the decision in *Walter Bau v. Thailand*, the Respondent further asserted that there could be no expropriation where the Claimant retained full ownership and control over its investment and its day-to-day operations.¹⁰⁷⁰ The Respondent further noted that the Claimants had not denied that they were in fact able to fully control, use, enjoy, or dispose of the affected property, in particular insofar as the Claimants continued to fully own and control the rights relating to the participatory interests in Tschechien 7 and ECE Praha, and that those entities in turn fully owned and controlled their asserts, including the project land.¹⁰⁷¹
- 4.360 The Respondent further invoked the decision of the tribunal in *Pope & Talbot v. Canada* as illustrating the point that there could be no expropriation in such circumstances;¹⁰⁷² it submitted that the Claimants had missed the point insofar as they had argued that the decision was irrelevant insofar as the claimant in that case had been able to pursue other business opportunities. It noted that ECE Praha had been in operation since 1996 and provided services to companies within the ECE Group within the Czech Republic, and that there was no reason it could not continue to do so in the future. Similarly, it observed that Tschechien 7 continued to own the project land and could attempt to use it for a different kind of development.¹⁰⁷³
- 4.361 The Respondent submitted that the decision in *Pope & Talbot* also illustrated a further point, noting that the tribunal in that decision had held that an interference resulting in the “loss of already established profits did not constitute an expropriatory taking” and that, by contrast, the Claimants’ claim for expropriation was based on lost profits even though the planned business activity had not even started.¹⁰⁷⁴ It also referred in that connection to the observation of the Tribunal in *Waste Management* that it was not the function of the international law of expropriation “to eliminate the normal commercial risks of a foreign investor”, or to require States to provide compensation for the failure of an investor’s flawed business plan.¹⁰⁷⁵ It thus concluded that even if the non-realization could constitute a taking (which it denied), the claim of expropriation would in any event fail.¹⁰⁷⁶

¹⁰⁶⁹ Counter-Memorial, para. 545, quoting *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of 16 September 2003, para. 20.30.

¹⁰⁷⁰ Counter-Memorial, paras. 546-547, quoting, inter alia, *Walter Bau v. Thailand* (UNCITRAL), Award of 1 July 2009, para. 10.13.

¹⁰⁷¹ Counter-Memorial, paras. 546; 548.

¹⁰⁷² Counter-Memorial, para. 549, referring to *Pope & Talbot Inc. v. Canada* (UNCITRAL), Interim Award of 26 June 2000, para. 102.

¹⁰⁷³ Counter-Memorial, para. 549.

¹⁰⁷⁴ Counter-Memorial, para. 550, referring to *Pope & Talbot Inc. v. Canada* (UNCITRAL), Interim Award of 26 June 2000.

¹⁰⁷⁵ Counter-Memorial, para. 550, quoting *Waste Management Inc. v. United Mexican States (No. 2)* (ICSID Case No. ARB(AF)/00/3), Final Award of 30 April 2004, para. 177.

¹⁰⁷⁶ Counter-Memorial, para. 551.

- 4.362 Finally, the Respondent submitted that, insofar as the Planning Permit had been issued unlawfully, a potential revocation within the Extraordinary Review Proceedings would have constituted a valid exercise of its regulatory powers and thus would not have constitute a compensable taking. It submitted that the same was true in relation to the conduct of the relevant authorities in instituting the Groundworks Removal Proceedings, and the decision of RAL to stay the appellate proceedings as to the main Building Permit on the basis of the pendency of the Groundworks Removal Proceedings.¹⁰⁷⁷
- 4.363 The Respondent submitted that the Claimants had misstated the scope of the police powers exception insofar as they asserted that it extended only to general non-discriminatory measures aimed at regulating general welfare, such as taxation.¹⁰⁷⁸ Although accepting that in order to fall within the police powers exception, any measures had to be non-discriminatory, it asserted that the measure in question could be individual, provided that it was adopted pursuant to a generally applicable statute; in support of that position, it noted that in *Saluka v. Czech Republic*, the forced administration of a bank had been held to come within the police powers exception.¹⁰⁷⁹
- 4.364 In support of its position that the relevant conduct had been within the police powers exception, the Respondent observed that the prior authorization of work constituted a fundamental principle of Czech construction law, and that unauthorized works had to be removed unless the owner of the land applied for and obtained regularization. It submitted that any requirement to remove unauthorized works, although potentially constituting a taking, nevertheless was not compensable insofar as it fell within the police powers exception.¹⁰⁸⁰ It further reiterated that the pendency of the Groundworks Removal Proceedings had necessitated a stay of the main Building Permit proceedings insofar as the subject matter of those proceedings would necessarily be affected by a future decision requiring removal of unauthorized works, or regularizing the situation.¹⁰⁸¹
- 4.365 The Respondent further noted that under Czech administrative law, pursuant to the principle of substantive correctness of administrative decisions, in certain circumstances and subject to certain procedural safeguards, an administrative permit could be cancelled even after it had become legally effective, and that the proceedings leading to such a cancellation could be opened by an administrative body acting *sua sponte*. As such, it argued that any potential cancellation of the Planning Permit in the Extraordinary Review Proceedings would have come within the police powers exception, and therefore would not have constituted a compensable taking.¹⁰⁸²

¹⁰⁷⁷ Counter-Memorial, para. 552.

¹⁰⁷⁸ Counter-Memorial, para. 553.

¹⁰⁷⁹ Counter-Memorial, para. 553, referring to *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, paras. 262 et seq.

¹⁰⁸⁰ Counter-Memorial, para. 554.

¹⁰⁸¹ Counter-Memorial, para. 555.

¹⁰⁸² Counter-Memorial, para. 556.

d. Causation

4.366 Quite apart from its case as to the merits of the Claimants' claims of breach of the BIT, the Respondent took the position that the Claimants' case failed as a matter of causation.

i. Incidence of the Burden of Proof as Regards Matters of Causation

4.367 Relying inter alia on the decisions in *Azurix v. Argentina* and *Biwater Gauff and Tanzania*, the Respondent submitted that the burden was upon the Claimants to show that there existed a causal link between each of the breaches of the BIT alleged and the losses claimed.¹⁰⁸³ It argued that that the relevant causal link could not be remote or indirect, and that the relevant standard for causation was a "but for" test.¹⁰⁸⁴

ii. Alleged Failure by the Claimants to Establish Their Case on Causation

4.368 As to the facts, the Respondent asserted that in order to establish their case on causation the Claimants would have to discharge the burden of proof upon them in relation to the following elements:

(a) The Czech Republic delayed and obstructed administrative proceedings for Galerie and thus breached the Treaty;

(b) The delays caused the issuance of the building permit to become unpredictable;

(c) The delays also required that the opening date of Galerie be postponed to fall 2010;

(d) The postponement of the opening date allegedly caused the loss of key tenants necessary for the success of the project;

(e) The loss of key tenants prevented Galerie from prevailing on the market and being sold to an investor with a profit for Claimants.¹⁰⁸⁵

4.738 It argued that that the Claimants had established none of those matters.¹⁰⁸⁶

4.369 The Respondent first argued that the Claimants were unable to establish that any alleged breach of the BIT had caused the postponement of the opening date to the Autumn of 2010.¹⁰⁸⁷ It took the position that

¹⁰⁸³ Counter-Memorial, para. 558-559, citing *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 297; and *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008, para. 779 and 782.

¹⁰⁸⁴ Counter-Memorial, para. 559-560, citing, inter alia, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008, paras. 785-786; and *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (UNCITRAL/PCA), Partial Award on the Merits of 30 March 2010, para. 374.

¹⁰⁸⁵ Counter-Memorial, para. 561.

¹⁰⁸⁶ Counter-Memorial, para. 562.

- a. it was not credible that a delay of approximately two weeks in the issuing by RAL of its decision on Multi's appeal against the Planning Permit resulted in the postponement of the opening of the Galerie centre from Autumn 2009 to Spring 2010;¹⁰⁸⁸
- b. the Claimants had not established that the Third Stay of the Building Permit proceedings had rendered the Building Permit proceedings unpredictable, and referred to its earlier arguments that any uncertainty was self-inflicted and resulted from Tschechien 7's failure to file a timely appeal, the fact that Tschechien 7 had improperly requested (and been granted) permission for excavations in the Planning Permit, and from the excavations in excess of those authorized in the Planning Permit;¹⁰⁸⁹
- c. the Claimants had not established that the shift of the opening from Spring to Autumn 2010 had been caused by the Third Stay, pointing to the Claimants' own internal documents, which showed that, during April and May 2008, the Claimants had envisaged opening in Autumn 2010; it submitted that the shift back to a projected Spring 2010 opening occurred only after the Claimants had improperly decided to exceed the authorized volume of excavations;¹⁰⁹⁰
- d. the overall delay was mainly of the Claimants' own making; the Respondent referred in particular to the delay of five months in submitting the documentation necessary for the Planning Permit, the delay of two months in applying for the Building Permits, and the further delay of approximately three months in completing those applications; it noted that in total 10 months of delay was attributable to the Claimants, and that that far exceeded any delays attributable to the Respondent.¹⁰⁹¹

4.370 Second, the Respondent argued that the Claimants had failed to substantiate the allegation that the shift from a Spring to an Autumn 2010 opening had in fact been fatal to the project,¹⁰⁹² drawing attention to the fact that the Claimants had themselves envisaged an Autumn 2010 opening from April 2008 onwards, but had not at that stage abandoned the project.¹⁰⁹³ Second, it submitted that the evidence showed that the departure of certain key tenants had in fact been due to the better location of Forum.¹⁰⁹⁴ It further noted that the Claimants had failed to disclose documents relating to the lease negotiations with certain prospective tenants, and invited the Tribunal to draw the inference that the reason why those tenants had not in the end signed up with Galerie had nothing to do with the projected opening date of Galerie.¹⁰⁹⁵ It submitted that

¹⁰⁸⁷ Counter-Memorial, para. 563.

¹⁰⁸⁸ Counter-Memorial, para. 564.

¹⁰⁸⁹ Counter-Memorial, para. 565.

¹⁰⁹⁰ Counter-Memorial, para. 566.

¹⁰⁹¹ Counter-Memorial, para. 567.

¹⁰⁹² Counter-Memorial, para. 568.

¹⁰⁹³ Counter-Memorial, para. 569.

¹⁰⁹⁴ Counter-Memorial, paras. 570-572.

¹⁰⁹⁵ Counter-Memorial, para. 573.

the loss of key tenants, and failure to secure others, resulted from Galerie's inferior location, which was part of the Claimants' business risk.¹⁰⁹⁶

4.371 Third, the Respondent attacked the Claimants' assertion that they would have prevailed on the market but for the alleged breaches of the BIT; it submitted that the Claimants had failed to provide any evidence that this was in fact the case, and noted that the evidence of their real estate experts was that the high level of saturation of the market in meant that all competitors would have suffered from high vacancy rates and fierce competition, resulting in lower profitability.¹⁰⁹⁷

4.372 Fourth, in relation to the Claimants' claim for lost profits, which was based on a valuation assuming a sale on 15 December 2007, the Respondent submitted that the Claimants had not shown any actions of the Czech Republic prior to 15 December 2007 "which even remotely appear as a possible violation of the Treaty", and recalled that the Claimants had themselves accepted that the proceedings relating to the Planning Permit had been "almost regular".¹⁰⁹⁸ It further noted that the Claimants had only prepared an Investment Exposé in November 2007, which it was intended would be distributed only once a valid Building Permit was obtained, and on that basis submitted that the Claimants had never intended to sell the project in December 2007.¹⁰⁹⁹ The Respondent submitted that the lack of causation and "implausible" valuation date undermined the entire claim for lost profits, and underlined that the Claimants in the Memorial had not responded to the Respondent's arguments in that regard contained in the Answer to the Statement of Claim.¹¹⁰⁰

iii. The Cause of Abandonment of the Galerie Project

4.373 In addition, the Respondent put forward a positive case that, rather than resulting from any difficulties in the administrative proceedings, as asserted by the Claimants, the real reasons for the abandonment had in fact been the real estate crisis, which had an impact on the availability of financing and depressed sale prices, and submitted that a further important factor had been the over-saturation of the retail market in ¹¹⁰¹

4.374 Although accepting that it had no documentary evidence that the real cause of the abandonment had been the financial pressure resulting from the combined effect of the retail crisis and over-saturation of the market, it submitted that that was because the Claimants had not disclosed "the financial calculations and liquidity reports underlying their decision", and other relevant documents, and invited the Tribunal to draw negative inferences in that regard.¹¹⁰²

4.375 The Respondent further submitted that the Claimants had "ultimately realized that their time estimates had been unreasonable", and submitted that, despite their assertions to the contrary, it

¹⁰⁹⁶ Counter-Memorial, para. 574.

¹⁰⁹⁷ Counter-Memorial, paras. 575-576.

¹⁰⁹⁸ Counter-Memorial, paras. 577-578.

¹⁰⁹⁹ Counter-Memorial, para. 579.

¹¹⁰⁰ Counter-Memorial, para. 580.

¹¹⁰¹ Counter-Memorial, paras. 581-582.

¹¹⁰² Counter-Memorial, para. 583.

was unlikely that they would have been able to complete the centre within just 19 months; it noted that the Claimants had produced no documents supporting their assertions in that regard.¹¹⁰³

4.376 By way of conclusion of its arguments as to the cause of abandonment, the Respondent submitted that the Claimants “finally recognized the inherent risks of the project, exacerbated by the real estate crisis, and decided to abandon it”.¹¹⁰⁴

iv. Relevance of the Excavations to Causation

4.377 Further, the Respondent argued that, even if the Claimants were able to establish their case as to causation, any chain of causation had in any case been broken by the excavations in excess of those authorized by the Planning Permit; it argued that the violation of Czech law had as a consequence that the relevant authorities were required to address the unauthorized excavations through the Groundworks Removal Proceedings, and that the Building Permit proceedings could only recommence once the Groundworks Removal Proceedings had been resolved.¹¹⁰⁵

4.378 The Respondent emphasized that the Claimants had chosen not to apply for regularization of the excess volume of excavations, or provide details as to their scope, which had prevented any consideration by the authorities of whether or not to regularize them.¹¹⁰⁶

4.379 As such, the Respondent submitted that what it referred to as the “alternative timeline” required by the Claimants’ case on causation (i.e. the situation “but for” the alleged breaches of the BIT), did not support their claims. It argued that even if there had been a breach of the BIT, the Claimants would still have found themselves in a situation in which the proceedings in relation to the Building Permit for the main construction remained blocked due to the unauthorized excavations with the result that Galerie would not have been able to open in Autumn 2010 in any event.¹¹⁰⁷

4.380 The Respondent concluded that the excessive excavations in any event broke the chain of causation, such that the Claimants’ entire claim for damages in any event failed.¹¹⁰⁸

5. The Claimants’ Reply

a. Overview and General Points

4.381 At the outset of their Reply, the Claimants asserted that their claim related to acts of the Czech authorities

¹¹⁰³ Counter-Memorial, para. 584.

¹¹⁰⁴ Counter-Memorial, para. 585.

¹¹⁰⁵ Counter-Memorial, paras. 586-588.

¹¹⁰⁶ Counter-Memorial, para. 589.

¹¹⁰⁷ Counter-Memorial, para. 590.

¹¹⁰⁸ Counter-Memorial, para. 591.

*“which led to the destruction of the Claimants’ investment in the Czech Republic. Because of such illegal acts, Claimants were disrupted in their investment activity and had to abandon an initially promising shopping centre project. Significant circumstantial evidence points to a corruptive scheme”.*¹¹⁰⁹

4.382 The Claimants went on to suggest that they had created a “reasonable time schedule” for the development of the Galerie project,¹¹¹⁰ and that, despite the parallel development, in close proximity, of Multi’s competing Forum project, on the basis of that schedule they had been entitled to “assume that it would be them and not Multi who would succeed in attracting the relevant tenants and opening first”.¹¹¹¹ They submitted that the “obstructions and delays” in the permit proceedings had been unexpected, and that they had not foreseen the “privileged treatment” which they alleged had been granted to Multi, as they had not been aware of the “corruption scheme created within Respondent’s authorities and related in particular to Multi.”¹¹¹² They further asserted that the circumstances were “highly suspicious”, in particular in so far as the “numerous irregularities in the permit proceedings and the preferences granted to Multi” could not be explained as mere “unfortunate circumstances”, and further that the number of “illegal decisions rendered in unlawful or non-standard proceedings” should be taken to exclude the possibility that they had occurred through pure coincidence. Rather, they suggest that “individuals in the authorities purposefully obstructed” the Claimants. They also pointed to other “conspicuous circumstances” which were alleged to show that a scheme of corruption existed.¹¹¹³

4.383 Having summarised their complaints as to the conduct of the Extraordinary Review Proceedings and the Building Permit proceedings, and their case that the delays in the proceedings forced them to abandon the project,¹¹¹⁴ the Claimants reiterated that they claimed breach of:

- a. the fair and equitable treatment standard (Article 2(1) of the BIT);
- b. the prohibition of impairment by arbitrary and discriminatory measures (Article 2(2) of the BIT); and
- c. the prohibition of expropriation and measures tantamount to compensation without compensation (Article 4 of the BIT).¹¹¹⁵

4.384 The Claimants affirmed that their case was not that it was the Respondent’s

“various different acts that constitute, each in and of itself, a breach of the treaty. [...] Rather Claimants submit that Respondent breached the treaty through its overall obstructive conduct in the Extraordinary Review and

¹¹⁰⁹ Reply, para. 1.

¹¹¹⁰ Reply, para. 3.

¹¹¹¹ Reply, para. 4.

¹¹¹² Reply, para. 5.

¹¹¹³ Reply, para. 5.

¹¹¹⁴ Reply, paras. 6-13.

¹¹¹⁵ Reply, para. 14.

- 4.385 They further argued that that was the case “irrespective of whether the numerous irregularities were part of a corruption scheme to obstruct Claimants or result of mere coincidence”, although they submitted that there were serious indices sufficient to prove corruption.¹¹¹⁷
- 4.386 The Claimants also made a number of observations in relation to the allegedly irregular conduct of the Respondent following the abandonment. In particular:
- a. they reiterated the suggestion that the Ministry of Finance, in the person of [redacted] had improperly used the settlement negotiations in order to “lure” the Claimants into agreeing to permit an on-site inspection and provide additional information in relation to the excavation works on the project site, and that in doing so, the Ministry had improperly taken advantage of the Claimants’ good faith attempts to reach a settlement, in circumstances in which it had in fact had no real intention of seeking a settlement, but was merely seeking material in order to raise a defence;¹¹¹⁸
 - b. the Claimants stressed that the excavations had never been relied on by the relevant authorities as a reason for the stays of which the Claimants complained, and submitted that any attempt by the Respondent to draw a connection between the stays and the excavation should be dismissed;¹¹¹⁹
 - c. the Claimants also raised a number of additional complaints as to the conduct of the Respondent once the present proceedings had started:
 - i. they repeated that the Respondent had made a formal complaint to the relevant Bar association against [redacted] one of the Claimants’ main witnesses;¹¹²⁰
 - ii. they complained that the Respondent had asked employees of the Ministry of Regional Development to submit any witness statements first to its Counsel, thereby effectively preventing the Claimants from obtaining evidence;¹¹²¹
 - iii. they observed that the Respondent had withheld from the Claimants information as to the workings of the Advisory Committee within the Ministry of Regional Development, despite the fact that under Czech law it

¹¹¹⁶ Reply, para. 14.

¹¹¹⁷ Reply, para. 15.

¹¹¹⁸ Reply, paras. 16-17.

¹¹¹⁹ Reply, para. 18.

¹¹²⁰ Reply, para. 20.

¹¹²¹ Reply, para. 21.

was obliged to disclose it, and in normal circumstances would have done so;¹¹²² and

- iv. noted that the Respondent had deliberately selected as its expert witness on Czech law a colleague within the same department as the Claimants' own expert witness; the Claimants expressed concern that the Respondent was thereby seeking to exert influence on the Claimants' legal expert.¹¹²³

4.387 Finally, the Claimants sought to identify what it asserted were irrelevant issues, the relevant issues, issues on which there was agreement between the Parties, and those issues which the Claimants deemed to be most important.¹¹²⁴

4.388 The Claimants submitted that the category of irrelevant issues included

- a. the imposition of the stays in the ancillary Building Permit proceedings (i.e. those relating to water, and to internal and external roads), which, although illegal, had not contributed to the delay which had forced the Claimants to abandon their project;
- b. the conduct of the Respondent's authorities following the abandonment, insofar as the Claimants were not claiming damages in respect of any conduct after 13 October 2008, the asserted date of the abandonment. Nevertheless, the Claimants submitted that those actions might indirectly be of relevance, in particular insofar as the conduct of the Ministry of Finance barred the Respondent from relying on particular evidence obtained by it.¹¹²⁵

4.389 As regards uncontested issues, the Claimants submitted that the Parties were in agreement that:

- a. the Third Stay had been illegal under Czech law;
- b. MAL had not noticed that the appeal brought by Tschechien 7 against the Third Stay had been out of time, and the issue had first been identified by RAL;
- c. an opinion adopted by an Advisory Committee within a Ministry was not legally binding;
- d. the First Stay had been legal (although the Claimants maintained their position that it had been unusual, and unnecessary); and
- e. "Claimants' excavations were legal at least until June of 2008".¹¹²⁶

4.390 As to the "relevant issues" to be decided, the Claimants submitted that these were:

¹¹²² Reply, para. 21

¹¹²³ Reply, para. 22.

¹¹²⁴ Reply, para. 23.

¹¹²⁵ Reply, para. 24.

¹¹²⁶ Reply, para. 25.

- a. whether there was a “corruption scheme involving Multi and individuals within the authorities”; they asserted that “Multi and its construction company Syner unduly influenced representatives of the City : and of MAL as well as the Minister of Regional Development”;
- b. whether, as part of the scheme, individuals within those authorities had illegally obstructed the Claimants; it submitted that the Claimants had been subjected to numerous non-standard and unjustified delays in the Extraordinary Review Proceedings and in the Main Building proceedings;
- c. whether, as part of the scheme, those individuals had “illegally favoured Multi”;
- d. whether, because of the “exceptionally high number of pre-lease agreements” concluded by the Claimants with premium tenants, there was a guarantee that the Claimants’ project would have succeeded;
- e. whether the “numerous obstructions”, as well as the favourable treatment accorded to Multi, had forced the Claimants to abandon the project;
- f. whether the Claimants had done “everything in their power to remedy the situation”; the Claimants submitted that the fact that the appeal against the Third Stay had been belated “does not play a role”; and
- g. whether the excavations had anything to do with the duration of the administrative proceedings, and the decision to abandon the project; the Claimants submitted that this was not the case, and that “the excavations do not play a role for Respondent’s liability”.¹¹²⁷

b. Factual Matters

i. The Claimants’ Claim of Corruption

4.391 As to the facts, the Claimants first set out the basis for their claim that the “significant and numerous circumstantial evidence points to a corruption scheme whereby Respondent intentionally obstructed GALERIE to enable the competition Multi to succeed with its project FORUM”.¹¹²⁸ They submitted that the irregularities in the administrative proceedings had not been “a mere pearl chain of coincidences”, but rather “the expression of a deliberate attempt to favour Multi over Claimants”.¹¹²⁹

4.392 In essence, the Claimants’ case in this regard was that:

- a. Multi had had a vital interest in ensuring that Forum would open first, and that Galerie would open later, or not at all,¹¹³⁰

¹¹²⁷ Reply, para. 26.

¹¹²⁸ Reply, para. 27.

¹¹²⁹ Reply, para. 27.

¹¹³⁰ Reply, para. 29.

- b. accordingly, it had influenced of MAL to obstruct the permit proceedings for the Claimants, and to simplify the permitting process for Multi,¹¹³¹
- c. that the vehicle for the alleged improper influence was Multi's construction firm, which, it was alleged, had a close relationship with the Mayor of the City ;¹¹³²
- d. following RAL's rejection of Multi's appeal against the Planning Permit, Multi had sought to obstruct the Claimants by filing Extraordinary Review proceedings, and in that connection, that it had recruited Minister who was prepared to remand the matter to the Ministry, rather than terminate it,¹¹³³ and
- e. Mr had improperly used the existence of the pending Extraordinary Review proceedings as a pretext in order to adopt the Third Stay in the Building Permit proceedings.¹¹³⁴

4.393 The Claimants emphasized that they did not allege that all officials within the relevant authorities were part of the scheme; in particular they submitted that

- a. RAL was "incorruptible and independent";¹¹³⁵
- b. the Deputy Mayor ; Mr had "stayed neutral";¹¹³⁶ and
- c. it was not all officials within the Ministry who were involved, but only those involved in the Extraordinary Review Proceedings.¹¹³⁷

4.394 The Claimants further admitted that it had "no direct proof of Multi paying the officials", but submitted that this was not necessary insofar as there were "numerous serious indices that leave no other option but to conclude that a corruption scheme exists".¹¹³⁸

4.395 The Tribunal will not attempt to summarize here the various detailed matters relied upon by the Claimants in order to substantiate their claim of the existence of a scheme of corruption, but rather will discuss those arguments in its substantive discussion of the Claimants' claim of corruption later in the present award. For present purposes, it is sufficient to note that the matters relied upon included:

- a. information, including from NGOs, relating to the level of corruption within the Czech Republic generally, as well as to particular alleged instances of corruption, none of which were connected to the facts of the present case;¹¹³⁹

¹¹³¹ Reply, para. 30.

¹¹³² Reply, para. 30.

¹¹³³ Reply, para. 33.

¹¹³⁴ Reply, para. 34.

¹¹³⁵ Reply, para. 35.

¹¹³⁶ Reply, para. 36.

¹¹³⁷ Reply, para. 37.

¹¹³⁸ Reply, para. 40.

- b. information, including from NGOs, relating to the level of corruption within itself, including specific alleged instances of corruption, again none of which were connected to the specific facts of the present case;¹¹⁴⁰
- c. allegations as to suspected corruption by within none of which specifically related to the facts of the present case, as well as allegations as to the close connections between the owner of ; and Mr , the Mayor of ;¹¹⁴¹
- d. allegations that the cause of a supposed “freezing” of relations between the City and the Claimants was due to the fact that was not awarded the contract to build the Galerie project, and eventually ended up building Forum;¹¹⁴²
- e. detailed allegations, largely based on witness evidence, to the effect that the reasons underlying particular occurrences within the Building Permit proceedings, including the adoption of the stays, was either due to obstruction by Mr or particular instructions given to officials within MAL to find ways to obstruct the progress of the proceedings.¹¹⁴³ The Claimants emphasized that MAL had been fully aware of the risk of abandonment by the Claimants in the event of delays as the result of a letter sent to MAL on 23 May 2008 submitting the documents requested pursuant to the Second Stay;¹¹⁴⁴
- f. detailed allegations, again largely based on witness evidence, as regards specific alleged irregularities within the Extraordinary Review Proceedings, as well as various other irregularities, which, it was alleged, could only be explained by corruption and an intention on the part of the relevant officials, including Minister to favour Multi.¹¹⁴⁵ The Claimants relied upon:
 - i. the fact of initiation of the Extraordinary Review Proceedings, which they submitted was in itself unusual;¹¹⁴⁶
 - ii. the First Ministry Decision, an allegation that the employee of the Ministry who had prepared the draft of the decision had expressed the opinion that it was wrong, and the assertion that Tschechien 7 should have been heard and treated as a participant in the proceedings;¹¹⁴⁷

¹¹³⁹ Reply, paras. 41-43.

¹¹⁴⁰ Reply, paras. 44-46.

¹¹⁴¹ Reply, paras. 47-50.

¹¹⁴² Reply, paras. 51-53.

¹¹⁴³ Reply, paras. 54-63 and 66.

¹¹⁴⁴ Reply, paras. 64-65, referring to Core 6/193(Exhibit -33).

¹¹⁴⁵ Reply, paras. 82-108.

¹¹⁴⁶ Reply, para. 84.

¹¹⁴⁷ Reply, para. 85.

- iii. the denial of Tschechien 7's status as a participant in the proceedings leading to the First Ministry Decision;¹¹⁴⁸
- iv. the fact that Minister had deviated from the opinion of the Advisory Committee in the First Minister Decision insofar as he had decided to remand the matter, rather than terminate the proceedings; although accepting that the opinion of the Advisory Committee was not legally binding, the Claimants submitted that the Minister had never before deviated from a recommendation of the Advisory Committee;¹¹⁴⁹
- v. the fact that Minister had not followed the draft prepared by the Legal Department of the Ministry; the Claimants noted that, although a draft had been prepared by the Legal Department based on the recommendation of the Advisory Committee, the Minister had requested the full file, following which the First Minister Decision had been issued in a form different from the draft;¹¹⁵⁰
- vi. the timing of the First Minister Decision on 27 June 2008; the Claimants submitted that the decision was significantly delayed, the recommendation of the Advisory Committee having been issued on 22 April 2008, and submitted that the decision was only issued as a result of the approach made by the Claimants to the Prime Minister in their letter dated 16 June 2008;¹¹⁵¹
- vii. an allegation that Multi had inspected the First Minister Decision before it was dispatched; the Claimants alleged that the legal representative of Multi had inspected the file at the Ministry, and had "checked the wording as if it had been Multi's own draft" prior to its dispatch; on that basis they alleged that Multi had communicated with the Minister and had requested that the proceedings should improperly be remanded to the Ministry;¹¹⁵²
- viii. the fact that subsequent to the First Minister Decision, the composition of the Advisory Committee had changed, with the Minister replacing two of its members with effect from 19 September 2008; the Claimants submitted that the Minister had disapproved of the recommendation of the Advisory Committee, and had appointed partisan members so as to be able to influence the recommendation of the Advisory Committee in relation to the Second Minister Decision;¹¹⁵³
- ix. the transfer of an official within the Legal Department at the Ministry, Ms to another position; the Claimants emphasized that Ms was the official who had previously stated to a representative of the Claimants

¹¹⁴⁸ Reply, para. 86.

¹¹⁴⁹ Reply, paras. 87-92.

¹¹⁵⁰ Reply, paras. 93-97.

¹¹⁵¹ Reply, para. 98.

¹¹⁵² Reply, paras. 99-100.

¹¹⁵³ Reply, paras. 101-102.

that the Minister had not previously deviated from a recommendation of the Advisory Committee;¹¹⁵⁴

- x. the fact that the Second Minister Decision had reached a different decision based on what the Claimants alleged were the same facts as those underlying the First Minister Decision;¹¹⁵⁵
- xi. specific allegations in relation to a corruption charge against Minister in an unconnected matter, which the Claimants characterized as a “further interesting coincidence” which cast doubt on his integrity;¹¹⁵⁶ and
- xii. the alleged illegality of a number of the administrative decisions, in particular all of the decisions in the Extraordinary Review Proceedings and the Second and Third Stays;¹¹⁵⁷ the Claimants argued that it was clear, even without regard to the evidence of the legal experts, that the decisions were “far from being standard”, and submitted that the decisions “cannot plausibly be explained without assuming that they were part of a scheme to obstruct Claimants”.¹¹⁵⁸

4.396 Although contained in the section setting out the Claimants’ case on corruption, it is necessary to examine in more detail certain of the Claimants’ arguments in relation to the Third Stay, which are also relevant to the Claimants’ claims more generally. The Claimants noted that the Respondent had accepted that the decision was illegal, but drew specific attention to RAL’s ruling of 8 October 2008 on the Claimants’ appeal against the Third Stay, and in particular RAL’s observation that MAL had “artificially fabricated” a non-existent preliminary issue in order to justify the Third Stay.¹¹⁵⁹ They submitted that the justification put forward by the Respondent for the Third Stay, based on the possibility that the Planning Permit might be revoked, was cynical, insofar as MAL had been fully aware of the risk of abandonment, which would have rendered revocation of the Planning Permit irrelevant.¹¹⁶⁰ They further argued that if the Planning Permit had been revoked, this would not necessarily have resulted in cancellation of the Building Permit and a need to demolish any construction which had already been carried out, and in any case, that they could have applied for a new Planning Permit.¹¹⁶¹

4.397 The Claimants submitted that MAL had been aware of the illegality of the Third Stay after the Claimants had on 31 July 2008 provided it with a copy of the opinion from the Ministry of Regional Development dated 28 July 2008. They asserted that MAL should accordingly have

¹¹⁵⁴ Reply, para. 103.

¹¹⁵⁵ Reply, paras. 104-108.

¹¹⁵⁶ Reply, paras. 109-114.

¹¹⁵⁷ Reply, paras. 115-116.

¹¹⁵⁸ Reply, para. 115.

¹¹⁵⁹ Reply, para. 67, quoting Core 8/279 (Exhibit R-59).

¹¹⁶⁰ Reply, paras. 68-69.

¹¹⁶¹ Reply, paras. 70-71.

sought to resume the proceedings *sua sponte*, and could have done so prior to the filing of Tschechien 7's (belated) appeal on 7 August 2008.¹¹⁶²

- 4.398 They further argued that MAL in any case had not been prevented from resuming the proceedings *sua sponte* even after the Claimants had filed their belated appeal, and submitted that it was crucial that MAL had not noted that the appeal was belated, and thus would not have regarded itself as prevented from resuming the proceedings.¹¹⁶³ They also made the point that if MAL had been concerned as to the Claimants' good fortunes, it could have informed the Claimants that the appeal would be an obstacle to it resuming the proceedings *sua sponte*, and the appeal could have been withdrawn.¹¹⁶⁴ Instead, they noted that MAL had failed to respect what they alleged was the ten day time limit for transferring the case file to RAL, and had only supplied it after 30 days.¹¹⁶⁵
- 4.399 Finally, the Claimants noted that following the delivery of RAL's decision on the appeal on 8 October 2008, MAL had only resumed the proceedings on 29 October 2008, some three weeks later, and after the Claimants had abandoned the project.¹¹⁶⁶ The Claimants noted that the Respondent had submitted that the file was returned from RAL only on 30 October 2008, and argued that MAL must accordingly have been aware of RAL's decision prior to that date, and the delay in receiving the file could not therefore have been the cause of the delay.¹¹⁶⁷

ii. The Claimants' Claims of Discrimination

- 4.400 The Claimants also devoted a substantial part of their discussion of the facts underlying their claims of discrimination as between the Forum and Galerie projects; they linked those arguments to their claim of corruption, asserting that favourable treatment of one competitor over another is "the most obvious indicator that corruption is involved".¹¹⁶⁸
- 4.401 The first complaint in this regard was the disparity between the length of the various permit proceedings for Forum, which the Claimants submitted were speedy, and the far longer proceedings for Galerie, which it was submitted, had been "severely disrupted by MAL".¹¹⁶⁹
- 4.402 Having noted that the Respondent had asserted that Forum had not met any opposition, the Claimants asserted that the reason why the Forum proceedings had been quicker was that the relevant authorities had miscalculated the number of neighbours, and therefore the number of participants in the proceedings, which had simplified the permit proceedings for Multi.¹¹⁷⁰
- 4.403 They submitted that, although officially there were fewer than 30 participants in the Forum proceedings, "it is hardly conceivable that a retail centre like Forum, in a similar location of

¹¹⁶² Reply, para. 72-74.

¹¹⁶³ Reply, paras. 75-76

¹¹⁶⁴ Reply, para. 77.

¹¹⁶⁵ Reply, para. 78.

¹¹⁶⁶ Reply, paras. 79-80.

¹¹⁶⁷ Reply, para. 81.

¹¹⁶⁸ Reply, para. 117.

¹¹⁶⁹ Reply, para. 118.

¹¹⁷⁰ Reply, para. 119.

like Claimants' project and even adjoining the pedestrian zone should have fewer than 30 participants".¹¹⁷¹ The Claimants submitted that, on the basis of the number of neighbouring plots of land, the proceedings should have involved well in excess of 30 participants, especially taking account of the number of plots of land abutting Street, which was reconstructed by Multi as part of the Forum development.¹¹⁷² They further submitted that the reason for the low number of official participants was that MAL had failed to check the number of land plots involved, and that Multi had not mentioned the land plot corresponding to street, and a number of other land plots, in the supporting documentation for either the Planning Permit or Main Building Permit.¹¹⁷³

- 4.404 The Claimants further submitted that, irrespective of the number of participants, the re-development of street had constituted a "line-type structure" and that accordingly, under the relevant legislation a public notice should in any case have been used to communicate the Planning Permit for Forum.¹¹⁷⁴
- 4.405 The Claimants contrasted that situation with that of Galerie, which had more than 30 participants, such that publication by public notice was required. The Claimants submitted that as a result, rather than being served individually by post, as had been the case with the proceedings in relation to Multi, all decisions had had to be published on the notice board for 15 days, with the result that the Galerie proceedings had taken longer.¹¹⁷⁵ They further noted that, due to the publication on the notice board, the general public had been informed of the progress of the proceedings, and interested parties were able to raise objections and appeals, whilst in the case of the proceedings relating to Forum, only those participants who had been individually served could raise objections and file appeals, whilst other neighbours that would normally have constituted participants were not informed of the progress of the proceedings and thus could not raise objections.¹¹⁷⁶
- 4.406 Second, the Claimants relied upon the differing number of Building Permits required for the two projects, asserting that both should have been required to submit only two applications for Building Permits, the first for the construction of the main building, to be issued by the general building authority, and the second for the construction of roads, to be issued by the special building authority. By contrast, the Claimants noted that it had been requested that the Galerie project submit four applications, whilst Forum had only submitted a single application.¹¹⁷⁷
- 4.407 The Claimants alleged that the requirement to split the Building Permits had come from Mr of MAL, who had requested the separation of the Building Permits for the main building (Construction I), the internal roads (Construction Ib), and for the external roads (Constructions II, III and IVa). They further alleged that he had threatened that, if that course of action were not followed, he would reject the application if an application was made for only two Building Permits, and promised that he would issue the Building Permits if the

¹¹⁷¹ Reply, para. 120.

¹¹⁷² Reply, paras. 121-122.

¹¹⁷³ Reply, para. 123.

¹¹⁷⁴ Reply, para. 124.

¹¹⁷⁵ Reply, para. 125-126.

¹¹⁷⁶ Reply, para. 127.

¹¹⁷⁷ Reply, para. 128.

- Claimants were to proceed as requested.¹¹⁷⁸ The Claimants further alleged that the cooperation agreement with the City of _____ was concluded only because the Claimants had decided to accede to Mr _____'s request.¹¹⁷⁹
- 4.408 The Claimants asserted that Mr _____'s alleged request to split the proceedings had clearly been illegal,¹¹⁸⁰ and that it put the Claimants at a disadvantage insofar as they had had to separate the documentation for the various sets of proceedings, resulting in further delay.¹¹⁸¹ They further submitted that MAL subsequently took advantage of the multiple proceedings in order to find a justification for the Second and Third Stays, arguing that the proceedings in relation to the Building Permit for the main building could not be continued whilst the proceedings for the Building Permit in relation to the external roads were pending.¹¹⁸²
- 4.409 The Claimants noted that, by contrast, Multi had applied for a single Building Permit, and had made no separate application for Building Permit for the external roads; they alleged that Forum's Building Permit had not even mentioned the external roads.¹¹⁸³
- 4.410 The Claimants submitted that Multi's Building Permit was illegal, and noted that, by a motion for extraordinary review, they had requested RAL to declare the permit null and void. They emphasized that RAL, in a "decision" dated 1 April 2008, although it did not find that Multi's Building Permit was null, had held that the construction of the external roads had not been duly authorized.¹¹⁸⁴ The Claimants further asserted that although RAL had thereafter on 2 April 2008 sent a letter to MAL instructing it to remedy the illegality, MAL had refused and had chosen to ignore the legal opinion issued by RAL, and ignored a further request from RAL to take relevant steps in that regard.¹¹⁸⁵
- 4.411 Finally, the Claimants drew attention to the fact that, although RAL had initially regarded itself as competent to decide those questions, following submission of the Claimants' Trigger Letter, RAL had expressed the view that the competent body was rather the Ministry of Transport. The Claimants submitted that that change of position was caused by the pendency of the present proceedings and the undue influence of the Ministry of Finance.¹¹⁸⁶
- 4.412 Third, the Claimants alleged that the relevant authorities had ignored unauthorized construction by Multi on land belonging to the City of _____ and the damage caused to that property, including the removal of pavements, and damage to greenery.¹¹⁸⁷
- 4.413 They also pointed to the fact that in the course of the supposedly unauthorized works, on 13 July 2008 Multi had damaged the municipal water main, resulting in flooding of _____

¹¹⁷⁸ Reply, paras. 129-130.

¹¹⁷⁹ Reply, para. 131.

¹¹⁸⁰ Reply, para. 132.

¹¹⁸¹ Reply, para. 133.

¹¹⁸² Reply, para. 134.

¹¹⁸³ Reply, para. 135.

¹¹⁸⁴ Reply, para. 137, referring to Core 5/165 (Exhibit C-129).

¹¹⁸⁵ Reply, paras. 138-139.

¹¹⁸⁶ Reply, para. 140.

¹¹⁸⁷ Reply, para. 141.

street, a landslide in a neighbouring park, flooding of garages belonging to RAL and of neighbouring properties and damage to vehicles parked in RAL's garages. They submitted that the incident would not have occurred if there had been due authorization of the works.¹¹⁸⁸ The Claimants noted that, although they had asked RAL to intervene, no action had been taken; that similarly no action had been taken upon a criminal complaint filed against Multi by the Claimants on 14 July 2008, which alleged that Multi was not authorized to construct on the relevant plots of land and that it had endangered public safety and unlawfully enjoyed a thing of another; and that no action had been taken following complaints to the City and Mayor.¹¹⁸⁹

- 4.414 Fourth, the Claimants complained of a difference of treatment in relation to the overlap issue. The Claimants asserted that only they had suffered from the overlap, despite the fact that it arose as a result of the failure of MAL to coordinate the two projects. They pointed to the fact that the overlap was the basis on which Multi had challenged Galerie's Planning Permit, and subsequently initiated the Extraordinary Review Proceedings, which in turn had been the pretext for the Second and Third Stays adopted by MAL.¹¹⁹⁰ The Claimants further submitted that not only had Multi made use of the overlap issue, but that MAL had done so as well; the overlap could have been solved by an "insignificant change" to the Forum Planning Permit, but, following the filing of a motion by the Claimants dated 22 November 2007 (i.e. during the pendency of Multi's appeal against the Planning Permit) for the Forum Planning Permit to be modified, MAL had remained inactive.¹¹⁹¹ The Claimants submitted that it was against this background that Tschechien 7 had filed its motion dated 14 April 2008 to withdraw their intention to build the relevant part of the construction, but that MAL had subsequently used that application in order to adopt the Second Stay.¹¹⁹²
- 4.415 The Claimants submitted that the Respondent had failed to provide any reason why Galerie and Forum should have been regarded as materially different, noting that they were located close to each other, separated only by a road; that they were of a similar size and complexity; were both already in the course of development and had commenced leasing activities; and that they were directed to a similar group of consumers.¹¹⁹³
- 4.416 They further denied that there existed any justification for the difference in treatment, suggesting that "most of Respondent's justifications indeed are based on Respondent's own discriminatory behaviour", and thus supported a finding of liability, rather than of justification for the relevant behaviour:¹¹⁹⁴
- a. the Claimants argued that the Respondent could not rely on the opposition to Galerie, noting that most of it was found to be "inadmissible" in any case. The Claimants recalled their argument that MAL had ignored a number of relevant land plots for the

¹¹⁸⁸ Reply, para. 142.

¹¹⁸⁹ Reply, paras. 143-146.

¹¹⁹⁰ Reply, paras. 147-150.

¹¹⁹¹ Reply, paras. 151-152.

¹¹⁹² Reply, paras. 153-154.

¹¹⁹³ Reply, para. 156.

¹¹⁹⁴ Reply, para. 157.

purposes of the proceedings for Forum, thereby effectively reducing the possibility of opposition to Forum;¹¹⁹⁵

- b. the Claimants denied that the road constructions for Galerie were in fact more complex, and in any case, argued that the Respondent could not rely on that matter insofar as MAL had not granted the required authorization and Forum had built the roads illegally;¹¹⁹⁶
- c. the Claimants further argued that the Respondent could not rely on the excavations; although admitting that such excavations were unusual, they submitted that the excavations had been authorized in the Planning Permit and in any case had not delayed the Planning Permit proceedings.¹¹⁹⁷ They further submitted that even if the excavations had been illegal, this would not have caused any delay in the Building Permit proceedings; had not been relied upon by RAL as grounds for a stay at any point prior to the abandonment of the project, and that MAL had discriminated insofar as, although it took action against the excavations, it had ignored the illegal construction by Multi.¹¹⁹⁸

iii. Prospects of Success of Galerie

- 4.417 The Claimants thereafter devoted a substantial section of its Reply to charting the transformation of the prospects of the project, from a situation in which they characterized the project as having “outstanding chances of success” to the situation in which the Claimants alleged they had been forced to abandon. The Claimants submitted that the cause was the “obstructive and discriminatory treatment” of the Galerie project by the relevant authorities.¹¹⁹⁹
- 4.418 The Claimants emphasized the “vast experience” of the project team,¹²⁰⁰ and, denying that the failure of the project was due to a bad business decision, argued that between 2005 and 2007, the Galerie project had had better chances of success than its competitors. The Claimants:
- a. relying on the high number of inhabitants in the catchment area, asserted that the retail market at that point in time was not yet saturated, and relied upon the number of developers contemplating projects as evidencing that the business opportunity was a good one;¹²⁰¹
 - b. submitted that the Galerie project had secured an unusually high number of pre-lease agreements, including a “representative and outstanding tenant mix” which was better than that secured at the time by Forum, and which they assert would have stayed with

¹¹⁹⁵ Reply, para. 158.

¹¹⁹⁶ Reply, para. 159.

¹¹⁹⁷ Reply, para. 160.

¹¹⁹⁸ Reply, para. 161.

¹¹⁹⁹ Reply, para. 162.

¹²⁰⁰ Reply, para. 163.

¹²⁰¹ Reply, paras. 164-165.

Galerie, rather than shifting to Forum but for the uncertainty caused as to permits and the Claimants' opening date;¹²⁰²

- c. attributed the high number of tenants to Galerie's better layout and design; its location, which was asserted to be better for customers arriving by car; and the reputation of ECE, as evidenced by the number of pre-lease agreements concluded. The Claimants denied that the location of Forum on the site of the former shopping centre was a factor which had been taken into account by retailers.¹²⁰³

4.419 The Claimants on that basis asserted that they would have succeeded in dominating the market in . . . They denied the Respondent's suggestion that high market saturation following the opening of all the planned retail centres would have resulted in lower tenancy rates in all centres; submitted that the strongest retail centre would have won; and claimed that they would not have had high vacancy rates since they had secured key anchor tenants and a high pre-lease rate at an early stage, amounting to 65% by December 2007, with the majority of tenants signed up for terms of 10 years.¹²⁰⁴

iv. Cause of Abandonment of the Project

4.420 As to the abandonment of the project, the Claimants emphasized that the determinative factor had been the uncertain opening date of Galerie, dismissed the Respondent's suggestion that the opening date was of lesser importance on the basis that the importance of the opening date was clear from the position taken by potential tenants, and submitted that the key factor was not whether customers would become accustomed to a shopping centre, but rather the views of key tenants.¹²⁰⁵

4.421 The Claimants noted that the pre-lease agreements which had been concluded became invalid if the stipulated expected opening date was not met. They further noted that the duration of a project depended to a large extent upon the amount of money that the developer was prepared to spend, and submitted that this explained the various projected opening dates apparent in the minutes of the Board Meetings, which varied according to the stage of the permitting process and the possibilities for accelerating the process by spending extra money.¹²⁰⁶ They noted that in an extreme case it would have been possible to commence construction works on the date of issue of the Planning Permit, with the general construction contractor having been identified and the documentation for the Building Permit having been prepared whilst the Planning Permit was being considered and submitted immediately thereafter such that the Building Permit could be issued soon after. They noted that such measures would have shortened the projected duration of the development, and denied the Respondent's suggestion of corruption.¹²⁰⁷ They further observed that different parts of the construction could have been undertaken in parallel, and resort could have been had to additional acceleration measures, including the use of night shifts, but that this was in the end a question of how much money

¹²⁰² Reply, paras. 166-169.

¹²⁰³ Reply, para. 170.

¹²⁰⁴ Reply, paras. 171-174.

¹²⁰⁵ Reply, para. 175-176.

¹²⁰⁶ Reply, paras. 177-178; 181.

¹²⁰⁷ Reply, para. 179.

was spent early in the project, which would have thus increased the Claimants' exposure.¹²⁰⁸ Finally, the Claimants emphasized that, contrary to the Respondent's position, it was indeed possible that a delay of two or three weeks could result in the shifting of the opening by half a year, as shopping centres generally open only in the Spring or Autumn.¹²⁰⁹

- 4.422 As to the facts, the Claimants emphasized that immediately before abandonment of the project it had become apparent that a shift of the opening date to Autumn 2010 had become necessary, submitted that "even this opening date could not be guaranteed because there was no fair play",¹²¹⁰ and noted that this would have had "severe implications on the tenant structure" of Galerie, insofar as it would have resulted in the loss of 15% of the pre-lease agreements, and renegotiation would thus have become necessary.¹²¹¹ They emphasized that the Respondent itself had recognized that many tenants had been disappointed by the shift, asserted that Multi had been offering discounted rates, and gave illustrative examples of the reaction of a number of individual tenants to the situation.¹²¹²
- 4.423 Against that background, the Claimants asserted that the cause for the abandonment had been the "unpredictability of the permit situation", and submitted that the Claimants had had to make a prognosis in October 2008 as to whether a Building Permit would be issued in the near future and whether the Planning Permit would be upheld by the Minister. They asserted that the uncertainty was entirely due to the conduct of the Czech authorities and was not self-inflicted.¹²¹³
- 4.424 By way of explanation, the Claimants first asserted that there was no link between the excavation and the Building Permit, and submitted that the issue of the Building Permit was not dependent upon the termination of the Groundwork Removal proceedings.¹²¹⁴ They submitted that, whatever the formal position as a matter of Czech law, the question was not relevant "because this issue could not have inflicted any uncertainty on Claimants and therefore could not have influenced their decision to abandon the project" and submitted that the issue had only become relevant after the sending of the Claimants' Trigger Letter.¹²¹⁵
- 4.425 They explained that the Third Stay had not been based on the Groundwork Removal proceedings, which had only been commenced on 15 August 2008, following the site visit of 13 August 2008, and therefore after the adoption of the Third Stay on 9 July 2008, but rather had been justified by MAL on the basis of the pending Extraordinary Review proceedings.¹²¹⁶ They further noted that the Groundworks Removal Proceedings had not initially been actively pursued, and that between their commencement and the abandonment of the project, there had been no discussion of whether a stay of the proceedings relating to the Main Building Permit

¹²⁰⁸ Reply, para. 180.

¹²⁰⁹ Reply, para. 182.

¹²¹⁰ Reply, para. 183.

¹²¹¹ Reply, para. 183.

¹²¹² Reply, para. 184-192.

¹²¹³ Reply, para. 193.

¹²¹⁴ Reply, paras. 194-195.

¹²¹⁵ Reply, para. 196.

¹²¹⁶ Reply, para. 197.

was required.¹²¹⁷ In addition they pointed to the fact that, despite the pendency of the Groundwork Removal proceedings, MAL had resumed the Building Permit proceedings on 29 October 2008 and thereafter had issued the Building Permit for the main construction on 26 November 2008.¹²¹⁸

4.426 Although acknowledging that the Main Building Permit never became legally effective, they submitted that this was because it contained an illegal condition as to its duration, and that this was the reason why it had been appealed by Tschechien 7.¹²¹⁹ They argued that it was only after the Ministry of Finance had given instructions to MAL and RAL following the start of the settlement negotiations that the question of a stay of the Building Permit proceedings became live. They pointed to the fact that the Groundworks Removal Proceedings had not been pursued, and noted that it was only following the instruction given by the Ministry of Finance that RAL, on 25 February 2009, had in turn instructed MAL to take action in that regard, that the question of a stay of the Main Building Permit proceedings had been raised, and that RAL had stayed the proceedings on 12 March 2009.¹²²⁰

4.427 Second, the Claimants submitted that no blame could be attributed to them for the fact that the Planning Permit had authorized excavation works; they submitted that the question had only been raised by the Respondent in the present proceedings, noting that Multi in challenging the Planning Permit had only raised the question of the overlap, and that that issue had remained the “single decisive issue” throughout the appellate proceedings and the subsequent Extraordinary Review process.¹²²¹ Although acknowledging that the Second Ministry Decision had raised the illegality of the Planning Permit on the basis of its authorization of excavation works, they submitted that that was a “side-note”, and simply the result of a search by the Ministry for additional reasons for finding the Planning Permit illegal. They further observed that although the Ministry had held that Tschechien 7 could not have been in good faith as to the legality of the Planning Permit, that finding had been based on the overlap issue, and the lack of coordination between the two projects.¹²²² They further submitted that the authorization of the excavation works had not played a role in the Second Ministry Decision, and that the excavation was rather relied upon as evidencing that the Claimants had relied in good faith on the Planning Permit.¹²²³

4.428 Finally on that point, the Claimants argued that, in any event, whether the Planning Permit could authorize excavation works was irrelevant insofar as MAL had granted the application and authorized the work, such that any illegality and the consequential risk that the Planning Permit might be quashed was to be attributed to the Respondent, and not to the Claimants.¹²²⁴

4.429 Third, the Claimants argued that no uncertainty had been caused by the lateness of the appeal against the Third Stay, suggesting that, at the point at which the decision to abandon the

¹²¹⁷ Reply, para. 198.

¹²¹⁸ Reply, para. 199.

¹²¹⁹ Reply, para. 200.

¹²²⁰ Reply, para. 201-202.

¹²²¹ Reply, paras. 203-204.

¹²²² Reply, para. 205.

¹²²³ Reply, para. 206.

¹²²⁴ Reply, para. 207.

project had been taken, there was no further uncertainty caused by that appeal, as RAL had already requested MAL to resume the proceedings *sua sponte*, and the Claimants thus were entitled to expect that the proceedings would recommence in the near future. The Claimants added that, in light of their previous experience, they had had no certainty that MAL would not find a further pretext to delay the proceedings, and that it was that uncertainty that caused the Claimants finally to abandon the project.¹²²⁵

- 4.430 As to the Respondent's arguments that the financial and real estate crisis or insufficient liquidity were behind the decision to abandon the project, the Claimants denied that those factors had played any role, asserting that the Claimants were largely funded by cash by the owners of the ECE Group and was not dependent upon external funding, and that ECE had not been dependent upon an investor purchasing the project, but could have held and managed the project until a suitable opportunity arose.¹²²⁶ They made reference to other retail centres they had successfully developed during the crisis, and denied that the failure of ECE's operations in Ukraine was in any way probative, observing that the cause had been the conduct of its joint venture partner.¹²²⁷

v. Date of Abandonment

- 4.431 As to the date of abandonment, the Claimants denied the Respondent's suggestion that the decision was linked to the financial crisis and had only been taken on 8 December 2008, following the Second Minister Decision and the issue of the Building Permit for the main construction; it asserted that the decision was taken on 13 October 2008.¹²²⁸ In support of that position, it relied principally on the evidence of a number of witnesses who had participated in the meeting of the "kleiner Kreis" (small circle) of the Management Board, and explained that minutes of such meetings, in which sensitive decisions were discussed, were not kept. As to the circumstances of the abandonment, its position was that after Mr [redacted] had given a presentation setting out the risks of the project, "the panel decided ad hoc to abandon the project", and that it was for this reason that there were no written documents evidencing the decision.¹²²⁹
- 4.432 The Claimants also submitted that "it followed from" the Trigger Letter dated 7 November 2008 that the abandonment had already taken place at that time, in particular insofar as the Claimants would not have claimed losses of up to €56 million if the project had not already been given up.¹²³⁰
- 4.433 As to the sequence of events relating to the communication of the abandonment to tenants, the Claimants asserted that although there had been some delay, that did not put into question the date of the abandonment insofar as they had decided to wait until after the opening of its Arkády Pankrac shopping centre in Prague on 13 November 2008. They explained that they had wanted to avoid the abandonment of the Galerie project overshadowing the opening of

¹²²⁵ Reply, paras. 208-210.

¹²²⁶ Reply, paras. 211-216.

¹²²⁷ Reply, paras. 217-218.

¹²²⁸ Reply, para. 219.

¹²²⁹ Reply, para. 220.

¹²³⁰ Reply, para. 221.

Arkády Pankrac; that, in any event, the period immediately preceding the opening was “very work-intensive”; and that following the opening of Arkády Pankrac the Claimants started to inform the prospective tenants of Galerie in the second-half of November 2008, with important tenants being informed in advance by individual conversation in an attempt to limit the Claimants’ loss of credibility, whilst the other tenants were officially informed by letter on or around 8 December 2008.¹²³¹ The Claimants submitted that, in that context, their actions in signing a pre-lease agreement with a prospective tenant on 6 November 2008 were understandable.¹²³²

4.434 In relation to the Respondent’s allegation as to the continuation of excavation works after the date of abandonment, the Claimants asserted that the only works carried out after October 2008 were “excavations for securing works” in November 2008, and “securing works without further excavations” in December 2008.¹²³³ They explained that excavation was necessary in order to prevent steep slopes from sliding, in particular either to reduce the angle of the slope, or to prepare the slope for the building of pile walls or nailed walls, and that excavations had been necessary in order to build approach ramps required for the heavy machinery necessary for securing works.¹²³⁴ They pointed to the low volumes of earth excavated, and submitted that only a few workers had been present on site from 13 October to the end of November 2008, pointed to the fact that an expert was engaged in mid-November in order to assess the stability of the construction pit and to determine the securing works necessary, and emphasized that no excavation, but only securing work, had taken place in December 2008.¹²³⁵

4.435 In addition, the Claimants disputed the Respondent’s argument that the permit situation as at the alleged abandonment date of 8 December 2008 submitted by the Respondent had in fact improved as a result of the issue in the interim of the Second Minister Decision and the Main Building Permit; the Claimants asserted that the argument was flawed insofar as they had only subsequently become aware of the Second Minister Decision, and it had only been served on them on 16 December 2008.¹²³⁶

vi. Reasonableness of Time Estimates

4.436 The Claimants asserted that the time schedule elaborated by them had been “sound and reasonable”, arguing that it was entitled to rely on its experience with Galerie Vaňkova in Brno where the permitting process had been “speedy and efficient”, whilst the delays it had faced in relation to Arkády Pankrac were to be ignored because of the “unique situation in Prague”.¹²³⁷ They further submitted that they had been entitled not to take into account appeals, both as a matter of principle, and on the basis that they were not to be expected in relation to the Galerie project.¹²³⁸

¹²³¹ Reply, paras. 222-226.

¹²³² Reply, para. 227.

¹²³³ Reply, para. 228.

¹²³⁴ Reply, para. 228.

¹²³⁵ Reply, paras. 229-230.

¹²³⁶ Reply, paras. 231-232.

¹²³⁷ Reply, para. 233.

¹²³⁸ Reply, para. 233.

4.437 As to the Galerie Vaňkova project, the Claimants submitted that it had been broadly comparable with Galerie , both in terms of size and technical complexity.¹²³⁹ By contrast, it submitted that Arkády Pankrac was not comparable, given the complexity of the project, including the fact that it formed part of a much larger development, which led to a number of requests for extension of time,¹²⁴⁰ and the strong resistance from civic associations in Prague, which, it was submitted, routinely opposed any major development.¹²⁴¹ It submitted that no similar opposition should have been expected outside Prague.¹²⁴² The Claimants added that the Planning Permit proceedings in relation to Arkády Pankrac were delayed because ECE had submitted a pro forma application without supporting documentation in order to ensure application of the then-applicable version of the Building Act, in advance of the point it would normally have made its application, and that the complete documentation had only been supplied some 14 months later.¹²⁴³

4.438 As to the issue of whether the statutory time-limits were binding, the Claimants first submitted that the question was not strictly relevant, and:

- a. characterized the Respondent's attempt to justify the non-binding nature of the statutory time-limits on the basis of the principle of substantive correctness of administrative decision under Czech administrative law as "cynical", and submitted that even if it were true that time-limits could be disregarded in order to ensure correct decisions were made, that argument could have no application to illegal decisions (as to which it pointed to the stays in the Building Permit proceedings, and the two Ministry Decisions and First Minister Decision in the Extraordinary Review Proceedings);
- b. argued that the principle of substantive correctness could not justify the alleged intention on the part of the authorities to delay the proceedings to the detriment of the Claimants; and
- c. noted that the Respondent had not argued that the delays were necessary to reach correct decisions, and observed that such an argument could not be made as the decisions were not of a complexity such as to justify the delays.¹²⁴⁴

4.439 The Claimants nevertheless maintained their position that the statutory time-limits were strictly binding, and argued that the Respondent's position to the contrary contradicted itself, insofar as:

- a. extensions of the statutory time limit had been sought and granted in relation to the Arkády Pankrac project; the Claimants submitted that that would not have been necessary if the time-limits were not in any case binding;

¹²³⁹ Reply, para. 234-235.

¹²⁴⁰ Reply, paras. 238-244.

¹²⁴¹ Reply, paras. 245-251.

¹²⁴² Reply, para. 252.

¹²⁴³ Reply, para. 253-255.

¹²⁴⁴ Reply, para. 257.

- b. in its Answer to the Statement of Claim, the Respondent had relied upon detailed calculations of time, based on the statutory time-limits; and
 - c. RAL in its decision of 8 October 2008, rejecting Tschechien 7's belated appeal against the Third Stay, had criticized MAL's handling of the Building Permit proceedings on a number of bases, including for failing to respect the time-limit for transmission of the the case-file to RAL.¹²⁴⁵
- 4.440 The Claimants asserted that they were entitled not to expect that appeals would be filed, insofar as it was a wide-spread practice in the area of property development, and that in any case, there was no indication that appeals from either Multi, neighbours or civil associations were likely.¹²⁴⁶ They further submitted that even taking account of appeals, an opening in Spring 2010 would still have been feasible.¹²⁴⁷ They characterized the Respondent's suggestion as to the necessary time which should have been budgeted as a "worst case scenario", and submitted that the Claimants should not have had to expect that the Planning Permit would be quashed.¹²⁴⁸ They further argued that what the Respondent submitted was the maximum time period was not in any event applicable to the Building Permit proceedings, and that a Building Permit could have been expected promptly insofar as, under the Old Building Code, objections that could have been raised in the Planning Permit proceedings or in relation to the change in zoning plan could not then be raised in the Building Permit proceedings.¹²⁴⁹
- 4.441 The Claimants further asserted that appeals by Multi should not have been expected, insofar as Multi did not qualify as a participant and was therefore not entitled to file an appeal, and in any case, Multi's appeal would not have been possible had it not been for the fact that the Planning Permit had been taken down from the notice board early by MAL. They argued that the need for repetition of the publication furnished Multi with the possibility of filing an appeal, insofar as its appeal was filed on the last day of the statutory period for appeals following the second publication, and submitted that, but for the error, which effectively extended the time-limit, Multi would not have filed any appeal.¹²⁵⁰ In addition, they submitted that there had initially been a "mutual understanding between Multi and ECE" that each would not appeal the other's permits and that it would be left to the market to decide which project would succeed, and that, on that basis, they had been entitled to expect that Multi would not attempt to obstruct the permitting process in relation to Galerie in elaborating their timetable.¹²⁵¹
- 4.442 The Claimants also disputed the Respondent's suggestion that appeals by neighbours were to have been expected insofar as there had been "no indicators that would have led to the expectation that there would be more resistance by neighbours than usual".¹²⁵² They argued that that expectation had in fact been confirmed insofar as the appeals filed by neighbours had not caused any delays, and it had only been the actions of Multi which had been of any

¹²⁴⁵ Reply, para. 258.

¹²⁴⁶ Reply, para. 259.

¹²⁴⁷ Reply, para. 260.

¹²⁴⁸ Reply, para. 261.

¹²⁴⁹ Reply, para. 262.

¹²⁵⁰ Reply, paras. 263-268.

¹²⁵¹ Reply, para. 269.

¹²⁵² Reply, para. 270.

relevance.¹²⁵³ They submitted that the site for Galerie was in the city centre, with only a few residential neighbours, and that in any case, it was normally possible for a developer to negotiate a solution with neighbours, such that the existence of residential neighbours could not be understood inevitably to result in opposition.¹²⁵⁴ They further emphasized that ECE generally developed sites in city centres, similar to , and its normal practice was not to budget for appeals.¹²⁵⁵

4.443 The Claimants further denied the Respondent's suggestion that opposition was to be expected from civic associations, suggesting that the authorities in had not previously faced appeals, and civic associations in had not previously opposed major construction projects.¹²⁵⁶ They pointed to the lack of opposition to Forum as supporting its position.¹²⁵⁷ They further submitted that although had not objected to Forum, this was because it was "the extended arm and the vehicle used by Multi to oppose Galerie .".¹²⁵⁸ They pointed to the close similarity of the formulation of the appeals and objections filed by Multi and in relation to the Main Building Permit, and alleged that Multi's architect had held a power of attorney for , and had approached neighbours of the Galerie project in an attempt to convince them to object to the permits for Galerie.¹²⁵⁹

4.444 The Claimants submitted that they had been realistic in budgeting for the time necessary for construction, again pointing to the experience of Galerie Vaňkova in Brno, which was slightly larger, and for which excavations had commenced only after obtaining a Building Permit. They submitted that it would have been possible to accelerate construction by having the groundworks and construction of the main building overlap, which they asserted had been planned from the outset, and which they submitted was a common practice. They further argued that the fact that the contract with Integra had made no reference to measures which would have permitted such acceleration was irrelevant, insofar as Integra had not at the time been selected as general contractor for the construction of the main building.¹²⁶⁰

vii. Cause of Delays

4.445 The Claimants further submitted that all delays in the project had been caused by actions of the relevant administrative authorities of the Respondent, in particular the First Minister Decision, the two Ministry Decisions, the stays in the Building Permit proceedings in relation to the main building, and the request to split the Building Permits.¹²⁶¹

4.446 Conversely, they denied that any delays had been caused by them. They:

¹²⁵³ Reply, para. 270.

¹²⁵⁴ Reply, paras. 271-272.

¹²⁵⁵ Reply, paras. 273.

¹²⁵⁶ Reply, para. 274.

¹²⁵⁷ Reply, para. 275.

¹²⁵⁸ Reply, para. 276.

¹²⁵⁹ Reply, paras. 277-279.

¹²⁶⁰ Reply, paras. 280-281.

¹²⁶¹ Reply, para. 282.

- a. denied that any delay had been caused by the fact that the complete application for the Building Permits was submitted only on 17 May 2007, after the application had been filed on 28 December 2006, suggesting that that had always been the Claimants' plan, and emphasized that the filing in December 2006 was so as to ensure that the Old Building Law was applicable;¹²⁶²
- b. submitted that it had been sensible to wait two months from having obtained the Planning Permit to apply for the Building Permits, insofar as time was necessary in order to prepare the application, and noted that they had originally foreseen a longer period in that regard;¹²⁶³
- c. argued that the fact that the application for a Building Permit when filed was incomplete, and that further documentation was required, was irrelevant, and that the delays rather resulted from the First and Second Stays, which were "nonstandard", insofar as proceedings were not normally stayed when documentation was missing.¹²⁶⁴
- 4.447 The Claimants further denied that any delay had been caused by local opposition, suggesting that the "few objections and appeals" filed during the course of the permit proceedings had had no effects. They drew a distinction in this connection between the objections and appeals of Multi and (which it was submitted was shown by the evidence merely to be an "extended arm of Multi"), and the objections filed by other third parties. As to the latter, the Claimants noted that most of the appeals and objections had been ruled inadmissible, and had had no effect on the proceedings. They submitted that there was "not a single objection or appeal that can not either be traced back to Multi or that was inadmissible".¹²⁶⁵
- 4.448 The Claimants went on to note that in the Planning Permit proceedings, the majority of the objections and appeals had been rejected as inadmissible on the ground either that they were belated, or because the person raising the objection did not have standing as a participant in the proceedings, and as a consequence did not have to be considered on the merits, and had therefore caused no delay, or were subsequently withdrawn. They emphasized that the only relevant opposition had been raised by Multi.¹²⁶⁶
- 4.449 As regards the Extraordinary Review Proceedings, they emphasized that only the motion by Multi was of any relevance, with the motions of other persons and entities being irrelevant.¹²⁶⁷
- 4.450 In relation to the Building Permit Proceedings for the main building, the Claimants submitted resistance by neighbours and civic associations had equally played no role. They noted that the objections raised by had been held to be inadmissible as had been held not to be a participant, and that objections raised by various neighbours, as well as by Multi, had been rejected on substantive grounds in the Building Permit. The Claimants further

¹²⁶² Reply, para. 283.

¹²⁶³ Reply, para. 284.

¹²⁶⁴ Reply, para. 285.

¹²⁶⁵ Reply, para. 286 (emphasis in original; footnote omitted).

¹²⁶⁶ Reply, paras. 287-290.

¹²⁶⁷ Reply, paras. 291-293.

dismissed the relevance of the appeals filed by neighbours against the Building Permit on 22 December 2008, as they had only been filed after the abandonment.¹²⁶⁸ In addition, the Claimants argued that the objections made by neighbours and civic associations in the proceedings relating to the Building Permits for the internal and external roads and water were irrelevant, insofar as it was the Building Permit for the main building which had been crucial for the progress of the project.¹²⁶⁹

viii. Actions Taken Against Delays

- 4.451 The Claimants submitted that they had taken “every possible and effective measure against the delays”, and rejected the Respondent’s argument that the delays occurred because they had failed to appeal every illegal decision rendered by the Czech authorities. The Claimants submitted that they had appealed against “each and every decision where an appeal was possible”, and in addition had taken “further political steps”.¹²⁷⁰ Although admitting that they had failed to file a timely appeal against the Third Stay, the Claimants submitted that this was irrelevant insofar as MAL had been obliged to resume the Building Permit proceedings *sua sponte*, and submitted that, in any case, even a timely appeal would not have resulted in any different outcome in light of the Respondent’s alleged intention to obstruct the proceedings.¹²⁷¹
- 4.452 By way of explanation, the Claimants asserted that they had appealed against each decision which was to their detriment in the Planning Permit proceedings, and emphasized that those proceedings were nearly regular and that they complained in particular of the Extraordinary Review Proceedings.¹²⁷² They noted that the Respondent admitted that the Claimants had successfully appealed against the relevant decisions insofar as possible, including appealing against the First and Second Ministry Decisions, and that they had commenced court proceedings before the Municipal Court in Prague in respect of the First Minister Decision, although that action was subsequently discontinued as moot due to the issuance of the Second Minister Decision.¹²⁷³ They observed that no appeal was brought against the Second Minister Decision because it was in their favour, and because it was rendered after the abandonment.¹²⁷⁴
- 4.453 As regards the Building Permit Proceedings for the main construction, the Claimants asserted that they had “successfully proceeded against” the First and Second Stays.¹²⁷⁵ As regards the First Stay, they noted that Tschechien 7 had produced the documents requested shortly after it was issued, with the result that it was lifted, and no appeal was necessary.¹²⁷⁶ In relation to the Second Stay, they observed that although an appeal had been filed on 27 May 2008, MAL

¹²⁶⁸ Reply, paras. 294-297.

¹²⁶⁹ Reply, paras. 298-299.

¹²⁷⁰ Reply, para. 300.

¹²⁷¹ Reply, para. 301.

¹²⁷² Reply, para. 302.

¹²⁷³ Reply, para. 303.

¹²⁷⁴ Reply, para. 304.

¹²⁷⁵ Reply, para. 306.

¹²⁷⁶ Reply, para. 307.

thereafter initiated the proceedings on 2 June 2008, with the result that there was no reason to pursue the appeal, and it was withdrawn.¹²⁷⁷

4.454 In relation to the Third Stay, the Claimants explained that the admittedly belated filing of the appeal had been due to “an unlucky accident”, in particular the fact that the Claimants had relied on the time period based on service of the Third Stay by public notice, without being aware that MAL had served the Third Stay personally on Mr (who had failed to inform Ms of that fact), with the result that the deadline for filing the appeal by Tschechien 7 and EKZ Prag 1 was in fact some 11 days earlier.¹²⁷⁸ They noted that MAL itself had failed to realize that Tschechien 7’s appeal was belated, and that it was only upon RAL’s consideration of the appeal that the issue had been identified.¹²⁷⁹

4.455 The Claimants submitted that the belatedness of the appeal against the Third Stay was nevertheless not relevant. First, referring to RAL’s decision of 8 October 2008, they argued that the Third Stay had been “manifestly and evidently illegal”,¹²⁸⁰ and that MAL could and should have resumed the proceedings *sua sponte*. They submitted that the proceedings should have been resumed by MAL even prior to the filing of the appeal by Tschechien 7 on 7 August 2008, insofar as it had been provided with the opinion obtained from the Ministry for Regional Development dated 31 July 2008 which stated that a stay in such circumstances was illegal.¹²⁸¹ They further submitted that even after the filing of the appeals, MAL had been “legally entitled and obliged” to resume the proceedings, and reiterated their argument that it was irrelevant that MAL could not auto-remedy the appealed decision because of the belated nature of the appeal due to the fact that MAL was not even aware that the appeal had been filed out of time.¹²⁸² Finally, they argued that following RAL’s decision of 8 October 2008, which “unequivocally ordered to resume the proceedings *sua sponte*”, MAL should not have waited until 29 October 2008 to resume the proceedings, by which time they had abandoned the project.¹²⁸³

4.456 Second, they argued that even if the appeal by Tschechien 7 had been filed in time, this would have made no difference, insofar as MAL rejected the appeal, without noticing that it was belated.¹²⁸⁴ They further submitted that, in light of the preceding events, MAL would in any case “have found a way to delay the Building Proceedings even further, even if RAL had quashed the third stay”.¹²⁸⁵ They pointed to the delay of several weeks between RAL requesting MAL to resume the proceedings, and MAL in fact doing so, and submitted that even if RAL had in fact quashed the Third Stay, MAL would in any case have delayed for several more weeks to issue the Building Permit, such that it would in any case have been issued after the abandonment by the Claimants.¹²⁸⁶

¹²⁷⁷ Reply, para. 308.

¹²⁷⁸ Reply, paras. 310-311.

¹²⁷⁹ Reply, para. 312.

¹²⁸⁰ Reply, para. 314.

¹²⁸¹ Reply, paras. 313-315.

¹²⁸² Reply, paras. 316-317; see above, paragraph 4.398.

¹²⁸³ Reply, para. 318.

¹²⁸⁴ Reply, para. 319.

¹²⁸⁵ Reply, para. 320.

¹²⁸⁶ Reply, para. 320.

- 4.457 The Claimants affirmed that the appeals in relation to the “ancillary” Building Permits concerning permits for the internal and external roads and water, were irrelevant as they had had no effect on their decision to abandon the project; again, they submitted that it was the Main Building Permit which was crucial, explaining that the ancillary works could have been undertaken after the start of construction of the main building.¹²⁸⁷
- 4.458 Finally, the Claimants submitted that any appeals filed after the abandonment of the project on 13 October 2008 were of no relevance; they explained that those appeals had been undertaken only in the hope that they would be able to sell the land plots.¹²⁸⁸
- 4.459 The Claimants in addition made reference to the “political remedies” to which they had resorted, including writing to the Prime Minister in June 2008 to “inform him of the irregularities in the Extraordinary Review Proceedings and to ask him to intervene”.¹²⁸⁹ The Claimants explained that that letter had been written in circumstances in which the Advisory Committee had in April 2008 issued its recommendation to terminate the proceedings, but Minister [redacted] had taken no action in that regard. They stressed that there had been “nothing improper in turning to political decision-makers and to diplomatic measures to point out the ill-treatment of an investor and to point out an investment arbitration as a legal and rightful alternative for the investor”,¹²⁹⁰ and submitted that, in a case of corruption, and not “mere administrative mistake”, “political measures are more appropriate than administrative measures”.¹²⁹¹

ix. Legality of the Claimants’ Conduct, Including Excavations

- 4.460 The Claimants further denied that they themselves had engaged in any illegal behaviour. They submitted that the Respondent had sought to “distract from its own corruption scheme” by invoking the excessive excavations and alleging corruption by the Claimants, noting that the Respondent “seems to insinuate without further factual support that Claimants raised the budget to ‘interfere’ with the administrative proceedings and that it sent fabricated invoices to Integra not in return for services, but to conceal these payments”.¹²⁹²
- 4.461 The Claimants denied that there had been any corruption on their part, and characterized the Respondent’s allegations in that regard as “outrageous”.¹²⁹³
- 4.462 They denied that the increase in the budget had been intended to conceal bribes, and affirmed that their aim had rather been to accelerate the project by use of regular measures, in particular by funding architectural services, including the preparation of the detailed work drawings to be

¹²⁸⁷ Reply, para. 321.

¹²⁸⁸ Reply, para. 322.

¹²⁸⁹ Reply, para. 323.

¹²⁹⁰ Reply, para. 324.

¹²⁹¹ Reply, para. 325.

¹²⁹² Reply, para. 326.

¹²⁹³ Reply, para. 327.

used by the general contractor for construction of the main building, and preparation of the tender documents necessary for the award of the contract to the general contractor.¹²⁹⁴

- 4.463 They further submitted that the Respondent was not fully aware of the background to the issuing of the relevant invoices, and that the supposed “irregularities” identified by the Respondent were due to a change in the pricing scheme for the excavation due to difficulties encountered due to the price applicable for different classes of earth which resulted in amendment of the price per cubic metre; disagreement with Integra as to the cost of the securing works, and difficulties linked to changes in the exchange rate between the Czech Crown and the Euro. The Claimants provided a detailed explanation and reconciliation of the course of events, and of the invoices issued by Integra and the sums paid.¹²⁹⁵ The Claimants explained that finalisation of the negotiations with Integra on the various issues had taken some time, and that it was for that reason that the amendment to the Integra contract had been finally concluded only on 25 June 2009.¹²⁹⁶
- 4.464 As regards the excessive excavations, the Claimants observed that whilst “the amount of excavation taken place and the necessity of securing works” was “largely undisputed”, there was disagreement as to whether all the excavations in excess of the amount permitted in the Planning Permit were justifiable as securing works.¹²⁹⁷
- 4.465 As to the legality of the excavations, the Claimants invoked the fact that the Planning Permit authorized excavation of “approximately” 170,000 m³, and submitted that the imprecise nature of the figure was necessary because of the fact that the works covered a large area, and were based on assumptions as to the soil structure; they accordingly submitted that “the actual amount therefore has to be adapted to the conditions found”¹²⁹⁸ They further submitted that the authorized amount was not exceeded “during the ordinary groundworks”, but that rather they had been forced to continue the excavation works in order “to secure the construction pit”.¹²⁹⁹ They further emphasized that there had been “no decision by the Czech authorities that has become effective and binding that finds against the legality of the excavations”,¹³⁰⁰ noting that the decision in the New Administrative Offence proceedings had not become legally effective and binding, but those proceedings were still pending before MAL, and that the Groundworks Removal Proceedings were equally pending insofar as RAL on 2 June 2010 had quashed the order of MAL dated 4 February 2010 by which MAL had ordered removal of the excessive groundworks, and remanded the matter to MAL.¹³⁰¹
- 4.466 The Claimants maintained their argument that the groundworks had subsequently been legalized by the issue of the Main Building Permit, suggesting that “[n]ot only were the excavations therefore originally legal, they were also legalized by the Building Permit”.¹³⁰²

¹²⁹⁴ Reply, paras. 327; 328-332.

¹²⁹⁵ Reply, paras. 327; 333-357.

¹²⁹⁶ Reply, para. 339.

¹²⁹⁷ Reply, para. 358, 359-360.

¹²⁹⁸ Reply, para. 361.

¹²⁹⁹ Reply, para. 362.

¹³⁰⁰ Reply, para. 363.

¹³⁰¹ Reply, para. 363.

¹³⁰² Reply, para. 364.

They submitted that the fact that the Building Permit had not yet become effective was not the Claimants' fault, as the Claimants had had to appeal the Building Permit due to the inclusion of the requirement that the building had to be completed within two years of it becoming legally binding, which they submitted was illegal.¹³⁰³

4.467 They further noted that they had submitted an application for an additional separate permit on 17 January 2011 without any admission of liability, and submitted that "even assuming that the Building Permit does not allow for such legalization and such legalization is necessary, such legalization can be expected within the course of this arbitration, provided that MAL does not find further pretexts to delay these proceedings".¹³⁰⁴

4.468 The Claimants submitted that the Respondent had "overvalued" the issue of the excavations, insofar as it had reproached the Claimants "for having excavated more soil than had been permitted in the Planning Permit, and a large part of which was justified by securing works",¹³⁰⁵ and submitted that it stood in "stark contrast" with the scheme of corruption alleged by the Claimants.

4.469 As to the seriousness of the issue, the Claimants submitted that the violation was of a "negligible nature", pointing to the fact that the fine imposed was only €8,000, and that, as the Respondent had emphasized, the works could be legalized in a subsequent permit.¹³⁰⁶

4.470 They further argued that the Respondent had tried to "overestimate the importance of the excavations", since the institution of the proceedings, and submitted that events subsequent to the abandonment were "primarily important to illustrate Respondent's attempt not only to gain information on these excavations under a pretext, but also to keep the related offence and Ground Work Removal Proceedings alive to underline the importance of such a negligible offence, if it was one at all".¹³⁰⁷ They alleged that the Ministry had issued "undue instructions", as a result of which:

- a. the Ministry of Finance had intervened in the administrative proceedings by commissioning an expert report in relation to the excavations;
- b. the Groundworks Removal Proceedings had been resumed by MAL, having previously lain dormant;
- c. the appellate proceedings in relation to the Building Permit for the main construction had been stayed by RAL on the basis of the pendency of the Groundworks Removal Proceedings,¹³⁰⁸

¹³⁰³ Reply, para. 365.

¹³⁰⁴ Reply, para. 366.

¹³⁰⁵ Reply, para. 367.

¹³⁰⁶ Reply, para. 368.

¹³⁰⁷ Reply, para. 369.

¹³⁰⁸ Reply, para. 370.

- d. the Old Administrative Offence Proceedings had been commenced on 16 December 2008, shortly after the Claimants had sent their Trigger Letter giving notice of their claims; and
- e. the New Administrative Offence Proceedings had been instituted in order to keep the claims against the Claimants alive.¹³⁰⁹

4.471 The Claimants submitted that the Ministry of Finance had had no authority to influence the further administrative proceedings, nor to instruct MAL and RAL as to their conduct in those proceedings.¹³¹⁰

4.472 Finally, the Claimants submitted that the excavations were irrelevant to the arbitration on the basis that “[n]one of the numerous links that Respondent seeks to establish” existed.¹³¹¹ Referring back to the treatment in their Memorial, the Claimants argued that:

- a. the excavations had played no role in the delays in issuing the Building Permit for the main building, insofar as the stays had been based on the pendency of the Extraordinary Review Proceedings, and that it was only after abandonment, and the involvement of the Ministry of Finance that the issue of priority between the Groundworks Removal Proceedings and the proceedings relating to the Building Permit for the main building arose;
- b. the question of whether it was possible as a matter of Czech law to authorize the excavations in the Planning Permit was irrelevant, as the crucial issue in the appellate proceedings in relation to the Planning Permit and the Extraordinary Review Proceedings had been the overlap between the Claimants’ and Multi’s Planning Permits;
- c. the excavations could not serve as a justification for the different treatment accorded to Multi and the Claimants, and indeed the fact that the authorities had ignored Multi’s “illegal activities” constituted a further ground of discrimination;
- d. there had been no irregularities in the invoices issued by Integra “that could provide the smallest hint to corrupt activities by Claimants”;
- e. the question of whether the excavations could have been legalized in the Building Permit for the main building or whether a subsequent permit was required was irrelevant, insofar as the Claimants had in the interim applied for such a permit, albeit without acknowledging liability;
- f. the excavations did not render construction or the permit proceedings any more complex, and the alleged complexity in any case did not justify any longer duration of the permit proceedings.¹³¹²

¹³⁰⁹ Reply, para. 370.

¹³¹⁰ Reply, para. 372.

¹³¹¹ Reply, para. 374.

¹³¹² Reply, para. 374.

c. Merits of the Claimants' Claims of Breach of the BIT

4.473 By way of preamble to their response on the merits of their claims of breach of the BIT, the Claimants reiterated their position that the BIT “provides for a high level of protection”; they referred back to the discussion in their Memorial of the preamble of the BIT and its historic context as supporting the conclusion that “the parties to the BIT intended for effective and far-reaching investor protection”.¹³¹³ The Claimants asserted that, by contrast, the Respondent had frequently “understated” the standards of protection contained in the BIT.¹³¹⁴

4.474 The Claimants further emphasized that their claims were not based on the actions of “one or more individuals”, but upon the Respondent’s “overall conduct”, and asserted that the Respondent had attempted to focus analysis on acts of individuals.¹³¹⁵ They argued that, “[w]hile it may be true that not every single act of Respondent amounts of itself to an international wrong, there can be no doubt that Respondent’s overall conduct does”,¹³¹⁶ and submitted that the purpose of the BIT was “precisely [...] that investors should not be repeatedly obstructed in their investment activity by host states”.¹³¹⁷

i. Alleged Breach of the Fair and Equitable Treatment Standard (Art. 2(1) BIT)

4.475 In summary, the Claimants alleged that the Respondent had breached the fair and equitable treatment standard by acting in bad faith; violating the principle of due process; failing to provide a transparent and predictable business environment; and by frustrating the Claimants’ legitimate expectations.

Applicable standard under the BIT

4.476 Prior to addressing the substance of their claims, the Claimants recalled their argument that the fair and equitable treatment standard as contained in Article 2(1) of the BIT was intended to provide a “high level of protection”, and submitted that the Respondent’s arguments that Article 2(1) provided no greater protection than the minimum standard of treatment under customary international law should be rejected.¹³¹⁸

4.477 They asserted that the level of protection under Article 2(1) of the BIT “clearly exceeds the level of protection under customary international law and grants broad protection against host state actions”, and submitted that the authorities invoked by the Respondent were either “not comparable” or did not in fact “argue for a narrow level of protection under the fair and equitable treatment standard of the BIT.”¹³¹⁹ In addition, the Claimants rejected as baseless the suggestion by the Respondent that they had misstated the case law in the Memorial.

¹³¹³ Reply, para. 423.

¹³¹⁴ Reply, para. 424.

¹³¹⁵ Reply, para. 426.

¹³¹⁶ Reply, para. 426.

¹³¹⁷ Reply, para. 426.

¹³¹⁸ Reply, para. 428.

¹³¹⁹ Reply, para. 429.

- 4.478 As regards the question of whether the level of protection under the BIT exceeded that under customary international law, the Claimant submitted that by inclusion of the fair and equitable treatment standard in the BIT, the Parties “granted investors a level of protection that exceeds the level of protection under customary international law”, and referring back to their Memorial, further asserted that the States parties intended a “high level of protection of investors”.¹³²⁰ They submitted that it would “contravene this clear intention of the parties” if the level of protection under the BIT were assimilated to that under customary international law.¹³²¹
- 4.479 They further argued that that conclusion was supported by the interpretation of Article 2(1) of the BIT in accordance with its ordinary meaning under Article 31 VCLT, and invoked Schreuer in support of their argument that there was no reason to think that the ordinary meaning of the term “fair and equitable treatment” was to be taken to mean “in accordance with customary international law”.¹³²² The Claimants distinguished provisions such as Article 1105(1) NAFTA, which explicitly make reference to international law, and noted that Article 2(1) of the BIT “uses the autonomous term of fair and equitable treatment and must therefore be understood as an autonomous standard, independent from customary international law”.¹³²³
- 4.480 The Claimants rejected the attempt by the Respondent to rely on Article 31(3)(c) VCLT to argue that, in interpreting the BIT, account should be taken on relevant rules of international law applicable in the relations between the parties, and that this should be taken to include the minimum standard of treatment under customary international law; they argued that the minimum standard of treatment formed part of the customary law of diplomatic protection and was not as such relevant to the present dispute, and that by conclusion of the BIT, the parties established an autonomous set of rules for protection of investments, which provided for “material guarantees independent from the customary law of diplomatic protection”.¹³²⁴ The Claimants disputed the Respondent’s suggestion that *Bayindir v. Pakistan* was authority for any other proposition, noting that although the tribunal in that case had observed that “customary international law and decisions of other tribunals may assist in interpretation” of the provision containing the fair and equitable treatment standard, in its subsequent analysis, the tribunal had made no reference to the minimum standard of protection.¹³²⁵
- 4.481 As regards the other cases relied upon by the Respondent in support of its argument that the standard of protection under the BIT was to be equated with the customary minimum standard of treatment, the Claimants first noted that a number of the authorities were decided under NAFTA, and argued that, given the express reference to “international law” in Article 1105 NAFTA in its enunciation of the fair and equitable treatment standard, they were inapplicable to the interpretation of the BIT which contained no such reference.¹³²⁶ As regards the remaining decisions relied upon by the Respondent (including *Duke Energy Electroquil v.*

¹³²⁰ Reply, para. 430.

¹³²¹ Reply, para. 430.

¹³²² Reply, para. 431.

¹³²³ Reply, para. 432.

¹³²⁴ Reply, para. 433.

¹³²⁵ Reply, para. 435.

¹³²⁶ Reply, para. 437.

Ecuador, Azurix v. Argentina, CMS Gas Transmission Company v. Argentina and Biwater Gauff v. Tanzania, the Claimants submitted that they were irrelevant for the Respondent's argument that the standard of protection under Article 2(1) of the BIT was low, as the tribunals in each of those cases rather had held that the minimum standard of protection had evolved to a level equivalent to that in the individual BITs, and thus did not conclude that the standard thereunder offered a low standard of protection.¹³²⁷

- 4.482 In support of their contention that Article 2(1) of the BIT offered broad protection against host State actions, the Claimants first submitted that this followed naturally from the wording of the clause and the use of the terms “fair” and “equitable”, which meant that that standard provided protection against “all kinds of host state actions that unjustly harm the investor”.¹³²⁸ In addition, the Claimants submitted that that conclusion was supported by the object and purpose of the BIT, which they submitted “show that the standard is meant to be applied broadly and in a pro-active way”.¹³²⁹ In support of that assertion, having referred to what they asserted were relevant passages of the preamble to the BIT, they invoked the observations of the tribunal in *MTD Equity & MTD Chile v. Chile*, in respect of what was said to be a similar preamble in the BIT at issue in that case.¹³³⁰ In addition, they referred to the observation of the *Azurix* tribunal to the effect that the standards of conduct contained in BITs presuppose “a favourable disposition towards foreign investments”, and a “pro-active behaviour of the State to encourage and protect it”.¹³³¹
- 4.483 Relying on the decision in *Bayindir v. Pakistan*, the Claimants argued that Article 2(1) of the BIT was to be understood “to offer broad protection, comprising the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment”.¹³³²
- 4.484 The Claimants noted that the tribunal in *Biwater Gauff*, invoked by the Respondent, had identified such a broad scope of protection, in particular referring to the protection of legitimate expectations, and the obligations of the host state to act in good faith and to deal with investors consistently, transparently and in a non-discriminatory manner.¹³³³
- 4.485 The Claimants denied the suggestion by the Respondent that in the Memorial they had mischaracterized the holdings of the tribunals in *Waste Management* and *Mondev* so as to “downplay the level of wrongdoing necessary” for a finding of violation of the fair and equitable treatment standard.¹³³⁴ They emphasized that in relying on the decision in *Mondev*

¹³²⁷ Reply, para. 438.

¹³²⁸ Reply, para. 439.

¹³²⁹ Reply, para. 440.

¹³³⁰ Reply, para. 440, citing *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of 25 May 2004, para. 113.

¹³³¹ Reply, para. 441, citing *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 372.

¹³³² Reply, para. 442, citing *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award of 27 August 2009, para. 178.

¹³³³ Reply, para. 443, citing *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008, para. 602.

¹³³⁴ Reply, para. 444.

they had only relied on the decision as showing that the observations of the ICJ in *ELSI* constituted “only a starting point for examining what is fair and equitable, but that the threshold in modern times is a lot lower”, noting that the tribunal in *Mondev*, having referred to the observations in *ELSI*, had thereafter established what was asserted to be a lower threshold for violation, namely whether “a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable”.¹³³⁵

4.486 As for their reliance on *Waste Management*, they emphasized that they had interpreted the decision as showing that the fair and equitable treatment standard “comprises the right of due process so that the investor can rely on any statutory administrative provisions and proceedings to plan its investment and make sustainable business decisions”.¹³³⁶ They submitted that the passages from the decision invoked by the Respondent supported that conclusion, and further noted that they alluded to transparency and candour in administrative processes, which they submitted demonstrated that an investor could rely upon statutory provisions and proceedings in planning their investment.¹³³⁷

Merits of the claim of breach of fair and equitable treatment

- *Bad faith*

4.487 As to the merits of their claim of breach of the fair and equitable treatment standard, the Claimants first submitted that the Respondent had acted in bad faith “by purposefully obstructing Claimants’ project”, and that the events in the Extraordinary Review Proceedings and the Building Permit proceedings “add up to a scheme to obstruct Claimants”.¹³³⁸

4.488 They invoked the comment of the *Waste Management* tribunal that it was a basic obligation of the State under the fair and equitable treatment standard “to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means”,¹³³⁹ and noted that other tribunals had identified a requirement under the fair and equitable treatment standard that the host state should act in good faith.¹³⁴⁰

4.489 The Claimants emphasized that while sufficient, it was not a necessary condition for breach that the Respondent should have intentionally harmed the Claimants.¹³⁴¹ They further argued that even if the Tribunal were to conclude that the Respondent had not acted in bad faith, it should nevertheless find a violation of the fair and equitable treatment standard on other

¹³³⁵ Reply, para. 445, citing *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 127.

¹³³⁶ Reply, para. 446.

¹³³⁷ *Ibid.*, referring to *Waste Management Inc. v. United Mexican States (No. 2)* (ICSID Case No. ARB(AF)/00/3), Final Award of 30 April 2004, para. 98.

¹³³⁸ Reply, para. 447.

¹³³⁹ Reply, para. 448, quoting *Waste Management Inc. v. United Mexican States (No. 2)* (ICSID Case No. ARB(AF)/00/3), Final Award of 30 April 2004, para. 138.

¹³⁴⁰ Reply, para. 448, referring to *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, para. 303; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of 25 May 2004, para. 109.

¹³⁴¹ Reply, para. 449, quoting *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 280; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 372.

grounds, including violation of due process, failure to provide a transparent and predictable business environment, and frustration of the Claimants' legitimate expectations.¹³⁴²

4.490 In addition, they emphasized the problems posed in proving corrupt behaviour between State authorities and a third party, in particular the difficulty of obtaining anything more than circumstantial evidence of corruption.¹³⁴³ Relying on the decision in *AAPL v. Sri Lanka*, they submitted that in such circumstances, the burden of proof should be lowered or even reversed;¹³⁴⁴ that, given the difficulties of proof of corruption, the Tribunal could be satisfied with only "serious indices";¹³⁴⁵ and, relying on an ICC decision, submitted that where some "relevant evidence" for its allegations had been produced by a party, the Tribunal might exceptionally require the other party to provide "counterevidence, if such task is possible and not too burdensome."¹³⁴⁶

- *Due process*

4.491 Second, the Claimants argued that the Respondent had breached the fair and equitable treatment standard by a failure to provide due process. They noted that the standard protected investors against State conduct which "leads to an outcome that offends judicial propriety", and to that end tribunals had analysed whether there was a "lack of candour and transparency in the proceedings".¹³⁴⁷ They submitted that that would be the case where there were unjustified delays, or where a decision had been rendered in the absence of an investor such that the investor was denied the right to be heard.¹³⁴⁸

4.492 On that basis, they reiterated that the Respondent had repeatedly delayed the proceedings, and that on one occasion, the Claimants had been denied the right to be heard before the issue of a decision. As to the claims of delay, they emphasized in particular that MAL had delayed the Main Building Permit proceedings without justification by resort to the First, Second and Third Stays, and highlighted that the Respondent accepted that the Third Stay was unlawful, and that MAL had not rectified the situation upon receipt of the opinion of the Ministry.¹³⁴⁹ They further pointed to the delays caused by the Ministry and Minister in the Extraordinary Review Proceedings, and the resulting prolonged uncertainty as to the validity of the Planning Permit; they emphasized that the Second Minister Decision had not been based on any new facts found by the Ministry, and submitted that this made clear that in the First Minister Decision, the Minister should not have remanded the matter to the Ministry.¹³⁵⁰ Although accepting that the

¹³⁴² Reply, para. 450.

¹³⁴³ Reply, para. 451.

¹³⁴⁴ Reply, para. 452, citing *Asian Agricultural Products Ltd v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Final Award of 27 June 1990, para. 56.

¹³⁴⁵ Reply, para. 453, citing ICC Case No. 8891; 127 JDI 1076 (2000), at 1079.

¹³⁴⁶ Reply, para. 454, citing ICC Case No. 6497 (Final Award); *Yearbook of Commercial Arbitration* 1999, Volume XXIVa, pp. 71-79, para. 4.

¹³⁴⁷ Reply, para. 456, referring to *Waste Management Inc. v. United Mexican States (No. 2)* (ICSID Case No. ARB(AF)/00/3), Final Award of 30 April 2004, para. 98.

¹³⁴⁸ Reply, para. 456, referring to *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (SCC Case No. V064/2008), Partial Award on Jurisdiction and Liability of 2 September 2009, para. 221; *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, para. 91.

¹³⁴⁹ Reply, para. 457.

¹³⁵⁰ Reply, paras. 457-458.

Planning Permit remained effective, they submitted that the delays in the Extraordinary Review Proceedings were crucial insofar as MAL relied upon the pendency of those proceedings to justify the Third Stay, and noted that if the Minister had not wrongfully remanded the matter by the First Minister Decision, this would not have been possible.¹³⁵¹

4.493 In relation to the claim of violation of the right to be heard, the Claimants reiterated their complaint that the Claimants were not treated as party to the proceedings resulting in the First Ministry Decision, and were thus not heard.¹³⁵² As regards the suggestion by the Respondent that the exclusion of the Claimants had been lawful under domestic law, the Claimants, invoking, inter alia, Article 3 of the ILC's Articles on State Responsibility countered that this was irrelevant, as domestic legality was irrelevant to whether conduct constitutes an internationally wrongful act,¹³⁵³ in any case, they denied that the Ministry's conduct was in fact lawful under Czech law.¹³⁵⁴

- *Failure to provide a transparent and predictable business environment*

4.494 Third, the Claimants alleged that the fair and equitable treatment standard was breached by reason of the fact that the Respondent had failed to provide a transparent and predictable business environment, insofar as it "repeatedly broke its own laws, thus frustrating Claimants' trust in Respondent's legal system, and derogated from established administrative practices".¹³⁵⁵

4.495 The Claimants first asserted that the Respondent had misstated the Claimants' position insofar as they characterized the Claimants as essentially complaining that the permitting process had taken longer than the Claimants had predicted, had argued that a specific expectation as to the duration of proceedings did not form part of a transparent and predictable business requirement, and had submitted that the Claimants' estimates had been overly optimistic and had disregarded the possibility of appeals.¹³⁵⁶ The Claimants responded that the claim was not premised "on a specific expectation as to the duration of proceedings. Rather, Claimants are complaining of Respondent's specific behaviour in the present case",¹³⁵⁷ and emphasized that under the fair and equitable treatment standard, it was the acts of the host State which were scrutinized, and that the Claimants were complaining of specific wrongful acts of the Respondent.¹³⁵⁸

4.496 In support of their claim that the Respondent had systematically violated its own laws, the Claimants first contended that the Respondent's argument that the Claimants had been aware of the relevant rules, and that those rules had undergone no material changes, although true, was irrelevant; they emphasized that they were not complaining of a change in the law, but rather of the fact that the Respondent had repeatedly violated the law. They submitted that the

¹³⁵¹ Reply, para. 459.

¹³⁵² Reply, para. 460.

¹³⁵³ Reply, paras. 461-463.

¹³⁵⁴ Reply, para. 464.

¹³⁵⁵ Reply, para. 465.

¹³⁵⁶ Reply, para. 466.

¹³⁵⁷ Reply, para. 467.

¹³⁵⁸ Reply, para. 468.

Respondent had thereby denied the Claimants a transparent and predictable business environment.¹³⁵⁹

- 4.497 The Claimants noted that the Parties were in agreement that a violation of domestic law did not *ipso facto* equate to a violation of international law, but submitted that it was “equally undisputed” that a violation of international law could arise from an action which was contrary to domestic law. In support, they invoked the decision in *PSEG Global v. Turkey*, and in particular the finding of the tribunal in that case that the host state had breached its own laws and its conclusion that there had been a breach of the fair and equitable treatment standard.¹³⁶⁰ They argued that the fair and equitable treatment standard was infringed if violations of domestic law were systematic and therefore affected the stability and transparency of the legal framework.¹³⁶¹
- 4.498 As to the facts of the case, the Claimants first submitted that the Respondent had “violated its own laws repeatedly and systematically”, and that “in doing so, Respondent undermined the business environment for Claimants’ investment and subjected Claimants to intransparent and unpredictable business conditions”.¹³⁶² They pointed in particular to the First Ministry Decision, which they asserted had purported to quash the Planning Permit, and the First Minister Decision by which the Minister had allegedly wrongfully decided to remand the case back to the Ministry. They observed that the remand had enabled Mr [redacted] to invoke the pending Extraordinary Review proceedings as a “pretext” to stay the proceedings in relation to the permit for the Main Construction.¹³⁶³ They further argued that the Respondent had violated the applicable “binding time-limits” contained in the Code of Administrative Procedure.¹³⁶⁴
- 4.499 Second, the Claimants submitted that the Respondent’s authorities “arbitrarily broke with established administrative procedures”, in particular insofar as Minister [redacted] had deviated from the opinion of the Advisory Committee and the draft decision prepared by the legal department. They submitted that there was an established administrative practice that the Minister would follow the recommendation of the Advisory Committee, emphasizing that in 20 cases decided since 2008, the Minister had never previously departed from the recommendation of the Committee; they further submitted that the Minister normally followed the recommendation of the legal department of the Ministry. Although accepting that the Minister was not bound by the decision of the Advisory Committee, they submitted that this was irrelevant insofar as a stable and predictable business environment encompassed also the practices of the authorities.¹³⁶⁵

¹³⁵⁹ Reply, para. 469.

¹³⁶⁰ Reply, para. 470, referring to *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award of 19 January 2007, para. 249.

¹³⁶¹ Reply, para. 470.

¹³⁶² Reply, para. 471.

¹³⁶³ Reply, para. 472.

¹³⁶⁴ Reply, para. 473.

¹³⁶⁵ Reply, para. 474-476.

- *Frustration of legitimate expectations*

- 4.500 Fourth, the Claimants submitted that the Respondent had violated their legitimate expectations, arguing that the Respondent had repeatedly provided assurances to the Claimants which had led to reasonable expectations and that those expectations had then been frustrated by the Respondent's actions in the permit proceedings.¹³⁶⁶
- 4.501 The Claimants argued that the Respondent had mischaracterized their position as being that they had had legitimate expectations as to the exact duration of the administrative proceedings; this was not their argument, but rather that, given that the purpose of the fair and equitable treatment standard was to scrutinize the behavior of the host state, they only complained of the specific wrongful actions taken by the Respondent during the various proceedings, and clarified that they did not complain of the actions of third parties, including appeals by NGOs or neighbours, which they accepted were of no relevance in that regard.¹³⁶⁷
- 4.502 As to the specific legitimate expectations claimed, the Claimants asserted that “[t]hrough explicit and implicit representations and assurances, Respondent created and reinforced in the Claimants the expectation that the permit proceedings would be conducted swiftly and in a non-discriminatory fashion”.¹³⁶⁸
- 4.503 They relied first upon the actions of the City in changing the zoning plan and agreeing to allow the applications for some of the Building Permits to be made in its name, which they submitted constituted “an implied assurance that Respondent would be supportive of the project”.¹³⁶⁹
- 4.504 The Claimants disputed the Respondent's assertion that legitimate expectations could only be derived from specific rather than implicit assurances, and noted that none of the decisions invoked by the Respondent made any distinction between “implicit”, “explicit” or “specific assurances”, but rather referred to the fact that there had to be a “promise of the administration” or “conditions that the state offered the investor”.¹³⁷⁰
- 4.505 Relying on Article 4(1) and 7 of the ILC's Articles on State Responsibility and in particular the proposition that the conduct of any State organ is to be considered to be an act of the State, irrespective of the organ's character as an organ of the central government or of a territorial unit, and even if it exceeds its authority, they further argued that whether the permit proceedings fell within the competence of the City, and whether it was competent to provide such assurances was irrelevant.¹³⁷¹

¹³⁶⁶ Reply, para. 477.

¹³⁶⁷ Reply, para. 478-479.

¹³⁶⁸ Reply, para. 480.

¹³⁶⁹ Reply, para. 481.

¹³⁷⁰ Reply, para. 482, quoting *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award of 19 January 2007, para. 241 and *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award of 18 August 2008, para. 340, respectively.

¹³⁷¹ Reply, para. 483.

- 4.506 Second, they submitted that a specific assurance as regards the Extraordinary Review Proceedings had been provided insofar as Mrs [redacted] had represented to the Claimants in an email that the Minister had never previously deviated from a recommendation of the Advisory Committee; they submitted that Mrs [redacted] had thereby assured the Claimants that the Extraordinary Review Proceedings could be expected to be concluded quickly, as the recommendation of the Advisory Committee had been to terminate the proceedings.¹³⁷²
- 4.507 Third, the Claimants invoked (albeit without any further explanation or elaboration), the assurance allegedly provided by Mr [redacted] of MAL that the Building Permits would be granted if the applications for Building Permits were split.¹³⁷³
- 4.508 Finally, the Claimants invoked the guarantee allegedly provided by Mr [redacted] Mayor of the City [redacted], that “there would be no discrimination between the competing projects of Claimants and Multi”.¹³⁷⁴
- 4.509 The Claimants argued that the expectations following from the assurances they claimed had been made by the Respondent were reasonable, and referring to the decision in *Duke Energy Electroquil v. Ecuador*, argued that, “[t]aking into account all the circumstances, including the facts surrounding the investment and the political, socioeconomic, cultural and historical conditions prevailing in the host State, Claimants could reasonable rely on Respondent acting in accordance with its assurance”.¹³⁷⁵ In particular they referred to their prior experience with the Galerie Vaňkova project in Brno, in which they submitted that the permitting proceedings had been conducted in a “swift and efficient fashion and only took nine months from application to legal enforceability”, and submitted that, on that basis, they were could have reasonably expected that the Respondent would act swiftly, and in accordance with the assurances given.¹³⁷⁶ Referring back to their earlier discussion in that regard, the Claimants sought to distinguish the proceedings in relation to the Arkády Pankrác project in Prague, relied upon by the Respondent, again arguing that the length of those proceedings was due to the “unique situation in Prague”.¹³⁷⁷
- 4.510 In relation to the frustration of their alleged legitimate expectations, the Claimants asserted, referring back to the factual section, that the Respondent “did not conduct the permit proceedings in a swift fashion but implemented numerous stays and issued wrongful decisions, thus prolonging the proceedings intolerably. Moreover Respondent also discriminated against Claimants by treating Multi much more favourably.”¹³⁷⁸

¹³⁷² Reply, para. 484.

¹³⁷³ Reply, para. 485.

¹³⁷⁴ Reply, para. 486.

¹³⁷⁵ Reply, para. 487.

¹³⁷⁶ Reply, para. 488.

¹³⁷⁷ Reply, para. 489.

¹³⁷⁸ Reply, para. 490.

ii. Alleged Breach of the Prohibition of Impairment of Investments by Arbitrary and Discriminatory Measures (Article 2(2) BIT)

Impairment by arbitrary measures

- 4.511 The Claimants maintained their claim of breach of Article 2(2) of the BIT on the basis that the Respondent had impaired the use and enjoyment of their investment through arbitrary measures.¹³⁷⁹ They submitted that the relevant conduct of the Respondent “meets any test of arbitrariness”¹³⁸⁰ asserting in particular that the Respondent had acted arbitrarily throughout the whole of the Extraordinary Review and Main Building proceedings “even under the inapplicable high standard submitted by the Respondent”.¹³⁸¹
- 4.512 As to the appropriate threshold, the Claimants reiterated their position that the appropriate test was that set out in *Lauder v. Czech Republic*, and argued that the Respondent’s position based on the decision in *ELSI* was to be rejected. Relying on the definition enunciated by the tribunal in *Lauder* that conduct is arbitrary if it is “founded on prejudice or preference rather than on reason or fact”,¹³⁸² the Claimants submitted that the decisive factor was the rationality of the conduct, and that the Tribunal should not analyse whether it would have acted in the same manner if it had been in the same position, but rather whether the conduct was based on “tenable reasoning”.¹³⁸³
- 4.513 As to the Respondent’s invocation of *ELSI*, the Claimants argued that the Respondent’s had attempted “incorrectly to inflate the threshold for a finding of arbitrariness as requiring a violation of due process or the rule of law”, and submitted that it was telling that the Respondent had not responded to its arguments that the decision in *ELSI* was based on the 1948 US-Italian Treaty of Friendship, Commerce and Navigation, when international investment protection was much less developed.¹³⁸⁴ They submitted that the “interpretation of a treaty from the Middle Ages of investment protection cannot be the basis for understanding the modern times Czech-German BIT, concluded in 1990.”¹³⁸⁵ In response to the Respondent’s argument that recent decisions had applied the standard enunciated in *ELSI*, rather than that in *Lauder*, the Claimants submitted that the authorities indicated that the *Lauder* rule in fact prevailed.¹³⁸⁶ They referred to the decision in *LG&E v. Argentina*, and the emphasis they submitted was placed by that tribunal upon the importance of rationality and “reasoned judgment”.¹³⁸⁷ Similarly, they invoked the decision in *Siemens v. Argentina*; although recognizing that the *Siemens* tribunal had referred to the decision in *ELSI* as an authoritative

¹³⁷⁹ Reply, para. 491.

¹³⁸⁰ Reply, para. 491

¹³⁸¹ Reply, para. 492.

¹³⁸² Reply, para. 493, quoting *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award of 3 September 2001, para. 221.

¹³⁸³ Reply, para. 494.

¹³⁸⁴ Reply, para. 495.

¹³⁸⁵ Reply, para. 495.

¹³⁸⁶ Reply, para. 496.

¹³⁸⁷ Reply, paras. 497-498, referring to *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006, para. 158.

interpretation of international law, they submitted that the tribunal had supported its finding that Argentina had acted arbitrarily not by reference to criteria deriving from *ELSI*, but solely on the basis of a conclusion that Argentina's conduct had not been "based on reason".¹³⁸⁸

4.514 On the basis that the applicable test was that submitted by the tribunal in *Lauder*, the Claimants argued that the conduct of the Respondent had not been based on reason or fact, but on prejudice and preference.¹³⁸⁹ They reiterated their argument that the relevant actions "formed part of a scheme to obstruct Claimants", and submitted in the alternative that even assuming no such overall scheme, the only conclusion was that "various of the Respondent's decisions were not based on reason and thus arbitrary".¹³⁹⁰ Reference was made in particular to:

- a. the First and Second Ministry Decisions, which the Claimants asserted "arbitrarily decided to revoke the Planning Permit", thus delaying the proceedings;
- b. the First Minister Decision, by which the Minister "arbitrarily remanded the case back to the Ministry"; the Claimants reiterated their observation that in the Second Ministry Decision, the Minister had decided differently based on the same facts;
- c. the fact that MAL "arbitrarily stayed the Main Building Permit proceedings two times".¹³⁹¹

4.515 The Claimants submitted that each of those decisions was not only unlawful under Czech law, but "not based on a reasonable judgment", and submitted that the Respondent had "failed to provide a satisfactory explanation of the conduct of its administrative bodies".¹³⁹²

4.516 In the further alternative, the Claimants argued that even applying the *ELSI* standard, the Tribunal should hold that the Respondent had acted arbitrarily. Referring to the prior discussion under the fair and equitable treatment standard, they argued that the Respondent had violated the rule of law as it had "breached its own laws in a systemic fashion in the course of the Extraordinary Review and Building Permit Proceedings with the intention to obstruct one party in favour of another one".¹³⁹³ Again, they submitted that the Respondent had offered no "sufficient explanation" for those breaches; noting the Respondent's denial that the burden of proof shifted even in case of prima facie arbitrariness, they argued that the Respondent "effectively argues that it does not have to offer explanations for its unlawful conduct".¹³⁹⁴ They argued that if "even an unexplained breach of law did not constitute an arbitrary measure, the standard of protection against arbitrary measures would hardly ever be breached and would be of no relevance whatsoever".¹³⁹⁵

¹³⁸⁸ Reply, para. 499, referring to *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007, paras. 318 and 319.

¹³⁸⁹ Reply, para. 500.

¹³⁹⁰ Reply, para. 500.

¹³⁹¹ Reply, para. 500.

¹³⁹² Reply, para. 501.

¹³⁹³ Reply, para. 503 (emphasis in original; footnote references omitted).

¹³⁹⁴ Reply, para. 504.

¹³⁹⁵ Reply, para. 504.

- 4.517 In addition, again referring back to the previous discussion in relation to the fair and equitable treatment standard, they claimed that the Respondent had violated due process of law insofar as the Claimants had not been heard in the Extraordinary Review Proceedings, and because its authorities had caused multiple delays in the various proceedings.¹³⁹⁶ They noted that the Respondent had alluded to the possibility of local remedies being available “in order to evade the conclusion of arbitrariness”, and cross-referred to their later discussion of that topic elsewhere in the Reply.¹³⁹⁷
- 4.518 In addition, the Claimants disputed the Respondent’s argument that the relevant acts had not in any case impaired their investment; they argued that the ordinary meaning of the term “impair” did not imply that the relevant object had to be completely destroyed, and submitted that it was sufficient if the object had been “damaged or made worse”, and more broadly, if there had been “a detrimental effect”, which they asserted clearly was the case on the facts.¹³⁹⁸
- 4.519 They submitted that the Respondent had engaged in “cherry-picking” of specific administrative decisions which it asserted had not impaired the Claimants’ investment, but argued that this was to no avail as it was the “overall dilatory conduct and its effect on Claimants’ investment that counts”.¹³⁹⁹ They argued that the overall dilatory conduct had resulted in the abandonment of the project “and thus clearly impaired the investment”, and argued that, in any case, even the specific decisions referred to by the Respondent constituted an impairment.¹⁴⁰⁰
- 4.520 In response to the Respondent’s argument that the investment was not impaired by the Extraordinary Review Proceedings insofar as the Planning Permit remained in force at all times, the Claimants emphasized that they had never complained of the loss of the Planning Permit, but rather relied upon the “increased unpredictability” resulting from those proceedings; they further noted that the Extraordinary Review Proceedings had constituted the basis for the Second and Third Stays adopted by MAL, such that those decisions could not have been adopted but for the delays in the Extraordinary Review Proceedings.¹⁴⁰¹
- 4.521 The Claimants characterized the Respondent’s argument that it had not withheld the Main Building Permit as “absurd”, noting that the Main Building Permit proceedings had been stayed twice “under a pretext until Claimants abandoned the project”.¹⁴⁰² Finally, the Claimants also dismissed the Respondent’s reference to the stay of the appellate proceedings in relation to the Main Building Permit, and the Respondent’s suggestion that it was lawful given the pendency of the Groundworks Removal Proceedings, as being without any relevance insofar as it had been adopted well after the abandonment.¹⁴⁰³

¹³⁹⁶ Reply, para. 505.

¹³⁹⁷ Reply, para. 506.

¹³⁹⁸ Reply, para. 507-508.

¹³⁹⁹ Reply, para. 509.

¹⁴⁰⁰ Reply, para. 509.

¹⁴⁰¹ Reply, para. 510.

¹⁴⁰² Reply, para. 511.

¹⁴⁰³ Reply, para. 512.

Impairment by discriminatory measures

- 4.522 In relation to their claim of breach of Article 2(2) of the BIT on the basis of discrimination between the Galerie and Forum projects, the Claimants noted that there was agreement between the Parties as to the prerequisites for such a claim, and asserted that those conditions were met, insofar as:
- a. Galerie and Forum had been treated differently;
 - b. the difference in treatment had occurred in like circumstances;
 - c. the difference in treatment had been without justification; and
 - d. it had impaired the Claimants' investment.¹⁴⁰⁴
- 4.523 As regards the first and fourth requirements, the Claimants cross-referred to their submissions on those points elsewhere in the Reply, as well as to their submissions in the Counter-Memorial.¹⁴⁰⁵
- 4.524 As to the existence of a justification for the alleged difference in treatment, the Claimants argued that the Respondent had unjustifiably argued that the burden was upon the Claimants to identify any justification for the different treatment, and asserted that, in that regard the burden undoubtedly fell on the Respondent to bring forward and prove any possible justification. Referring to their submissions earlier in the Reply, they submitted that the Respondent had failed to do so as there had been no justification for the difference in treatment.¹⁴⁰⁶ In relation to the comparability of the circumstances of the two projects, the Claimants likewise referred back to the earlier treatment of that topic in the Reply,¹⁴⁰⁷ and noted that the only legal argument raised by the Respondent in that connection was that the Claimants' treatment of the comparison of the factors of comparability had been insufficient. Their response was that there was nothing further to compare, and noted that the Respondent had refrained from specifying what additional factors might be relevant.¹⁴⁰⁸
- 4.525 Further, the Claimants argued that the Respondent's reliance on the decision in *Bayindir v. Pakistan* was misplaced. They distinguished that decision on its facts on the basis that in circumstances in which the allegation of discrimination in that case had been that a State entity had wrongfully terminated a contract for works, and then entered into a contract for the same works with a local company, allegedly on more favourable conditions, the comparison was necessarily between the terms of the two contracts; they argued that, by contrast, in the present case there were no contracts to compare.¹⁴⁰⁹

¹⁴⁰⁴ Reply, paras. 513-514.

¹⁴⁰⁵ Reply, para. 514.

¹⁴⁰⁶ Reply, para. 516, cross-referring to Reply, paras. 156 et seq (above, paras. 4.415 to 4.416).

¹⁴⁰⁷ Reply, para. 517, cross-referring to Reply, paras. 117 et seq (above, paras. 4.400 to 4.416).

¹⁴⁰⁸ Reply, para. 517.

¹⁴⁰⁹ Reply, para. 518.

iii. Alleged Breach of the Prohibition of Expropriation (Article 4(2) BIT)

- 4.526 The Claimants' repeated their claim of indirect expropriation in breach of Article 4(2) of the BIT, on the basis that the Respondent had "deprived Claimants' shares in ECE Praha and Tschechien 7 of their use and benefit for Claimants without acting within the framework of their police powers".¹⁴¹⁰
- 4.527 The Claimants first denied that it was of any relevance that they had not lost any previously granted rights, on the basis that "no formal act of taking of the investment is necessary"; they emphasized that Article 4(2) of the BIT contains a prohibition of measures "the effect of which would be tantamount to expropriation", and submitted that consequently, there could be a taking under that provision even where the investor retained nominal ownership of the investment.¹⁴¹¹ They argued that it was sufficient that measures were taken "the effect of which is to deprive the investor of the use and benefit of his investment".¹⁴¹²
- 4.528 They submitted that "[t]hrough the various wrongful decisions and delays in the extraordinary review and Main Building Permit proceedings, Respondent deprived Claimants' shares in Tschechien 7 and ECE Praha of any use and benefit", and submitted that, from an economic point of view, the actions of the Respondent "had the same effect as an overt taking".¹⁴¹³
- 4.529 In support of that claim, the Claimants first argued that expropriation may result from a series of State actions, each of which alone would not be sufficient to constitute an expropriation, and noted that the Respondent had not denied that a "creeping expropriation" on that basis was possible. They asserted that "the whole of Respondent's conduct amounts to expropriation".¹⁴¹⁴
- 4.530 By way of elaboration of the assertion that they had lost the use and benefit of their shares in Tschechien 7 and ECE Praha, the Claimants explained that they could "no longer use these companies for implementing a shopping centre project in , as originally intended".¹⁴¹⁵
- 4.531 They recalled that Tschechien 7 was a special purpose vehicle created for the development of the Galerie project, observed that the Claimants had "spent a considerable amount of money and put it into the development of GALERIE through Tschechien 7, in the hope of one day being able to collect the benefits", and asserted that, following the abandonment, Tschechien 7 had "lost all use for Claimants and Claimants lost the money they had put into Tschechien 7".¹⁴¹⁶ As for ECE Praha, the Claimants recalled that it had provided services to Tschechien 7 in relation to the development of the Galerie project, and that it had been intended that it would provide management services to the future purchaser of the project; they

¹⁴¹⁰ Reply, para. 519.

¹⁴¹¹ Reply, para. 520.

¹⁴¹² Reply, para. 521, citing *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award of 12 April 2002, para. 108.

¹⁴¹³ Reply, para. 522.

¹⁴¹⁴ Reply, para. 523.

¹⁴¹⁵ Reply, para. 524.

¹⁴¹⁶ Reply, para. 525.

asserted that, as a consequence of the abandonment, their participation in ECE Praha had become “partially useless”.¹⁴¹⁷

- 4.532 In response to the Respondent’s argument that the legal status of the land plots on which the project was to be built had not been affected by the abandonment, the Claimants submitted that, in the circumstances, that was irrelevant, and that it was the status of the shares which was decisive. They noted that the value of the shares had been “considerably diminished” due to the fact that the project was unfinished and abandoned; on that basis, they rejected the suggestion by the Respondent that “nothing” had changed insofar as the situation was still that they had not received a legally effective Building Permit.¹⁴¹⁸
- 4.533 In response to the Respondent’s argument that the Claimants could still use their shares in Tschechien 7 and ECE Praha for some other purpose, the Claimants asserted, relying on the decision in *Biwater Gauff v. Tanzania* that only “reasonable ways of using the nominally remaining rights” were relevant, and that the Respondent had failed to demonstrate that there existed any such reasonable alternative use for the shares.¹⁴¹⁹ They submitted that it was not possible for Tschechien 7 to use the plots for a different type of development, noting that specialisation in a particular field of development was required in order to be able to compete, and that the ECE Group was not in a position simply to develop an office building or residential properties. On that basis it was asserted that “[f]or ECE, the land plots owned by Tschechien 7, and thus Tschechien 7 itself, have become worthless”.¹⁴²⁰
- 4.534 In relation to ECE Praha, the Claimants submitted that the fact that ECE Praha had provided services to other ECE shopping centres within the Czech Republic was beside the point insofar as a “partial deprivation of the use and benefits” could amount to an expropriation. They referred to *Middle East Cement v. Egypt* as an illustrative example, noting that the tribunal in that case had not limited itself to an assessment of whether there had been a loss of the investment as a whole, but had “also analysed whether particular assets had been lost”.¹⁴²¹
- 4.535 They argued that, on that basis, the Tribunal should take account of the fact that ECE Praha’s business related to the Galerie project formed a “structural unit” that had been lost due to the Respondent’s actions; that the Respondent had “completely deprived Claimants of the use and benefit of its shares in ECE Praha as regards the project GALERIE”; and that this amounted to “an indirect partial expropriation”.¹⁴²² In support of that argument, they observed that absurd results would be caused if there was no protection against the particular expropriation of separate business units within a single company insofar as investors would be better protected if they established numerous companies each of which dealt with specific business areas; that if there was no protection against partial direct expropriation, it would always be open to a host state to argue that some use for the company remained; and that the

¹⁴¹⁷ Reply, para. 526.

¹⁴¹⁸ Reply, para. 527.

¹⁴¹⁹ Reply, para. 528, citing *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008, para. 463.

¹⁴²⁰ Reply, para. 529.

¹⁴²¹ Reply, para. 530, referring to *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award of 12 April 2002, paras. 97 et seq and 131 et seq.

¹⁴²² Reply, para. 531 (emphasis in original).

manner in which an investor's business had been organized could not be decisive for an expropriation claim.¹⁴²³

- 4.536 The Claimants further asserted that the Respondent's argument that they still had day-to-day control over the business of Tschechien 7 and ECE Praha was "absurd", noting that such control could only be relevant where there remained some day-to-day business in existence.¹⁴²⁴ They submitted that due to the abandonment, Tschechien 7 had no day-to-day business, but existed solely for the purposes of liquidating the project, and that denying the existence of an expropriation on that basis would be "to ignore economic realities".¹⁴²⁵ As for ECE Praha, they asserted that it had no day-to-day business "with regard to GALERIE", and submitted that that was sufficient for a partial indirect expropriation of the shares in ECE Praha.¹⁴²⁶
- 4.537 The Claimants did not dispute the Respondent's observation that the purpose of the prohibition of expropriation in the BIT was not to remunerate investors for bad business decisions, but in response asserted that the project "would have had success, had it not been for Respondent's interference".¹⁴²⁷
- 4.538 As regards the Respondent's reliance on the police powers exception, the Claimants denied that the "delaying actions" of the Respondent had constituted a valid exercise of the Respondent's regulatory powers, with the result that they did not fall within the exception.¹⁴²⁸ They noted that the police powers exception presupposed the pursuit of some "purpose of social and general welfare"; noted that the Respondent had only alluded to the alleged illegality of the Planning Permit and of the excavations, apparently on the basis that its actions were in pursuit of the enforcement of domestic law; and submitted that that argument was without merit.¹⁴²⁹
- 4.539 First, they denied that the Respondent had in fact pursued the enforcement of domestic law, arguing that various of the decisions in the Extraordinary Review and Main Building Permit proceedings had been unlawful and that the Respondent's actions had been part of a scheme of obstruction; on that basis, they submitted that the actions had not been in pursuit of any welfare purpose, but rather had been aimed "to hinder a private business".¹⁴³⁰
- 4.540 Second, the Claimants in any case denied that the enforcement of domestic law could constitute a valid welfare purpose, invoking the decision in *Tecmed* as an example of a case in which an act an authority was bound to execute under domestic law had nevertheless been found to constitute a breach of international law resulting in an obligation to pay

¹⁴²³ Reply, para. 532.

¹⁴²⁴ Reply, para. 533.

¹⁴²⁵ Reply, para. 534.

¹⁴²⁶ Reply, para. 535.

¹⁴²⁷ Reply, para. 536.

¹⁴²⁸ Reply, para. 537.

¹⁴²⁹ Reply, para. 538.

¹⁴³⁰ Reply, para. 539.

compensation. They observed that if that were not the case, a State could simply enact a law in order to justify its actions.¹⁴³¹

4.541 Third, they argued that even if enforcement of domestic law could be held to constitute a valid welfare purpose, the justification based on the excessive excavations put forward by the Respondent was insufficient insofar as the First to Third Stays in the Main Building Permit proceedings had made no reference to the excessive excavations. They reiterated their earlier observation that the stay of the appellate proceedings was irrelevant, as it had been adopted after the abandonment of the project.¹⁴³²

4.542 Fourth, the Claimants postulated that, in any case, any application of the police powers exception was only valid to the extent it was non-discriminatory, and that that was not so on the facts of the present case; they submitted that “Respondent’s overall conduct [...] favoured Multi to the detriment of Claimants”, pointing in particular to the disparate number of Building Permits required, and the delays in the Claimants’ proceedings compared to those for Multi.¹⁴³³ As regards what they characterized as the Respondent’s attempt “to justify its discriminatory action by arguing that the exempted measure may be individual, i.e. imposed specifically with respect to the investor, if it is taken in application of a general applicable statute”, the Claimants accepted that the proposition was true as a general matter, but denied that it assisted the Respondent in the present case, suggesting that “the measures in question were not taken in application of the law but in *misapplication* thereof. At all times MAL acted illegally in treating Claimants and Multi differently”.¹⁴³⁴

iv. Exhaustion of Local Remedies

4.543 As regards the Respondent’s reliance on the denial of justice standard and their arguments based on what they labelled “a purported requirement to pursue local remedies”,¹⁴³⁵ the Claimants first noted that the Respondent sought to deprive them of protection under the BIT by relying principally on the fact that the Claimants had missed the deadline for filing an appeal against the Third Stay, and that despite the fact that that event had not been relevant for the abandonment of the project. They argued that the Respondent’s arguments based on the local remedies rule under customary international law should be rejected on the basis that:

- a. the denial of justice standard did not apply exclusively;
- b. they had been required only to pursue “reasonable efforts for domestic redress”, had not been required to comply with the customary local remedies rule, and in any case, that what had been required of them was limited due to the fact that the actions of the Respondent constituted a pattern of State conduct aimed at obstructing them; and

¹⁴³¹ Reply, para. 540.

¹⁴³² Reply, para. 541.

¹⁴³³ Reply, para. 543.

¹⁴³⁴ Reply, para. 544 (emphasis in original).

¹⁴³⁵ Reply, para. 545.

c. they had in any case pursued all efforts required by law.¹⁴³⁶

4.544 As regards the asserted non-exclusivity of the denial of justice standard, the Claimants first noted that, although the Respondent had originally argued that the denial of justice standard was the exclusive standard for the determination of liability under the BIT in relation to any administrative proceedings, and had thereby attempted to introduce a substantive requirement of exhaustion of local remedies in relation to all claims, in its Counter-Memorial, the Respondent had limited itself to arguing that the standard applied to “multi-level decision-making proceedings”. The Claimants submitted that the distinction between “multi-level” and other decision-making proceedings was an invention of the Respondent, and that local remedies did not have to be exhausted even in “multi-level decision-making proceedings”.¹⁴³⁷

4.545 Second, the Claimants argued that the denial of justice standard did not exclude the application of other BIT guarantees; in addition to referring to the views of academic commentators, they relied principally upon the decision of the tribunal in *Saipem v Bangladesh* for the propositions that, although expropriation by judicial act presupposed some illegal intervention by the court, it did not necessarily presuppose a denial of justice, and that the exhaustion of local remedies was not a substantive requirement for a finding of expropriation by a court.¹⁴³⁸

4.546 Third, the Claimants asserted that the BIT constituted *lex specialis* in relation to the customary law standard for denial of justice, and submitted that the Respondent was trying to invert the normal relationship by attempting “to make the customary law standard of denial of justice prevail over specific treaty standards”.¹⁴³⁹ Relying on the historical development of the denial of justice standard as part of customary international law relating to diplomatic protection, in which regard it was asserted that diplomatic protection embodied only an “absolute minimum standard that does not ensure an effective protection of investors”, the Claimant submitted that States concluded BITs precisely to remedy that inadequacy, and that as a result, the customary standard can “therefore not exclude the explicit standards of the BIT”.¹⁴⁴⁰ They invoked the writings of Paulsson in support.¹⁴⁴¹

4.547 They emphasized that that conclusion was not subject to any modification to the extent that it was recognized that certain elements of the denial of justice standard were implicitly incorporated into the fair and equitable treatment standard. They argued that “[d]enial of justice does not form part of the BIT guarantees so that the level of protection is lowered to the level of protection under customary international law. Rather, denial of justice only forms part of the BIT guarantees so that it is ensured that the level of protection under the BIT never undercuts the level of protection under customary law.”¹⁴⁴²

¹⁴³⁶ Reply, para. 546.

¹⁴³⁷ Reply, para. 547.

¹⁴³⁸ Reply, para. 549, citing *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Award of 30 June 2009, para. 181.

¹⁴³⁹ Reply, para. 551.

¹⁴⁴⁰ Reply, para. 552.

¹⁴⁴¹ Reply, para. 553, quoting J. Paulsson, *Denial of Justice in International Law* (CUP, 2005), p. 111

¹⁴⁴² Reply, para. 554.

- 4.548 Fourth, they submitted that the exclusivity of denial of justice had only ever been applied to acts of the judiciary, and was not applicable to administrative proceedings, and submitted that it was irrelevant in that regard whether the proceedings were “single-level” or “multi-level”.¹⁴⁴³
- 4.549 As regards the Respondent’s reliance on *Amco* and *Jan del Nul*, the Claimants noted that the decision in *Amco* was not concerned with the exclusivity of denial of justice compared with other BIT standards, in particular because it was decided under customary international law.¹⁴⁴⁴ As for *Jan de Nul*, the Claimants noted first, that the case had not concerned “multi-level” administrative proceedings, but rather court proceedings and “single-level” administrative proceedings; and second, that the tribunal had applied the denial of justice standard to the court proceedings, whilst applying the fair and equitable treatment standard to the administrative proceedings.¹⁴⁴⁵
- 4.550 The Claimants further submitted, referring to the decision in *RosInvestCo v. Russian Federation*, that the denial of justice standard did not apply exclusively to administrative proceedings insofar as it had developed to deal with the specific issue of wrongful acts committed by the judiciary.¹⁴⁴⁶
- 4.551 Finally, the Claimants argued that the denial of justice standard was not the exclusive applicable standard where there were multiple, interlocking acts of the State which cumulatively harmed the investor, and that such claims should be analysed under the individual explicit standards under the BIT, which were more appropriate insofar as they allowed the assessment of the cumulative effects of the various actions as a whole.¹⁴⁴⁷ The Claimants again invoked the decision in *RosInvestCo*, noting that the tribunal in that case had considered the actions of the host state’s courts under the denial of justice standard, but had not held that it could not exclude those decisions from its analysis of the claims under other treaty standards.¹⁴⁴⁸ The Claimants noted that their investment activities had not been impeded by a single decision, but rather by the “cumulative effect of multiple state actions on different administrative levels”, pointing in particular to the Extraordinary Review and Main Building Permit proceedings.¹⁴⁴⁹
- 4.552 As regards the argument that they had had only to pursue “reasonable efforts” for domestic redress in order to rely on the investment protection guarantees under the BIT, the Claimants asserted first that there was no requirement that they should have complied with the rule requiring exhaustion of local remedies under customary international law, as no such

¹⁴⁴³ Reply, para. 555.

¹⁴⁴⁴ Reply, para. 556.

¹⁴⁴⁵ Reply, para. 557.

¹⁴⁴⁶ Reply, paras. 558-559, citing *RosInvestCo UK Ltd. v. Russian Federation* (SCC Case No. V079/2005), Final Award of 12 September 2010, para. 274.

¹⁴⁴⁷ Reply, para. 560.

¹⁴⁴⁸ Reply, para. 561, citing *RosInvestCo UK Ltd. v. Russian Federation* (SCC Case No. V079/2005), Final Award of 12 September 2010, para. 280.

¹⁴⁴⁹ Reply, para. 562.

requirement was contained in the BIT; they relied on certain observations of the tribunal in *Chevron and Texaco v. Ecuador*.¹⁴⁵⁰

- 4.553 Second, they submitted that even under the denial of justice standard, if it were held to be applicable and exclusive, there was no obligation to exhaust local remedies, but only to pursue reasonable efforts to do so, and that the same standard applied under the treaty guarantees.¹⁴⁵¹ The Claimants emphasized that the BIT contained no substantive requirement to exhaust local remedies, and that the Respondent's argument that the Claimants should have appealed every decision was thus without foundation.¹⁴⁵² They noted that any strict requirement of exhaustion would contradict the purpose of investment protection, and submitted that the jurisprudence showed that an investor only had to undertake reasonable efforts to obtain redress locally before commencing arbitration.¹⁴⁵³
- 4.554 Although accepting that "not any wrongful decision on the lowest administrative level can amount to a breach of international law", the Claimants denied that this meant that the exhaustion of local remedies rule established under customary international law applied with "full rigour".¹⁴⁵⁴ They submitted that any such conclusion, and the imposition of a substantive requirement of exhaustion of local remedies, would be inconsistent with the purpose of investment arbitration.¹⁴⁵⁵ They invoked various decisions as showing that only "reasonable efforts" to obtain redress had to be pursued, including the decisions in *Generation Ukraine v. Ukraine* and *Lemire v. Ukraine*.¹⁴⁵⁶
- 4.555 Third, the Claimants argued that they were in any case under no obligation to seek anything other than limited domestic redress by reason of what they submitted was a "pattern of state conduct, aimed at delaying Claimants' investment activities".¹⁴⁵⁷ As support for that argument, they referred to the comments of the ad hoc Committee in *Helnan Hotels*.¹⁴⁵⁸
- 4.556 The Claimants submitted that the Respondent had utilized the Claimants' attempts to obtain redress to prolong the proceedings, and had thus compounded the breach; they made reference inter alia to the delay which had occurred following the appeal of the First Ministry Decision, including in particular the delay between the recommendation of the Advisory Committee and the adoption of the First Minister Decision; the remand to the Ministry; and the Claimants' appeal of the Third Stay, including MAL's delay in forwarding the case file to RAL.¹⁴⁵⁹

¹⁴⁵⁰ Reply, paras. 563; 565-567, referring to *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (UNCITRAL/PCA), Partial Award on the Merits of 30 March 2010, para. 321.

¹⁴⁵¹ Reply, para. 564.

¹⁴⁵² Reply, para. 568.

¹⁴⁵³ Reply, para. 569.

¹⁴⁵⁴ Reply, para. 570.

¹⁴⁵⁵ Reply, para. 571-572.

¹⁴⁵⁶ Reply, paras. 573-574, quoting *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of 16 September 2003, para. 20.30; *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability of 14 January 2010, para. 282.

¹⁴⁵⁷ Reply, para. 575.

¹⁴⁵⁸ Reply, paras. 576-577, quoting *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision of the ad hoc Committee of 14 June 2010, para. 50

¹⁴⁵⁹ Reply paras. 578-580.

- 4.557 Further, they reiterated their position that the various decisions had been the result of a pattern of State conduct, constituting a “scheme to obstruct Claimants”.¹⁴⁶⁰ They noted that the authorities had adopted a number of obviously incorrect decisions, and submitted that the number of gross errors was such that it could not be regarded as mere coincidence. They further invoked what they asserted was the allegedly more favourable treatment given to Multi. As a consequence, they submitted, they had had no prospect of obtaining a domestic solution through further appeals, and could not be required to have pursued any further domestic efforts.¹⁴⁶¹
- 4.558 The Claimants further claimed that they had in any case pursued every form of redress required, albeit without success, cross-referring in that regard to the development of the point earlier in the Reply;¹⁴⁶² by way of summary, they emphasized that they had only had to seek redress in the Main Building and Planning Permit proceedings, and only as regards actions prior to the abandonment.¹⁴⁶³ They submitted that, on that basis, they had done everything required by law, noting that they had appealed every decision possible in the Extraordinary Review Proceedings save the Second Minister Decision, and had taken action where necessary against the various stays in the Building Permit proceedings.¹⁴⁶⁴
- 4.559 The Claimants denied that they should have had recourse to the Czech administrative courts, suggesting that because they had been continuously rebuffed, they could not have been expected to seek relief before the courts, and that, in any case, it was evident that any such recourse would have been ineffective as it would have only come far too late.¹⁴⁶⁵
- 4.560 Finally, although stressing that it was not necessary for their claims, the Claimants asserted that, as a result of the conduct of the Respondent they had been denied justice, “because of procedural irregularities, and because of manifestly unlawful decisions”. They claimed that they had pursued all necessary local remedies.¹⁴⁶⁶ They reiterated their position that exhaustion was not strictly required and that “reasonable efforts for domestic redress” was sufficient, and again referred to *Chevron v. Ecuador*.¹⁴⁶⁷
- 4.561 As to the effectiveness of the remedies available, the Claimants repeated their argument, based on the decision of the International Court of Justice in *Diallo*, that the burden to establish that effective remedies existed was upon the Respondent.¹⁴⁶⁸ The Claimants submitted that none of the various remedies theoretically available under Czech law were effective. They noted in particular that, as recognized by the Respondent, the motion against failure to act was not available against stays; that it was likewise not available in relation to the Minister, as he had no superior authority; and that in any case, it would have been likely to have prolonged the

¹⁴⁶⁰ Reply, para. 581.

¹⁴⁶¹ Reply, paras. 581-582.

¹⁴⁶² Reply, para. 583.

¹⁴⁶³ Reply, paras. 584-585

¹⁴⁶⁴ Reply, para. 586.

¹⁴⁶⁵ Reply, para. 587.

¹⁴⁶⁶ Reply, para. 588.

¹⁴⁶⁷ Reply, para. 589-591.

¹⁴⁶⁸ Reply, para. 592, referring to *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Preliminary Objections*, ICJ Reports 2007, p. 582, at p. 600 (para. 44).

- proceedings.¹⁴⁶⁹ They argued that recourse to the administrative courts would likewise not have been effective insofar as administrative means of recourse first had to be exhausted, and in any case it would not have resulted in a decision prior to the abandonment.¹⁴⁷⁰
- 4.562 Specifically as regards the Third Stay, the Claimants submitted that no effective remedies had been available, and rejected the Respondent's argument that they were precluded from relying on that decision because of their untimely appeal; they argued that even an appeal filed in time would not have made any difference, referring again to the fact that MAL had in any case ignored the opinion of the Ministry that the stay was improper.¹⁴⁷¹
- 4.563 As to the substance of the alleged denial of justice, they argued that consideration could not be limited to manifestly unlawful decisions (although they argued that decisions of that nature had been adopted), and submitted that a denial of justice had also occurred as a result of the unwarranted delay in the Main Building Permit proceedings as the result of the unlawful stay decisions, and the "grossly deficient" manner in which the Respondent had administered justice as a result of failing to hear the Claimants in the Extraordinary Review Proceedings.¹⁴⁷²
- 4.564 As to the duration of the proceedings, the Claimants rejected the Respondent's invocation of the decision in *Jan de Nul* to the effect that even a 10 year delay in complex proceedings might not constitute a denial of justice as inapposite, noting that they did not rely on the overall duration of the proceedings but on specific delays; they further argued that the proceedings were not of a complexity such as to justify the delays which had occurred, and submitted that the delays were rather due to the alleged scheme of corruption.¹⁴⁷³
- 4.565 By way of expansion of their claim of manifest unlawfulness, the Claimants focused on the Third Stay and the First Minister Decision, and disputed the Respondent's attempt to suggest that those decisions were justified by reasonable motives. On the one hand, they asserted that the intention of both Mr [redacted] and the Minister had been to obstruct the Claimants,¹⁴⁷⁴ and on the other noted that the subjective intention of the decision-maker was not relevant for a denial of justice, emphasizing that no finding of bad faith was necessary.¹⁴⁷⁵
- 4.566 They argued that on an objective approach, no justification for the Third Stay was possible, and that in light of the relevant Czech law, it had been "manifestly unjust"; they asserted that the same was true of the Second Stay insofar as it had relied on the pendency of the Extraordinary Review Proceedings.¹⁴⁷⁶ As for the First Minister Decision, the Claimants took issue with the Respondent's attempt to portray the difference between remand and immediate termination as a subtle point of administrative procedure, and argued that the manifest

¹⁴⁶⁹ Reply, para. 594.

¹⁴⁷⁰ Reply, para. 595.

¹⁴⁷¹ Reply, para. 596.

¹⁴⁷² Reply, paras. 597-599.

¹⁴⁷³ Reply, paras. 600-602.

¹⁴⁷⁴ Reply, para. 604.

¹⁴⁷⁵ Reply, para. 605, citing *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (UNCITRAL/PCA), Partial Award on the Merits of 30 March 2010, para. 244.

¹⁴⁷⁶ Reply, para. 606.

unlawfulness of the First Minister Decision resulted clearly from the fact that the Minister had reached a different conclusion on precisely the same facts in the Second Minister Decision.¹⁴⁷⁷

v. Causation

- 4.567 On causation, the Claimants cross-referred to their submissions on the facts, repeating their assertion that the project would have prevailed but for the alleged interference by the Respondent, and that it had been the Respondent's "obstruction" that had forced the postponement of the opening date to the Autumn of 2010 and made it impossible for the Claimants to guarantee even that date, as a result of which it was alleged that key tenants had been lost, and the Claimants had had "no other option but to abandon their project".¹⁴⁷⁸
- 4.568 In addition, the Claimants disputed the Respondent's suggestion, which they submitted entailed the idea of a "hypothetical timeline", according to which even if the Second and Third Stays had not been adopted, the Main Building Permit proceedings would in any case have been stayed due to the Groundworks Removal Proceedings. The Claimants argued that the Respondent had provided no authority that consideration of such "hypothetical chains of causation" had to be considered, noting in particular that the decision in *Factory at Chorzów* provided no support in that regard.¹⁴⁷⁹ They continued by arguing that if such hypothetical situations had to be considered, investors would be disadvantaged as respondent States could invoke reasons for decisions that had not been relied upon initially; they noted that the excessive excavations had not been relied upon by the Respondent as a reason for the Third Stay.¹⁴⁸⁰
- 4.569 On that basis, they submitted that the question for the Tribunal was whether the Claimants would have had to abandon their project without the decisions in the Extraordinary Review Proceedings, the illegal stays and the illegal splitting of the Building Permits, and that the answer to that question was that the project would have continued uninterrupted. They further asserted that, in the absence of those decisions, "[t]here would not have been any excavations beyond the limit in the Planning Permit in the first place because the Building Permit would have been issued even before the limit in the Planning Permit had been reached", with the result that there would have been no Groundworks Removal Proceedings which could have had an effect on the Main Building Permit proceedings.¹⁴⁸¹

6. The Respondent's Rejoinder

a. Overview and Preliminary Points

- 4.570 By way of introduction in their Rejoinder, the Respondent submitted that "[t]acitly acknowledging their failure to state a viable claim in either their Statement of Claim or their

¹⁴⁷⁷ Reply, para. 607.

¹⁴⁷⁸ Reply, para. 608.

¹⁴⁷⁹ Reply, para. 609.

¹⁴⁸⁰ Reply, para. 610.

¹⁴⁸¹ Reply, para. 611.

Memorial” the Claimants had “completely revamped their case yet again” in the Reply.¹⁴⁸² They noted that whilst, in the Statement of Claim, the claims had been put forward on the basis of the issuing of incorrect decisions and the causing of delays by the Czech authorities, the focus in the Memorial had shifted to allegations of discrimination in respect of the manner in which the Claimants’ investment had been treated by comparison to that of Multi, and that in the Rejoinder the focus had shifted again to allegations of bribery by Multi of Czech officials in order to procure incorrect decisions and cause delays.¹⁴⁸³

- 4.571 The Respondent highlighted the Claimants’ acknowledgment that it had no direct evidence to support the allegations of bribery,¹⁴⁸⁴ and set out in a table the principal allegations made by the Claimants and what it referred to as the “stunning lack of support” for the allegations of corruption, as well as its own evidence in response.¹⁴⁸⁵ It submitted that in respect of all but one of the allegations, no evidence was put forward by the Claimants, and that as regards the remaining allegation (that employees of MAL were instructed to obstruct the permit proceedings in respect of Galerie), the only evidence was the witness statement of Ms ¹⁴⁸⁶
- 4.572 The Respondent rejected the claims of corruption as unfounded.¹⁴⁸⁷ It submitted that they were “a creative afterthought to a failed case”, noting that the Statement of Claim had made no mention at all of corruption; it argued that the claims constituted a “flagrant violation” of the Tribunal’s Procedural Order No. 1, Article 20 of the UNCITRAL Rules, and “basic notions of due process”, in particular insofar as the Claimants had failed to provide any explanation for the delay in raising the new claim.¹⁴⁸⁸
- 4.573 They further took particular objection to the fact that in support of their claim, the Claimants had resorted to relying upon an unsigned witness statement attributed to Mr ¹⁴⁸⁹ of the Ministry of Regional Development, and drew attention to the fact that the reason why that statement was unsigned was because Mr ¹⁴⁸⁹ had been asked to sign it and had refused to do so.¹⁴⁸⁹ Relying on the observations of the Tribunal in *Azinian v. Mexico*, the Respondent strongly objected to this procedural impropriety, in particular insofar as it was alleged that Mr ¹⁴⁸⁹ and another employee of the Ministry had not been informed that they were being approached as potential witnesses, and that they had a right to legal representation.¹⁴⁹⁰ It further submitted that the Claimants had attempted to obtain information from the Ministry under false pretences, including in particular by recruiting a law student to request information

¹⁴⁸² Rejoinder, para. 1.

¹⁴⁸³ Rejoinder, paras. 2-4.

¹⁴⁸⁴ Rejoinder, para. 4, quoting Reply, para. 40.

¹⁴⁸⁵ Rejoinder, para. 4.

¹⁴⁸⁶ Rejoinder, para. 4.

¹⁴⁸⁷ Rejoinder, para. 5.

¹⁴⁸⁸ Rejoinder paras. 6 and 7.

¹⁴⁸⁹ Rejoinder, para. 8 and 9.

¹⁴⁹⁰ Rejoinder, paras. 10 and 11, citing *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award of 1 November 1999, para. 56.

as to the frequency with which the Minister did not follow recommendations of the Advisory Committee under the guise that it was required for “school research”.¹⁴⁹¹

4.574 As an overview of its response to the Claimants’ case as set out in the Reply, the Respondent submitted that the essential flaw in the Claimants’ case was that they had believed that it was not necessary for them to calculate risk, that they could start development of their own project more than a year after Multi had started work, in a worse location, and “at the tipping point of a saturated market”, and that the cause of the abandonment was that situation, coupled with the 10 month delay caused by the Claimants themselves in the permitting process, and the onset of the global economic crisis in late 2008.¹⁴⁹²

4.575 It further submitted that, in response to the reply to their claims contained in the Respondent’s Answer and Counter-Memorial, the Claimants’ Reply had offered “little more by way of rebuttal than a string of mischaracterizations and a wild-growth of new and unsupported assertions”.¹⁴⁹³

4.576 As to the new claim of corruption, the Respondent argued that it was “taken from thin air”; noting that if the Claimants had been serious about the claim, it would have been raised previously, but that no criminal complaint for corruption had been filed in 2007 or 2008 whilst the project was ongoing, nor after the arbitration had been initiated. It repeated that the claim of corruption was entirely unsupported, and noted that, although the Claimants accused virtually all of the public officials involved, with the exception of the officials of RAL, of very serious crimes, the only actual evidence relied upon was “newspaper clippings and general studies regarding so-called ‘corruption scandals’” which were unconnected to the present case.¹⁴⁹⁴ They noted that the Claimants were in effect asking the Tribunal to infer a specific conclusion of corruption by Multi from “exceedingly general” conclusion that corruption was present in the Czech Republic.¹⁴⁹⁵

4.577 The Respondent noted that the principal officials against whom allegations were made (Mr , Mr and Mr) categorically denied the accusations made against them.¹⁴⁹⁶ Further:

- a. as regards Mr it drew attention to the fact that he had issued numerous procedural and substantive decisions that were entirely favourable to the Claimants, including in particular the Planning Permit, the Main Building Permit and the building permit for the roads, as well as other minor procedural decisions,¹⁴⁹⁷ as well as the fact that he had “resumed all of the incorrectly-stayed building permit proceedings promptly” following the decisions on the appeals by Tschechien 7.¹⁴⁹⁸ They further highlighted that a number of mistakes made by Mr were

¹⁴⁹¹ Rejoinder, paras. 12 and 13.

¹⁴⁹² Rejoinder, para. 16.

¹⁴⁹³ Rejoinder, para. 17.

¹⁴⁹⁴ Rejoinder paras. 18-20.

¹⁴⁹⁵ Rejoinder, para. 21.

¹⁴⁹⁶ Rejoinder, para. 22.

¹⁴⁹⁷ Rejoinder, para. 23.

¹⁴⁹⁸ Rejoinder, para. 24.

favourable to the Claimants, in particular the authorization of the excavations in the Planning Permit, which it was submitted, had been contrary to Czech law, and that he had issued the Main Building Permit even though it was alleged that he should have required updating of the documentation to take account of the unauthorized excavations;¹⁴⁹⁹

- b. as regards Mr . they recalled that the City of had changed its zoning plan in a manner which assisted the Claimants, that the City had applied for certain of the main building permits in its own name, and that on 30 April 2008 it had entered into the coordination agreement with the Claimants to reconstruct the roads owned by it that were necessary to make the Galerie shopping centre accessible by road;¹⁵⁰⁰
- c. as regards Minister the Respondent asserted that his decisions had been in accordance with Czech law, and had always been in the Claimants' favour. It notes that the only act of which criticism was made by the Claimants was his choice in the First Minister Decision to remand, rather than reverse the First Ministry Decision, and submitted that that was the correct decision, pointing to the fact that that was the course of action which Tschechien 7 itself had originally requested in its appeal. It noted that if the Minister had wished to obstruct the Claimants' project, he could easily have ruled against Tschechien 7 by confirming the First or Second Ministry Decisions, thereby cancelling the Planning Permit, but that he had not done so.¹⁵⁰¹

4.578 In addition to its response on the merits of the corruption claims, the Respondent also raised a procedural objection to the allegations of corruption, arguing that they were inadmissible insofar as Article 12.2 of the Tribunal's Procedural Order No. 1 had provided that the Reply was to be limited to responding to points raised in the Counter-Memorial.¹⁵⁰²

4.579 As regards the Claimants' other claims, the Respondent submitted that the Claimants' allegations centred around three key dates, namely:

- a. 1 July 2007, the date on which the Claimants made their investment in Tschechien 7;
- b. 15 December 2007, the Claimants' "valuation date" for the purposes of its assessment of the lost profits claimed as damages; and
- c. 13 October 2008, the last date on which the Claimants had alleged any violation of the BIT.¹⁵⁰³

4.580 As regards the first key date of 1 July 2007, the Respondent noted, recalling its position on the jurisdiction *ratione temporis* of the Tribunal, that the Claimants had admitted that there could be no violation of the BIT prior to the date when their investment was made.¹⁵⁰⁴

¹⁴⁹⁹ Rejoinder, para 25.

¹⁵⁰⁰ Rejoinder, para. 26.

¹⁵⁰¹ Rejoinder, para. 27.

¹⁵⁰² Rejoinder, paras. 28-29.

¹⁵⁰³ Rejoinder , para. 30.

- 4.581 As regards the second key date of 15 December 2007, the Respondent argued that, as a matter of public international law, the valuation date must immediately precede the breach to which it relates, and that accordingly the Claimants' selection of 15 December 2007 was an indication of when the Claimants believed that the breach of the BIT occurred.¹⁵⁰⁵ On that basis, the Respondent submitted that the relevant period for analysis of breach of the BIT was between 1 July 2007 and the end of 2007.¹⁵⁰⁶ Although acknowledging that acts after late 2007 could in theory breach the BIT, the Respondent argued that the Tribunal could not award any damages for lost-profit on that basis insofar as the Claimants had not presented any evidence of valuation of their investment after 2007.¹⁵⁰⁷
- 4.582 Finally, as regards the third date of 13 October 2008, the Respondent argued that, although in theory the Claimants could recover damages for the "obsolete expenses" flowing from a breach after the end of 2007, the Claimants had expressly stated that they made no claim in respect of events after the alleged abandonment on 13 October 2007, and that accordingly, on the Claimants' own case, the Respondent could only be liable in that regard in respect of events between 1 July 2007 and 13 October 2008.¹⁵⁰⁸ It added that it could only be liable in respect of expenses incurred by the Claimants' subsidiaries whilst they were in fact owned by the Claimants, and that those expenses would have to be valued as at the date of the breach. It argued that the Claimants' claim for "obsolete expenses" was "unsubstantiated" insofar as they had not shown either that the amounts claimed in that regard had been incurred whilst the relevant subsidiaries were owned by them, nor that the valuation had been undertaken as at the date of the relevant alleged breach.¹⁵⁰⁹
- 4.583 On the basis of that analysis, the Respondent submitted that two periods were relevant for assessment of whether there had been a breach of the BIT:
- a. first, in respect of the Claimants' claims in respect of lost profits, the relevant period was between 1 July 2007 and the end of 2007;
 - b. second, in respect of the Claimants' claims in respect of "obsolete expenses", the relevant period was between 1 July 2007 and 13 October 2008.¹⁵¹⁰
- 4.584 However, the Respondent emphasized that the Claimants had admitted in the Reply that none of the events prior to 13 October 2008 were in fact decisive for the abandonment of the project, and that the decision to abandon the project had been taken on the basis that they could "no longer be certain that MAL would not soon find another pretext to delay the proceedings".¹⁵¹¹ They further highlighted the fact that the Claimants' own assessment as at the time of the alleged abandonment was that the shopping centre in Spring/Summer 2010 was at least 50%, and repeated their argument that, on the basis of the position taken by the Claimants, the cause

¹⁵⁰⁴ Rejoinder, para. 32.

¹⁵⁰⁵ Rejoinder, para. 33.

¹⁵⁰⁶ Rejoinder, para. 34.

¹⁵⁰⁷ Rejoinder, para. 34.

¹⁵⁰⁸ Rejoinder, para. 35.

¹⁵⁰⁹ Rejoinder, para. 36.

¹⁵¹⁰ Rejoinder, para. 37.

¹⁵¹¹ Rejoinder, para. 38, quoting Reply, para. 210.

of the abandonment was thus a fear of a future violation of Czech law.¹⁵¹² They further submitted that, in any case, the fear of a future breach had not been the real cause of the abandonment, but that rather the project had been abandoned due to a belated appreciation of the riskiness of the project, Tschechien 7's own delays in the permitting process, and the fact that, as a result of the financial crisis in the early Autumn of 2008, liquidity problems had arisen; the Respondent made reference to the PowerPoint presentation given to the board in October 2008 and submitted that that was conclusive proof that the actions of the Respondent had not been the real cause of the abandonment.¹⁵¹³

b. Factual Allegations

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¹⁵¹² Rejoinder paras. 38-39.

¹⁵¹³ Rejoinder, paras. 40-41.

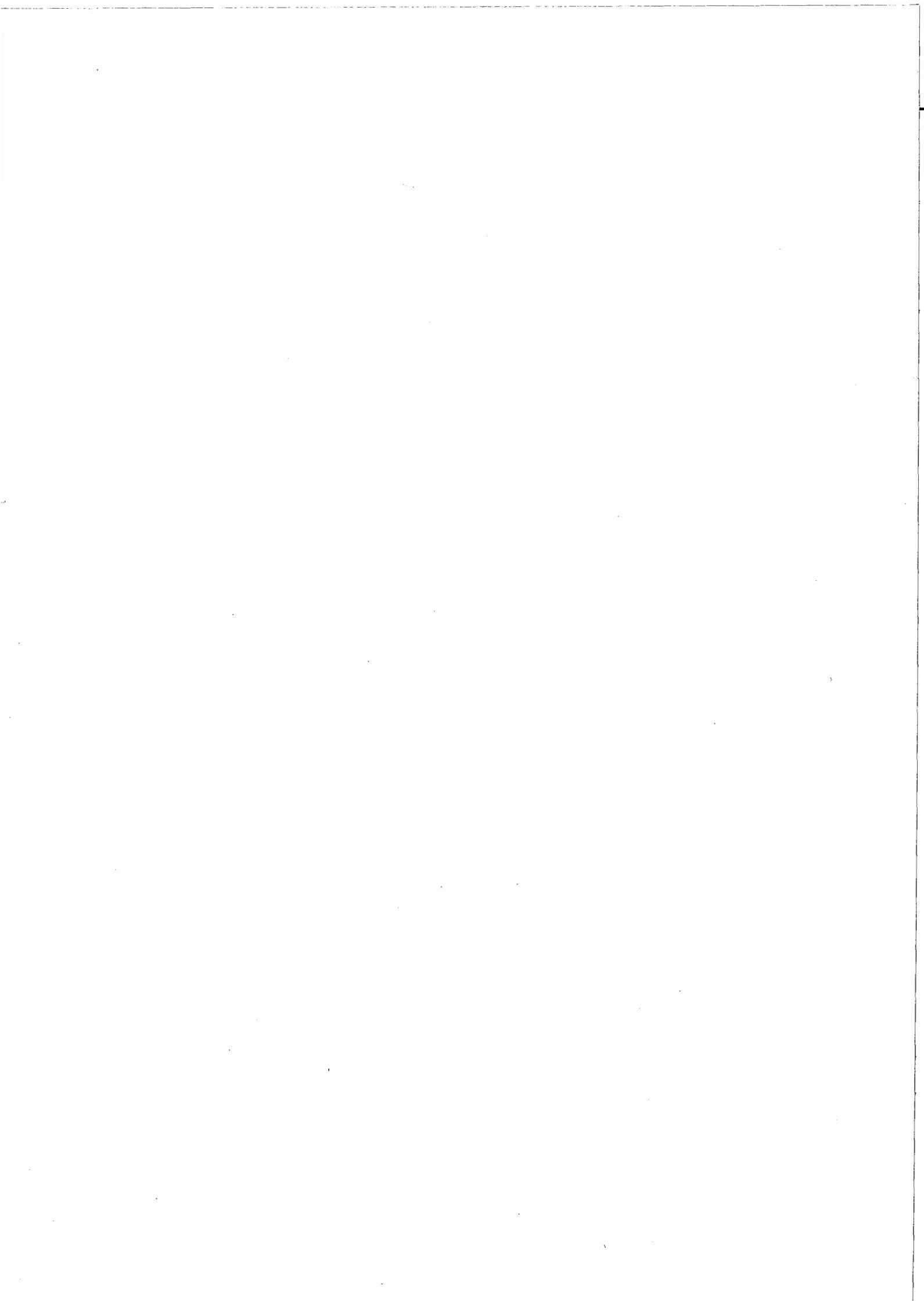
¹⁵¹⁴ Rejoinder, para. 42.

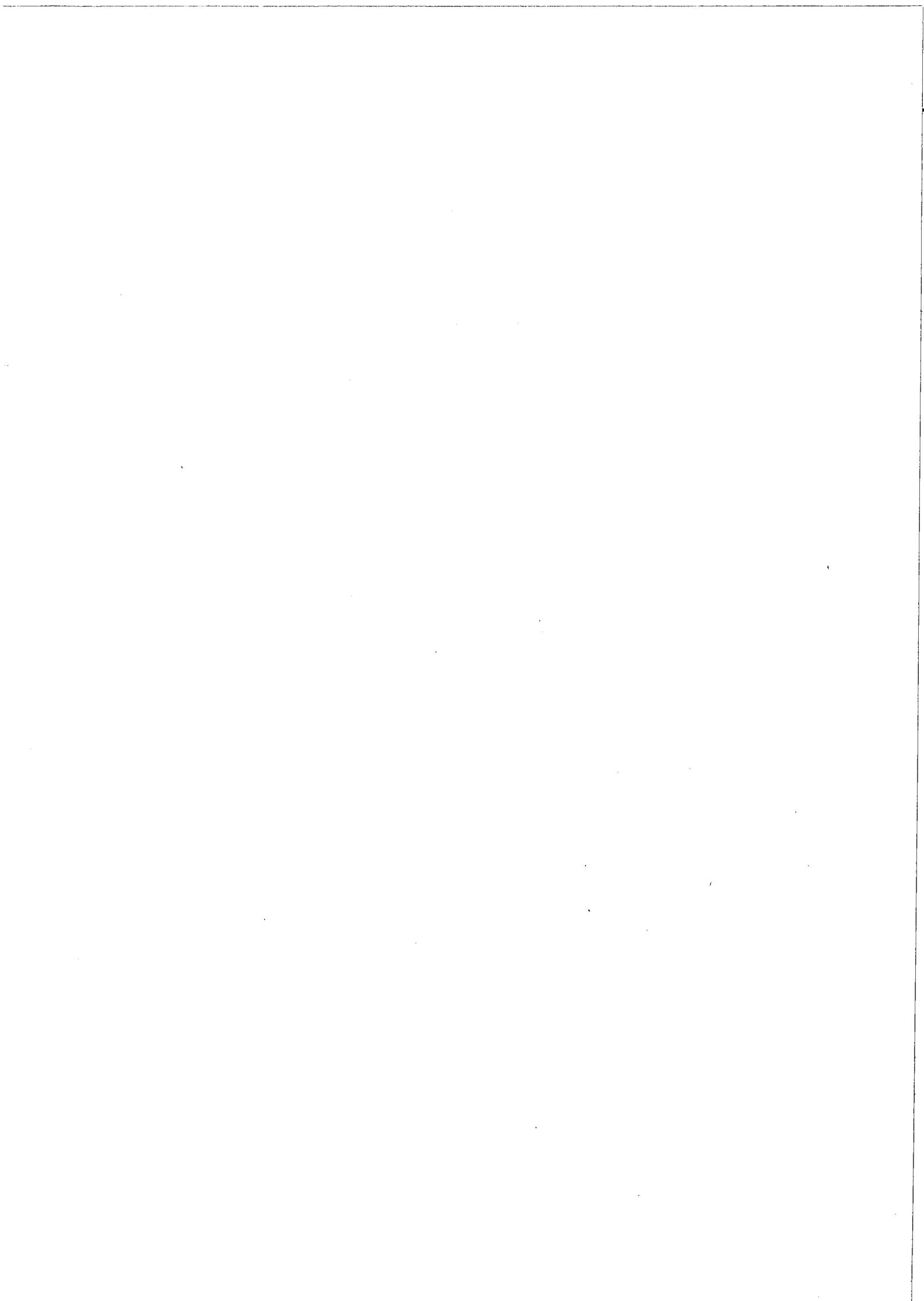
¹⁵¹⁵ Rejoinder, para. 45.

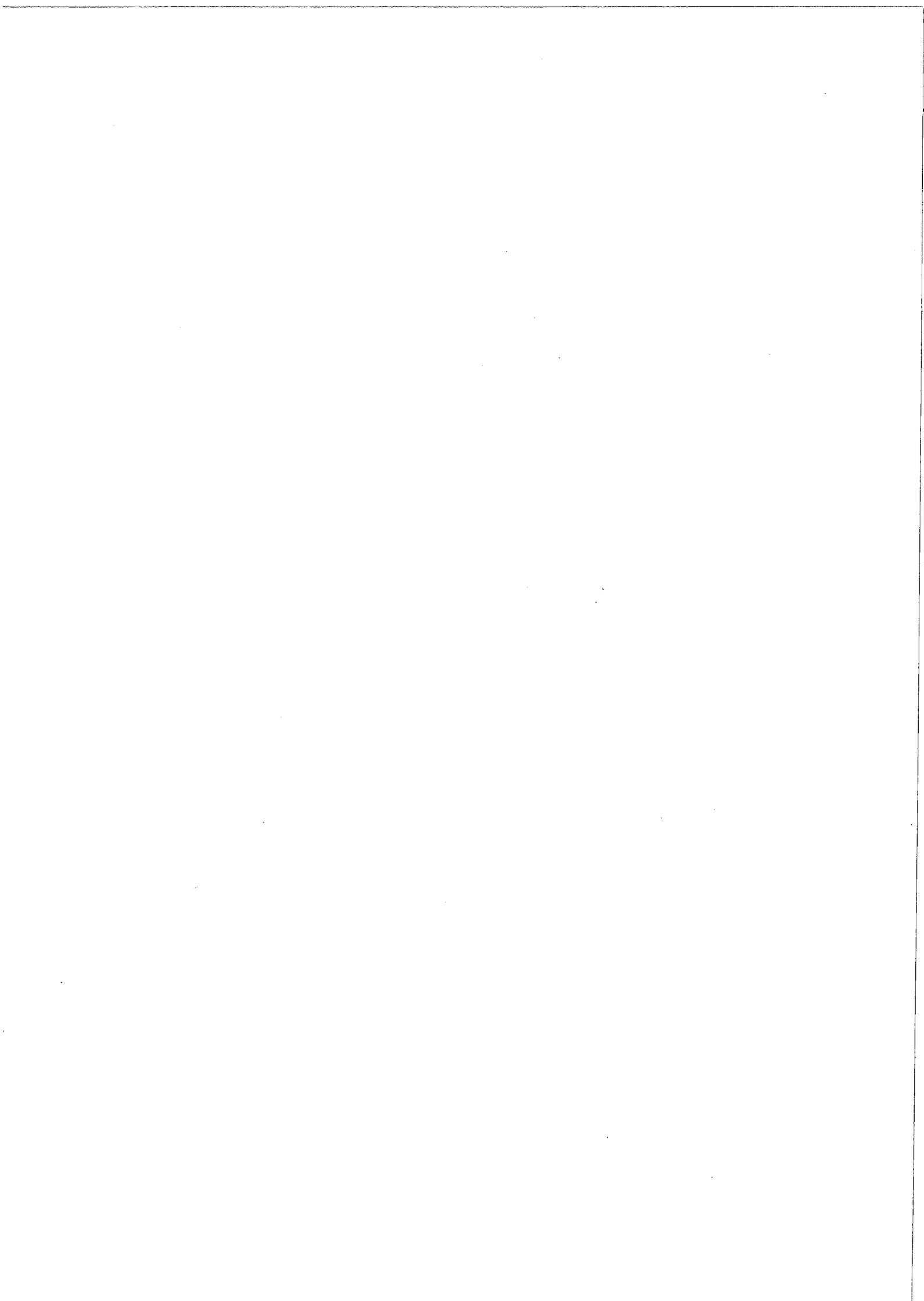
¹⁵¹⁶ Rejoinder, para. 45.

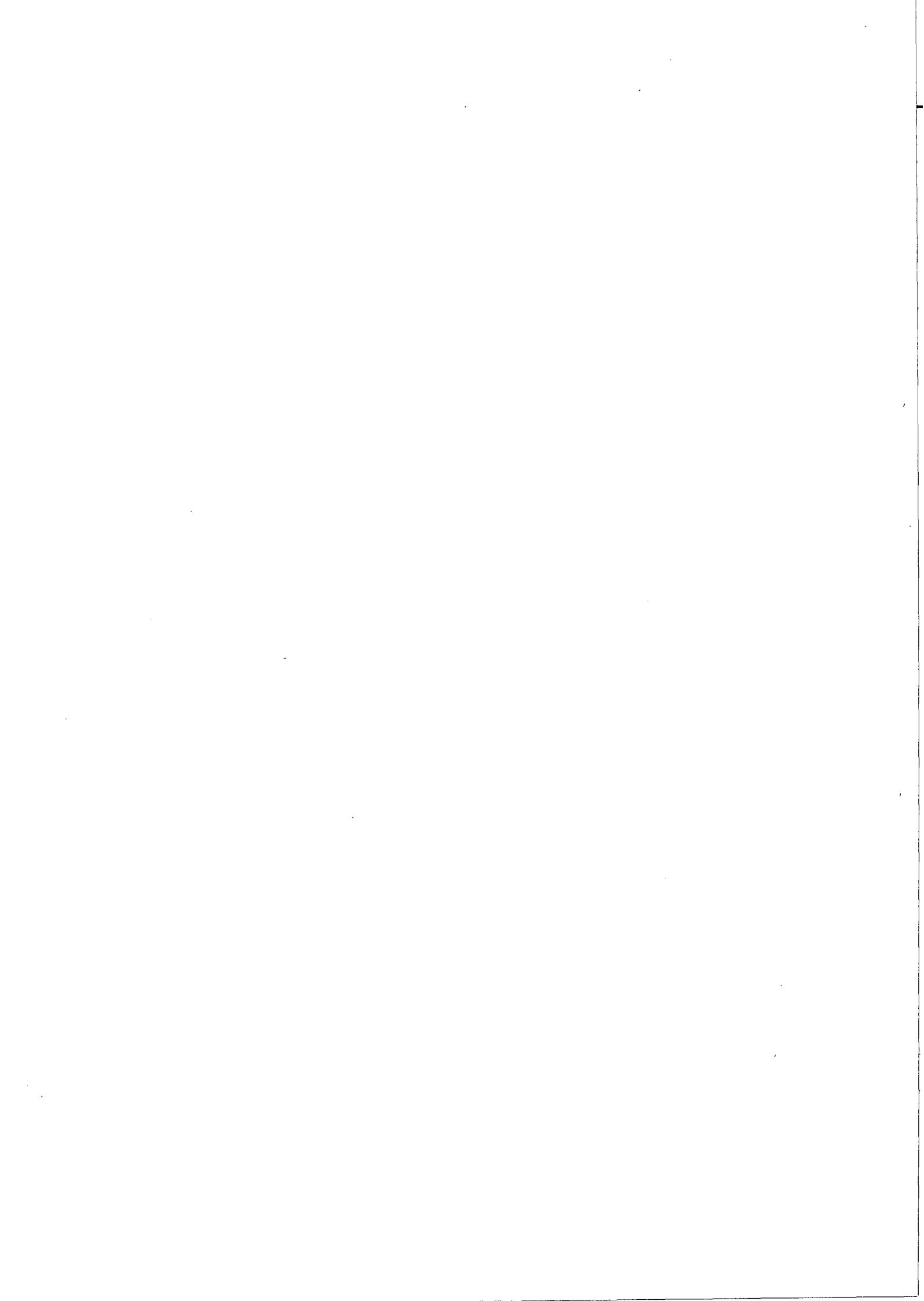
¹⁵¹⁷ Rejoinder, para. 47.

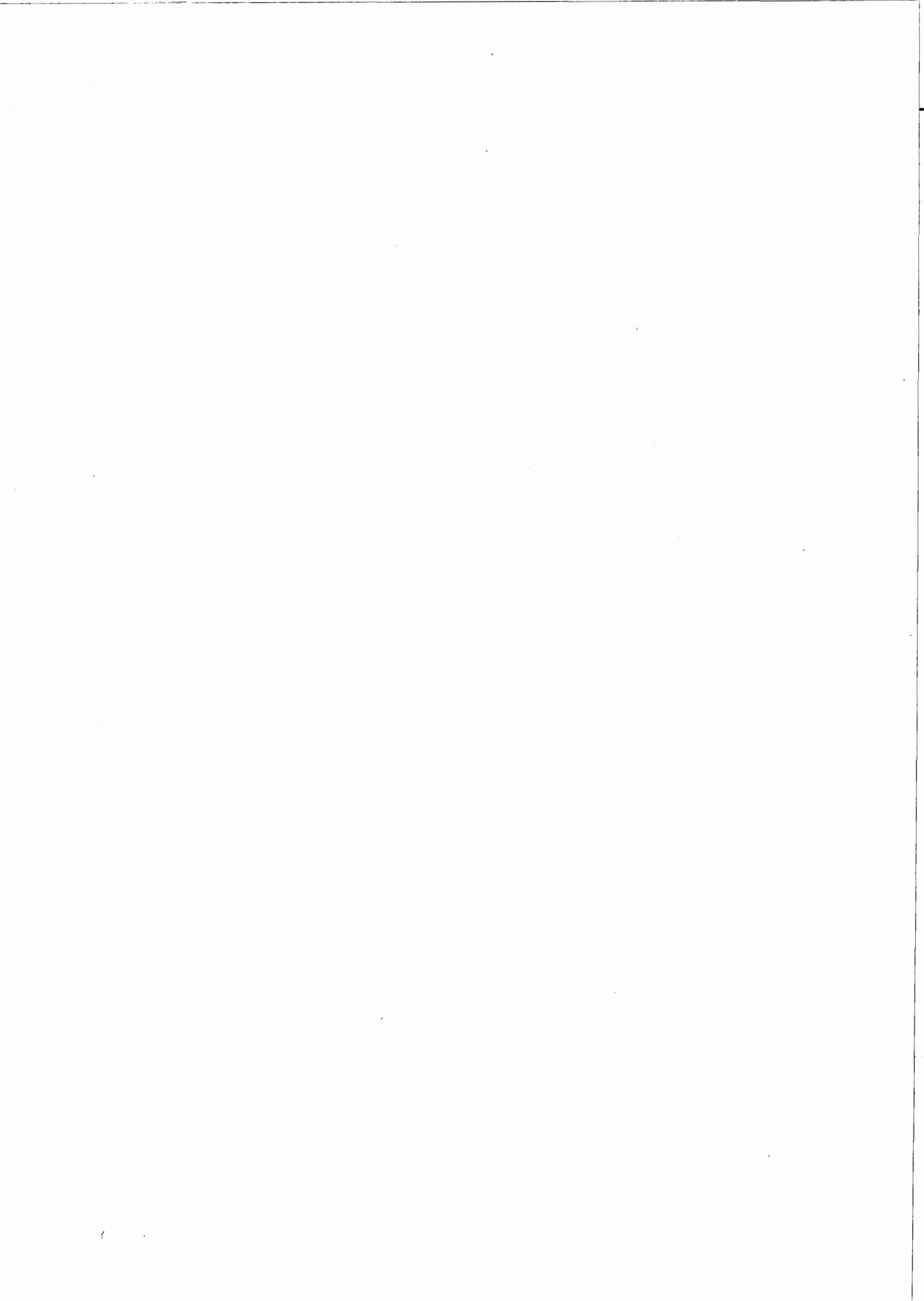
¹⁵¹⁸ Rejoinder, paras. 48-50.











c. **Merits of the Claimants' Claims**

4.629 As to the merits of the Claimants' claims, the Respondent submitted that, despite the changes in the Claimants' case, the common thread had been complaints as to delays in the permit proceedings; it produced a table summarising the dates of the filing and completion of each application, as well of each first instance decision and any decisions on appeal in relation to the various proceedings. It asserted that the Claimants complained of proceedings which had all ended in their favour, with the sole exception being the proceedings in relation to Main Building Permit, as to which the appellate proceedings had been stayed on 12 March 2009, and again submitted that the Claimants "had only themselves to blame" insofar as the stay was caused by the excessive excavations, and in any case noted that the Claimants asserted no breaches after October 2008.¹⁵⁹⁶

4.630 On the basis that the Claimants had been successful in all of the relevant proceedings, the Respondent submitted that their only complaint could be that the successful outcomes had not come quickly enough, and noted that that had never been held to be a sufficient basis for concluding that a State had violated international law.¹⁵⁹⁷

i. Denial of Justice and Exhaustion of Local Remedies

4.631 To that end, the Respondent reiterated its position that the Claimants' claims had to be assessed against the principles of denial of justice.

4.632 As to the applicability of the denial of justice standard and its content, the Respondent noted that the Claimants in the Reply had taken the position that they only complained as to the conduct of the Extraordinary Review Proceedings and the Main Building Permit proceedings,

¹⁵⁹² Rejoinder, para. 147.

¹⁵⁹³ Rejoinder, paras. 148-149.

¹⁵⁹⁴ Rejoinder, para. 150.

¹⁵⁹⁵ Rejoinder, para. 151.

¹⁵⁹⁶ Rejoinder, paras. 152-153.

¹⁵⁹⁷ Rejoinder, para. 154.

and emphasized that their complaint was not as to delays due to inactivity in the periods between the various decisions in those proceedings. It submitted that any such claim would have been hopeless insofar as the relevant authorities had “always decided the matters before them within a reasonable time”.¹⁵⁹⁸ Rather, the Respondent submitted, the Claimants’ complaint was that “too many first-instance decisions were incorrect, and it caused delay by having to remedy them on appeal”, and argued that, whether assessed against the principles of denial of justice or against other standards of protection, tribunals had consistently concluded that “incorrect decisions subsequently quashed by a superior authority (or which could have been quashed had the investor used available local remedies) do not give rise to an international delict”.¹⁵⁹⁹

- 4.633 By way of expansion of that argument, the Respondent explained that incorrect first-instance decisions were subject to “a substantive requirement of exhaustion of local remedies because States must be given an opportunity to quash incorrect first instance decisions in the usual appellate process”.¹⁶⁰⁰ Relying on the decisions of the tribunal and ad hoc Committee in *Helnan Hotels*, of the tribunal in *EDF v. Romania*, and of the tribunal in *Amco Asia v. Indonesia*, it submitted that that conclusion had been reached “either by analysing similar claims under the standard of denial of justice or by expressly or implicitly imposing the requirement under other standards”.¹⁶⁰¹ The Respondent submitted that the underlying justification for that approach was that it would be “unrealistic to interpret investment treaties as requiring that first instance administrative decisions always be procedurally and substantively correct”, and submitted that that was particularly the case where errors could be remedied upon appeal, or by another domestic remedy.¹⁶⁰² It further argued that domestic bodies were far better placed to deal with appeals against incorrect first instance administrative decisions, and invoked the observation of the tribunal in *Generation Ukraine v. Ukraine* that it was for domestic bodies, and not international tribunals, to “ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently”.¹⁶⁰³
- 4.634 It noted that despite the fact that it had consistently reiterated those principles, the Claimants had failed to address them.¹⁶⁰⁴
- 4.635 Second, in response to the Claimants’ argument that the denial of justice standard was not exclusive, the Respondent submitted that that argument missed the point, which was rather that

¹⁵⁹⁸ Rejoinder, para. 155.

¹⁵⁹⁹ Rejoinder, para. 156.

¹⁶⁰⁰ Rejoinder, para. 157.

¹⁶⁰¹ Rejoinder, para. 157, quoting *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Award of 3 July 2008, para. 148; *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision of the *ad hoc* Committee of 14 June 2010, paras. 48 and 50; *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009, para. 313; and *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case ARB/81/1), Award in Resubmitted Proceeding of 5 June 1990.

¹⁶⁰² Rejoinder, para. 158.

¹⁶⁰³ Rejoinder, para. 158, quoting *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of 16 September 2003, para. 20.33.

¹⁶⁰⁴ Rejoinder, para. 159.

no standard of protection under the BIT could be violated by “an incorrect first-instance decision that was remedied upon appeal, or not appealed at all”.¹⁶⁰⁵

- 4.636 The Respondent submitted that the Claimants had failed to provide any “meaningful response to that well-established principle”; insofar as the Claimants had invoked the decision in *Saipem v. Bangladesh* for the proposition that a first-instance decision could constitute an expropriation, even if not appealed, the Respondent submitted that they had overstated its holding insofar as, although the tribunal in that case had expressed the view that exhaustion was not a substantive requirement of a finding of expropriation, it had held that it was not in any case required to make a determination on that issue.¹⁶⁰⁶ The Respondent in any case criticized the “apparent readiness” of the tribunal in *Saipem* to hold that exhaustion was not a substantive requirement for expropriation by a judicial act as “not in line with prevailing interpretation”, and referring to, inter alia, the decisions in *Loewen v. USA*, *Pantechniki v. Albania*, and *EDF v. Romania* submitted that other tribunals were “adamant” that exhaustion of local remedies was required.¹⁶⁰⁷
- 4.637 The Respondent also disputed the relevance of the reliance by the Claimants on the decision in *RosInvestCo v. Russia*, arguing that the tribunal in that case had held that the criteria for denial of justice had been developed in light of the different functions of administrative organs and judicial organs and “the resulting differences in their discretion when applying the law and in the appeals available against their decisions”, and that that did not contradict its position.¹⁶⁰⁸
- 4.638 The Respondent emphasized that all of the administrative decisions of which the Claimants complained (with the exception of the First Minister Decision) had been first instance decisions rendered in multi-level administrative proceedings, and thus were subject to appeal and could have been quashed as efficiently as if they had been first instance court decisions. On that basis it submitted that there was no difference between Czech administrative and judicial proceedings in that respect, and that accordingly the requirement of exhaustion of local remedies applicable to first-instance judicial decisions applied equally to first-instance administrative decisions.¹⁶⁰⁹
- 4.639 Third, the Respondent asserted that denial of justice constituted the applicable *lex specialis* governing claims based on the conduct of administrative proceedings. It disputed the Claimants’ assertion that, because the denial of justice standard allegedly provided for a low level of protection, it could not constitute *lex specialis* as against the supposedly higher standard of protection contained in the BIT; it submitted that the opposite was in fact true when claims related to the conduct, rather than the outcome, of administrative proceedings. Further, it argued that the Claimants’ position appeared to be based on a misunderstanding of a

¹⁶⁰⁵ Rejoinder, para. 160

¹⁶⁰⁶ Rejoinder, para. 161, quoting *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Award of 30 June 2009, paras. 181-182.

¹⁶⁰⁷ Rejoinder, para. 162, referring to *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003, para. 154; *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21), Award of 30 July 2009, paras. 96-102; and *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009, para. 313.

¹⁶⁰⁸ Rejoinder, para. 163, quoting *RosInvestCo UK Ltd. v. Russian Federation* (SCC Case No. V079/2005), Final Award of 12 September 2010, para. 274 (emphasis in original).

¹⁶⁰⁹ Rejoinder, para. 164.

footnote contained in an academic treatise on denial of justice, and submitted that, where claims related to matters which were covered by the customary law of denial of justice, that standard “should either prevail as *lex specialis* or at least inform the interpretation of any other Treaty standard.”¹⁶¹⁰ It submitted that this was the case was confirmed by a number of decisions in which the author of the treatise in question had acted as arbitrator, in particular the decisions in *Generation Ukraine v. Ukraine*, and *Pantechniki v. Albania*.¹⁶¹¹

- 4.640 Fourth, the Respondent disputed the Claimants’ argument that the requirement of exhaustion of local remedies did not apply where an investment suffered from the “cumulative effects” of “several interlocking acts”, suggesting that that argument was an attempt to avoid the consequence of the fact that the Claimants were unable to defend their position that the requirement of exhaustion did not apply to administrative proceedings, and that it was without support in the case law.¹⁶¹²
- 4.641 The Respondent noted that the Claimants had relied solely on the decision in *RosInvestCo v. Russia*, but submitted that the case was inapposite because it was based “on very different facts”.¹⁶¹³ In any case, it argued that there had in fact been no “cumulative” delay, insofar as the delay of which complaint was made had originated in the Building Permit proceedings and had been fully remedied within those proceedings. It reiterated its position that, of the three stays, only the Third Stay had been incorrect as a matter of Czech law, and argued that, insofar as the First and Second Stays had been entirely proper, the delay resulting from them could not be “added” to that resulting from the Third Stay.¹⁶¹⁴ It further emphasized that although the pendency of the Extraordinary Review Proceedings had been the motivation underlying the adoption of the Third Stay, they had not in any way added to the delay, and noted that the Main Building Permit proceedings had resumed in October 2008 in spite of the continued pendency of the Extraordinary Review Proceedings.¹⁶¹⁵
- 4.642 In conclusion, it submitted that the only delay of which complaint could be made was that resulting from the Third Stay, and noted that the Third Stay had been remedied by MAL *sua sponte*.¹⁶¹⁶
- 4.643 Finally, the Respondent submitted that the Claimants had misunderstood the standard for exhaustion of local remedies, and had attempted to change the standard altogether insofar as they had argued that they only had to pursue “reasonable efforts for domestic redress”, and that “no strict requirement for the exhaustion of local remedies exists”.¹⁶¹⁷ The Respondent submitted that the Claimants’ argument was based on a “gross misrepresentation” of the decision in *Chevron v. Ecuador*, which related to a specific treaty provision which imposed a

¹⁶¹⁰ Rejoinder, para. 165.

¹⁶¹¹ Rejoinder, para. 166, referring to *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of 16 September 2003, para. 20.33 and *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21), Award of 30 July 2009, paras. 96-102.

¹⁶¹² Rejoinder, para. 167.

¹⁶¹³ Rejoinder, para. 168.

¹⁶¹⁴ Rejoinder, para. 169.

¹⁶¹⁵ Rejoinder, para. 169.

¹⁶¹⁶ Rejoinder, para. 170.

¹⁶¹⁷ Rejoinder, para. 171, quoting Reply, para. 563.

less demanding *lex specialis* standard compared to the customary law prohibition of denial of justice, and which had no equivalent in the BIT.¹⁶¹⁸

- 4.644 As to the applicability of the denial of justice standard and the requirement of exhaustion of local remedies to the facts of the case, the Respondent asserted that the Claimants had “often failed to make even reasonable efforts to use effective domestic remedies”.¹⁶¹⁹
- 4.645 It argued that Czech law had provided effective remedies against delays in administrative proceedings. It submitted that insofar as the Claimants had complained of alleged violations of the statutory time limits for the issuing of decisions, an appropriate remedy had been provided by the possibility of bringing a motion for failure to act, whilst to the extent that they complained of allegedly incorrect decisions to stay the Building Permit proceedings, a remedy had existed in the form of a regular administrative appeal.¹⁶²⁰
- 4.646 It submitted that the Claimants’ argument appeared to be that those remedies were not effective solely on the basis that the process of applying for those remedies in itself took time, and countered that that argument would “inexorably” lead to the conclusion that no remedies against incorrect decisions would ever even theoretically be possible insofar as any remedial process unavoidably required some time which, on the Claimants’ argument would have constituted “unwarranted delay”.¹⁶²¹
- 4.647 In relation to the Third Stay, the Respondent submitted that an ordinary appeal, if filed in a timely fashion, would have been an effective remedy; it submitted that if the Claimants had in fact filed their appeals on time, then RAL would have quashed the Third Stay and the proceedings would have automatically resumed. However, given that that had not been the case, RAL had had no option but to reject Tschechien 7’s appeals, and MAL had been under no obligation to resume the proceedings.¹⁶²² It invoked the outcome of Tschechien 7’s timely appeal against the stay of the water management proceedings, as a result of which RAL had quashed MAL’s decision, as demonstrating that a timely appeal would have been effective.¹⁶²³
- 4.648 The Respondent disputed the Claimants’ suggestion that a timely appeal would have been no quicker than the actual course of events, in which MAL had resumed the proceedings *sua sponte* following RAL’s rejection of the appeal as inadmissible on 8 October 2008; it argued that if Tschechien 7 had filed an appeal against the Third Stay immediately after being notified of it, RAL could have issued a decision quashing the stay as early as 15 September 2008. It further noted that, in any case, if the Third Stay had been quashed, MAL would have been under an obligation to resume the proceedings, which had not been the case following the rejection of Tschechien 7’s belated appeal.¹⁶²⁴

¹⁶¹⁸ Rejoinder, para. 172.

¹⁶¹⁹ Rejoinder, para. 172.

¹⁶²⁰ Rejoinder, para. 174.

¹⁶²¹ Rejoinder, para. 175.

¹⁶²² Rejoinder, para. 176.

¹⁶²³ Rejoinder, para. 177.

¹⁶²⁴ Rejoinder, paras. 178-179.

- 4.649 Finally, the Respondent argued that there had been a further effective remedy available, of which the Claimants had not availed themselves, in the form of recourse to the administrative courts. It repeated its argument that the Claimants could not discard that remedy merely on the basis that it would have taken time. It noted that recourse to the courts required exhaustion within the administrative proceedings, and that where there had not been such exhaustion, any attempt to seize the courts would have been declared inadmissible, but submitted that it could not be blamed for the non-exhaustion by the Claimants of administrative remedies.¹⁶²⁵
- 4.650 Second, the Respondent in the alternative argued that the Claimants had not in fact exhausted all reasonable remedies. Having noted that the Claimants had admitted that the First and Second Ministry Decisions had in fact been remedied by the First and Second Minister Decisions pursuant to Tschechien 7's appeals, the Respondent submitted that as a result, those decisions could not give rise to an international delict. Similarly, it noted that the Claimants had acknowledged that the Second Stay had been remedied when MAL resumed the proceedings, and submitted that as a result it also could not give rise to any violation of international law.¹⁶²⁶
- 4.651 As regards the Third Stay, the Respondent noted that the Claimants had failed to make proper use of the "reasonable and effective remedy" consisting of an appeal to RAL, and submitted that that fact alone prevented the Claimants from arguing that the Third Stay violated the BIT. The Respondent disputed the Claimants' suggestion that the belated nature of their appeal was irrelevant insofar as MAL was under an obligation to remedy its error *sua sponte* at all times; it argued that under Czech law, an administrative body had the power, but was under no obligation to rectify incorrect suspensions of proceedings *sua sponte*, and that the only binding remedy was the quashing of the incorrect stay in appellate proceedings.¹⁶²⁷
- 4.652 Finally, the Respondent disputed the Claimants' argument that they were only under a limited obligation to exhaust local remedies because, in light of the alleged pattern of conduct by the Respondent against them and adverse to their investment, such remedies would have been futile and would have been used against them. The Respondent asserted that there was no such pattern of conduct, and that all of the appeals initiated by the Claimants had in fact been favourable to them, and on that basis, denied the Claimants' suggestion that they had been "rebuffed in their efforts to gain redress".¹⁶²⁸
- 4.653 Next, the Respondent denied that, even if the requirement of exhaustion of local remedies were ignored, the Claimants had in fact been denied justice.
- 4.654 First, it rejected the Claimants' suggestion that they had suffered a denial of justice as a consequence of unlawful decisions, arguing that "most of the decisions complained of were perfectly lawful and none were egregious or manifestly unlawful".¹⁶²⁹ It argued that:

¹⁶²⁵ Rejoinder, para. 180.

¹⁶²⁶ Rejoinder, para. 181.

¹⁶²⁷ Rejoinder, para. 182.

¹⁶²⁸ Rejoinder, paras. 183-184.

¹⁶²⁹ Rejoinder, para. 186.

- a. although the First Ministry Decision had been incorrect (insofar as it had failed to enquire as to whether Tschechien 7 had acquired rights under the Planning Permit in good faith), it had not been egregious or manifestly unlawful, and in any case could not constitute a denial of justice insofar as it had been remedied upon appeal;¹⁶³⁰
- b. the First Minister Decision had been entirely correct, including insofar as it had remanded the case.¹⁶³¹ The Respondent noted that the Claimants had not sought to explain how the First Minister Decision had been wrong, but rather had focused on the fact that the Second Minister Decision had resulted in a reversal rather than a remand, allegedly “based on the exact same facts”.¹⁶³² The Respondent denied that that had in fact been the case, pointing to the fact that new evidence had been on the record at the time of the issuing of the Second Ministry Decision, including inter alia, correspondence from Tschechien 7 and RAL, as well as Tschechien 7’s appeal against the Second Ministry Decision, the amendment thereto, and further submissions made by Tschechien 7. The Respondent noted that the correspondence had raised several new factual issues, including the repeated statements by Tschechien 7 that the overlap issue had been resolved in the building permit proceedings, & ; it submitted that that material had been highly relevant to the issue of the proportionality of any cancellation of the Planning Permit.¹⁶³³ Quite apart from that, the Respondent drew attention to the fact that the Claimants had accepted that a remand, as opposed to immediate termination, could not give rise to manifest unlawfulness, and noted that Tschechien 7, in its appeal against the First Minister Decision had itself requested a remand, and that it was only later that it had changed its position so as to request termination.¹⁶³⁴ Finally, the Respondent argued that even if the First Minister Decision had not been lawful, it would be “wholly unprecedented” that a breach of treaty were to be found based on a decision which was essentially favourable to the investor solely because it had remanded the matter for further fact-finding; the Respondent invoked the decision in *Mondev*, and the observations of the tribunal in that case that questions of fact-finding upon appeal were “quintessentially matters of local procedural practice”, and the doubts expressed as to how the application of local procedural rules as to matters such as remand could result in a violation;¹⁶³⁵
- c. although the Second Ministry Decision had been incorrect insofar it had “erred in improperly assessing whether Tschechien 7 was in good faith regarding the correctness of the Planning Permit”, it had likewise not been egregious or manifestly unlawful; again, the Respondent submitted that the Second Ministry Decision could

¹⁶³⁰ Rejoinder, para. 187.

¹⁶³¹ Rejoinder, para. 188.

¹⁶³² Rejoinder, para. 189.

¹⁶³³ Rejoinder, paras. 189-190.

¹⁶³⁴ Rejoinder, para. 191, referring to Reply, para. 607.

¹⁶³⁵ Rejoinder, para. 192, citing *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 136.

not constitute a denial of justice as it had been remedied upon Tschechien 7's appeal;¹⁶³⁶

- d. the Second Stay adopted by MAL could not be qualified as manifestly unlawful, insofar as two of the three alternative bases put forward as justifying it had been lawful; the Respondent noted that although the Claimants' Czech law expert had disputed the validity of the second reason, he had not called into question the first reason (i.e. Tschechien 7's Motion for Partial Invalidation), and submitted that, even if the second reason had been incorrect (which it denied), this was in itself sufficient to have justified the adoption of the Second Stay;¹⁶³⁷
 - e. the Third Stay had been incorrect, but could not be characterized as egregious or manifestly unlawful; the Respondent again submitted that the Third Stay had been motivated by a "precautionary approach favourable to the Claimants", which, although incorrect as a matter of Czech law, had been logical. On that basis, it submitted that it had not been irrational for MAL to adopt the Third Stay, even if the principle of administrative correctness under Czech law dictated a different result.¹⁶³⁸ The Respondent added that even if the Third Stay could be considered to have been manifestly unlawful (which it denied), it was disputed that it could give rise to a denial of justice insofar as Tschechien 7 had failed to exhaust available remedies; it invoked the decision in *Pantehniki v. Albania* as an example of a case in which even an extreme misapplication of the law had been held not to constitute a denial of justice where the investor had not pursued available remedies.¹⁶³⁹
- 4.655 Second, the Respondent denied that the Claimants had suffered any denial of justice due to departure from what the Claimants had submitted were "well-established administrative practices" that i) permit proceedings were not stayed where an application was incomplete; and ii) that a Minister always followed the recommendation of his or her Advisory Committee.¹⁶⁴⁰
- 4.656 The primary ground for that position was that the asserted "administrative practices" did not exist. In relation to the imposition of stays of proceedings based on the incompleteness of applications, the Respondent pointed to the fact that stays had been imposed on that basis in the Claimants' Planning and Building Permit proceedings in relation to Galerie, in Multi's planning proceedings, and in the planning and building proceedings in relation to Arkády Pankrác.¹⁶⁴¹
- 4.657 As regards the extent to which there was an administrative practice that Ministers followed the recommendation of their Advisory Committees, the Respondent pointed to the evidence of a number of witnesses who denied that this was the case, both in the Ministry for Regional

¹⁶³⁶ Rejoinder, para. 193.

¹⁶³⁷ Rejoinder, paras. 194-195.

¹⁶³⁸ Rejoinder, paras. 196-198.

¹⁶³⁹ Rejoinder, para. 199, citing *Pantehniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21), Award of 30 July 2009, para. 96.

¹⁶⁴⁰ Rejoinder, para. 200.

¹⁶⁴¹ Rejoinder, para. 201.

Development, and in other Ministries.¹⁶⁴² It further noted that, if the Claimants' suggestion were correct, it would have been reflected in legal commentaries or court decisions, but that, to the contrary, the leading commentary merely confirmed that recommendations of Advisory Committees were not binding, and a decision of the Supreme Administrative Court confirmed that this was not the case.¹⁶⁴³

4.658 The Respondent submitted that the Claimants' theory rested solely upon the email from Ms [redacted] stating that, from her personal experience, the Minister had, up to that point, always followed the opinion of the Advisory Committee, and reiterated its early observation that that email had in fact clearly warned that there was a risk that the Minister might not sign the proposed decision if he did not agree with it.¹⁶⁴⁴

4.659 Third, the Respondent denied that there had been a denial of justice by reason of delays:

a. as regards the allegations of delay resulting from the First to Third Stays, it reiterated its position that the First and Second Stays had been lawful and justified, and noted that the Third Stay, although unlawful, had been remedied after three and a half months, a portion of which was attributable to the fact that Tschechien 7's appeal was belated, and that MAL had resumed the proceedings shortly after RAL's appellate decision had become legally effective. It submitted that in such circumstances "a voluntarily remedied delay of three-and-a-half months cannot qualify as denial of justice";¹⁶⁴⁵

b. in relation to the allegation of delay in the Extraordinary Review Proceedings, the Respondent noted that the First and Second Ministry Decisions had both been quashed upon the Claimants' appeals, and that the two appellate processes had each taken approximately three months, delays which it submitted were inherent in any remedial process.¹⁶⁴⁶ It argued that insofar as the First Minister Decision had correctly remanded the matter, it had not caused any undue delay.¹⁶⁴⁷

4.660 Fourth, the Respondent denied that there had been a denial of justice because the Ministry had not allowed Tschechien 7 to be heard in the proceedings preceding the First Ministry Decision. It noted that the relevant legislation did not require the Ministry to allow Tschechien 7 to be a party to the proceedings,¹⁶⁴⁸ and further submitted that Tschechien 7's non-party status had had no adverse impact upon it, insofar as it had in fact submitted substantive comments; even if the First Ministry Decision had not been served upon it by the Ministry it had been informed of it by both MAL and RAL; and insofar as the First Minister decision had been successfully appealed, that meant that it never produced any legal effects.¹⁶⁴⁹

¹⁶⁴² Rejoinder, para. 202.

¹⁶⁴³ Rejoinder, para. 203.

¹⁶⁴⁴ Rejoinder, para. 204.

¹⁶⁴⁵ Rejoinder, para. 205.

¹⁶⁴⁶ Rejoinder, para. 206.

¹⁶⁴⁷ Rejoinder, para. 207.

¹⁶⁴⁸ Rejoinder, para. 208.

¹⁶⁴⁹ Rejoinder, para. 209.

4.661 Fifth, the Respondent submitted that the Claimants' allegation that they had suffered a denial of justice as a result of the "overall conduct" of the Czech authorities was unsupported by authority. It argued that none of the individual acts of the Czech authorities amounted to a denial of justice individually, and the same was true if they were taken together. On that basis, it argued that it was thus unnecessary to determine whether the "overall conduct" could amount to a breach of the BIT where none of the individual actions "even remotely reach that threshold".¹⁶⁵⁰ The Respondent argued that the Claimants' reliance on the decision in *RosInvestCo v. Russia* was inapposite insofar as, first, the individual acts at issue in that case "*prima facie* reached the threshold for a breach of the applicable treaty", and it thus did not address the question whether a breach could result from "the alleged cumulative effect of a number of non-violative individual actions"; and second, that, in any case, the decision in *RosInvestCo* was readily distinguishable on the facts given the "devastating measures" which were at issue.¹⁶⁵¹

ii. Alleged Breach of the Fair and Equitable Treatment Standard (Art. 2(1) BIT)

4.662 In relation to the Claimants' claims of breach of the fair and equitable treatment standard, the Respondent first recalled its earlier submissions that the Claimants' "fabrication of a corruption scheme is unsupported by any evidence, easily defeated on the facts, and inadmissible at this stage of the proceeding", and that "the alleged violations of domestic law [...] were certainly not systemic".¹⁶⁵²

4.663 In relation to the allegation of failure to provide a transparent and predictable business environment, the Respondent asserted that the standard guaranteed "a transparent, predictable, and stable *legal framework* for the investment; it does not guarantee against alleged procedural irregularities in specific proceedings",¹⁶⁵³ and referred back to its arguments in the Counter-Memorial, which it submitted supported the conclusion that it had not violated that standard.¹⁶⁵⁴ By way of supplement, the Respondent added that the Claimants' claims would fail "even if this standard covered Claimants' allegations that the Czech Republic 'repeatedly broke its own laws, thus frustrating Claimants' trust in Respondent's legal system, and derogated from established administrative practices'", on the basis that the errors of Czech law were not systemic, and in any event were remedied; it submitted that "[r]emedied errors of law *ipso facto* are not systemic".¹⁶⁵⁵ It relied upon the decision in *PSEG Global v. Turkey*, in which it submitted the tribunal found a breach of the fair and equitable treatment standard (but not of the duty to provide a predictable and transparent business environment) as a result of the unremedied failure of the Government to abide by a decision of the Constitutional Court.¹⁶⁵⁶

4.664 The Respondent argued that the Claimants' claim of breach of legitimate expectations likewise failed. It emphasized that the Claimants accepted that whether expectations were legitimate

¹⁶⁵⁰ Rejoinder, para. 210.

¹⁶⁵¹ Rejoinder, para. 211.

¹⁶⁵² Rejoinder, para. 213.

¹⁶⁵³ Rejoinder, para. 214 (emphasis in original).

¹⁶⁵⁴ Rejoinder, para. 214, referring to Counter-Memorial, paras. 454-457.

¹⁶⁵⁵ Rejoinder, para. 215, quoting Reply, para. 465.

¹⁶⁵⁶ Rejoinder, para. 216, referring to *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award of 19 January 2007, para. 249.

and protected had to be assessed taking into account “all circumstances, including the facts surrounding the investment and the political, socioeconomic, cultural and historical conditions prevailing in the host State”,¹⁶⁵⁷ and submitted that the Claimants should have been aware from their prior experience with Arkády Pankrác that “decision making in administrative proceedings for a retail center may be complex – and thus time-consuming – because of, inter alia, appeals of third parties or incorrect first-instance decisions”.¹⁶⁵⁸

4.665 Further, invoking the decision in *Walter Bau v. Thailand*, it reiterated its argument that only expectations based on specific assurances were protected, and relied upon the decision in *Total v. Argentina* in relation to the required degree of specificity and clarity of the alleged assurance.¹⁶⁵⁹ It argued that the Claimants’ expectations in relation to the duration of the administrative proceedings had not been reasonable, and thus were not protected, and that in recognition of that fact, the Claimants had modified their case so as to rely on four alleged specific assurances.¹⁶⁶⁰

4.666 As regards those four alleged assurances, first the Respondent characterized the Claimants’ argument that the change in the zoning plan by the City of [redacted] and the subsequent agreement by the City to apply for certain of the building permits for roads constituted “an implied assurance that Respondent would be supportive of the project”,¹⁶⁶¹ as “absurd”, observing that the conduct of the City of [redacted] did not relate to the conduct, duration or success of the proceedings handled by MAL. It added that even if the City of [redacted] had made clear promises in that regard (which it denied), those acts could not have given rise to any protected legitimate expectation insofar as the Claimants must have been fully aware that such matters were outside the City of [redacted]’s competence. Further, it argued that whether or not the conduct of the City of [redacted] was attributable to the Czech Republic was irrelevant, insofar as the issue was not one of attribution but of the scope of the alleged assurance the reasonableness of the purported reliance by the Claimants.¹⁶⁶²

4.667 Second, the Respondent dismissed the factual basis for the supposed assurance provided by Ms [redacted], that a speedy resolution of the Extraordinary Review Proceedings was to be expected insofar as, in the proceedings in relation to the Claimants’ appeal against the First Ministry Decision, the Advisory Committee had recommended termination of the proceedings. Again, the Respondent emphasized that the email from Ms [redacted] had highlighted the risk that the Minister might not follow the recommendation of the Advisory Committee, and submitted that there was nothing in the email which would be interpreted as “an expression of an intention to bind the Minister or the Ministry for the future”.¹⁶⁶³

¹⁶⁵⁷ Rejoinder, para. 217, quoting *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award of 18 August 2008, para. 340.

¹⁶⁵⁸ Rejoinder, para. 218.

¹⁶⁵⁹ Rejoinder, paras. 219 and 220, quoting *Walter Bau v. Thailand* (UNCITRAL), Award of 1 July 2009, para. 11.11, and *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Liability of 27 December 2010, para. 121.

¹⁶⁶⁰ Rejoinder, para. 221.

¹⁶⁶¹ Rejoinder, para. 222, quoting Counter-Memorial, para. 481

¹⁶⁶² Rejoinder, para. 222

¹⁶⁶³ Rejoinder, para. 223.

- 4.668 Third, the Respondent likewise dismissed the factual basis for the alleged assurance given by Mr . . . that the building permits would be granted if the applications for the building permits were split, arguing that he had done no such thing, and that in fact the splitting was agreed between the Claimants and the City of ¹⁶⁶⁴
- 4.669 Fourth, insofar as the Claimants claimed that there had been a “general promise of the City of . . . to provide equal treatment to Forum and Galerie . . .”, the Respondent argued that, if any such promise had been made, it had been more than fulfilled.¹⁶⁶⁵

iii. Alleged Breach of the Prohibition of Impairment of Investments by Arbitrary and Discriminatory Measures (Article 2(2) BIT)

Impairment by Arbitrary Measures

- 4.670 In response to the Claimants’ claims of breach of the prohibition of impairment by arbitrary measures, the Respondent first reiterated its position that the decision of the ICJ in *ELSI* was of particular relevance, both, for its definition of “arbitrariness” as “‘something opposed to the rule of law’ rather than ‘something opposed to a rule of law,’ ‘a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety’”,¹⁶⁶⁶ and second insofar as the ICJ had held that “quashed first instance decisions could not be qualified as arbitrary just because they were quashed”.¹⁶⁶⁷ It submitted that the decision in *ELSI* was particularly apposite, both because it emanated from the ICJ, and because it addressed “the issue of arbitrariness in an administrative process based on the quashing of an incorrect first-instance decision by a superior authority”.¹⁶⁶⁸
- 4.671 The Respondent emphasized that *ELSI* had been widely followed by tribunals in relation to the question of arbitrariness.¹⁶⁶⁹ It contested the Claimants’ criticism of the decision on the basis that the underlying FCN treaty at issue had been concluded in 1948, noting that the Claimants had provided no support for their suggestion that the notion of arbitrariness had evolved over time, and adding that, in any case, the decision in *ELSI* had been delivered in 1989, only shortly before conclusion of the BIT, such that it was safe to assume that the Parties to the BIT had been aware of it.¹⁶⁷⁰
- 4.672 The Respondent further argued that, in reality, there was less disparity between the definition in *ELSI* and that given by the tribunal in *Lauder*, relied upon by the Claimants, than the

¹⁶⁶⁴ Rejoinder, para. 224.

¹⁶⁶⁵ Rejoinder, para. 225.

¹⁶⁶⁶ Rejoinder, para. 226, citing *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at pp. 74 (para. 124) and 76 (para. 128).

¹⁶⁶⁷ Rejoinder, para. 226.

¹⁶⁶⁸ Ibid.

¹⁶⁶⁹ Rejoinder, para. 227, quoting *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007, para. 318 and *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award of 18 August 2008, para. 378.

¹⁶⁷⁰ Rejoinder, para. 228.

Claimants had argued; it noted that the tribunal in *Lauder*, although putting forward its own definition, had not questioned the holding in *ELSI* that first-instance decisions cannot be characterized as arbitrary merely on the basis that they were quashed as unlawful. It submitted that that alone was fatal to the Claimants' case.¹⁶⁷¹

4.673 As to the merits of the Claimants' claims of breach of the prohibition by impairment, the Respondent maintained its position that the various decisions had not been arbitrary, and by reference to its previous arguments in its Answer to the Statement of Claim and Counter-Memorial rejected the Claimants' accusation that it had failed to explain those decisions as "simply not credible".¹⁶⁷²

4.674 As to the specific decisions of which complaint was made, the Respondent referred back to its arguments that the Second Stay and the First Minister Decision had been correct, and submitted that, accordingly, they were not arbitrary. In relation to the First and Second Ministry Decisions and the Third Stay, it recalled its position that those decisions had not been either egregious or manifestly illegal, and on that basis submitted that they likewise did not reach the threshold of arbitrariness. It also noted that, in any event, the decisions were either quashed on appeal, or, in the case of the Third Stay, the proceedings were subsequently resumed by MAL *sua sponte* following Tschechien 7's belated appeal.¹⁶⁷³

4.675 It further reiterated its position that, even if any of the decisions were held to have been arbitrary, they nevertheless had not impaired the Claimants' investment, and took issue with the Claimants' arguments in response. First, as regards the Claimants' suggestion that it had been the "overall dilatory conduct" which led to the abandonment, and thus impaired their investment, the Respondent noted that this put "the cart before the horse", that the Claimants rather had to show that they had abandoned the project because it had been impaired by the Respondent's arbitrary measures, and that the Claimants could not "derive the impairment from the abandonment".¹⁶⁷⁴

4.676 Second, insofar as the Claimants argued that the pendency of the Extraordinary Review Proceedings had resulted in "increased unpredictability", the Respondent commented that the argument was "difficult to follow" and in any case "disproved by Claimants' own factual statements in their Reply", in particular the Claimants' acceptance that there was no uncertainty because of the illegality of the Planning Permit, and the position they took that the decision to abandon the project was in fact motivated by the future uncertainty as to whether MAL would find another pretext to delay the proceedings.¹⁶⁷⁵

4.677 Third, insofar as the Claimants had argued that the Second and Third Stays had been adopted "under a pretext until Claimants abandoned the project", the Respondent noted that this assumed that their investment had in fact been impaired by the stays, but repeated its argument that the Second Stay had been lawful, and that the Third Stay had not been arbitrary. In addition, the Respondent noted that the Claimants themselves had stated that, at the time of the

¹⁶⁷¹ Rejoinder, para. 229.

¹⁶⁷² Rejoinder, para. 230.

¹⁶⁷³ Rejoinder, para. 231.

¹⁶⁷⁴ Rejoinder, paras. 232-233.

¹⁶⁷⁵ Rejoinder, para. 234.

abandonment, they had expected that the proceedings would have been resumed in the near future.¹⁶⁷⁶ Finally, the Respondent reiterated its suggestion that the abandonment did not in fact actually occur until December 2008, by which time the Main Building Permit proceedings had recommenced, and further noted that even if the Claimants' case that the abandonment had occurred on 13 October 2008 were to be accepted, its corollary was that the fact of the abandonment was kept secret until December 2008, such that MAL's resumption of the proceedings could not have been influenced by it.¹⁶⁷⁷

Impairment by Discriminatory Measures

- 4.678 As regards the Claimants' claim of breach of the prohibition of impairment by discriminatory measures, the Respondent noted that the claim was stated shortly, and did no more than refer to the Claimants' factual submissions. It referred generally to its previous pleadings, particularly as regards the applicable standard and the differences between Forum and Galerie, and added specific remarks in relation to what it characterized as "new or amended discrimination claims".¹⁶⁷⁸
- 4.679 First, the Respondent recalled that in the Counter-Memorial, it had submitted that the smaller number of participants and lack of opposition in the Forum proceedings had been an objective reason for their shorter duration, and that in response, the Claimants had argued that the smaller number of participants in the Forum proceedings itself resulted from discrimination, and that MAL had intentionally reduced the number of participants so that decisions could be delivered without requiring publication on the official notice board.¹⁶⁷⁹ The Respondent dismissed those allegations as "manifestly baseless", reiterating its arguments that MAL had correctly identified the participants in the Forum proceedings, and noting that, in any case, any individual who thought that they had been improperly omitted could have applied to be joined, or appealed or filed a motion for review with RAL.¹⁶⁸⁰ In any case, it noted that the claim was flawed insofar as the Claimants had acquired their rights in Tschechien 7 on 1 July 2007, but the planning and building permits for Forum had been issued on 19 June 2006 and 31 January 2007, respectively, such that no claim of breach of the BIT could be made by the Claimants in that regard.¹⁶⁸¹ Finally, it argued that the Claimants had failed to show that a requirement to publish decisions on the notice board would have made any significant difference to the Forum project, and dismissed as "pure speculation" the suggestion that Forum would have faced local opposition if notices had been so displayed.¹⁶⁸²
- 4.680 Second, the Respondent disputed the Claimants' assertion that the differing number of permits required for the Forum and Gallery projects had impaired the Claimants' investment, noting that the single building permit covering both the main building and modifications to the roads for Forum had been lawful that MAL had been competent to grant it, and that a single permit could have been granted for the Galerie project, but that it was as a result of the Claimants'

¹⁶⁷⁶ Rejoinder, para. 235.

¹⁶⁷⁷ Rejoinder, para. 236.

¹⁶⁷⁸ Rejoinder, para. 237.

¹⁶⁷⁹ Rejoinder, paras. 238-239.

¹⁶⁸⁰ Rejoinder, para. 240.

¹⁶⁸¹ Rejoinder, para. 241.

¹⁶⁸² Rejoinder, para. 242.

agreement with the City of [redacted] that the proceedings were split. The Respondent further noted that the Claimants had not explained how and on what basis an application for a single permit could have been rejected by MAL.¹⁶⁸³

- 4.681 In addition, the Respondent submitted that a further, fundamental defect in the claim was that the splitting of the building permits had in no way impaired the investment, and that the Claimants had admitted as much insofar as, in the Memorial, they had accepted that the splitting of the proceedings had not endangered an opening before Forum.¹⁶⁸⁴ Although noting that, in their Reply, the Claimants had sought to change their position, suggesting that they had been put at a disadvantage, and that the splitting had caused delays, the Respondent noted that the Claimants had not explained how they had in fact disadvantaged, what delays had been incurred, and how their conflicting positions were to be reconciled.¹⁶⁸⁵
- 4.682 Third, insofar as the Claimants alleged impairment by reason of the fact that the relevant authorities had not acted on the Claimants' motion by which they sought review of Multi's building permit, the Respondent recalled that in their Counter-Memorial, they had explained that the motion had been filed after the relevant deadline, and thus the circumstances had been materially different from those in which Multi had sought review of the Claimants' Planning Permit; they further noted that the Claimants had modified their position such that they focused on exchanges between the director of RAL and the secretary of MAL as to whether the building permit for Forum had also authorized work on the roads.¹⁶⁸⁶ It noted that MAL had taken the view that the construction on the roads had been properly authorized, and that therefore no action was necessary.¹⁶⁸⁷
- 4.683 The Respondent criticized the Claimants as having misrepresented the correspondence as involving decisions, when in fact it was a simple exchange of letters, and emphasized that RAL had not issued any binding decision to MAL. It added that neither the director of RAL nor the secretary of MAL had any authority in relation to building proceedings, being instead responsible for administrative and organizational matters.¹⁶⁸⁸ The Respondent added that MAL had assured RAL that everything was in order, and RAL had then not pursued the matter, nor had the Claimants.¹⁶⁸⁹
- 4.684 As to the merits of the Claimants' allegation, it repeated that even if a failure to take regulatory action against a competitor could be considered to constitute impairment, there was in any case "practically no chance" that Forum's building permit would have been quashed, even if the Claimants' motion could have led to the commencement of an extraordinary review proceeding (which it denied). It noted that the Claimants had put forward no response to that in their Reply.¹⁶⁹⁰

¹⁶⁸³ Rejoinder, para. 244.

¹⁶⁸⁴ Rejoinder, para. 245, quoting Memorial, para. 165.

¹⁶⁸⁵ Rejoinder, para. 245, quoting Reply, para. 133.

¹⁶⁸⁶ Rejoinder, para. 246-247.

¹⁶⁸⁷ Rejoinder, para. 247.

¹⁶⁸⁸ Rejoinder, para. 248.

¹⁶⁸⁹ Rejoinder, para. 249.

¹⁶⁹⁰ Rejoinder, para. 250.

- 4.685 Likewise, it argued that even if the road construction had not been properly authorized, at most any action by MAL would have resulted in a temporary halt, the could have continued once MAL had legalized the constructions, and would have had no impact on the construction of the Main Building, which would still have been fully completed by the Autumn of 2010. It submitted that it likewise did not assist the Claimants.¹⁶⁹¹
- 4.686 Fourth, the Respondent argued that what it characterized as the Claimants’ “new allegations regarding the alleged unresponsiveness of the Czech Republic to the Claimants’ further complaints against Multi”, in particular in relation to damage to a water pipe, were groundless, insofar as construction on the land plots owned by the City of had been “fully authorized”, and the works carried out by Multi had not constituted criminal behaviour.¹⁶⁹² Although admitting that there had been some flooding of adjacent streets, the Respondent submitted that it was “far less dramatic” than had been submitted by the Claimants, and noted that the City of had not seen fit to take any action, and that Multi had in any case repaired all damage caused.¹⁶⁹³
- 4.687 In addition, the Respondent noted that the authorities had never received any criminal complaints in relation to the Claimants’ works, and there was thus no basis on which to allege discriminatory treatment,. They submitted that the Claimants had not explained how their project had been impaired by reason of the facts that Multi had not been fined, and that the City of : had not endorsed the Claimants’ criminal complaint.¹⁶⁹⁴
- 4.688 Fifth, the Respondent rejected as baseless the Claimants’ claim that MAL had taken action only to the detriment of the Claimants in respect of the overlap issue, again noting that the Claimants had provided no meaningful response to the Respondent’s arguments in that regard in the Counter-Memorial.¹⁶⁹⁵ It further rejected the Claimants’ new argument that Multi’s appeal and the motion for extraordinary review of the Planning Permit had only been possible because of the overlap; it argued that Multi had qualified as a participant in the Planning Permit proceedings on two other grounds such that the overlap issue was “irrelevant”, and that Multi had appealed the Planning Permit primarily on the basis of the alleged insufficiency of the traffic solutions. It further noted that there were a number of other reasons why Multi’s motion for review had been granted, including that RAL had incorrectly held that Multi was not a participant in the proceedings, and had on that basis rejected Multi’s appeal as inadmissible.¹⁶⁹⁶
- 4.689 The Respondent added that, in any case, the overlap had not hindered the proceedings in relation to the Building Permit, and that the overlap had been resolved in the context of those proceedings. On that basis, it argued that the overlap had not impaired the Claimants’ investment.¹⁶⁹⁷

¹⁶⁹¹ Rejoinder, para. 251.

¹⁶⁹² Rejoinder, para 252.

¹⁶⁹³ Rejoinder, para. 253.

¹⁶⁹⁴ Rejoinder, para. 254.

¹⁶⁹⁵ Rejoinder, para. 255.

¹⁶⁹⁶ Rejoinder, para. 256.

¹⁶⁹⁷ Rejoinder, para. 257.

iv. Alleged Breach of the Obligation to Admit Investments (Article 2(1) BIT)

4.690 As regards the Claimants' claim based on the alleged failure to admit the Claimants' investment in accordance with its legislation, the Respondent noted that the Claimants had not responded to its arguments in that regard in the Counter-Memorial, which thus stood unchallenged.¹⁶⁹⁸

v. Alleged Breach of the Prohibition of Expropriation (Article 4(2) BIT)

4.691 As to the claim of breach of the prohibition of expropriation, the Respondent submitted that the Claimants' various arguments in the Reply were irrelevant, insofar as they had not articulated "what assets or legal rights had been taken or made useless prior to their decision to abandon the Project," and noted that in all of the cases relied upon by the Claimants, there had been "a taking of previously granted rights or assets."¹⁶⁹⁹ It submitted that the failure by the Claimants to identify lost assets or rights was because there were none, and that that was the case was made clear by the fact that the Claimants had decided to abandon the project at a time when they themselves estimated that their chances of opening Galerie "were still at least 50%", and that at that time, the Claimants "were still in full control of their investment".¹⁷⁰⁰

4.692 In support of that submission, it pointed to the assertions by the Claimants that, following the abandonment, Tschechien 7 had "lost all use for Claimants", that they had "lost they money they had put into Tschechien 7", and that "Tschechien 7 [had] no day-to-day business anymore."¹⁷⁰¹ Although disputing that those statements were correct, the Respondent submitted that they made clear that any loss of use occurred after the abandonment, and argued that there could only have been an indirect expropriation if the loss had occurred prior to the abandonment.¹⁷⁰²

4.693 Further, the Respondent reiterated the argument put forward in its Counter-Memorial that, even if the Planning Permit had been revoked in the Extraordinary Review Proceedings, the mere possibility of revocation would have been insufficient to constitute an expropriation insofar as it would have constituted a valid exercise of the Czech Republic's police powers. It asserted that the same was true of the decisions relating to the unauthorized excavations, including RAL's stay of the appellate proceedings in relation to the Main Building Permit, and any future decision requiring removal of the unauthorized excavation (i.e. by requiring them to be filled in).¹⁷⁰³

d. Causation

4.694 The Respondent further submitted that the Claimants' claims failed "as the alleged wrongful conduct did not cause their alleged damages"; it submitted that there was no "causal nexus" for five independent reasons, namely:

¹⁶⁹⁸ Rejoinder, para. 258.

¹⁶⁹⁹ Rejoinder, paras. 259-260.

¹⁷⁰⁰ Rejoinder, para. 261.

¹⁷⁰¹ Rejoinder, para. 262, quoting Reply, para. 534.

¹⁷⁰² Rejoinder, para. 262.

¹⁷⁰³ Rejoinder, para. 263.

- a. that the Claimants had admitted that the project had been abandoned because of an anticipated breach;
- b. the Claimants had admitted that, “but for” the alleged wrongful conduct, the Project still had a 50% chance of opening when projected;
- c. the decision to abandon the project had not been caused by the administrative proceedings;
- d. the decision to abandon the project had been due to reasons unrelated to the conduct of the administrative proceedings; and
- e. the excessive excavations broke any causal chain.¹⁷⁰⁴

4.695 As to the first point, the Respondent reiterated that the Claimants had asserted in the Reply that the cause of the abandonment was the uncertainty that “MAL would not soon find another pretext to delay the proceedings”,¹⁷⁰⁵ that this was an admission that the cause of the abandonment was an anticipated breach, and that such an anticipated breach was insufficient to give rise to liability under the BIT.¹⁷⁰⁶ It further emphasized that the anticipated breach had not in fact occurred, insofar as MAL had issued the various Building Permits, including issuing the Main Building Permit on 26 November 2008.¹⁷⁰⁷

4.696 As to the second point, the Respondent submitted that that conclusion was “buttressed” by the Claimants’ own internal documents, which indicated that, at the time of the abandonment, the view was that the project had at least a 50% chance of opening in Spring/Summer 2010; it submitted that if the project could nevertheless have succeeded “despite the Czech Republic’s alleged acts, then there can be no causation between the alleged acts and Claimants’ damages”.¹⁷⁰⁸

4.697 The Respondent submitted that, although the Claimants appeared to dispute the need for “but for” causation, such a causal link was required. Relying on, inter alia, the decisions in *Chevron v. Ecuador*, *Azurix v. Argentina* and *Biwater Gauff v. Tanzania*, it argued that “Claimants must positively establish a ‘but for’ causal link between breaches of the Treaty and Claimants’ loss”, that the link “can be neither remote nor indirect”, and that causation had to be established “with respect to each alleged breach”.¹⁷⁰⁹ It rejected the Claimants’ approach based on the “hypothetical time-line”, which it submitted was one which did not involve consideration of

¹⁷⁰⁴ Rejoinder para. 264.

¹⁷⁰⁵ Rejoinder, para. 265, quoting Reply, para. 210.

¹⁷⁰⁶ Rejoinder, paras. 266-267.

¹⁷⁰⁷ Rejoinder, para. 268.

¹⁷⁰⁸ Rejoinder, para. 269.

¹⁷⁰⁹ Rejoinder, para. 270, citing *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (UNCITRAL/PCA), Partial Award on the Merits of 30 March 2010, para. 374, *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 297; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008, paras. 779; 785-786; and 782.

“what would have happened in the absence of the alleged breaches”, and thus of “but for” causation.¹⁷¹⁰

4.698 In relation to the third point, the Respondent asserted that the Claimants had failed to “positively establish causation” insofar as the evidence supposedly underlying the Claimants’ factual allegations rather showed that the actions of the Czech Republic had not caused the postponement of the opening date to the Autumn of 2010. It submitted that there were four flaws in the Claimants’ theory of causation:¹⁷¹¹

- a. first it argued that the Claimants’ internal documents in evidence indicated that the Claimants’ had expected the project to open in Autumn 2010 as early as 28 April 2008, such that nothing after that date could have been the cause of the postponement; it noted that this included the Second and Third Stays of the Building Permit proceedings, as well as the First Minister Decision and subsequent events in the Extraordinary Review Proceedings.¹⁷¹² It noted that, although it had made that point in the Counter-Memorial, the Claimants in their Reply had put forward no answer,¹⁷¹³
- b. second, it argued that the Claimants had failed to show that the postponement of the opening date had in fact caused the loss of anchor tenants, and submitted that rather major tenants had left, at least in part, due to the fact that Forum had a better location, and in part because Forum by that stage had already had a building permit since February 2007 (as to which it emphasized that that latter fact was not its fault);¹⁷¹⁴
- c. third, it asserted that the Claimants had failed to show that Galerie would have prevailed on the retail market in _____ but for each of the alleged breaches; it pointed to the expert evidence on both sides as to high saturation of the retail market in _____ which, it submitted, “would have led to high vacancies, fierce competition and thus lower profitability”;¹⁷¹⁵
- d. fourth, it submitted that the alleged breaches had not in fact prevented a sale of the project by the “valuation date” of 15 December 2007, which was the fundamental premise for the Claimants’ claim in respect of lost profits; it highlighted that the Claimants had admitted that the Planning Permit proceedings had been “almost regular”, and noted that the Claimants had made no efforts to sell the project by that date.¹⁷¹⁶

4.699 As to the third and fourth points alleged to preclude causation, the Respondent repeated its assertion that the real reasons for the abandonment had been unrelated to the administrative proceedings. It highlighted that it had requested documentation relating to the abandonment of

¹⁷¹⁰ Rejoinder, para. 271.

¹⁷¹¹ Rejoinder, para. 273.

¹⁷¹² Rejoinder, paras. 274-275.

¹⁷¹³ Rejoinder, para. 276.

¹⁷¹⁴ Rejoinder, paras. 277-281.

¹⁷¹⁵ Rejoinder, para. 282.

¹⁷¹⁶ Rejoinder, para. 283.

the project, asserted that the Claimants had “refused to produce many of them”, but submitted that even the few documents which had been produced confirmed its theory.¹⁷¹⁷

4.700 The Respondent observed that the presentation to the Supervisory Board made in advance of the alleged decision to abandon the project had:

- a. stated that there were two alternatives, namely carrying on “with all consequences”, or to halt the project and “through sale of the lands and a successful arbitration, to get compensation for the invested capital and damages that may exceed it”,
- b. submitted that the chances of opening in Spring/Summer 2010 were still at least 50%;
- c. stated that the factor militating against continuance was “the requirement for liquid funds”.¹⁷¹⁸

4.701 In that last regard, the Respondent again recalled that the presentation had made reference to various annexes, including calculations as to “liquidity needs” and “theoretical loss at postponement of the opening of the Centre”, which had not been disclosed by the Claimants on the ground that they had not been able to locate them.¹⁷¹⁹ It further noted that the Claimants had likewise failed to disclose documents relating to the profit/loss of similar projects in the Czech Republic or any other country in Central or Eastern Europe in the last five years, and any other similar project developed and then operated or sold by third parties, justifying the failure on the basis that no such documents existed, as the Claimants’ internal documents used earnings rather than profitability calculations; it criticized the Claimants’ position in that regard as “semantic gamesmanship”.¹⁷²⁰

4.702 The Respondent noted that, even in the absence of those documents, it was apparent from the evidence on the record that in April 2008, the Claimants had increased the budget by 22.9% (from €100.18m to €123.15m), whilst its internal financing costs increased by approximately 82.5% from €4.80m to €8.79m; the Respondent drew the conclusion that the “internal financing funds became scarcer and thus more costly”.¹⁷²¹

4.703 On that basis, it argued that the evidence showed that the project had been under intense financial pressure as the result of the “combined effect of the real estate crisis and the saturation of the retail market in ”, and that the Claimants understood that the project was no longer financially viable; relying on its own expert valuation experts, it submitted that the gross value of the project as at 15 October 2008 was €80.41m, whilst total costs amounted to up to €107.56m, resulting in a negative net valuation of some €27.15m.¹⁷²²

4.704 On that basis, the Respondent submitted that the truth was that the Claimants had realized that they would save money by abandoning the project, and that that was what they had done.

¹⁷¹⁷ Rejoinder, para. 285.

¹⁷¹⁸ Rejoinder, para. 286, quoting Core 8/288 (Exhibit R-58).

¹⁷¹⁹ Rejoinder, para. 287, quoting Reply, para. 664.

¹⁷²⁰ Rejoinder, para. 288.

¹⁷²¹ Rejoinder, para. 289.

¹⁷²² Rejoinder, paras. 290-291.

Whilst suggesting that that decision may have been “entirely reasonable”, the Respondent denied that its conduct had been the proximate cause.¹⁷²³

4.705 As to the fifth point, based on the assertion that the excessive excavations had broken any causal chain, the Respondent explained that the excavations had vastly exceeded the 170,000m³ authorized in the Planning Permit, excavating approximately an additional 120,000m³; denied that the excess excavations could be justified as emergency securing works; emphasized that the evidence showed that, the authorized amount of excavations having been reached around mid-June 2008, the Claimants had deliberately decided to exceed the authorized volume when the Board of ECE International had, on 18 June 2008 approved a proposal to increase the budget for excavation works; and reiterated that excavation had thereafter continued “at full speed” until late August 2008.¹⁷²⁴

4.706 Although noting that it was not disputed that Tschechien 7 had notified MAL of the alleged need to carry out emergency securing works on 11 August 2008, it observed that when MAL had ordered securing works on 19 September 2008, the volume of works authorized was approximately 1.7% of the amount authorized in the Planning Permit, and argued that MAL’s order had not addressed, still less legalized, any other excavations.¹⁷²⁵

4.707 It submitted that it was irrelevant that, due to what it characterized as the Claimants’ obstruction, there had been no effective decision holding the excessive excavations to be illegal. It noted that MAL’s decision of 4 February 2010 had been quashed on formal grounds, and that the substantive conclusion was unlikely to be affected in any subsequent decision.¹⁷²⁶

4.708 It submitted that the effect of the excessive excavations was to put the Project in a “perilous situation”, due to the fact that the immediate consequence was that MAL had opened the Groundworks Removal Proceedings with a view to ensuring removal.¹⁷²⁷ Although acknowledging that Claimants could have applied for regularization of the excavations, and could then have submitted updated documentation for the Main Building Permit to reflect the changed situation, it emphasized that the Main Building Permit should only have been issued after that process had been followed. It argued that the fact that MAL had nevertheless incorrectly issued the Main Building Permit was not relevant, insofar as the Main Building Permit had been appealed and had never become legally effective, and RAL had spotted MAL’s error, and had therefore stayed the appellate proceedings until a decision had been reached in the Groundworks Removal Proceedings.¹⁷²⁸

4.709 The Respondent emphasized that the only means for legalization was by using the special procedure available for that purpose, and that it had not been possible for the excessive excavations to be legalized by the Building Permit. It emphasized that the Claimants’ argument to the contrary had been expressly rejected by a 2008 decision of the Czech Supreme

¹⁷²³ Rejoinder, para. 292.

¹⁷²⁴ Rejoinder, paras. 294-297.

¹⁷²⁵ Rejoinder, para. 298.

¹⁷²⁶ Rejoinder, para. 299.

¹⁷²⁷ Rejoinder, para. 300.

¹⁷²⁸ Rejoinder, paras. 300-302.

Administrative Court in unrelated litigation, which had been confirmed on appeal by the Czech Constitutional Court.¹⁷²⁹

- 4.710 The Respondent further disputed the Claimants' assertion that it could be expected that legalization could be expected as a result of an application filed by the Claimants on 17 January 2011, noting that that application was not one for regularization, and rather appeared to have been aimed at luring MAL into providing confirmation that the excessive excavations had been emergency securing works. It noted that MAL had subsequently discontinued the proceedings on the application.¹⁷³⁰
- 4.711 The Respondent further denied that the excessive excavations had been in any way provoked by the conduct of its authorities, and rejected the Claimants' argument to the contrary, which it submitted presumably were based on the fact that Tschechien 7 had not had a Building Permit by the time it reached the volume permitted under the Planning Permit.¹⁷³¹ It argued first that, even if there had been a breach of the BIT prior to mid-June 2008, as a matter of principle that could in no way excuse the Claimants' violation of Czech law. Second, it in any case disputed that there had been any violation prior to the relevant time, noting that the First and Second Stays had been fully justified, and that the existence of the Extraordinary Review Proceedings had played no role until the Third Stay, adopted on 9 July 2008, after the Claimants had exceeded the authorized volume.¹⁷³²
- 4.712 The Respondent further submitted that, in fact, the Claimants had been fully aware from the outset of the proceedings relating to the Main Building Permit that they would have reached the volume of authorized excavation before the permit was issued, given that the initial application filed on 20 February 2008 had been incomplete, the omissions only being rectified at the beginning of April 2008, and the fact that building permit proceedings normally take approximately six and a half months.¹⁷³³
- 4.713 On that basis, the Respondent argued that even accepting for the sake of argument that the Third Stay had resulted in a violation of the BIT, this would have had no impact upon the effect of the excessive excavations on the Main Building Permit proceedings. In particular, it noted that even in the absence of the Third Stay, this would not have affected the fact that Čistá Města had complained of the excessive excavations in July 2008, such that MAL would in any case have had to open the Groundworks Removal Proceedings. It argued that, even assuming that MAL had mistakenly issued the Main Building Permit, in spite of the excessive excavations, this would have occurred at earliest in early August 2008, and that it was likely that Čistá Města and Multi would thereafter have appealed, and that RAL would have spotted MAL's error, and stayed the appellate proceedings.¹⁷³⁴
- 4.714 In the alternative, it submitted that even if no appeals had been filed, the Main Building Permit would have been "vitiated by error of law", RAL would have opened review proceedings once

¹⁷²⁹ Rejoinder, paras. 303-304.

¹⁷³⁰ Rejoinder, para. 305.

¹⁷³¹ Rejoinder, para. 306.

¹⁷³² Rejoinder, paras. 307-308.

¹⁷³³ Rejoinder, para. 309.

¹⁷³⁴ Rejoinder, paras. 311-312.

it had become aware of the issue, and this could have resulted in the cancellation of the Building Permit; the Respondent again submitted that it was safe to assume that Čistá Města and Multi would have brought the issue to the attention of RAL.¹⁷³⁵

- 4.715 The Respondent submitted that events thereafter would have been dependent upon the attitude of the Claimants, and in particular whether they had been willing to admit their violation of the Planning Permit and apply for subsequent legalization; however, it submitted that even if such an application had been made, the consequent delay, and the need to submit updated documentation for the Main Building Permit “would have postponed the opening of Galerie until the fall of 2010, if not later”, such that the situation would have been no better.¹⁷³⁶
- 4.716 On that basis, the Respondent submitted that even without the Third Stay, the proceedings would in any case have been stayed on the basis of the excessive excavations, such that the alleged chain of causation was broken by the Claimants’ own illegal conduct.¹⁷³⁷

C. THE TRIBUNAL’S ANALYSIS

1. Introduction

4.717 As noted above, and as results from the preceding summary of the pleadings, the Claimants’ claims underwent a profound modification during the course of the proceedings, both as regards the emergence of the allegation of corruption, and as regards the specific breaches of the BIT alleged.

a. The Claimants’ Claim of Corruption

4.718 To begin with the issue of corruption, in their Request for Arbitration and Statement of Claim the Claimants’ principal allegations were of breach of the standard of fair and equitable treatment, and in addition of the prohibition of impairment by arbitrary measures and the prohibition of expropriation. As noted above, as regards the “prohibition of discrimination” (by which the Tribunal understands to have been intended the second limb of the prohibition of impairment standard), the Claimants did no more than reserve their rights.

4.719 In the Memorial, the reliance on an allegation of preferential treatment accorded to the rival project of Multi became more pronounced, accompanied by innuendoes of corruption as the motivating factor underlying the irregularities and delays that were said to have occurred in the administrative proceedings. Those suggestions then became explicit in the Reply. By the time of the hearing, the Claimants’ case rested squarely on an allegation of an overarching scheme of corruption which infected and was the cause of all actions adverse to the Claimants.

4.720 The Tribunal will deal with the allegations of corruption below.

¹⁷³⁵ Rejoinder, para. 313.

¹⁷³⁶ Rejoinder, paras. 314-315.

¹⁷³⁷ Rejoinder, para. 316.

b. The Claimants' New Claims

- 4.721 In addition, the development of the arbitral process also brought new claims into the light of day, even at a late stage. In the Claimants' opening statement on the first day of the oral hearing, Counsel invoked for the first time Article 7 of the BIT (the "umbrella" clause), as well as the Most Favoured Nation clause contained in Article 3, and the full protection standard contained in Articles 2(3) and 4(1).¹⁷³⁸ Likewise at the resumed hearing in Prague, Counsel for the Claimants argued that the conduct of the Respondent had violated "virtually all of the treaty's substantive obligations",¹⁷³⁹ and subsequently made reference to the full protection and security standard, the requirement of most-favoured nation treatment and the umbrella clause.¹⁷⁴⁰
- 4.722 Subsequent to the Prague Hearing, the Claimants sent a letter to the Tribunal on 4 November 2011 in which, inter alia, it provided a response on certain points raised at the hearing, and submitted formal corrections to the transcript of the Prague Hearing.
- 4.723 Part 6 of that letter put forward what were called "Factual Clarifications" of certain submissions made by Counsel for the Respondent at the Prague Hearing, whilst Section 7 contained a new "Prayer for Relief", in which the Claimants, "with reference to all of their written submissions and their oral submissions in London and Prague", requested the Tribunal to find that the Respondent had breached:

- 1.) *the Guarantee of Fair and Equitable Treatment (Article 2(1) BIT)*
- 2.) *the Guarantee not to Impair in any Way the Investment by Arbitrary or Discriminatory Measures (Article 2(2) BIT)*
- 3.) *the Guarantees of Full Protection (Article 2(3) BIT) and of Full Protection and Security (Article 4(1) BIT)*
- 4.) *the Guarantee of Most Favoured Nation Treatment (Article 3 BIT)*
- 5.) *the Guarantee not to Expropriate without a Prompt, Adequate and Effective Compensation (Article 4(2) BIT)*
- 6.) *the Guarantee to Observe all Obligations under Domestic and International Law (the so-called "Umbrella Clause") (Article 7 BIT).*

In addition, the Prayer for Relief contained a reformulation of the remedies sought by the Claimants.

¹⁷³⁸ T1/34:22 – 39:16 (umbrella clause); 39:17-18 (full protection and security and Most Favoured Nation) ("if you don't agree with me on applying 7(1) and 7(2) as I suggest, we rely on the substantive protection standards of the treaty, 2, 3.1, 4.1"); see also 39:21-25 (full protection and security) 102:4-16 (full protection and security) and 103:18-23 (full protection and security) (Mr Marriott).

¹⁷³⁹ T10/122:25 – 123:1 (Ms Malik).

¹⁷⁴⁰ T10/125:13 – 127:23 (Most Favoured Nation and full protection and security); 128:8 -130:12 (umbrella clause) (Ms Malik).

- 4.724 Invited by the Tribunal to provide its observations, by letter dated 9 November 2011 the Respondent objected to the “Factual Clarifications”, as constituting “a short post-hearing brief in letter form” which had not been authorized by the Tribunal, and requested the Tribunal to strike that part of the letter from the record.
- 4.725 By email dated 11 November 2011, the Tribunal indicated that it was not, as then advised, minded to admit Sections 6 and 7 of the Claimants’ letter (with one exception), but indicated that, should the position in that regard change, the Respondent would at that point be afforded an opportunity to respond to the material in question.
- 4.726 By letter of 15 November 2011, the Claimants submitted that there was no reason to strike Section 6 of its letter dated 4 November 2011 from the record, although it left the matter to the Tribunal’s discretion. As regards the Prayer for Relief contained in Section 7 of that letter, the Claimants insisted that it should remain on the record, noting that the Respondent had not requested that it be struck, and arguing that it did not contain new submissions “but merely summarises [...] a consolidated version of Claimants’ pleadings for the relief sought after the written and oral submissions.”
- 4.727 By response also dated 15 November 2011, the Respondent expressed the view that the Tribunal in its email of 11 November 2011 had clearly rejected the admissibility of Sections 6 and 7 of the Claimants’ letter of 4 November, and objected to what it characterized as the Claimants’ unsolicited request to the Tribunal to reverse its ruling.
- 4.728 By letter dated 25 November 2011, the Claimants stated their understanding that the Tribunal’s communication of 11 November 2011 did not constitute a formal decision to strike the ‘Factual Clarifications’, but made no further reference to the Prayer for Relief.
- 4.729 The Tribunal’s communication of 11 November 2011 referred to above contained the Tribunal’s provisional view as to the appropriateness of admitting Sections 6 and 7 of the Claimants’ letter of 4 November 2011. The Tribunal now formally confirms that decision. It was procedurally improper for the Claimants to seek to introduce a new prayer for relief in its letter of 4 November 2011; no provision had been made in that regard in the procedural timetable nor had it been contemplated in the discussion with the Parties at the close of the Prague Hearing, in which it was agreed that there would be no need for Post-Hearing Briefs. The procedural irregularity is not however limited to the formality of the submission of a new Prayer for Relief at that stage, but extends to the fact that the Claimants sought to introduce by this means new claims which had not previously been the subject of any discussion in the written pleadings. These new claims – under the umbrella clause, the guarantee of full protection and security, and the Most Favoured Nation clause – were introduced in only the most general terms at the September hearing. The Claimants’ closing submissions at the Prague Hearing on those matters were likewise pitched at a high level of generality, with no specification of which particular facts were relied upon as constituting a breach of those provisions of the BIT.
- 4.730 The Tribunal notes that it had been faced with a not dissimilar situation before. In its Procedural Order No 5, dated 4 January 2011, in ruling upon the Respondent’s Application to Reject New Claims (see above, paragraph 1.70), the Tribunal:

- a. made clear that it drew “a distinction between the claims formulated by a Party in its submissions to the Tribunal and the facts asserted by that Party in support of those claims” (paragraph 1);
- b. expressed the view that the dispute submitted to the Tribunal was “a dispute over whether the Respondent's administrative procedures in relation to the Claimants' GALERIE project, and the effects thereof, constituted a breach of the [BIT]” (paragraph 2);
- c. ruled that, “[s]o long as their submissions remain within the boundaries of that dispute, the Parties are at liberty to formulate their claims and defences as they choose, subject only to the exercise by the Tribunal of the discretionary power vested in it under Article 20 of the UNCITRAL Rules” (paragraph 3); and
- d. declined to strike out any part of the Memorial on the basis that it saw no good reason to exercise the power contained in Article 20 of the UNCITRAL Rules (paragraph 4).

4.731 Article 20 of UNCITRAL Rules envisages that a Party may amend or supplement its claim or defence during the course of the proceedings, unless the tribunal considers it inappropriate to allow the amendment, “having regard to the delay in making it or prejudice to the other party or any other circumstances”. Article 20 does not expressly require the making of a formal application for amendment, but adopts a permissive approach, in principle allowing amendments unless they are disallowed on one or more of the grounds specified.

4.732 That said, the Tribunal is of the view that if the Claimants wished to put forward claims of breach of provisions of the BIT other than those relied upon in the pleadings, it would have been proper for them either to make a formal application to the Tribunal for permission to do so, or at the least, to state clearly at the outset of the September hearing that they were seeking to amend their case. To have done so would have contributed to the orderly conduct of the proceedings. That was not however done. Rather, the various new claims were introduced during the course of submissions, in the case of the Most-Favoured Nation clause indirectly through the invocation of Article 3 of the BIT. In the result, the Respondent was never faced with a pleaded case setting out the Claimants' case in this regard. Nor has the Tribunal had the benefit of any written specification of the matters on which the Claimants relied as constituting the breaches which underlie their new claims.

4.733 Although, as indicated above, Procedural Order No 5 did not accept the Respondent's application to strike those portions of the Memorial which were alleged to contain new claims, the Tribunal takes the view that the introduction of new claims at and after the hearing is of a fundamentally different nature. Whereas the new claims in the Claimants' Memorial were introduced in writing, thus allowing the Respondent a proper opportunity to respond, by contrast the late introduction of new claims, without adequate particulars, did not of itself allow the Respondent a proper opportunity to prepare its response within the framework of the agreed procedure. And even though the Respondent raised no formal objection at the hearing (and in its own opening, responded to the umbrella clause claim on the merits), the Tribunal does not feel that it would be appropriate to exercise its discretion under Article 20 of the UNCITRAL Rules to allow this amendment and supplementation of the Claimants' claims “having regard to the delay in making it or prejudice to the other party or any other

circumstances". The Claimants had more than ample opportunity to raise these claims during a phase of written procedure lasting roughly two years and, not having taken that opportunity, must be regarded as having lost it by the time the oral hearing began. The Tribunal will therefore assess the Claimants' allegations on the merits against the standard of Articles 2(1), 2(2), and 4(1) of the BIT, in the light of the allegations of corruption referred to above, but not against the standard of Articles 2(3), 3, or 7.

4.734 The Tribunal notes, in addition, that the Claimants had originally pleaded a claim of breach of the obligation to admit investments contained in Article 2(1) of the BIT, and maintained that claim in the Memorial. Although the Prayer for Relief in the Claimants' Reply still made formal reference to Article 2(1), the body of the Reply contained no further submissions in relation to that claim, and there was no reference to it in the oral argument of either Party at the hearing.¹⁷⁴¹ The Tribunal therefore regards it as having been abandoned.

c. The Tribunal's Approach to the Claimants' Claims

4.735 In light of the exclusion of the Claimants' claims other than those included in the written pleadings, the only claims remaining before the Tribunal are those of breach of:

- a. the obligation to provide fair and equitable treatment (Article 2(1) BIT);
- b. the prohibition of impairment by arbitrary or discriminatory measures Article 2(2) BIT); and
- c. the prohibition of expropriation (Article 4(1) BIT).

4.736 The Tribunal notes that the primary focus of the Claimants' claims is on breach of the standard of fair and equitable treatment. The facts relied upon as giving rise to a breach of the prohibitions of impairment by arbitrary measures and of expropriation are in essence identical to those relied upon in relation to fair and equitable treatment.

4.737 The Tribunal notes further that, although the Claimants invite the Tribunal to find that the actions of the Respondent were the result of a scheme of corruption, they also rely on breach of various standards contained in the BIT even in the absence of corruption. That being so, the Tribunal considers it appropriate to deal first with the Claimants' claims of breach of the BIT, leaving to one side the specific allegations of corruption. In other words, the Tribunal will begin by examining whether the facts of the case sustain the Claimants' claims of breach of the standard of fair and equitable treatment, even in the absence of corruption. It will then examine the claims of impairment by arbitrary or discriminatory measures and expropriation.

4.738 The Tribunal will then deal with the Claimants' case on corruption, and assess whether that claim is made out. That approach is adopted on the basis that if the Claimants were able to establish that they had been adversely affected by an otherwise defensible key decision adopted by the authorities which had been tainted by corruption, the decision in and of itself is likely to give rise to a breach of the requirements of fair and equitable treatment and/or be

¹⁷⁴¹ Nor indeed in the revised Prayer for Relief discussed above.

arbitrary or (depending on the precise circumstances) discriminatory and thus result in a breach of the prohibition of impairment.

4.739 Finally, the Tribunal recalls that, as set out above, on 7 October 2011, following the London Hearing, and in advance of hearing the Parties' closing arguments at the Prague Hearing, it circulated a list of issues on which it would appreciate receiving the submissions of the Parties. This list of issues is set out in full at paragraph 1.136 above.

2. Preliminary Matters: Denial of Justice; Exhaustion of Local Remedies; and the Relevance of Breaches of Domestic Law

4.740 Prior to turning to assess the merits of the Claimants' claims, the Tribunal thinks it appropriate to address at the outset three issues which were canvassed by the Parties in the course of the written pleadings, and which, in the circumstances of the present case, are of transversal relevance. Those issues are

- a. the Respondent's argument that all of the Claimants' claims are in fact for denial of justice, and fall to be assessed against the standard for denial of justice under customary international law;
- b. the connected invocation by the Respondent of the requirement of exhaustion of local remedies; and
- c. the relevance of violations of domestic law.

a. The Respondent's Argument that the Claimants' Claims Are Essentially for Denial of Justice

4.741 As regards the Respondent's argument that the Claimants' claims are all in essence, claims of denial of justice, and that the more stringent requirements of such a claim must therefore apply (both substantively, and in terms of exhaustion of local remedies) the Tribunal notes that no mention of denial of justice is made anywhere in the BIT as a separate standard.

4.742 That said, the Tribunal equally notes that denial of justice is not limited to judicial proceedings but may equally occur in administrative proceedings, and that a denial of justice in respect of an investment constitutes one form of treatment by a respondent State that would in general result in a violation of the fair and equitable treatment standard. However, equally, a denial of justice approach is merely one way of characterizing conduct of a State, and it is by no means an exclusive standard.

4.743 The Tribunal is of the view that in principle it is for the investor to allege and formulate its claims of breach of relevant treaty standards as it sees fit. It is not the place of the respondent State to recast those claims in a different manner of its own choosing and the Claimants' claims accordingly fall to be assessed on the basis on which they are pleaded. While the facts underlying a particular claim might also be characterized as resulting in a denial of justice, this does not mean that more stringent conditions applicable to a claim for denial of justice must necessarily apply to other claims to which the same facts may give rise.

b. The Respondent's Invocation of the Requirement of Exhaustion of Local Remedies

4.744 The Respondent's arguments as to the applicability of the denial of justice standard constitute the point of departure for its related argument that the Claimants were required to exhaust local remedies before raising their claims before the present Tribunal under the BIT.

4.745 Some tribunals have observed that whether or not an investor has had recourse to the local courts of the host State in an attempt to obtain redress for the alleged harm suffered may be relevant in assessing whether or not there has been a breach of the relevant treaty-based standard of protection. But in these cases, where recourse to the local courts has been held to be relevant to the question of breach, that does not make it into a mandatory precondition for the admissibility of the claim before an investment tribunal, nor into a constitutive requirement for the claim. Rather the extent to which an investor pursued available domestic remedies (and to which it in fact obtained a remedy for its complaint) has been treated as constituting one element which is relevant for the assessment of whether the investor has been treated in a manner which constitutes a breach of the respondent State's obligations for the protection of the investment.

4.746 This is however different from a claim for denial of justice arising out of the operations of the courts themselves, where the requirement to exhaust local remedies is not a condition of the admissibility of the claim, but goes to its substance as a constitutive element of the claim itself; it is precisely the fact that the error has gone unremedied by the State's own courts which constitutes the international wrong.

4.747 In brief, given that the Claimants have not presented their claims in the form of claims of denial of justice, those claims are not subject to any requirement to exhaust such local remedies as may have been available and effective. Nevertheless any remedies that were available to the Claimants, and would have been or were effective to remedy the defects in the local administrative proceedings, retain their potential relevance and the Tribunal will have regard to them in assessing whether the conduct of the relevant authorities breached the standards of protection contained in the BIT.

c. The Significance of Violations of Domestic Law

4.748 Finally, as the Claimants' claims of breach of the standard of fair and equitable treatment rely heavily on the alleged illegality of some of the decisions adopted by the domestic authorities, the Tribunal observes it is well-established that a breach of domestic law does not, without more, result in a breach of international law. As expressed by a Chamber of the International Court of Justice in *ELSI*:

*Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in municipal law and what is unlawful in the municipal law may be fully innocent of violation of a treaty provision.*¹⁷⁴²

The Chamber later observed:

¹⁷⁴² *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at p. 51 (para. 73).

*[T]he fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise.*¹⁷⁴³

4.749 That forms part of the more general principle, recognized in Article 27 of the Vienna Convention on the Law of Treaties, and more generally in Article 3 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts, that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of a State. Article 3 of the ILC's Articles provides

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

4.750 As indicated in the ILC's Commentary, the principle embodies two elements -

*First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law.*¹⁷⁴⁴

4.751 The Tribunal has no doubt that these principles are applicable here, and that, accordingly, the mere fact that a particular act is illegal under the domestic law of the Respondent does not mean that it necessarily constitutes a breach of the substantive standards of protection contained in the BIT, or *vice versa*. The Tribunal will return as appropriate to the implications of these principles when discussing the breaches alleged by the Claimants of the specific standards of protection contained in the BIT.

3. Alleged Breach of the Fair and Equitable Treatment Standard (Article 2(1) BIT)

4.752 The Claimants identified three "strands" encompassed in the fair and equitable treatment standard, which it alleged were violated as a result of the conduct of the authorities of the Respondent in the various administrative proceedings: frustration of the Claimants' legitimate expectations; violation of the requirement of transparency and predictability of the legal system; and violations of due process. The Tribunal will not however deal with these separately, but as elements entering into the assessment of whether the fair and equitable treatment standard has been breached.

¹⁷⁴³ *Ibid.*, at p. 74 (para. 124).

¹⁷⁴⁴ ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, State Responsibility, Commentary to Article 3, paragraph (1). See also *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, paras. 95–96; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of 6 August 2003, para. 147; and *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005, at para. 53.

4.753 Prior to examining the substance of the Claimants' claim, however, it is necessary to deal with the debate between the Parties as to the applicable general standard under the obligation to accord fair and equitable treatment contained in Article 2(1) of the BIT, and its relationship to customary international law.

a. The Applicable Standard of Fair and Equitable Treatment Under the BIT and Its Relationship to the Standard of Treatment under Customary International Law

4.754 The debate as to the relationship between the fair and equitable treatment standard embodied in the BIT and the standard applicable under customary international law is, in the Tribunal's view, in the final analysis an essentially academic one with little practical impact. What the Tribunal is called upon to interpret and apply is the fair and equitable standard as embodied in Article 2(1) of the BIT, which corresponds also to the limits of the Tribunal's jurisdiction, namely, whether the Respondent has complied with its obligations under the BIT.

4.755 The Respondent argues that the standard should be equated or limited to the minimum standard under customary international law and invokes arbitral decisions adopted in the application of Article 1105 of the North American Free Trade Agreement (NAFTA). The Claimant argues to the contrary that, since Article 2(1) of the BIT makes no reference to international law or the international minimum standard, it must be taken to impose a standard higher than that obtaining under customary international law. The Tribunal finds itself unable to accept either view. It does not find NAFTA Article 1105 (entitled "Minimum Standard of Treatment"), which explicitly requires the Parties to NAFTA to accord treatment, including fair and equitable treatment, "in accordance with international law", to be of particular assistance in deriving the proper meaning to be given to a differently formulated provision in an unconnected and free-standing bilateral investment agreement between two European States. Conversely, it can see no logical basis for the Claimants' submission that a failure to mention international law in a treaty provision should be taken to be equivalent to the establishment of a particular relationship to the customary international law standard, either in general or in relation to a specific understanding of what the customary standard is.

4.756 Several investment tribunals have held that, when a bilateral treaty adopts a standard of fair and equitable treatment without further qualification, the treaty is to be interpreted and applied in its own right and on its own terms. The present Tribunal shares that view. The applicable principles for the interpretation of Article 2(1) of the BIT are therefore those laid down by Article 31 of the Vienna Convention on the Law of Treaties. Under paragraph (1) of that Article a treaty is to 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".

4.757 Article 2(1) of the BIT reads in full as follows:

*Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment.*¹⁷⁴⁵

¹⁷⁴⁵ In the English-language translation agreed between the Parties.

- 4.758 It is followed by two further paragraphs laying down, respectively, the non-impairment standard and the full protection standard. The language used is simple and straightforward, and appears plainly to lay down a standard that incorporates ample flexibility to determine what should be regarded as “fair and equitable treatment” in relation to the circumstances of particular cases. There is no indication either within the treaty or in the other information furnished by either the Claimants or the Respondent that the Parties to the treaty had intended a special meaning to be given to any of its terms, as contemplated in Article 31(4) of the Vienna Convention.
- 4.759 The immediate context of the reference to ‘fair and equitable treatment’ is the obligation in the same paragraph on each Party to “promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its legislation,” which suggests that ‘fair and equitable treatment’ should be understood against the background of the Parties’ wish to promote and encourage the making of investments and their continued management thereafter. The Tribunal sees further confirmation of this interpretation in the treaty’s preamble, with its references to the intensification of mutual economic cooperation and the creation of favourable conditions for reciprocal investments and its recognition that “encouragement and reciprocal protection of investments are apt to strengthen all forms of economic initiative, in particular in the area of private entrepreneurial activity”.
- 4.760 The conclusion that the fair and equitable treatment standard under the BIT is not as such limited by reference to the minimum standard of treatment under customary international law (whatever the content of that standard may be), does not mean that the standard is necessarily open-ended or subject to idiosyncratic interpretation by individual tribunals. In particular, there is broad agreement in the decisions as to the core of what is required by the fair and equitable treatment standard. As stated by the *Mondev* tribunal (in the context of application of Article 1105 NAFTA),

*the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.*¹⁷⁴⁶

- 4.761 The Tribunal will return as necessary to the question of the specific treatment which the fair and equitable standard requires, and the types of conduct which may result in a violation, in the context of its discussion of the three strands which the Claimants say constitute specific elements of ‘fair and equitable treatment’.

b. The Claimants’ Claims Based on Breach of Their Legitimate Expectations

- 4.762 The Tribunal accepts the Claimants’ argument that frustration of an investor’s legitimate expectations is capable of constituting a breach of the standard of fair and equitable treatment. For a claimant’s expectations to qualify in this sense, however, they must normally be based on

¹⁷⁴⁶ *Mondev International Limited v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 127.

specific assurances given by the competent authorities to the investor prior to or at the time of the making of the investment. The Tribunal will return below to the question of what specific assurances were in fact given to the Claimants, and the scope of the legitimate expectations which may reasonably have arisen as a result.

- 4.763 In the present case, however, the Claimants' assertion is the general one that they had a legitimate expectation that the law on planning and building permission would be applied in a proper manner, and that that expectation was improperly frustrated as a result of the decisions of the Respondent's authorities and the way in which these decisions were taken.
- 4.764 Subject to the caveat that any such expectation must be within the limits of the reasonable, the Tribunal is prepared to accept that the Claimants were entitled to expect that the law on planning and building permissions would be properly applied by the competent administrative authorities within the wider framework of Czech administrative law, and, that if the courts were seized with disputes arising out of the foregoing, there would be fair disposition of such disputes in accordance with internationally accepted standards of justice. By reasonable in this context, the Tribunal means that it has to be accepted that it is an inherent feature of any legal system that the competent administrative authorities (and courts), in applying domestic law, may commit errors and make mistakes, or simply reach decisions as to the meaning of the law or as to the facts of a case on to which a superior court or administrative authority subsequently takes a different view. It has also to be accepted that it is not the role of an international tribunal to sit on appeal against the legal correctness or substantive reasonableness of individual administrative acts or the judgments of a municipal court reviewing them. Its role is rather to assess whether the decision makers and the courts acted fairly and consistently with accepted standards of due process, and that their decision making was not tainted by improper motives. It follows that the possibility that a decision was wrong under domestic law is not in and of itself a breach of the standard of fair and equitable treatment, although it may in appropriate circumstances constitute a relevant factor to be weighed in the balance alongside the availability of effective remedies. In other words, the standard is about the operation of the State's administrative and legal system as a whole.
- 4.765 A particular point to be borne in mind in this connection is that the expectations of a given investor, however legitimate, do not exist in isolation, and removed from the factual circumstances of the specific situation. The crucial factor in the present case is the existence on the scene of a competing investor, Multi, whose actions are not attributable to the Respondent and do not engage the Respondent's international responsibility. Competition is an inescapable component of the risk element that characterizes the making of an investment in an open economic system. The fact therefore that Multi sought to exercise its legal rights in a way that impinged adversely on the interests of its competitor, ECE, or asserted a claim to standing to do so before the Czech courts or administrative authorities, is not something for which the Respondent can be reproached by ECE under the standard of fair and equitable treatment – so long as the courts and administrative authorities dealt with the competing claims in conformity with the standard described in the preceding paragraph. It is of the essence of planning and building law that one of its central purposes is precisely to balance competing interests, which in specific cases may be many, varied and conflicting.

4.766 One of the consequences of the above is that an investor dependent on the grant of a planning or building permit must be taken to be aware of the possibility of delays in the decision making process, and that there is a risk that other participants, including opponents and competitors, will seek to slow or even halt the proposed project. The investor can have no 'legitimate expectation' opposable to the host State that such delays will not occur. Whether delay can reach a point at which it passes beyond what could reasonably have been anticipated is not a matter of kind but of degree. It will therefore be heavily dependent on the particular facts, and a tribunal will take special care to weigh the sequential investment decisions taken by the investor against the actual or assumed state of the investor's knowledge at the time that each decision was made. The tribunal will also assess the extent to which the investor might itself have caused or contributed to the delay. In brief, it is not the function of the doctrine of 'legitimate expectations' to remove the risk element from commercial investment, including the risk of competitors or other parties resorting to domestic remedies.

4.767 As indicated above, 'legitimate expectations' in the context of investment arbitration would normally be based on specific assurances given by the competent authorities to the investor, and it is to that aspect that the Tribunal now turns.

i. Mr [redacted] Assurance and the Claimants' Expectations

4.768 The Claimants sought to make much of an assurance alleged to have been given by Mr [redacted] to representatives of ECE in August 2005. Although in the written pleadings the Claimants had also invoked the fact that the City of [redacted] changed the zoning plan so that the Galerie project could be constructed on the intended site, in the end, as the argument developed in the oral hearings, Mr [redacted]'s assurance became the sole basis on which the Claimants relied for their legitimate expectation that the planning process would be conducted in proper manner, and that they could accordingly expect the grant of the planning and building permits in time to allow an opening prior to or contemporaneous with Multi's Forum project.

4.769 The Tribunal is not convinced that the assurance made by Mr [redacted] can bear the weight which the Claimants seek to make it carry.

4.770 As to the content of the assurance, when Mr [redacted] was asked by Counsel for the Claimants whether, when he had met with representatives of ECE in 2005, he had assured them that Multi and ECE 'would be treated fairly and equitably', his response was that he had assured them that "we approach all investors in the same manner."¹⁷⁴⁷ He later explained that the policy of his administration when he was Mayor had been to provide support to all developers who were interested in investing in the City, and, effectively, to leave it to the investors and to the market to decide which projects were feasible.¹⁷⁴⁸ That explanation is fully consistent with the account of the relevant meeting provided by Mr [redacted] in his witness statement who recounted that "When the conversation turned to the role of Multi, the mayor remarked that both developers would be measured against the same standard and that it is each developer's

¹⁷⁴⁷ T5/104:18-23,

¹⁷⁴⁸ T5/118:5-16.

responsibility to make the best out of the project".¹⁷⁴⁹ An assurance of this kind, in effect that the City of [redacted] would not take sides in the competition between different investors, falls well short of any kind of promise that the necessary planning and building permits would be granted within a particular time, or even that the permits would be granted at all.

4.771 An important factor in this regard is the limited competence of the City of [redacted] and of Mr [redacted] as its Mayor, in relation to the overall permitting process. On the evidence, there is a distinction under Czech administrative law between institutions of self-government (including entities such as the City of [redacted]) and the central State authorities (which included the Building Authority within MAL). Therefore, although the City of [redacted] had competence over the local zoning plan, it had no competence over the grant of planning or building permits. In those circumstances, it would have been surprising if Mr [redacted] had purported to provide any assurance as to the conduct of the planning and building permit proceedings. The Tribunal accepts his evidence, corroborated by that of Mr [redacted], that he did not do so, but merely gave an assurance that the City of [redacted] would support the respective projects of Multi and ECE equally.

4.772 In actual fact, the evidence suggests that the City of [redacted] did precisely that. Quite apart from, as already noted, changing its zoning plan at the outset so as to permit the construction of the Galerie project, it subsequently agreed to allow applications for the building permits in respect of the external traffic constructions to be made in its name by Tschechien 7's contractor, SIAL (apparently in the hope that in doing so, Multi would be less likely to challenge them). Moreover, once the overlap issue had arisen, the City of [redacted] entered into a cooperation agreement by which it agreed to take steps to assist the Claimants in resolving the problems which had arisen.¹⁷⁵⁰ It follows, in the Tribunal's view, that nothing in the conduct of the City of [redacted] including Mr [redacted]'s specific assurance to ECE, can be taken as the ground for any fixed expectation on the part of the Claimants that they would obtain the necessary planning and building permits within a specific time.

ii. The Time Sensitivity of the Project

4.773 The Claimants argued that the relevant authorities of the Respondent must at the least have been aware of the time-critical nature of the Galerie project. It must indeed have been clear to any knowledgeable observer that Galerie and Forum were in stiff competition with one another. Nevertheless the Tribunal would only be able to regard the Claimants' commercial objective as entering within the realms of "legitimate expectation" if the competent Czech authorities had offered some form of specific assurance in that regard, and in such a way that ECE could fairly be said to have relied upon it. That would however have to be proved by evidence. The Tribunal has before it no evidence to that effect. In the Tribunal's view, the only express assurance provided was the one given by Mr [redacted], discussed above, and that (as indicated) was primarily in the form of an assurance of non-discrimination as between the Galerie and Forum projects.

¹⁷⁴⁹ [redacted] statement, para. 10.

¹⁷⁵⁰ Core 6/184 (Exhibit R-49).

- 4.774 In the Tribunal's opinion, even if it had been shown that the Claimants had informed the appropriate authorities at the outset of the commercial imperatives underlying an opening at the same time or in advance of the Forum project, that would not mean that the Claimants, by so doing, were able to transfer to the Respondent all or part of the commercial risk inherent in the competitive situation in which the Claimants found themselves.
- 4.775 Given that finding, it is not necessary for the Tribunal to investigate in detail the reasonableness of the Claimants' alleged expectations, based on how much time the Claimants had in fact assumed for completion of the permitting procedures when drawing up and adopting their internal decisions to undertake the investment. Such evidence as the Tribunal has seen suggests that, in preparing their time schedule for the construction and opening of Galerie the Claimants budgeted only for the maximum statutory deadlines for the granting of the various permits, and failed to take into account the possibility of appeals against the grant of planning or building permits.¹⁷⁵¹ Both Mr and Mr agreed in evidence that appeals were a possibility and that they were used to dealing with them,¹⁷⁵² and there was further evidence that the Claimants had suffered severe delays over a project of the same kind in Prague as a result of the filing of appeals. Mr's explanation was that, judging from the site inspection, the situation was not "particularly sensitive" compared to other projects. Mr admitted that the time schedule was optimistic in not budgeting for appeals, and that the Board of ECE knew this.¹⁷⁵³ He said that he had been assured by the owner of the principal construction contractor that, in previous of that contractor's projects, no appeals had been lodged and on that basis he felt that appeals were not likely, and by SIAL, the Claimants' local project company, that appeals were not very common in the area, at least outside the specific field of mining operations raising environmental concerns, in which some local NGOs were active.¹⁷⁵⁴ These individual impressions notwithstanding, the minutes of the ECE Board meeting on 23 July 2007 noted that "some protests" were to be expected in respect of the planning permit,¹⁷⁵⁵ whilst those of the meeting held on 7 July 2008 recognized that it was likely that Multi would appeal against the grant of the building permit.¹⁷⁵⁶
- 4.776 The above leaves in the mind of the Tribunal a picture of the Claimants knowingly entering into what was characterized in the Memorial as a "horse race" with Multi as to who could complete their respective projects first, on the basis of time estimates for the permitting process which were not based on a realistically hard-headed calculation of the likelihood of appeals or of their effect.

¹⁷⁵¹ T2/89:3-6 (Mr); T4/75:4-5 (Mr).

¹⁷⁵² T2/88:21 – 89:2 ; T4/131:11-13.

¹⁷⁵³ T2/89:6-14 ; T4/77:20-21 and 78:1-13.

¹⁷⁵⁴ T4/131:3-10; T4/132:2-11; see also T4/76:6-10.

¹⁷⁵⁵ Core 4/114, (Exhibit R-39).

¹⁷⁵⁶ Core 6/218 (Exhibit C-64).

iii. The Planning Proceedings

- 4.777 In the light of the above, the Tribunal can now turn to whether the Claimants' reasonable expectations of the normal and regular operation of the planning process were frustrated in a way that might give rise to a breach of the standard of fair and equitable treatment.
- 4.778 The Tribunal notes that, although initially the Claimants raised multiple allegations of procedural irregularity and unlawfulness in relation to individual actions and decisions in each stage of the planning process, in the final analysis it relied essentially on the conduct of the Extraordinary Review Proceedings, and the various stays adopted by MAL in the context of the building permit proceedings.
- 4.779 As regards the alleged irregularities in the planning permit proceedings, including the episode in which the notice of the opening of planning permit proceedings was removed prematurely from the noticeboard, resulting in the need for it to be republished, the Claimants admitted that the various relatively minor delays suffered at that time had no adverse effect on the realization of the project and, in particular, on the timely progress of the further proceedings and the possibility of Galerie opening in advance of or contemporaneously with Multi's Forum centre. However, they did argue strongly that it was only the premature taking down of the application which permitted Multi to launch the process of appeal which set in train a course of events gravely damaging to their interests.
- 4.780 As to the Extraordinary Review Proceedings in relation to MAL's grant of the Planning Permit, initiated by the Ministry further to a motion by Multi on 7 December 2007, although these proceedings did not as such affect the entry into force of the planning permit, following RAL's rejection of Multi's appeal on 3 December 2007, the Claimants assert that the pendency of the proceedings created continuing uncertainty as to the validity of the Planning Permit and that this was a factor contributing to the decision to abandon the project. They draw attention to the fact that the First and Second Ministry Decisions purported to quash the planning permit, albeit that those decisions never entered into force in consequence of Tschechien 7's appeals to the Minister. The existence of the Extraordinary Review Proceedings is also of significance insofar as MAL purported to rely on the fact that they were pending in adopting the Second and Third Stays of the Building Permit proceedings.
- 4.781 The next set of proceedings upon which reliance was placed was the Building Permit proceedings which commenced consequent upon the applications filed on behalf of Tschechien 7 starting on 20 February 2008. The Claimants assert that it was the conduct of those proceedings, and in particular the delay caused by the adoption of the Second and Third Stays, when taken with the uncertainty mentioned above over the validity of the Planning Permit, that forced ECE to abandon the project once it became clear that even an Autumn 2010 opening was in jeopardy.
- 4.782 Before examining whether anything which occurred in the proceedings can be regarded as rising to the level of a breach of the fair and equitable treatment standard, the Tribunal recalls its observations above that the mere occurrence of irregularities in administrative or court proceedings, or the adoption of mistaken decisions, does not in itself give rise to a breach of this kind. What is necessary in order for a breach to be found is something that falls outside what is generally accepted as fair in administrative or judicial proceedings.

The Planning Permit Proceedings

- 4.783 As to the premature taking down of the planning permit, although the notice was taken down early, a certain length of time, however limited, still remained within which an appeal could have been filed, and the Tribunal cannot simply make the assumption that Multi would not have filed an appeal within that time period.

The Extraordinary Review Proceedings

- 4.784 It came as an unpleasant surprise to the Claimants when the First Ministry Decision of 29 February 2008 upheld Multi's challenge to RAL's decision dismissing Multi's appeal against the grant of the planning permission. The Tribunal, for its own part, finds it hard to follow the precise chain of reasoning which led the Ministry to reach this conclusion. However, as previously noted, the present Tribunal does not sit as a court of appeal or review, and the fundamental fact, despite the striking nature of some of the Ministry's findings, (including as to Tschechien 7's status in the proceedings), is that the Decision was subsequently reversed by the First Minister Decision upon Tschechien 7's appeal, and therefore had no legal effect.
- 4.785 As regards the First Minister Decision itself, although the Claimants initially attempted to characterize it as not only unusual, but also improper insofar as it departed from the prior opinion of the Advisory Committee which had recommended the termination of the proceedings, it was subsequently accepted by the Claimants, in the light of the evidence on Czech law, that the Minister was not bound to follow the opinion expressed by the Committee, and was free to adopt his own view. Nor, against this background, has the Tribunal been able to find anything improper in the Minister's decision to consult Dr [redacted] on the approach he should adopt, however unusual that course may have been.
- 4.786 As to the attack mounted by the Claimants on the Minister's decision to remand the matter to the Ministry for consideration of the question of whether the rights acquired in good faith by Tschechien 7 under the planning permit would be disproportionately affected by any decision to quash the planning permit, the legal experts agreed that, as a matter of Czech law, such a course of action was open to the Minister, and the Tribunal can appreciate his logic in so doing. It is not without significance that Tschechien 7 itself initially proposed to proceed this way in its appeal of 12 March 2008,¹⁷⁵⁷ and it was only in a supplemental submission dated 18 April 2008 that it requested that the First Ministry Decision be cancelled and the proceedings discontinued.¹⁷⁵⁸
- 4.787 In summary, the Tribunal can see nothing which could give rise to a conclusion that the First Minister Decision was anything other than an admissible application of the options which were open to the Minister under Czech law.
- 4.788 As to the Second Ministry Decision adopted on 15 August 2008 following the remand, although the Ministry again purported to quash the planning permit, once again its decision to that effect was subsequently reversed and never had effect, having been quashed by the Second Minister Decision upon Tschechien 7's further appeal.

¹⁷⁵⁷ Core 5/152 (Exhibits R-105/C-60).

¹⁷⁵⁸ Core 6/176, (Exhibit R-128).

4.789 To pass now to the Second Minister Decision of 4 December 2008, which was fully in the Claimants' favour, the Claimants' main criticism is that it was delivered late, as well as drawing attention to the fact that it was inconsistent with the First Minister Decision, despite the factual basis not having changed. As already noted, however, the mere failure to comply with a procedural time limit, resulting in a relatively minor delay in the rendering of the Second Minister Decision, is not enough in and of itself to give rise to a potential breach of the standard of fair and equitable treatment.

4.790 The Tribunal does not see anything in the way in which the Extraordinary Review Proceedings were conducted which violates an investor's legitimate expectation that the planning and permitting process would be operated in a proper manner. The issuing of decisions by inferior decision-makers which were subsequently overturned on appeal, the consequent delays, and the extent of non-compliance with statutory time-limits for the rendering of decisions, are none of them matters which should have been beyond the reasonable contemplation of an investor.

The Building Permit Proceedings

4.791 As to the building permit proceedings, the Claimants' criticisms focus in particular on the Second and Third Stays of the proceedings adopted by MAL. As set out in paragraph 2.20 above, the effect of a stay is not entirely to suspend the proceedings, but rather to stop the running of time for the purposes of the time-limit within which the authority must reach its decision. The adoption of a stay also stops time running for the purposes of calculation of the time period of 15 days within which notification of the opening of proceedings has to be displayed, as well as the period of 15 days within which participants in the proceedings are able to submit their comments and objections.

4.792 Following the filing of the application for the main building permit on 20 February 2008, the First Stay of the main building permit was issued by MAL on 13 March 2008, consequent upon the applicant's failure to file a complete application.¹⁷⁵⁹ The missing information and documents requested by MAL were supplied on 2 April 2008,¹⁷⁶⁰ and the stay was lifted the same day. The evidence before the Tribunal was that such an initial suspension of proceedings occurs frequently in practice, in consequence of the great number and complexity of documents to be submitted as part of an application. In the end, the Claimants made no complaint about the delay caused by the First Stay, and admitted that it did not materially impair the time schedule.¹⁷⁶¹

4.793 The Parties and their legal experts disagreed as to the reason for the Second Stay, adopted on 28 April 2008. The Claimants argued that the stay was improper because it merely invited the Developer "to submit supporting documents clearly demonstrating that the provisions of Article 111[2] of the Czech Building Act have been satisfied", without specifying the nature and content of the further documents requested. In addition, they argued that, as a matter of Czech administrative law, in accordance with the principle of procedural efficiency, a call for the supply of further documentation should be made once in relation to any application and not be divided in subsequent decisions, each causing an additional suspension of the proceedings,

¹⁷⁵⁹ Core 5/155 (Exhibit R-50).

¹⁷⁶⁰ Core 5/167, (Exhibit 29) i 61)

¹⁷⁶¹ T7/126:14-24 (Dr

and that the First Stay already having requested supplemental documentation, it was improper for MAL subsequently to stay the proceedings in order to seek production of further documents. Finally, the Claimants submitted that the Second Stay was improper insofar as it purported to rely on the pendency of the Extraordinary Review Proceedings.

4.794 The Tribunal does not accept any of these criticisms. Article 111[2] of the Building Act, contained in a provision dealing with applications for building permits, requires Building Authorities to verify the “effects (impacts, influences) of the future use of the structure” which is the subject of an application for planning permission. It would seem, judging from the terms of the Second Stay, that MAL was not seeking further documents solely in respect of the original application for building permission, but rather that the request for supplemental information was provoked in part by the application filed by Tschechien 7 itself on 14 April 2008, apparently in an attempt to resolve the problems caused by the overlap and conflict between the planning permission granted to Multi and the planning permission obtained by Tschechien 7 for Construction IV.b, relating to the exterior roads. Tschechien 7’s letter was headed “partial abandonment of intention”, in which it set out its abandonment of its intention to implement Construction IV.b, and asserted that, as a consequence the planning permit to the extent that it related to Construction IV.b “becomes invalid as of the date of delivery of the present notification [...]”.¹⁷⁶²

4.795 Mr [redacted]’s evidence was that he had regarded such an attempt to effect a partial abandonment of the planning permit as legally impossible, on the basis that “the law says that if you leave out a part of a construction, this is a change of the planning permit, and this has to be changed whole. In other words, I am changing the whole planning permit, the original planning permit no longer exists, and has to be replaced with a new planning permit, which again has to go through the whole process, being put up on the public noticeboard and so on and so forth.”¹⁷⁶³ That this was Mr [redacted]’s view at the time is reflected in the Second Stay itself, which stated the view that the motion of 14 April 2008 “amounts to a modification of the planning permit”.

4.796 Dr [redacted], the Claimants’ expert on Czech law, agreed that a partial abandonment of a planning permit “was not possible”,¹⁷⁶⁴ and expressed the view that faced with such a situation, “it is the obligation of the building authority to find what the actual intention of the participant was”.¹⁷⁶⁵ In addition, although present as a witness of fact called by the Respondent, Dr [redacted], an expert in administrative law, stated his view that the approach adopted by Tschechien 7 was flawed, noting that Tschechien 7 had sought to operate “a partial withdrawal from some rights, which is legally a nonsense”.¹⁷⁶⁶

4.797 Indeed, it appears to the Tribunal that Tschechien 7 subsequently realized the error in the approach it had taken, or at least clearly understood the basis on which MAL was analysing the situation created by its application for “partial invalidation”. For, by a motion dated 22 May 2008, Tschechien 7 withdrew its application for partial invalidation; the motion stated that the wording of the Second Stay, “indicates beyond any doubt that the Building Authority in

¹⁷⁶² Core 5/171 (Exhibit [redacted] 6-30; [redacted] 6-63).

¹⁷⁶³ T6/50:6-13.

¹⁷⁶⁴ T7/132:15-18.

¹⁷⁶⁵ T7/132:24-133:2.

¹⁷⁶⁶ T7/31:6-8.

deems the 14 April 2008 filing of Tschechien 7 to be an application for a change to the planning permit dated 16 July 2007” and stated that, although Tschechien 7 did not agree with that analysis, it withdrew the motion as “it was not the intention of Tschechien 7 to initiate proceedings on changes to the 16 July 2007 planning permit.”¹⁷⁶⁷

- 4.798 Given that the Second Stay was based in part upon Tschechien 7’s application of 14 April 2008, rather than solely upon the original application for a planning permit, the argument based on the principle of procedural economy proceeds on a mistaken basis. Quite apart from this, given that the First Stay was adopted on 13 March 2008, the initial request for supplementation of the application underlying that decision could not possibly have extended to the matters arising from Tschechien 7’s application of 14 April 2008.
- 4.799 Finally, although the Claimants suggest that the Second Stay was motivated by the pendency of the Extraordinary Review Proceedings, this is not borne out by the text itself of the Second Stay. Although the text includes wording which in the circumstances can only be understood as referring to the Extraordinary Review Proceedings, nevertheless the explanation of grounds shows that the reason for the stay was not the pendency of the Extraordinary Review Proceedings as such, but rather the need to verify the effects of due use of the construction in circumstances in which various proceedings potentially affecting the overlap were pending, the actual connection of the roads was not clear in light of the clash between the two planning permits, and the Building Authority was therefore of the view that it was not in a position in which it could verify “that the development will be sufficiently comprehensive and continuous to ensure creation of the technical requirements for due and proper use of the construction”.
- 4.800 Following receipt of the withdrawal of Tschechien 7’s application for partial invalidation, MAL put an end to the Second Stay on 2 June 2008 and decided to publish a notice of the commencement of the building permit proceedings through display on the noticeboard. That decision appears to have been linked to the fact that, on the next day, the proceeding to modify Multi’s planning permit referred to in the Second Stay, which had been commenced by the Building Office on 12 December 2007 *proprio motu*, was discontinued. The notice of discontinuance noted that, on 17 April 2008, the application for building permission in respect of, inter alia, Construction IV.a, had been filed, in which the City of [redacted] was specified as builder, and reasoned that, since the City of [redacted] was also the owner of the land plots and the roads, “the ‘overlap’ of both respective planning proceedings will be removed within the building proceeding”.¹⁷⁶⁸ It appears that it was on this basis that MAL was of the view that the overlap issue was resolved, and that accordingly there was no further need for supplemental information as to the effects of Construction IV.b.
- 4.801 As to the Third Stay, there was no dispute between the Parties that it was adopted on a flawed legal basis, and was thus unlawful. However its illegality was quickly identified by the competent authorities as a result of the enquiry made by the lawyers acting on behalf of Tschechien 7, and the Claimants ultimately obtained a remedy. In the circumstances, the Tribunal does not regard the adoption of the Third Stay as rising to the level of a breach of an investor’s legitimate expectation that the law would be applied in a fair and reasonable manner.

¹⁷⁶⁷ Core 6/192, (Exhibit R-51).

¹⁷⁶⁸ Core 6/199, (Exhibit R-47).

The Tribunal notes in that regard that the delay in the Building Permit proceedings occasioned by the Third Stay cannot be attributed in its entirety to the Respondent; although the letter from the Ministry obtained by Tschechien 7 and provided to MAL on 31 July 2008 stated clearly that the pendency of Extraordinary Review proceedings in relation to the planning permit did not constitute a ground for staying the Building Permit proceedings, the ability of MAL subsequently to discontinue the stay in the light of that letter was substantially complicated by the fact that Tschechien 7, EKZ Prag 7 and the City of subsequently filed appeals with RAL against the various decisions constituting the Third Stay.

4.802 On the evidence before the Tribunal, the filing of those appeals meant that MAL was required to provide the relevant files to RAL, which then prevented it from resuming the Building Permit Proceedings of its own motion. At the same time, RAL was unable formally to quash the decisions constituting the Third Stay inasmuch as all but one of the appeals had been filed out of time.¹⁷⁶⁹ Although RAL's decisions put beyond any reasonable doubt that the Third Stay was not justified, and that MAL should discontinue the Third Stay and recommence the Building Permit proceedings *sua sponte*, further delay in that regard was caused by the requirement of publication of RAL's various decisions on the noticeboard for 15 days. The crucial decision of RAL dated 8 October 2008 in relation to the main building permit (Construction I), in which RAL rejected Tschechien 7's appeal as out of time, but indicated that there was no basis for the Third Stay, came into force on 25 October 2008. Very shortly thereafter, on 29 October 2008 MAL did in fact resume the Building Permit Proceedings and declared the evidence gathering phase of the building permit proceedings in that regard closed. Of course, by that stage, on the Claimants' case, the Board of ECE had already resolved to abandon the project.

4.803 It thus appears to the Tribunal that, but for the filing of the appeals by Tschechien 7 and other entities, MAL would have been able to discontinue the stay substantially earlier. The Tribunal does not regard it as critical in this regard that the Claimants' appeal was filed out of time. More important is that Tschechien 7, despite having a strong basis from the Ministry's letter (which it had forwarded to MAL on 31 July) to argue that the Third Stay should not have been adopted and should be discontinued, decided to file appeals which, owing to the procedural requirements of Czech law, stood in the way of MAL taking any action on the basis of that letter. Whatever its other merits or demerits, it is clear therefore that a significant element in the delay caused by the Third Stay in the Building Permit proceedings was not attributable to the Respondent.

c. The Due Process and Transparency Complaints

4.804 The Tribunal can deal somewhat more briefly with the Claimants' claims of breach of the standard of fair and equitable treatment on the basis of the other 'strands' identified by the Claimants, namely violation of due process, and of the requirement that the legal system be transparent and predictable. The Claimants' reliance on these 'strands' subsided noticeably during the course of the oral proceedings.

¹⁷⁶⁹ By contrast, RAL was able swiftly to quash the Third Stay insofar as it related to the water permit proceedings, as the appeal by Tschechien 7 was filed in a timely fashion.

- 4.805 Taking first the question of due process, the Tribunal has no doubt that a failure to accord due process in administrative or judicial proceedings may, if unremedied and of sufficient seriousness, result in a violation of the fair and equitable treatment standard. The purpose of due process is however, while enabling the decision-maker to exercise its administrative or judicial powers, to see to it that that is done in a manner which is fair to the interests of an investor; it follows that there can be no violation of fair and equitable treatment in a flawed decision at first instance which is subsequently reversed on appeal, and the effects of which were therefore only temporary.
- 4.806 The Claimants' argue that the First Ministry Decision was a breach of due process because of its denial to Tschechien 7 of the status of participant in relation to Multi's appeal against the planning permit. The fact remains however that the Decision was quashed by the First Minister Decision, and in all subsequent phases of the Extraordinary Review Proceedings, Tschechien 7 was treated as a participant. Moreover, albeit via a complex path through the remand, the Second Ministry Decision and the Second Minister Decision, Tschechien 7 did ultimately prevail on the merits on the question which was the subject of the Extraordinary Review Proceedings. The Tribunal notes in any event that the finding in the First Ministry Decision that Tschechien 7 was not a participant did not apparently have the effect of precluding Tschechien 7 from filing submissions in relation to Multi's appeal in the proceedings leading up to that Decision, which it duly did, and thereafter was able to appeal against that decision. The defects in the First Ministry Decision and the procedures leading up to it therefore seem to the Tribunal to be more formal than substantial. Finally, although the two sets of Ministry and Minister decisions in the Extraordinary Review Proceedings were undoubtedly complex and took time to complete, the Tribunal is of the view that the delays involved were not out of the ordinary and thus not a violation of due process. The Tribunal therefore sees no basis to conclude that Tschechien 7 was in fact denied due process in breach of the standard of fair and equitable treatment.
- 4.807 The Tribunal can deal briefly too with the invocation by the Claimants of a transparency and predictability 'strand' in the standard of fair and equitable treatment. The essential thrust of this argument is, in turn, also closely related to the expectation that the relevant law is readily ascertainable and will be applied in a proper manner, so that the analysis of the various proceedings set out above is equally applicable to it.
- 4.808 The Tribunal begins by observing that many of the cases in which the requirement of transparency or predictability of the legal system has been invoked have concerned situations in which the law has been changed to the detriment of the investor following the making of its investment. By contrast, in the present case the overall structure of Czech administrative law remained unchanged throughout the relevant period. And, as regards planning law, the possibility of appeals in relation to permitting matters (including the Extraordinary Review procedure) at all times formed a part of the wider applicable system, and must therefore have been within the Claimants' reasonable contemplation when making and developing their investment plans. As regards the Building Code in particular, the Tribunal notes that although did undergo a change in 2007, there was no allegation that the change unduly disadvantaged developers in general or the Claimants in particular. It seems in any event to have been the case that a transitional device was available to developers to preserve the application of the

known and tried procedures, and that Tschechien 7 took advantage of it.¹⁷⁷⁰ The Tribunal cannot regard the complaints raised by the Claimants about the handling of their planning permits as raising any serious question as to the transparency or predictability of the applicable procedures.

4. Alleged Breach of the Prohibition of Expropriation (Article 4(2) BIT)

4.809 The Claimants also allege that the conduct of the Respondent's authorities constitutes, in effect, an expropriation or nationalization of their investment, in violation of Article 4(2) of the BIT.

4.810 Article 4(2) provides, in relevant part

Investments of investors of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for public interest and against compensation.

4.811 The Tribunal agrees with the Respondent's submission that, to bring this provision into play, there must have been some 'taking' of an investment. That applies equally to a claim for indirect expropriation or, in the words of Article 4(2), "measures the effects of which would be tantamount to expropriation or nationalization".

4.812 The Tribunal in *Metalclad* framed the prohibition of direct or indirect expropriation and measures tantamount to such expropriation in Article 1110 of the NAFTA as including

*incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not to the obvious benefit of the host State.*¹⁷⁷¹

That has however been criticized as extending too far the boundaries of protection against indirect expropriation. The Tribunal need not form a definitive view as to whether the *Metalclad* standard is the appropriate one to be applied in the present case, as it is of the view that even applying that standard, the Claimants' claim of expropriation must fail.

4.813 The Claimants appear to equate the *Metalclad* Tribunal's reference to the "reasonably-to-be expected economic benefit of property" to their own expectations of the economic benefit that they would have obtained from the project if it had come to fruition in accordance with their plans. The introduction of that approach would however subvert the notion of protection against expropriation or measures tantamount to expropriation, and render it the equivalent of no more than a further protection of the legitimate expectations of the investor. In the view of the Tribunal, the *Metalclad* tribunal had in mind the economic benefits which any owner can

¹⁷⁷⁰ See paragraphs 2.5 and 2.8 above.

¹⁷⁷¹ *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, para. 103.

reasonably expect to enjoy as a result of his or her ownership of property. It is the interference with those benefits, short of an outright taking of the property but equivalent in terms of its intensity, seriousness and duration of its effects,¹⁷⁷² which may, in an appropriate case, give rise to a finding of an indirect expropriation. The test is in other words an objective one, based on a standard of reasonableness.

4.814 In any case, the Tribunal is of the view that the Claimants' claim of a "creeping" expropriation of their investment faces insurmountable difficulties on the facts. The Claimants insisted throughout that their "investment" for the purposes of Article 1(1) of the BIT was their shareholding or other participatory rights in Tschechien 7 and ECE Praha. They were not however able to point to any measure adopted by the Respondent which had adversely affected their rights in that regard. The Claimants retain their participatory rights in Tschechien 7 and ECE Praha; their complaint is that those rights are now worth less to them than they had hoped and expected. That does not however in and of itself give rise to a claim of expropriation, even if it could be shown that the reduction in value was solely attributable to the actions of the Respondent.

4.815 Moreover, the Tribunal finds no basis for a finding that there has been either a direct or indirect expropriation of the land plots on which the Galerie project was to be built; the plots remain the property of Tschechien 7. Similarly, although those plots of land may be worth far less to the Claimants in circumstances in which the Galerie project has not been built and there must now be severe doubts as to its future commercial viability, the mere drop in value of property cannot normally be characterized as amounting to an expropriation. As explained above, the Claimants' business model was to sell on projects of this kind to investors at a point prior to the start of construction work, and enter into a long-term agreement with the investors to manage the centre on their behalf. The expropriation claim therefore mistakenly conflates the Claimants' rights constituting their investment, which they hoped to exploit, and the expectation of future benefit or future profits, if that exploitation had proved commercially viable. The position might have been different had the Galerie project in fact been completed, and had the Claimants now been complaining against some measure interfering in a substantial way with their continuing right to its profitable exploitation. However, that is not the situation with which the Tribunal is faced; the Claimants' investment was at most for the most part executory, and the anticipated value to the Claimants of the project if it had in fact been completed cannot constitute something which was prospectively taken.

4.816 In the absence therefore of any 'taking' of the Claimants' investment by the Respondent, the claim for breach of the prohibition of expropriation contained in Article 4(2) of the BIT must fail.

¹⁷⁷² The Claimants recognized that in order for an expropriation to be found, the Tribunal would have to find "significant and permanent deprivation" (T10/128:5-7).

5. Alleged Breach of the Prohibition of Impairment of Investments by Arbitrary or Discriminatory Measures (Article 2(2) BIT)

a. The Applicable Standard

4.817 Article 2(2) of the BIT imposes an obligation upon the Contracting Parties not to

impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments in its territory of investors of the other Contracting Party.

4.818 Although the Claimants originally only complained of the arbitrary nature of the conduct of the authorities of the Respondent under the first limb of the test, reserving their position as whether those measures could also be characterized as discriminatory, they subsequently pleaded in the Memorial that the measures were also discriminatory by comparison with the treatment of their competitor, Multi. As noted above, in Procedural Order No. 5 the Tribunal rejected the Respondent's application to strike out certain parts of the Memorial in which the Claimants put forward a new claim alleging discrimination in breach of Article 2(2).

4.819 The Parties are in disagreement as to the appropriate standard to be applied to the prohibition of impairment, in particular in the determination of whether the measures adopted by the Respondent were arbitrary. In their written pleadings, the Claimants asserted that the touchstone for the prohibition of arbitrary measures is whether the conduct in question was rational. In that regard, they submitted that the threshold for a finding of arbitrary conduct enunciated in the *ELSI* case was inconsistent with the standard enunciated in the BIT, and that the correct standard is that submitted by the tribunal in *Lauder*, where arbitrariness was defined as "depending on individual discretion [...] founded on prejudice or preference rather than on reason or fact".¹⁷⁷³ In the alternative, they submitted that even if the *ELSI* standard is applicable, that once a *prima facie* finding of arbitrariness has been shown, the burden shifts to the State to provide an explanation which mitigates or explains the conduct in question.

4.820 By contrast, according to the Respondent, the applicable standard is that set out in *ELSI* (see paragraph 4.822 below). In any case, the Respondent questions whether the tribunal in *Lauder* did in fact intend to introduce a lower standard than that set out in *ELSI*.

4.821 As to the standard applicable in respect of the prohibition of impairment by discriminatory measures, the Claimants suggest that the standard for discriminatory conduct laid down by the Tribunal in *Saluka* provides the appropriate test, namely that "(i) similar cases are (ii) treated differently (iii) and without reasonable justification".¹⁷⁷⁴ The Respondent did not as such dispute that *Saluka* provided the appropriate test, although it emphasized that a breach of the prohibition of impairment on the basis of discriminatory measures would only occur when an investment was in fact impaired by a difference in treatment in comparison to others in comparable circumstances, and that difference in treatment was unjustified.

¹⁷⁷³ *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award of 3 September 2001, para. 221.

¹⁷⁷⁴ *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, para. 313.

4.822 In the Tribunal's view the judgment of the Chamber of the International Court of Justice in the *ELSI* case does indeed provide the appropriate standard:

*Arbitrariness is not so much something opposed to a rule of law, but something opposed to the rule of law. [...] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety*¹⁷⁷⁵

4.823 The Tribunal finds no inconsistency between this *dictum* and the decision in *Lauder v. Czech Republic*; there the tribunal referred to a decision "founded on prejudice or preference rather than on reason or fact".¹⁷⁷⁶ But in the view of the present Tribunal, a decision of a decision-maker based on 'prejudice or preference' would normally constitute a wilful disregard of due process of law and would be likely to surprise a sense of judicial propriety. Moreover, the Tribunal cannot understand the *Lauder* tribunal to have been suggesting that the mere fact that a decision involved the exercise of discretion automatically meant that it was arbitrary, but rather to have been referring to decisions which are adopted at the whim of the decision-maker, unconstrained by the facts or by reason.

4.824 Nor can the Tribunal accept that it is sufficient for an investor merely to establish a *prima facie* case of arbitrariness, and that thereafter it is for the respondent State to provide evidence mitigating or explaining the conduct. The Chamber in *ELSI* was clear in its statement that "without more, unlawfulness cannot be said to amount to arbitrariness"; although the Chamber subsequently observed that "a finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary", it also clearly envisaged that such a finding was not sufficient for that purpose. If an investor is able to show through its own evidence (including, where relevant, through the decisions of the local courts as to its unlawfulness) that a particular decision is presumptively arbitrary, it may well then be incumbent upon the respondent State to rebut the *prima facie* showing of arbitrariness. But the burden of proof remains; it is for a claimant to prove its case, including whether a decision complained of was arbitrary.¹⁷⁷⁷

4.825 As to the second limb of the prohibition contained in Article 2(2) of the BIT, which prohibits impairment by discriminatory measures, the Tribunal accepts the test enunciated by the *Saluka* Tribunal, namely that:

*State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.*¹⁷⁷⁸

¹⁷⁷⁵ *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, p. 15, at p. 76 (para. 128).

¹⁷⁷⁶ Memorial, paras. 523-524.

¹⁷⁷⁷ The authors of the academic commentary relied upon by the Claimants were not suggesting that there exists a formal reversal of the burden of proof, but rather were making precisely the point that once strong evidence as to the arbitrariness of a particular decision is adduced by a claimant, it falls *de facto* to the respondent State to rebut the allegation.

¹⁷⁷⁸ *Saluka Investments B.V. v. The Czech Republic (UNCITRAL)*, Partial Award of 17 March 2006, para. 313.

b. The Claimants' Allegations of Breach

- 4.826 On the question of arbitrariness, although the Claimants assert that the decisions complained about were *prima facie* arbitrary, they failed to put forward any coherent grounds as to why this was the case. The Memorial simply asserted their arbitrariness and submitted that the Respondent “has never explained why its authorities acted contrary to the law persistently”.¹⁷⁷⁹
- 4.827 The Tribunal refers to its discussion of the Claimants' claims of breach of the standard of fair and equitable treatment and is of the view that (although the converse is not always the case) any decision that is arbitrary would necessarily breach the fair and equitable treatment standard. That being so, it is not necessary for the Tribunal to review once again the individual decisions of which complaint was made by the Claimants. It is sufficient for it to recall that, as set out above in its consideration of fair and equitable treatment, on their face the majority of the relevant decisions constituted reasonable applications of the applicable Czech law, even if some of them contained legal errors.
- 4.828 However, the Third Stay adopted by Mr [redacted] of MAL calls for special comment. The decisions constituting the Third Stay were adopted on 9 and 10 July 2008. At that time, the Ministry had already adopted the First Ministry Decision on 28 February 2008, which would have affected the validity of the Planning Permit. Although that decision had never taken effect and had subsequently in turn been overturned by the First Minister Decision adopted on 27 June 2008, nevertheless the Minister had remanded the case to the Ministry for further decision. There was no dispute between the Parties or their legal experts that the Third Stay was unlawful as a matter of Czech law, given that the pendency of the Extraordinary Review Proceedings did not constitute a valid ground for suspension of the Building Permit proceedings, and that that had been confirmed by the Ministry's letter of 31 July 2008.
- 4.829 In those circumstances, although it is not disputed that the Third Stay was unlawful, the Tribunal is of the view that it cannot be characterized as arbitrary. In the Tribunal's view, it is understandable that Mr [redacted], faced with the prospect that the decision of the Ministry upon remand in the Extraordinary Review Proceedings might once again affect the validity of the underlying Planning Permit, which would inevitably have rendered the Building Permit proceedings moot, should have taken the view that it was better to stay the Building Permit proceedings until the question was resolved. His evidence was that, at the time, he thought that what he had done was lawful.¹⁷⁸⁰ Although that was based on a misunderstanding of what Czech law required in such circumstances (as Mr [redacted] freely accepted at the hearing), the Tribunal cannot but have some sympathy with the situation in which he found himself, and cannot therefore characterize the decision he took as arbitrary.
- 4.830 Further, although the Second Minister Decision was adopted after the critical date on which the Claimants assert that the decision was taken to abandon the Galerie project, brief comment is also required on it, as the Claimants rely upon the different result reached as evidence that the First Minister Decision had been arbitrary.

¹⁷⁷⁹ Memorial, para. 536.

¹⁷⁸⁰ T6/34:1-8.

- 4.831 The Tribunal cannot accept this submission. It has already noted that remand to the Ministry was an option that was open to the Minister under Czech law; moreover, given both that the assessment of the relative weight of rights acquired in good faith required a detailed factual investigation and that a remand had been the outcome originally requested by the Claimants, the Tribunal can find nothing inherently unreasonable in the Minister's decision in favour of so remanding the question. Moreover, the fact that the Minister in the Second Minister Decision chose to terminate the proceedings does not demonstrate that his first decision was wrong; by the time that Decision was taken the Ministry (in the Second Ministry Decision) had again purported to invalidate the planning permit, and evidence was available as to the rights acquired in good faith by Tschechien 7. In these circumstances, the Tribunal finds the Second Minister Decision entirely understandable.
- 4.832 As to the Claimants' claims of discriminatory treatment by comparison with the Forum project, the Tribunal must begin by considering whether the two projects were sufficiently similar as to require identical treatment.
- 4.833 The evidence of Mr [redacted] was that the scale of the works involved in the two projects was markedly different, and in particular, that the Galerie project was far more extensive, in particular insofar as it involved major modifications to the external roads.¹⁷⁸¹ From having visited the site, and having had indicated to it the extent of the road modifications that the Multi project involved, and that the Galerie project would have necessitated, the Tribunal is of the view that there were material differences in the scale of the two projects.
- 4.834 Although the Claimants relied on the fact that the Galerie project required six separate planning permits, whilst the Forum project had required only two, the Tribunal concludes that that difference was at least in part attributable to the differing scopes of the two projects; both building projects required only one building permit for the construction of the main building, whereas four of the total of six building permits required for the Galerie project related to the external road works, with the final permit relating to Galerie's internal roads.
- 4.835 The Tribunal cannot moreover ignore the fact that, on the evidence before it, the splitting of the permits was not imposed upon the Claimants, but was the result of negotiation and agreement between the Claimants, the City of [redacted] and MAL, apparently with a view to minimizing the risk of appeals by Multi.
- 4.836 The Tribunal further sees nothing in the Claimants' complaints of discriminatory treatment in respect of the various appeals in the planning and building permit proceedings.
- 4.837 The Tribunal is satisfied that the principal cause of delay in the planning permit proceedings and the Extraordinary Review Proceedings was the appeals filed by Multi, whereas Multi faced only minor appeals in its own permitting proceedings. Once the appeal procedures were instituted, they had to run their natural course. The Tribunal has already found that the actions of Multi in that regard do not engage the legal responsibility of the Respondent.
- 4.838 As for the delays in the Building Permit Proceedings, the Tribunal sees no basis on which they can properly be characterized as discriminatory. The First Stay was the result of the

¹⁷⁸¹ T6:48/21 – 49:5.

Claimants not having filed complete documentation, and, as the Claimant eventually accepted, was relatively routine. The Second Stay was imposed principally as the result of the uncertainties resulting from the overlap issue, and it goes without saying that, as Multi's building permit proceedings came first, they did not face similar problems. Finally, as to the Third Stay, the Tribunal refers to its findings above, which provide no basis on which to conclude that the misunderstanding by Mr [redacted] of the relevant law was the disingenuous result of any discrimination against the Respondent in favour of Multi.

4.839 The Tribunal therefore rejects the Claimants' claims of breach of the prohibition of impairment by arbitrary or discriminatory measures contained in Article 2(2) of the BIT.

6. The Claimants' Allegations of Corruption

4.840 Having concluded that the various decisions adopted in the course of the proceedings do not, on their face, disclose any violation of the various standards of protection invoked by the Claimants, the Tribunal must now consider whether a different conclusion is warranted on the basis of the Claimants' allegations that those decisions were in fact procured by corruption.

a. The Claimants' Position

4.841 No complaint of corruption was advanced in the Statement of Claim or the Memorial, although as noted above, the Memorial made reference to general information drawn from NGO reports as to the existence of corruption as well as noting the allegations against Minister [redacted] in an unrelated case and suggesting that it was a "striking coincidence" that in that case, the Minister was accused of taking bribes from a real estate developer and in the present case, he is primarily responsible for the failure of one real estate developer's project to the advantage of another real estate developer.¹⁷⁸²

4.842 However, Part 2 of the Claimants' Reply contains a section entitled, "Multi: A Case of Corruption", which argues that Multi had a "vital interest that its shopping centre would open first and that GALERIE [redacted] would open later, or preferably not open at all." It contends that Multi "therefore exercised undue influence on Mr [redacted] to obstruct the permit proceedings for GALERIE [redacted] and instead to simplify matters in the Building Permit Proceedings for [Multi's project] FORUM." It argues further that "Multi used its construction firm [redacted] which had an exceptionally good relationship to the mayor Mr [redacted] to influence the local authorities."¹⁷⁸³

4.843 At the September hearing, the allegations of corruption formed a major component of the Claimants' case, and by the Prague hearing, they formed the lens through which the Claimants submitted that all of their complaints were to be viewed.

4.844 The Claimants do not adduce any specific evidence of corruption. Their allegations of corruption are inextricably bound up with their challenge to the merits of the decisions by various officials of the Czech Republic which they challenge. At the oral hearings, it was

¹⁷⁸² Above, paragraph 4.121 and Memorial, para. 286.

¹⁷⁸³ Reply, paras. 29-30.

repeatedly contended that those decisions were “bogus”,¹⁷⁸⁴ the implication being that no official acting reasonably and lawfully would have arrived at these decisions. Therefore, the Claimants assert, it is the combined weight of these unreasonable and unlawful decisions, taken together with what they say is general evidence of corruption in the Czech Republic, should lead the Tribunal to the inference that corruption motivated the decisions impugned in this Arbitration.

4.845 After asserting their belief that Multi unduly influenced various officials at different levels of the Czech Government so as to prejudice the Galerie project, the Claimants’ Reply observed:

*Claimants admit that they do not have direct proof of Multi paying the officials. However, this is not necessary. During the preparation of this Reply, Claimants found numerous serious indices that leave no other option but to conclude that a corruption scheme exists. The following summarizes the various irregularities that have occurred in this case and that point to the aforementioned scheme...*¹⁷⁸⁵

4.846 The Reply then sets out the evidence which the Claimants contend supports this allegation. It begins by directing the Tribunal to general evidence of corruption in the Czech Republic. A report prepared by Transparency International is cited in support of the proposition that the Respondent suffers from systemic corruption.¹⁷⁸⁶ Ministerial resignations from the Czech Government for improper acts are noted (the Minister of Environment and the Minister of Transportation have both resigned since December 2010), as is the apparent suicide of an officer of the anti-corruption police in Prague.¹⁷⁸⁷ It is also noted that Mr [redacted], the then-Minister who took two of the decisions that are challenged in this proceeding, was forced to step down from office temporarily owing to allegations of improper conduct.¹⁷⁸⁸

4.847 With regard to the City of [redacted], the Reply asserts that the Czech chapter of Transparency International (“TIC”) has called [redacted] a city “run by the building lobby”, because of close connections between municipal politicians and local construction companies.¹⁷⁸⁹ The Reply contends in particular that the [redacted], which constructed Multi’s Forum [redacted] complex, was Mayor [redacted] former employer. [redacted] is said to be highly influential in the City’s developmental circles,¹⁷⁹⁰ and, indeed, it was [redacted] that arranged ECE’s first meeting with Mayor [redacted] in 2005 and ECE’s Mr [redacted] considered hiring [redacted] because of its

¹⁷⁸⁴ See e.g. T1/103:24 – 104: 7: “The acts of this administration are so obviously unlawful, are so egregious and so damaging that I can get there without having to prove corruption, but we cannot avoid the circumstances in which these decisions were made at local and ministerial level. The decisions are perverse, they are unlawful, they are irrational, they are legally incoherent. The suspensions are bogus in the second and third cases, and admittedly unlawful in the third. They have catastrophic effects...”

¹⁷⁸⁵ Reply, para. 40.

¹⁷⁸⁶ Reply, paras. 41-43.

¹⁷⁸⁷ Reply, para. 43.

¹⁷⁸⁸ Reply, paras. 109-114. He returned to office in April 2008.

¹⁷⁸⁹ Reply, para. 45. In fact, reference to Core 2/45 (Exhibit C-109), the Transparency International Czech Republic report, shows that the report quotes an interview with [redacted] then-Deputy Mayor of [redacted], in an October 2003 article in *Reflex* magazine in which she is quoted as saying that “... the volume of public contracts that [redacted] gets (is) the basis of the fact that [redacted] has the reputation of a city run by the building lobby.”

¹⁷⁹⁰ Reply, paras. 44-50: “One of the construction companies most involved in corruption schemes is the company which, coincidentally, was also the general contract for Multi’s project FORUM”: Reply, para. 7.

perceived influence with City officials.¹⁷⁹¹ The Reply asserts “that [redacted] is well-known for corruption, in particular corruption by construction companies”¹⁷⁹² and lists various contracts that the [redacted] was said to have received as a result of its “corrupt entanglement” with then-Mayor [redacted].¹⁷⁹³

4.848 This general evidence in support of the close relationships and allegedly corrupt acts in relation to other building projects was supplemented by more specific evidence on the various permit proceedings relating to the Galerie [redacted] project, which came principally from the testimony of Ms [redacted]. Ms [redacted], a Czech lawyer in private practice at the time and now an employee of ECE Praha, was one of the external legal counsel who advised Tschechien 7 and ECE Praha on various issues relating to the permit proceedings and acted on their behalf in filing motions and appeals. Her two witness statements attest to events in which she participated, criticize various decisions taken at the municipal level and by the Ministry and Minister of Regional Development, and recount statements made to her by various Czech officials or recounted to her by Mr [redacted]. Mr [redacted] a partner in the company SIAL, was the chief designer of the Galerie [redacted] project documentation and was responsible for procuring the relevant permits for Tschechien 7, EKZ Prag 1 and the City of [redacted].

4.849 For example, in her second witness statement, Ms [redacted] testified that Mr [redacted] told her that between the First and Second Stays of the building permit proceedings, employees of MAL had informed him that they had been instructed to find ways to obstruct the permit proceedings for GALERIE [redacted] and in particular, to find grounds for suspending the proceedings.¹⁷⁹⁴

4.850 Three officials in particular are singled out in the Claimants’ corruption case:

[redacted] : at the time of the events giving rise to the claim: Mr [redacted] is alleged to have a particularly close relationship to the principal of [redacted] Mr [redacted] who was apparently best man at Mr [redacted] wedding.¹⁷⁹⁵ Mr [redacted] was also a former manager of [redacted] and said to have been on the Company’s Board of Directors.¹⁷⁹⁶ Thus, according to the Claimants, “through [redacted], there was a strong connection between [redacted] and Multi.”¹⁷⁹⁷ In addition to identifying certain allegedly improper transactions involving the [redacted] company which occurred while Mr [redacted] the Claimants noted that he had recently been named in an investigation launched by the Czech anti-corruption agency to inquire into the acts of certain municipal officials in relation to the letting of contracts for the construction of works when [redacted].

¹⁷⁹¹ T4/82:14 -83:7.

¹⁷⁹² Reply, para. 7.

¹⁷⁹³ Reply, paras. 48-50.

¹⁷⁹⁴ [redacted] second witness statement, para. 61. Annexes 5 and 6 to Ms [redacted]’s statement contain translations of contemporaneous notes of these conversations, recording Mr [redacted] as saying that a MAL employee “received an order to find reason for suspension: ‘Mr. [redacted] is not the only one in the city hall’”.

¹⁷⁹⁵ Reply, para. 50.

¹⁷⁹⁶ Ibid., para. 7.

¹⁷⁹⁷ Ibid., para. 7.

¹⁷⁹⁸ T5/88 *et seq.*

∴ As noted above, it is contended that due to Multi's realisation that it could not compete with Galerie, it "therefore exercised undue influence on Mr [redacted] to obstruct the permit proceedings for GALERIE and instead to simplify matters in the Building Permit Proceedings for FORUM."¹⁷⁹⁹ The Tribunal is invited to analyse certain of the decisions adopted by MAL and to find that they were tainted by corruption. Ms [redacted]'s evidence is cited in support of this allegation.

[redacted] the Minister of Regional Development at the relevant time: The allegations of corruption pertain not to the performance of his office as minister, but rather to a real estate transaction in Vsetin. In this regard, it was noted that it was alleged in the Czech Republic that when Mr [redacted] was the Mayor of Vsetin, he took a bribe of 500,000 CZK from the H&B Real Company relating to the sale of the majority share of the municipal housing company.¹⁸⁰⁰ From November 2007 until April 2008 Mr [redacted] stepped down from his positions in the Czech government as result of allegations made by a Czech television station. He subsequently returned to government and took the First and Second Minister decisions in the Extraordinary Review Proceedings. Ms [redacted]'s evidence as to alleged irregularities in the acts of the Ministry and of the Minister himself is also cited in support of this allegation.

4.851 Allegations are also made against the unnamed official who took Tschechien 7's Planning Permit down from the public notice board prematurely¹⁸⁰¹ as well as unnamed officials within the Ministry of Regional Development.¹⁸⁰² Insofar as the Ministry of Regional Development is concerned, it is not contended that the Ministry as a whole is implicated, but rather that "individuals involved in the Extraordinary Review Proceedings" obstructed the Claimants.¹⁸⁰³ As in the case of Mr [redacted], the allegation is that there must have been corruption at the Ministry because Multi was the only party that benefited from certain decisions taken by the Ministry.

4.852 On this basis the Reply asserts with respect to the corruption allegations:

Claimants submit that the following are the relevant issues to be decided:

- *There was a corruption scheme involving Multi and individuals within the authorities. Multi and its construction company unduly influenced representatives of the City of [redacted] and of MAL as well as the Minister of Regional Development.*
- *As part of the corruption scheme, these individuals illegally obstructed Claimants. Claimants were subjected to numerous non-standard and unjustified delays in the Extraordinary Review Proceedings and in the Main Building Proceedings.*

¹⁷⁹⁹ Reply, para. 30.

¹⁸⁰⁰ Reply, para. 110.

¹⁸⁰¹ T1/55:17 – 56:18 and T10/17:7-10" "...the only logical explanation that you can find for taking it down half a day early is that it was a corrupt act, and it benefited Multi to do that."

¹⁸⁰² Reply, para. 37.

¹⁸⁰³ Ibid.

- *As part of the corruption scheme, these individuals also illegally favoured Multi, in particular by applying an easier, but legally inapplicable, type of proceeding and by illegally requiring only one application for Multi's Building Permit.*¹⁸⁰⁴

4.853 It was further contended that the irregularities in the permit proceedings “were not a mere pearl chain of coincidences, but the expression of a deliberate attempt to favour Multi over Claimants” and when viewed against this background, “most other issues discussed in this arbitration become irrelevant.”¹⁸⁰⁵ The Claimants point to differences in the treatment of their permit applications and those of Multi and consider that this is “the most obvious indicator that corruption is involved.”¹⁸⁰⁶

4.854 There is a question as to whether the Claimants’ case was that the identified and unidentified officials acted in concert. For example, Claimants made a point of excluding from their accusations _____, Mr _____, and other officials in the Czech administration who “did not participate in the corruption scheme of Multi, Mr. _____; Mr. _____ and Mr. _____.”¹⁸⁰⁷ Although the suggestion of a “scheme” involving different actors seemed to imply that it was being alleged that various officials in different offices and at different levels of the State acted in concert with Multi, at the hearing counsel for the Claimants took the position that it was not necessary for the Claimants to show that the officials acted in concert in order to make out the claim.¹⁸⁰⁸

4.855 As noted above, Ms _____’s testimony is of relevance to both the alleged breaches of the BIT and to the corruption allegations. Her two witness statements submitted that: (i) incorrect decisions were deliberately made by the authorities; (ii) the Extraordinary Review Proceedings, as well as the Building Permit proceedings were delayed for improper reasons; and (iii) incorrect and irregular procedures were followed by the Czech authorities in relation to the various measures taken, or not taken, as the case may be.

4.856 With respect to the splitting of the Building Permit proceedings in February/March 2008 (where the parties disagree as to who pressed for this to happen), Ms _____’s written evidence was that _____ told her and her ECE colleagues that Mr _____ wanted the building permit process to be split; she argued against that approach, but _____ informed her that he could not do anything and that this was what Mr _____ wanted.¹⁸⁰⁹ On her account, she subsequently telephoned Mr _____; but he shouted at her that he would refuse the application if it was not split. She was herself against splitting the applications because it did not make sense to her and she “did not trust Mr _____ to keep his word”¹⁸¹⁰ (although she did not say why). However, after discussion with ECE Mr _____

¹⁸⁰⁴ Reply, para. 26.

¹⁸⁰⁵ Reply, para. 27.

¹⁸⁰⁶ Reply, para. 117.

¹⁸⁰⁷ Reply, para. 36.

¹⁸⁰⁸ T10/33:10-13.

¹⁸⁰⁹ _____’s second witness statement, paras. 38-39.

¹⁸¹⁰ _____’s second witness statement, para. 41.

prevailed and the applications were split. Her view was that the splitting of the individual building permit process worked only to ECE's disadvantage.¹⁸¹¹

4.857 The Reply also contended that the "Claimants know from a conversation with two employees of MAL that the employees were instructed to find pretexts for delaying the proceedings and in particular to find reasons for suspensions."¹⁸¹² Ms testified that she was told by Mr. of SIAL, that two employees of MAL informed him that they had been instructed "to find ways to obstruct the permit proceedings for GALERIE", and in particular that "they were advised to find grounds for suspending the proceedings."¹⁸¹³

4.858 With respect to the First Ministry Decision in the Extraordinary Review Proceeding, Ms testified that Ms told her that after that decision, (which had held that Tschechien 7 was not a participant), Ms had gone to see for a meeting at which Mrs was present. Ms recounted that Mrs was reported by Ms to have been "aware of the incorrectness of deciding that Tschechien 7 is not a party to the [Extraordinary Review] proceedings."¹⁸¹⁴ Ms testified that this "greatly disturbed" her and to her "it seemed as if Mrs and/or had made the decision according to the instructions of someone, but not according to the law."¹⁸¹⁵ She did not elaborate on how she drew this inference from the comment made to her by Ms

4.859 As for Minister decision not to follow the Advisory Committee's recommendation adopted on 22 April 2008, which had expressed the view that Multi's objections to the Planning Permit granted in favour of Tschechien 7 "should be irreversibly refused",¹⁸¹⁶ Ms testified that before the First Minister Decision, Ms, had informed her that according to her experience, the Ministry had never before differed from the Advisory Committee's recommendation. She said further that she received an e-mail which indicated that the Minister's decision on the challenge to the First Ministry Decision had already been prepared in line with the Advisory Committee's resolution of 20 May 2008 and that it was to be signed by the Minister. This of course did not occur and Ms noted that Ms was later transferred (the implication apparently being that she had been demoted for having communicated with a representative of Tschechien 7).¹⁸¹⁷ In the event, (as already indicated above) the First Minister Decision differed from that recommended by the Advisory Committee, which counsel for the Claimants characterized as highly irregular.¹⁸¹⁸

¹⁸¹¹ second witness statement, para. 46.

¹⁸¹² Reply, para. 9.

¹⁸¹³ Reply, paras. 57-61. second witness statement, paras. 61-63.

¹⁸¹⁴ second witness statement, para. 13.

¹⁸¹⁵ second witness statement, para. 14.

¹⁸¹⁶ second witness statement, para. 15.

¹⁸¹⁷ second witness statement, paras. 16-17. The Reply discussed this under the heading "Displacement of

¹⁸¹⁸ T10/21:2-5.

4.860

4.861 Finally, in her second witness statement Ms [redacted] noted, with respect to the events occurring within the Ministry, that after discussing various issues with Mr [redacted], it was agreed that he would make a written witness statement for use in the arbitration proceedings. She testified that she summarised the contents of their conversation and sent the summary as the basis for a draft statement to Mr [redacted] one day after their meeting.¹⁸²¹ However, Mr [redacted] declined to prepare a witness statement along those lines. In the event, the Claimants filed the draft of the matters to which Ms [redacted] had expected Mr [redacted] to attest.¹⁸²²

b. The Respondent's Position

4.862 The Respondent objects to the corruption allegation on procedural grounds and rejects it as to its merits. It characterizes the allegation as a new and belated theory in the Claimants' case and in the Rejoinder objected that the "change of claim" was a violation of Procedural Order No. 1, Article 20 of the UNCITRAL Arbitration Rules, and basic notions of due process.¹⁸²³

4.863 With respect to the filing by the Claimants of the unsigned witness statement of Mr [redacted] the Respondent likewise raised both procedural and substantive objections; it argued that submitting an unsigned witness statement to be filed in the proceeding violated Article 25 of the UNCITRAL Arbitration Rules and argued further that the reason why Mr [redacted] refused to sign it was because it was untrue.¹⁸²⁴ In this regard, the Respondent directed the Tribunal's attention to Mr [redacted]'s signed witness statement filed with its Rejoinder in which Mr [redacted] makes precisely that point.

4.864 The Respondent also objected to the *ex parte* circumstances in which Mr [redacted] was interviewed by Ms [redacted] and the Claimants' failure to advise the Respondent that he and another employee of the Ministry were being approached with a view to obtaining statements from them for use in the present proceedings.¹⁸²⁵

4.865 On the merits of the corruption claim, in its Rejoinder the Respondent noted the absence of any prior criminal complaint of corruption made to the relevant authorities in the Czech Republic

¹⁸¹⁹ [redacted] second witness statement, para. 21.

¹⁸²⁰ [redacted] second witness statement, para. 22.

¹⁸²¹ [redacted] second witness statement, paras. 33-35.

¹⁸²² Exhibit C122.

¹⁸²³ Rejoinder, paras. 5-7.

¹⁸²⁴ Rejoinder, para. 8.

¹⁸²⁵ Rejoinder, para. 11.

prior to the matter being raised in the Reply.¹⁸²⁶ The Respondent asserts that the complaint is entirely unsupported by the evidence and it takes issue with the use of newspaper clippings and general studies of alleged corruption in the Czech Republic that have nothing to do with this case.¹⁸²⁷ It submitted with the Rejoinder witness statements by the individuals who are specifically alleged to have engaged in corruption.¹⁸²⁸

4.866 The Respondent stressed that the Claimants admitted that they had no evidence of Multi paying bribes to government officials.¹⁸²⁹ In their written testimony, Messrs [redacted], and [redacted] each expressly denied the allegations of bribe-taking.¹⁸³⁰ When, at the hearing, the allegations were put directly to Messrs [redacted] and [redacted], they repeated their denials.¹⁸³¹

4.867 The Respondent also summarized in tabular form the various allegations with summaries of the evidence said to support them and submitted that, with the exception of one paragraph of the second witness statement of Ms [redacted] there is no evidence which supports these allegations.¹⁸³²

c. The Tribunal's Findings

i. The Treatment of Mr [redacted] Witness Statements

4.868 As noted above, the Tribunal was informed, prior to the hearing in London that Mr [redacted] had decided that he would not attend to be examined on the contents of his two witness statements. At the hearing, the reason provided by Counsel for the Claimants was that his business partners feared that testifying against the Czech Republic would damage their firm's professional dealings with Czech authorities.¹⁸³³

4.869 As also noted above, the Parties initially disagreed as to how the Tribunal should treat Mr [redacted] written statements in view of his non-attendance. The issue was one of some considerable significance because in, addition to the content of his statements, which the Respondent was now to be denied the chance to challenge in cross-examination, Ms [redacted] had testified as to statements attributed to certain officials that she said Mr [redacted] had passed on to her.¹⁸³⁴ Thus, the crucial intermediary between the Claimants and the local building authorities, on whose statements Ms [redacted] relied, would not be available to testify as to the events in which he participated directly.

¹⁸²⁶ Rejoinder, para. 19.

¹⁸²⁷ Rejoinder, para. 21.

¹⁸²⁸ Rejoinder, para. 22.

¹⁸²⁹ Rejoinder, paras. 4 and 21.

¹⁸³⁰ Rejoinder witness statements of Messrs [redacted], [redacted], and [redacted] (at paras. 2-3, 2-3, and 20, respectively).

¹⁸³¹ For [redacted] T5/115:3-9 and for [redacted] T6/52:22-25. The allegation of corruption by Multi was not put to Mr [redacted].

¹⁸³² Rejoinder, para. 4.

¹⁸³³ T1/14:10-23.

¹⁸³⁴ Ms [redacted] also testified in her second witness statement that Mr [redacted] was not prepared to put the information concerning his conversations with MAL officials into his witness statement because he feared disadvantages for his future cooperation with the authorities in [redacted], given that he depended on a good relationship with the local authorities for future projects. ([redacted] second witness statement, para. 63).

4.870 However as detailed above, after hearing the submissions of both parties, the Tribunal decided that, consistent with Procedural Order No. 1, Mr [redacted] statements should be struck from the record.¹⁸³⁵ Accordingly, this Award makes no reference to the contents of either of his statements.

ii. General Comments

4.871 The Tribunal accepts the submission of the Claimants that it is bound to consider allegations of corruption. International tribunals cannot turn a blind eye to corruption and cannot decline to investigate the matter simply because of the difficulties of proof.¹⁸³⁶

4.872 Corruption is a serious matter and when it is alleged, a tribunal must weigh the evidence with care, both to see whether the allegation is made out (and if it is, to then determine the legal consequences that follow) and at the same time to safeguard those against whom corruption is alleged, if the allegations turn out to be unproven.

4.873 The burden of proof is undoubtedly on the party alleging corruption.¹⁸³⁷ As for the standard of proof that should be applied, different views have been expressed by tribunals, with some holding that a stricter standard of proof is required¹⁸³⁸, while others have found that the seriousness of the allegation does not necessarily mean that the tribunal must apply a heightened standard of proof.¹⁸³⁹ Irrespective of the standard of proof adopted by the Tribunal, it must examine with care the facts alleged to prove corruption.

4.874 No direct evidence has been submitted to the Tribunal of any bribe either being offered by or on behalf of Multi or being accepted by any Czech official at any level. Nor has any evidence been submitted to sustain the allegation that [redacted] the local construction company that is said to enjoy particularly close links with local politicians and was constructing the Forum

¹⁸³⁵ T2/126:10-127: 5.

¹⁸³⁶ Counsel for the Claimants argued in his opening: “You also have your international law obligations. Tribunals, if I may say so, with great respect, have to address this problem. It is part and parcel of what’s going on internationally: the OECD Convention, the other Model International Agreement on Investment for Sustainable Development, are imposing obligations on host states to combat corruption and take measures to deal with it.” T1/103:8-15.

¹⁸³⁷ *Wena Hotels Ltd. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award of 8 December 2000, paras. 77, 117. See also *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009, para. 221.

¹⁸³⁸ Judge Higgins made the general point in her Separate Opinion in *Oil Platforms*, that “the graver the charge, the more confidence there must be in the evidence relied on.” (Separate Opinion of Judge Higgins in *Oil Platforms (Iran v. United States of America)*, *ICJ Reports 2003*, p. 225, at p. 234 (para. 33)). In the context of an allegation of corruption in an investment treaty claim, the tribunal in *EDF v. Romania*, held that: “...corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption”; *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009, para. 221 (Footnotes omitted).

¹⁸³⁹ In the course of considering allegations of fraud against the claimant, the tribunal in *Libananco v. Turkey*, accepted that while fraud is a serious allegation, “it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that ‘the graver the charge, the more confidence there must be in the evidence relied on’ ... this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged”: *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Award of 2 September 2011, para. 125.

shopping centre, in any way used its connections to induce officials to delay or thwart the Claimants' investment.

4.875 Nevertheless, the Reply contends that "significant ... circumstantial evidence points to a corruptive scheme whereby Respondent intentionally obstructed GALERIE to enable the competitor Multi to succeed..."¹⁸⁴⁰ The Reply makes the point that it "is usually impossible for the investor to gather anything more than circumstantial evidence, as is the case here" and requests the Tribunal "to consider these difficulties when assessing the evidence."¹⁸⁴¹

4.876 When considering the Claimants' evidence the Tribunal has borne in mind the difficulties of obtaining evidence of corruption. It is well aware that acts of corruption are rarely admitted or documented and that tribunals have discussed the need to "connect the dots".¹⁸⁴² At the same time, the allegations that have been made are very serious indeed. Not only would they (if true) involve criminal liability on the part of a number of named individuals, they also implicate the reputation, commercial and legal interests of various business undertakings which are not party to these proceedings and which are not represented before the Tribunal. Corruption is a charge which an arbitral tribunal must take seriously. At the same time, it is a charge that should not be made lightly, and the Tribunal is bound to express its reservations as to whether it is acceptable for charges of that level of seriousness to be advanced without without either some direct evidence or compelling circumstantial evidence. That said, the Tribunal must of course decide the case on the basis of the evidence before it. If the burden of proof is not discharged, the allegation is not made out. The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.

4.877 One of the main predicates of the Claimants' corruption case is the allegedly 'bogus' measures that the Claimants contend frustrated their investment.¹⁸⁴³ The alleged unreasonableness and/or unlawfulness of the decisions of MAL, the Ministry of Regional Development and the Minister of Regional Development have been addressed by the Tribunal above, in its consideration of each measure complained of, and the Tribunal has no need to revert to the matter. All that needs to be said is that the predicate of a course of bogus measures has not

¹⁸⁴⁰ Reply, paras. 1, 27.

¹⁸⁴¹ Reply, para. 451.

¹⁸⁴² In this respect, the Tribunal notes the observation made by the tribunal in *Methanex Corporation v. United States of America*, a claim under NAFTA Chapter Eleven and the UNCITRAL Arbitration Rules, where in somewhat similar circumstances the claimant sought to prove that the State of California's true motivation in enacting certain measures was not its stated motivation: "Connecting the dots is hardly a unique methodology; but when it is applied, it is critical, first, that *all* the relevant dots be assembled; and, second, that each be examined, in its own context, for its own significance, before a possible pattern is essayed. Plainly, a self-serving selection of events and a self-serving interpretation of each of those selected, may produce an account approximating verisimilitude, but it will not reflect what actually happened...": *Methanex Corporation v. United States of America* (UNCITRAL), Final Award on Jurisdiction and Merits of 3 August 2005, Part III – Chapter B, Mr Gray Davis, ADM, and the US System of Political Contributions, para. 3.

¹⁸⁴³ T1/104:21-105: 6: "Now proving corruption, the hand in the till, the money in the briefcase, the transfer to a bank account, is never easy. It's never easy even for a government. But you have enough grounds to believe that there was a real risk of corruption, simply by looking at what happens in and what happened with this minister. No doubt about it. You have enough grounds in my submission to say, if you want to, that when you look at these perverse, irrational and unlawful decisions, there is another explanation, and the other explanation is, as the Americans would say, the fix is in".

been made out by the Claimants, and has been rejected by the Tribunal. It remains however the case that, even if a measure and the stated reasons therefore, is not ‘bogus’, it is still possible that the decision was made corruptly. A decision which on its face appears to be properly motivated or reasoned, could nevertheless have been made under improper influence or for an improper purpose.

4.878 In the Tribunal’s opinion, the Claimants’ entire case on corruption encounters serious difficulty.

4.879 The Tribunal must begin by stating that it finds to be deeply unattractive an argument to the effect that ‘everyone knows that the Czech Republic is corrupt; therefore, there was corruption in this case...’. The Tribunal acknowledges that some effort was made to adduce specific evidence of corruption, but it did feel that there was a strain of the ‘everyone knows’ argument in the overall case, for example in the reliance on reports of NGOs as to the general presence of corruption within the Czech Republic. The Tribunal does not close its eyes to the fact that the Czech Republic, like other countries, has had, and reportedly still has, problems with corruption. But the Tribunal remains vigilant against blanket condemnatory allegations which can have the appearance of an attempt to ‘poison the well’ in the hopes of making up for a lack of direct proof. Reference to other instances of alleged corruption may prove that corruption exists in the State, but it does little to advance the argument that corruption existed in the specific events giving rise to the claim. Nor do allegations of this kind, however seriously advanced, give rise to a burden on the Respondent to ‘disprove’ the existence of corruption. While the present Tribunal is therefore willing to “connect the dots”, if that is appropriate, the dots have to exist and they must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it.

4.880 Second, the Tribunal notes, as the Respondent has done, that there was no mention of corruption in the Statement of Claim. When the Memorial was filed, it contained only evidence of a general nature as to the existence of corruption as a problem within the Czech Republic, coupled with press reports of (unconnected) allegations against Mr [redacted] and rhetorical questions as to the motivations underlying the adoption of certain decisions taken by the relevant authorities. Indeed, even the less far-reaching allegations simply of discrimination against ECE and in favour of Multi were hardly adverted to in the Notice of Arbitration and Statement of Claim and emerged clearly only in the Claimants’ last written pleading.

4.881 Third, there is no evidence of any contemporaneous complaint of suspected corruption having been made by Tschechien 7, ECE Praha or ECE to any Czech authority during the relevant period. Around the time of the first letters to Messrs [redacted] and Mr [redacted] held a press conference in which ECE threatened to bring an investment treaty claim.¹⁸⁴⁴ Yet, neither Mr [redacted] letters to Prime Minister [redacted] nor Mr [redacted]’s letter to Minister [redacted] adverted to any allegation of corruption. Had ECE felt itself to be the victim of corruption however, it would have been advisable to express its suspicions to the relevant authorities with

¹⁸⁴⁴ T4/113: 25 – 118: 21. Mr [redacted] testified that: “Since the minister was not willing to receive me, we had to take a certain step, we called a press conference, and at this press conference I called for a swift legal decision in this matter so that we would know what our position was, to be able to make a qualified decision as to whether to continue or not in this project”.

a request that they be investigated.¹⁸⁴⁵ If all that was held were mere suspicions, it may be understandable that ECE decided that it would be indelicate or counter-productive to voice them. But that would not explain their absence from the Statement of Claim.

- 4.882 Fourth, there is the issue of the alleged agent of corruption, Multi, which is accused of having created the entire scheme. In every case of corruption, there is not only the corrupted; there must also be a corruptor. Multi is a leading European developer and competitor of ECE. Prominent international firms have been charged and found guilty of foreign corrupt practices, so a company's size and standing in its sector is no guarantee that its officers and employees will comply with legal prohibitions against corrupting foreign officials. However, when allegations of this seriousness are made against a leading company or against a government, there has to be a factual basis for them.
- 4.883 Admitting that they have no evidence that Multi engaged in improper acts of this nature, the Claimants put their case on the following basis: (i) the governmental decisions being challenged in this arbitration lacked any rational basis; (ii) the only beneficiary of the various acts complained of was Multi; (iii) the decisions therefore must have been committed at Multi's behest; (iv) it follows that Multi corrupted the various governmental actors to handle the permit applications and Extraordinary Review Procedure as they did.
- 4.884 Multi is not a party to this arbitration. Relevant officers and employees involved with the Forum project in [redacted] have not been called upon to give evidence by either Party, and Multi has not had the allegations put to it, nor had an opportunity to respond. Although the Claimants adduced general evidence of proven or suspected corruption in the Czech Republic and [redacted], they did not adduce *any* evidence of any prior or subsequent acts of corruption by Multi in the Czech Republic or in any other country.
- 4.885 Even had such evidence been offered, it would have required careful evaluation. Although a company may have been convicted of criminal offences in other contexts, it does not follow that it has engaged in criminal or improper activity in the events giving rise to the claim. For example, in *Methanex Corporation v. United States of America*, the tribunal rejected a claimant's attempt to assert that a third party company's unlawful activity in another context provided a basis for inferring that it had engaged in criminal or illegal activity with respect to the enactment by the government of a particular measure that was injurious to the claimant's business interests. The *Methanex* tribunal held that:

*The Tribunal has no legal basis for concluding that one unlawful activity of a corporation which leads to a criminal conviction of some of its officers transforms that entity into a criminal organisation for all purposes – either tainting per se all other actions by any division, subsidiary or other vehicle, no matter how separate or remote its activities from those upon which the conviction was based; or creating a presumption of unlawful behaviour in all other areas and thereby shifting the burden of proof.*¹⁸⁴⁶

¹⁸⁴⁵ Such a request and the Respondent's response thereto would then form a fact in any subsequent international claim.

¹⁸⁴⁶ *Methanex Corporation v. United States of America* (UNCITRAL), Final Award on Jurisdiction and Merits of 3 August 2005, Final Award, Part III – Chapter B, para. 15.

4.886 The Tribunal has no doubt that Multi approached the market in a hard-headed fashion. Mr testified that Multi broke the “unspoken law” that developers do not interfere with each other’s permitting processes and instead compete in the marketplace.¹⁸⁴⁷ In fact, Multi did quite the opposite, seeking to intervene in the permitting process, objecting to any change in the traffic solution and launching the Extraordinary Review Procedure before the Ministry of Regional Development. Multi plainly did not want Galerie to succeed and it appears to have done everything within its power to slow it down, including by emphasizing to prospective tenants that it was ahead of ECE and would remain so and therefore they should sign leases with its project. All these actions were within Multi’s rights and raise no presumption of competition by unlawful means.

4.887 The Claimants relied on a remark attributed to a Multi representative by a significant potential tenant, , for whose tenancy both developers were competing. Mr , an ECE employee responsible for leasing, testified in his second witness statement that:

8. When I reviewed the negotiating history, which I had summarized for Mr after had made their decision ... a discussion with Mr during the negotiations was called to mind. As mentioned before, I met Mr to discuss the issue. We also spoke about the state of the permit proceeding and Multi. Mr told me that Multi (General Manager H. Dasbach) had notified him that would not have to consider ECE in because ECE was not going to obtain a building permit. I cannot recall the exact wording. However, this was the message conveyed by Multi. The object of competition turned up repeatedly and in each negotiation due to the marketing of both properties in

9. Other tenants who had entered into negotiations with Multi were also always perfectly informed about the status of the permit proceeding regarding the GALERIE . One example for that is New Yorker. I would like to illustrate the facts and enclose an email that I received from Mr on August 7, 2008, which was shortly before New Yorker announced their refusal ... The email says that during the negotiations over the extension of the preliminary lease agreement, New Yorker was also negotiating with Multi and apparently fully informed about the details regarding the status of our building permit proceeding. Again, the decisive problem was, the email makes it clear, that we could not produce a guarantee or evidence that we would be able to open the center, since the building permit was still missing.¹⁸⁴⁸

4.888 The Tribunal is unable to infer corruption from this account of what Multi was reportedly telling and other would-be tenants in the competition between the two companies to secure commitments from retailers to take spaces in their respective shopping centres. It is not difficult to contemplate that Multi would have been contrasting its progress with Galerie comparatively slow progress – slowed in terms of the pall cast over the Galerie project by Multi’s own permitting objections to the Galerie project and its petition to the Ministry to commence the Extraordinary Review Proceedings. That is hard-nosed

¹⁸⁴⁷ T2/79:20-25.

¹⁸⁴⁸ Second witness statement of , paras. 8-9.

competition and the Tribunal does not doubt that Multi took the opportunity to emphasize its competitive advantages at every turn. Moreover, as Mr [redacted] himself notes, he did not witness the conversation between Mr [redacted] and Mr [redacted], and he did not recall the exact wording of what Mr [redacted] told him Mr [redacted] had said to Mr [redacted].

iii. Analysis of the Allegations in Detail

4.889 The Tribunal now turns to the allegations made against particular officials.

4.890 Although counsel for the Claimants submitted that they had no need to show a relationship between the State actors that were alleged to have been corrupted, it warrants noting that other than the structure prescribed by law as to the relationships between decision-makers, there was no evidence of *any* relationship between any of the principal actors said to have acted improperly to Multi's benefit. In particular, the evidence shows that:

- a. MAL, including its Building Office of which Mr [redacted] was the head, was separate from the self-governing City of [redacted], and was not subject to its legal or other control.
- b. Mr [redacted] testified that he could not interfere with the decisions of the building authority because the authority was independent of the Mayor's office.¹⁸⁴⁹ His evidence in that regard was supported by that of the former deputy Mayor, Mr [redacted], a witness called by the Claimants.¹⁸⁵⁰
- c. The unnamed official who took the Planning Permit down half a day early was not in Mr [redacted]'s office, nor subject to his direction and control. Mr [redacted]'s testimony in response to a question from the President of the Tribunal was that after the error, which he admitted was serious, was brought to his attention, he complained to the Municipal Secretary and that steps were taken to prevent its recurrence.¹⁸⁵¹
- d. MAL was separated from the Ministry both in terms of the scope of their respective administrative decision-making competence and by geography. The Ministry was situated in Prague, not in [redacted]. Further, in terms of hierarchy, RAL was interposed between them.¹⁸⁵²
- e. The Minister likewise was formally separated from the Ministry in terms of administrative decision-making. The Advisory Committee was interposed between Minister [redacted] and the Ministry and there is no evidence that the Minister implicitly or explicitly ordered his subordinates within the Ministry to render a particular decision in the case of the First Ministry decision.¹⁸⁵³ Indeed, it appears that having

¹⁸⁴⁹ T5/109:20-23.

¹⁸⁵⁰ T3/121:14 – 123:19.

¹⁸⁵¹ T6/59:10-18.

¹⁸⁵² RAL's actions are not challenged by the Claimants and its only role in relation to the Extraordinary Review Proceeding appears to be the transfer of the file under appeal.

¹⁸⁵³ The evidence is that the Minister did discuss the appeal with Mrs [redacted] (T6/131:1-9) but at that point the first Ministry decision had already been issued. With respect to the Second Ministry Decision, there was no suggestion that

temporarily stepped down in November 2007, Mr [redacted] did not in fact occupy the office of Minister at the time that the First Ministry decision was taken (29 February 2008). On his evidence, he was reappointed to his position in April 2008¹⁸⁵⁴ and became seized of the appeal in May.¹⁸⁵⁵

4.891 Leaving aside the structure of the State's decision-making apparatus, having reviewed the evidence and the testimony, the Tribunal makes the following findings.

Mr [redacted].

4.892 Mr [redacted] past employment relationship with [redacted] and his friendship with Mr [redacted], was not contested by Mr [redacted] nor by the Respondent and can be taken to be common ground. Without more, it is however in and of itself evidence only of a personal relationship, not of corruption.

4.893 The Tribunal notes moreover whatever may be the case in relation to [redacted]'s activities in [redacted] in connection with developing facilities [redacted], they do not relate to the Forum [redacted] or Galerie [redacted] projects. There is no dispute that [redacted] was Multi's construction firm for the Forum project, but that too in and of itself is not proof of an allegation that, through the intermediation of [redacted], Multi corrupted local officials.

4.894 Shortly before the hearing, it was announced that Mr [redacted] accused by the Czech anti-corruption police of abuse in relation to the management of property. This was pursued by counsel for the Claimants during Mr [redacted] cross-examination.¹⁸⁵⁶ The investigation raises questions, but the criminal process is in its early stages and it is difficult for the Tribunal to make any assessment as to what it means in terms of Mr [redacted]'s conduct as Mayor or his credibility as a witness in the proceeding. Moreover, [redacted]; it does not bear on the events at issue in this arbitration. The Tribunal accordingly finds that this evidence is not decisive in sustaining the Claimants' allegation against Mr [redacted].

4.895 The Claimants are unable to point to specific evidence of any bribe or other favour said to have been proffered to Mr [redacted] by Multi or any agent thereof, including [redacted]. It was contended that the absence of such direct evidence is overcome by the evidence of Mr [redacted]'s prior employment relationship with [redacted] and his friendship with the company's principal which enabled Multi to use "its construction firm [redacted] ... to influence the local authorities."¹⁸⁵⁷ The Tribunal does not share this view.

4.896 There are two glaring weaknesses with the allegation against Mr [redacted]. The first is that there is nothing on the record that supports the view that he (or the City Council, for that matter), did anything adverse to the interests of Tschechien 7 or ECE Praha, and through them to the Claimants. It was put to Mr [redacted] that he assured ECE's representatives that ECE and Multi

he in any way ordered them to decide in a particular way other than consistently with the instructions set out in his remand decision. This instruction was rendered within the applicable legal framework.

¹⁸⁵⁴ T6/115:22-23.

¹⁸⁵⁵ T6/116:11 – 117: 22.

¹⁸⁵⁶ T5/88-92.

¹⁸⁵⁷ Reply, para. 30.

would be treated fairly and equitably and he acknowledged that he informed the ECE representatives that "we approach all investors in the same manner."¹⁸⁵⁸ The Tribunal saw no evidence that he did anything other than that.

4.897 Even more importantly, it is evident that the City could not and, on the Tribunal's view of the evidence before it, did not seek to interfere with the local offices of the State administration.¹⁸⁵⁹ There is no evidentiary basis for a finding that the former Mayor acted adversely to Tschechien 7's interests, let alone that he was corrupted by Multi or any other person.

4.898 Finally, even though the Reply had alleged that Mr [redacted] was corrupted by Multi (through [redacted]), when it came to cross examining him, the allegation was not even put to him by counsel for the Claimants. It was left to counsel for the Respondent to do so and the allegation was met with a firm denial.¹⁸⁶⁰ Having regard to all of the evidence on record, Mr [redacted]'s denial is accepted and the allegation of corruption against him is rejected for want of proof.

Mr [redacted],

4.899 Likewise, there is no direct evidence of any bribe or other consideration being paid to to Mr [redacted]. The Claimants contend however that he must have acted at the behest of Multi because Multi was the only party that benefited from certain decisions taken by the Building Office within MAL.

4.900 As noted earlier, the corruption allegation against Mr [redacted] is bound up with the merits of the complaints against certain decisions of the Building Office. However, the Tribunal observes at the outset that some of MAL's decisions were undoubtedly favourable to Tschechien 7. So for example, MAL agreed to issue a Planning Permit that granted Tschechien 7 the right to remove 170,000 cubic metres of earth from the site so as to expedite the project's construction pending the issuance of the Building Permits. In the view of others, including both the Ministry and the Minister, as well as the legal expert tendered by the Respondent, this was not in fact permitted under the Old Building Code.¹⁸⁶¹ However that may be, the permission to excavate was critical in allowing Tschechien 7 to begin preparing the site for construction and in retrospect, had it not been granted, the Claimants probably would not have proceeded with the project at all because they could have had no real possibility of catching up with the Forum project.

4.901 Mr [redacted]'s office also ruled that Multi and others did *not* have standing to participate in the Planning Permit proceedings, a decision which was upheld on appeal by RAL. The Claimants' problems arose when Multi then referred RAL's decision to the Ministry in the Extraordinary Review Proceedings. Mr [redacted], who testified that he had not previously encountered an

¹⁸⁵⁸ T5/104:18-23.

¹⁸⁵⁹ T5/109:20-23, and 114:4 - 115: 2.

¹⁸⁶⁰ T5/115:3-9.

¹⁸⁶¹ The Respondent argues that this decision was incorrect; it was also one of the features of the Multi Extraordinary Review proceedings that attracted the Minister's attention.

Extraordinary Review proceeding¹⁸⁶², was plainly influenced by the First Ministry decision adopted on 22 February 2008 quashing the Planning Permit. Although it is common ground that the Planning Permit remained in force and did not have legal effect due to the subsequent appeal to the Minister, in the Tribunal's view, it hung over the Building Permit proceedings. The pendency of the Extraordinary Review Proceedings was in fact cited by MAL as a reason to issue the Third Stay, and as noted above, played a role, albeit minor, in the decision to issue the Second Stay.

4.902 So far as the splitting of the applications for Building Permits is concerned, the weight of the evidence seems to indicate that the splitting was discussed and ultimately agreed between the representatives of the City of [redacted] and by the proponents of the Galerie project as a means of attempting to reduce the possibility that Multi would appeal certain other applications for Building Permit applications. At the time that the issue arose, Multi had already appealed against the grant of the Planning Permit and was objecting to any change in the traffic solution. It may well have been that the impetus to do so came from MAL and the City of [redacted], and the judgement that if the City of [redacted] applied for certain of the road permits, that would reduce the likelihood of Multi's challenging such permits seems to have been borne out by events. In the final analysis, it seems to the Tribunal that the question of who instigated the splitting of the permit applications is hardly material because (as Ms [redacted] pointed out in her own testimony) MAL could have required this to be done on its own initiative.¹⁸⁶³

4.903 The allegation that the "Claimants know from a conversation with two employees of MAL that the employees were instructed to find pretexts for delaying the proceedings and in particular to find reasons for suspensions" was one that arose from Ms [redacted]'s witness statements and the notes of her conversations with Mr [redacted]. However, the Respondent filed a witness statement from Ms [redacted] in which she explicitly denied what she was alleged to have said to Mr [redacted].

7. [...] I have never received from anybody any instructions or directions to compound or protract intentionally the course of the building proceedings regarding Galerie [redacted] and I have always approached these proceedings in a totally standard manner. As an ordinary desk officer at the building authority I do not even come into contact with members of the city management so I categorically reject the assertion that I got the instruction to find a reason for staying the proceedings.

8. I do not know what Mr [redacted] said to Ms [redacted], nonetheless I have definitely not said to Mr [redacted] anything of what Ms [redacted] says. Of course, this applies also to my alleged speculations about the relation of the city management of the project. I and Mr. [redacted] have always communicated only and strictly to the point and our communication regarded exclusively the documentation that was supposed to be submitted in the proceedings.¹⁸⁶⁴

¹⁸⁶² T6/53:12-15.

¹⁸⁶³ [redacted] i second witness statement, para. 40.

¹⁸⁶⁴ [redacted] witness statement, paras. 7-8.

- 4.904 Obviously, the Tribunal would have profited from the attendance of Mr [redacted] at the hearing. It is left with Ms [redacted]'s notes and recollection of a conversation she held with Mr [redacted] about a conversation that he is said to have had with Ms [redacted] who was not called by the Claimants for cross-examination. While this does not mean that the Claimants are to be taken to have thereby accepted her evidence, in the circumstances, the combination of Mr [redacted]'s decision not to attend for cross-examination and the express denial by Ms [redacted] of what she is alleged to have said to him means that it is not possible to accept as proved Ms [redacted]'s double-hearsay statement that Ms [redacted] had been instructed to find reasons to delay the building permit proceedings.¹⁸⁶⁵
- 4.905 The observation in RAL's decision dated 7 October 2008 that MAL had "artificially fabricated" a non-existent preliminary issue in order to justify the Third Stay,¹⁸⁶⁶ which was heavily relied upon by the Claimants, in particular in opening at the hearing was undoubtedly striking and suggestive, and raised some questions.
- 4.906 However, it was not entirely clear what was intended by those words, nor why they were placed in quotation marks in the Czech original of the decision; Mr [redacted] when questioned about the phrase, stated that he was unable to shed any light on what the author of the letter had intended, and the matter was not pressed by Counsel for the Claimants.¹⁸⁶⁷
- 4.907 Further, although a witness statement by the signatory of the decision, Dr [redacted] had been submitted by the Respondent with the Counter-Memorial, and discussed the reasoning of the decision of 8 October 2008 in some detail, it did not refer to or discuss the relevant passage of the decision which had contained the suggestion that MAL had "artificially fabricated" the preliminary issue. Dr [redacted]'s second witness statement, filed by the Respondent with its Rejoinder, did not discuss the decision of 8 October 2008, and the Claimants elected not to call Dr [redacted] for cross-examination. As a consequence the Tribunal did not have the benefit of hearing her evidence as to what had been intended or meant by the unusual phrase.
- 4.908 In such circumstances, the Tribunal feels unable to attach any great weight to the comment that the preliminary issue had been "artificially fabricated", which must be regarded as being unexplained. In particular it does not feel able to interpret this as evidence of a view on RAL's part that Mr [redacted] had been corrupted, and that corruption had been the reason for the adoption of the Third Stay.
- 4.909 The Tribunal notes finally that, despite having alleged that Mr [redacted] was corrupted by Multi, when it came to confronting him at the hearing, the Claimants did not even put the bribery allegation to him. It was left to Counsel for the Respondent to do so and, when asked whether

¹⁸⁶⁵ The Tribunal is not in any way bound by technical common law rules against hearsay evidence, but when a party relies upon alleged statements not witnessed by one person (Mrs [redacted] and denied by the person alleged to have made the statement and that witness is not challenged on cross-examination, and the intermediate witness (Mr [redacted]) declines to testify, it is appropriate to find that the party making the allegation has not discharged its burden of proving the truth of the statement.

¹⁸⁶⁶ Core 8/279 (Exhibit R-59).

¹⁸⁶⁷ T5:156:14 – 158:3; :T6:4:5 – 5:6.

he had ever accepted any form of bribe or kickback in connection with Galerie : or Forum ;, Mr responded simply “no”.¹⁸⁶⁸

Improper decisions by unnamed Ministry officials

4.910 The Tribunal is of the view that there was nothing *per se* objectionable about the Ministry’s initiation of the Extraordinary Review Proceedings on the application of a party claiming to have standing, in circumstances in which a subordinate decision-maker had denied that that party had standing. No evidence was offered of any official within the Ministry having been bribed by Multi or any party acting on its behalf, either in this regard or otherwise.

4.911 Although the reasoning of the First and Second Ministry decisions taken in the Extraordinary Review proceeding are not entirely clear, and the parties dispute precisely what their findings were, it is at the least clear that the Ministry thought that Multi *did* have standing to complain about the grant of the Planning Permit to Tschechien 7. At all events, the Ministry and subsequently the Minister undoubtedly both considered that there were defects in the procedure that resulted in the grant of the Planning Permit, since a ‘good faith acquisition of rights’ analysis would not have been conducted had it been the view that the Planning Permit was completely lawful.

4.912 As regards Ms ’s testimony that the Ministry’s Ms í told her in a telephone conversation after the First Ministry Decision had been adopted that Ms í was “aware of the incorrectness of deciding that Tschechien 7 is not a party to the [Extraordinary Review] proceedings”¹⁸⁶⁹, the latter allegation was not met with any denial or explanation from Ms r from any other official of the Ministry. Moreover, it appears that the decision not to consider Tschechien 7 to constitute a participant in the Extraordinary Review Proceedings was at the very least odd. In the circumstances, it seems not unreasonable that an official could have expressed such a view privately. However, the inference drawn by Ms does not necessarily follow from what she was told. She testified that from this conversation “it seemed as if Mrs and/or her department had made the decision according to the instructions of someone, but not according to the law.”¹⁸⁷⁰ She does not say that this is what Ms told her; rather, the conclusion is expressed as a surmise, presumably of her own.

4.913 The point is illustrated by two instances. First, with respect to Minister ’s decision in the First Ministry Decision not to follow the recommendation of the Advisory Committee, Ms says that Ms a lawyer in the Ministry who acted as Secretary to the Advisory Committee, had informed her in advance that according to her experience, the Ministry had never before differed from what the Advisory Committee recommended, and that a draft decision had been prepared on the basis of the Advisory Committee’s resolution for signature by the Minister. Ms then notes that Ms was later transferred to another department of the Ministry; The implication plainly was that Ms had been transferred or demoted for disclosing the internal workings of the Ministry to M.¹⁸⁷¹

¹⁸⁶⁸ The question was put to him on re-direct. T6/52:22-25.

¹⁸⁶⁹ second witness statement, para. 13.

¹⁸⁷⁰ second witness statement nt, para. 14.

¹⁸⁷¹ second witness statement, paras. 16-17.

and that this was evidence of a hostility towards the proponents of the Galerie project or its legal representative.

4.914 The Respondent addressed this issue in the witness statement of Mr [redacted], filed with the Rejoinder. Mr [redacted] was appointed Secretary to the Advisory Committee in October 2007. Prior to the transfer of Ms [redacted] in approximately May 2008, he fulfilled that role jointly with her, and he continued in the role alone after that. He testified that Mrs [redacted] was in fact made head of a new section on European and international law created within the Ministry,¹⁸⁷² in other words that Mrs [redacted] was not punished, but rather promoted. His evidence in that regard was not challenged in cross-examination.

4.915 Mr [redacted] went on to address a number of other allegations. He described his understanding of how the Minister's First Decision came about, including the transfer of the file to the Minister's office,¹⁸⁷³ the precise times when various individuals, including Ms [redacted] and Dr [redacted] (about which more below) visited the Ministry to review the Minister's Decision, the preparation of the Second Minister Decision, the events relating to the draft witness statement that Ms [redacted] prepared and sent to him for his review and signature, his view of the allegations made by Ms [redacted] and an incident in which ECE had a law student contact the Ministry pretending to seek for research purposes statistical information pertaining to the number of times that the Minister had departed from the advice of his Advisory Committee, that 'research' then being used in these proceedings.

4.916 Ms [redacted] testified that the proceedings carried out by the Ministry were unusual and that she received "worrying information" from Mr [redacted] a who told her that "the file had disappeared from the building of the Ministry overnight."¹⁸⁷⁴ She noted further that, as she experienced the situation in 2008, the employees of the Ministry were "very afraid" of the Minister, and asserted that Mr [redacted] once left the building with her to talk about changes in the composition of the Advisory Committee "so that no one could hear us."¹⁸⁷⁵ Mr [redacted] denied all these claims, saying that there had been no disappearance of the file, but rather that it had been requested by the Minister and therefore was put in his office for at least one day. He also denied that there was an atmosphere of fear created in the Ministry when Mr [redacted] was Minister. He stated that he did not recall allegedly leaving the Ministry building because "someone could hear us", as alleged by Ms [redacted].¹⁸⁷⁶ He also said that it was no secret that the composition of the Advisory Committee had changed.¹⁸⁷⁷

4.917 In the judgement of the Tribunal, Ms [redacted] was too ready to read improper motives or undue pressure into the behaviour of various officials. The Tribunal can understand that her suspicions may have been aroused, for example by the Ministry's decision that Tschechien 7 did not constitute a participant in the proceedings, its decision in the First Ministry Decision to quash the Planning Permit, the length of time taken for the Minister to address the appeal, and

¹⁸⁷² [redacted] witness statement, para. 9.

¹⁸⁷³ This testimony related to the testimony of the then-Minister and Dr [redacted] as to how the former enlisted the latter to assist him in reviewing the Advisory Committee's draft and revising it to his satisfaction.

¹⁸⁷⁴ [redacted] second witness statement, para. 21.

¹⁸⁷⁵ [redacted] second witness statement, para. 22.

¹⁸⁷⁶ [redacted] witness statement, paras. 23-24.

¹⁸⁷⁷ Ibid., para. 24.

the Minister's deviation from the recommendation of the Advisory Committee. But she was wrong in her belief that under Czech law he was bound by the Advisory Committee's decision¹⁸⁷⁸ and altogether too prone to assume that everything that did not go the Claimants' way came together as evidence of an all-embracing conspiracy against them.

Mr "

4.918 In the case of the Minister, Mr , the Claimants are unable to point to specific evidence of any bribe or other favour said to have been proffered to him by Multi or any agent on Multi's behalf. The evidence put forward for corruption by Mr is unrelated to the events giving rise to the claim.

4.919 The frailty of this evidence is illustrated by the Claimants' Reply. After complaining about the prolongation of the Extraordinary Review Proceedings by taking "unnecessarily long" to render his decision and by "illegally remanding the case to the Ministry instead of deciding it in Claimants' favour", the Reply asserts:

*... In doing so, the Minister ignored the opinions prepared by the legal experts of his advisory committee and of his legal department, the only time he did so in 20 cases decided over the last three years. It is telling that while the legal experts from the committee and the legal department were ignored, a representative of Multi was able to read the decision before it was issued by the Minister. Coincidentally, the Minister has been involved in cases of corruption before.*¹⁸⁷⁹

4.920 The Tribunal has found that the facts as alleged in the first sentence of this paragraph were not improper, and do not give rise to a breach of the Treaty. Although the Minister's decision to consult a member of the Advisory Committee, Dr , in respect of the recommendation of the Advisory Committee and what he should do to decide the appeal was unusual, the experts on Czech law for both parties agreed that the Minister was not bound to follow the Advisory Committee's view¹⁸⁸⁰ and Czech law did not prohibit him from engaging in this course of conduct, including remanding the issue to the Ministry for further consideration.

4.921 With respect to the second allegation, namely, that a Multi representative read the decision before it was issued, the Reply elaborates upon this under the heading "Multi inspects the First Minister Decision before it is dispatched":

99. There was another unusual circumstance related to the First Minister Decision. Before the First Minister Decision was even dispatched, the legal representative of Multi, Mr. , JUDr. visited the Ministry of Regional Development to inspect the file. As confirmed by the secretary of the Ministry's appeal commission, Mr. , it seemed that Multi's legal counsel checked the wording as if it had been Multi's own draft. Only thereafter, the First Minister Decision was dispatched.

100. Claimants submit therefore that Multi had communicated with Mr.

¹⁸⁷⁸ T4/156:8 – 157:10.

¹⁸⁷⁹ Reply, para. 6.

¹⁸⁸⁰ T7/54: 2-15; 82-85.

*to discuss the contents of the decision and requested the Minister to illegally remand the proceedings back to the Ministry.*¹⁸⁸¹

4.922 This claim was supported once again by the evidence of Ms [redacted] who testified specifically that Dr [redacted] on visiting the Ministry, “read the [Minister’s] resolution in a manner as if he had be (sic) the creator of the resolution, and as if he wanted to review whether the final version corresponded to his draft.”¹⁸⁸²

4.923 Ms [redacted] did not specify in her witness statement when this visit took place (other than to say that it occurred before the First Ministry Decision was delivered), nor how she had ascertained from those present that Dr [redacted] appeared to be checking the ministerial decision to see if it corresponded to his draft. She did not witness this event personally and it must be inferred that she considers Mr [redacted] to be her source, because she says: “Although, according to Mr [redacted], this procedure was very unusual, Mr [redacted] had the Minister’s resolution delivered.”¹⁸⁸³

4.924 These allegations, if proven, would have been very damaging to the Respondent’s case, because the obvious innuendo was that the Minister was improperly collaborating with Multi in delivering its preferred resolution of the petition that it had filed. In a witness statement filed with the Rejoinder, Mr [redacted] denied the allegation that he had allowed Multi to influence his decision.¹⁸⁸⁴ The Respondent also filed other direct evidence from Mr [redacted] which is of obvious significance because of the circumstantial nature of the allegations and the fact that Ms [redacted] claimed Mr [redacted] as her source of information. In the event, what the Claimants filed was a draft witness statement that Ms [redacted] had prepared which, she said, accurately summarized her discussions with Mr [redacted] but which, when presented with it, Mr [redacted] refused to sign.

4.925 In so doing Mr [redacted] told Ms [redacted] that he would only provide his statement through the law firm representing the Czech Republic in these proceedings.¹⁸⁸⁵ That statement was in due course filed with the Rejoinder and in it Mr [redacted] rejected many of Ms [redacted]’s allegations. Of particular relevance to the question of whether Multi had any advance notice of the Minister’s decision and whether Dr [redacted] was complicit in formulating its terms, according to Mr [redacted] the Minister rendered his decision on 27 June 2008 and it was only on 30 June 2008, three days later, at 14:30, that Dr [redacted] examined the file. Attached to Mr [redacted]’s statement was an exhibit entitled, “Protocol on examination of the file dated 30 June 2008” to substantiate his testimony.

4.926 Mr [redacted] also said:

[...] I consider the allegation of Ms [redacted] that in examining the file Dr [redacted] gave me the impression that he was the author

¹⁸⁸¹ Reply, paras. 99-100.

¹⁸⁸² [redacted] second witness statement, para. 31.

¹⁸⁸³ [redacted] second witness statement, para. 32.

¹⁸⁸⁴ [redacted] Rejoinder witness statement, para. 20.

¹⁸⁸⁵ [redacted] second witness statement, Annex 4.

*of the Minister's decision dated 27 June 2008, to be absolute nonsense. In examination of the file, he read the Minister's decision and asked for its copy. I do not know based on that it would be possible to assume the above.*¹⁸⁸⁶

- 4.927 At the hearing, Mr [redacted] gave a full account of his decision to seek out the advice of Dr [redacted] and Dr [redacted] in turn corroborated the Minister's account. As noted above, Mr [redacted] denied Ms [redacted]'s account of their conversations and attached a document showing that Dr [redacted] visited the Ministry *after* the decision had been signed by the Minister. There is no evidence on the record to indicate that there was any contact between Dr [redacted] or any other representative of Multi and the Minister. Confronted with this direct contradiction between the witnesses, the balancing of direct versus secondhand evidence as to certain events, and the documents, the Tribunal must conclude that the Claimants have not discharged the burden of proof in respect of this serious allegation. In view of the contemporaneous documentary evidence recording when Dr [redacted] inspected the already-released Decision, the Minister's explanation of his reaction to the opposing positions taken by his Ministry and the Advisory Committee, his denial of any misconduct, the combined effect of his testimony and that of Dr [redacted] regarding the provenance of the First Ministerial Decision, Mr [redacted]'s denial of the account provided by Ms [redacted]'s of her conversations with him as to Dr [redacted] visit, and Mr [redacted] evidence as to what in fact happened during that visit, the assertion that Multi's legal representative had any role in the drafting of the Minister's decision is not accepted.
- 4.928 Although he took some time to make the First and Second Minister decisions, on both occasions during the pendency of the Extraordinary Review Proceedings Minister [redacted] reversed the decisions of the Ministry by which they quashed the Planning Permit. Moreover, to the Tribunal, his explanation of his reasons for deciding not to accept the Advisory Committee's draft decision had the ring of truth. It is understandable that a Minister could be puzzled by the diametrically opposed positions taken by his Ministry and his Advisory Committee.¹⁸⁸⁷ The fact that he took note of the extensive amount of groundworks authorized by the Planning Permit, and his view that such a permit should not be used to authorize such extensive works prior to receiving a building permit also made sense to the Tribunal.¹⁸⁸⁸
- 4.929 While the First Minister Decision had the effect of continuing the Extraordinary Review Proceedings, with some adverse impact on the tenants' perception of the viability of the Galerie [redacted] development, the evidence of the legal experts was that he was fully entitled to order a remand, rather than terminate the proceedings.¹⁸⁸⁹ For the reasons set out above, the Tribunal is able to appreciate the logic of ordering a remand in the particular circumstances, and does not regard the Minister's decision to do so as tainted by bias or unreasonableness.
- 4.930 Finally, whereas at paragraph 26 of the Reply, the Claimants alleged that: "Multi and its construction company Syner unduly influenced ... the Minister of Regional Development", there is simply no evidence on the record to support this allegation and the Tribunal finds that

¹⁸⁸⁶ [redacted] witness statement, para. 25.

¹⁸⁸⁷ T6/118:25- 119: 6; and 121:7-17.

¹⁸⁸⁸ T6/119:7-18, 120:17-22, 122:25 – 123:13.

¹⁸⁸⁹ T7/125:14 – 125: 11; 126: 6-10.

the Claimants have also failed to discharge the burden of proof in respect of this aspect of their case.

iv. The Tribunal's Conclusion on the Allegations of Corruption

4.931 Much of the Claimants' case rested in the end on Ms [redacted] s testimony, or at least on inferences which the Claimants wished to draw from it. For the reasons given above, although the Claimants' evidence raised a number of questions of process and motivation, it is far from reaching a sufficient level of cogency. The Tribunal therefore cannot draw the inferences which the Claimants wish, even without taking account of the counter-evidence produced by the Respondent.

4.932 In sum, the Tribunal has found that the measures complained of do not rise to the level of a breach of the BIT, and that the reasons given in all instances were comprehensible and not unreasonable in the circumstances in which each decision was made. None of the measures in question, including the Third Stay, was "bogus", and the other evidence offered by the Claimants did not discharge their burden of proof. In the light of the totality of the evidence before it, the Tribunal does not find any substantial evidence of corruption, be it in respect of individual acts or, as the Claimants put it, a "scheme" of corruption.

7. Conclusion

4.933 In conclusion, the Tribunal holds that the Claimants' claims of breach of Articles 2(1), 2(2) and 4(2) of the BIT fail in their entirety.

4.934 In the circumstances, the Respondent's objection to the Tribunal's jurisdiction over the Claimants' claims *ratione temporis* and *ratione materiae*, which the Tribunal joined to the merits, is moot.

4.935 However, if the matter had arisen, the Tribunal would have been inclined to hold that it had no jurisdiction over the Claimants' claims insofar as they related to losses occurring prior to the acquisition by the Claimants of its interest in the relevant subsidiary, and/or that the Claimants were unable to claim for losses suffered by each subsidiary prior to their acquisition by the Claimants.

PART V
CAUSATION

A. INTRODUCTION

5.1 The Tribunal has thus concluded that no action taken by the Respondent resulted in any breach of its obligations towards the Claimants under the BIT. However, in addition to denying any breach of the substantive standards of protection contained in the BIT, the Respondent mounted a sustained attack upon the Claimants' case theory as to causation, and the Tribunal considers it desirable to address this aspect of the case as it took up a significant part of the pleadings and testimony.

5.2

B. CAUSATION BETWEEN THE ALLEGED BREACHES AND THE DECISION TO ABANDON THE PROJECT.

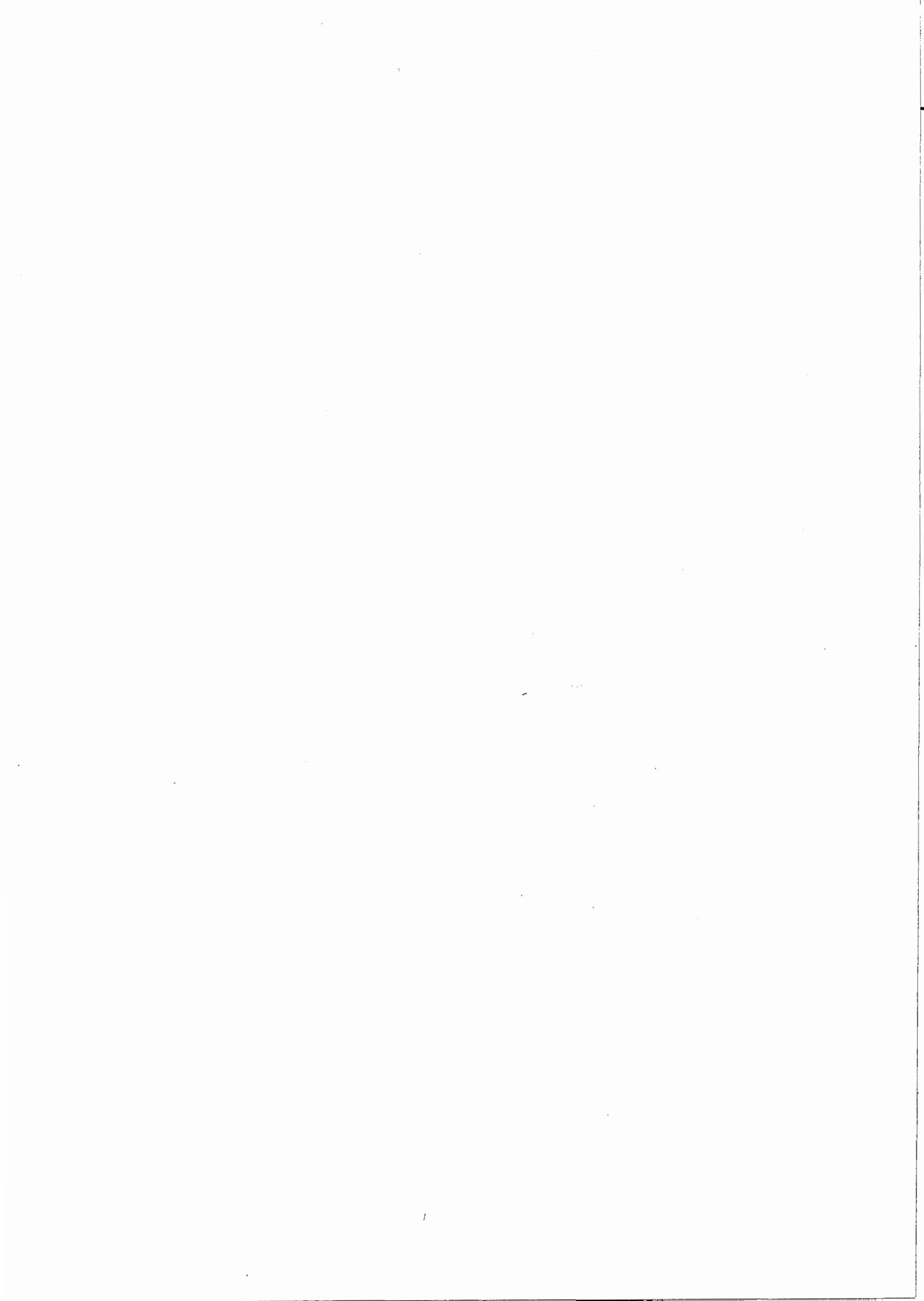
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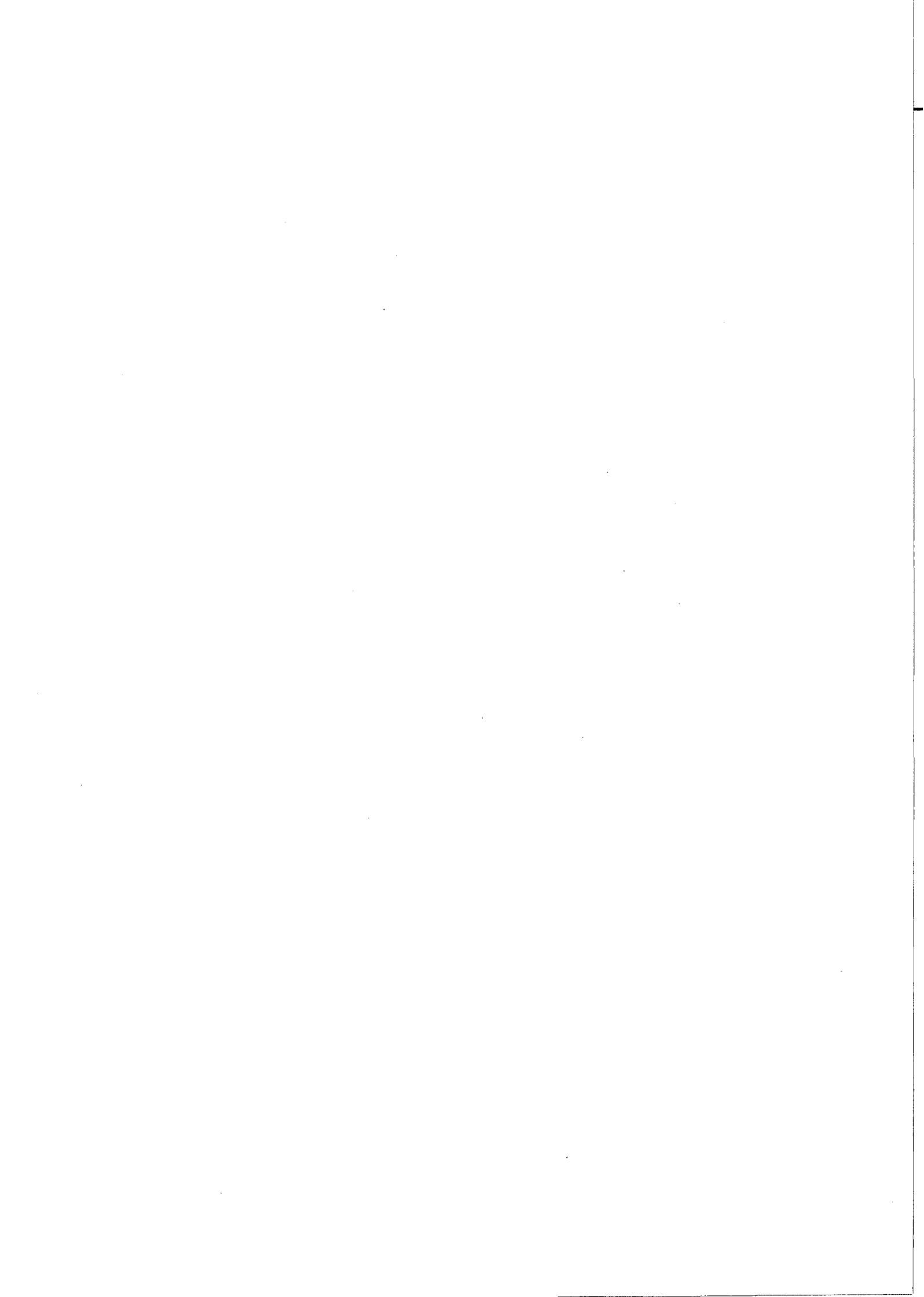
¹⁸⁹⁰ Memorial, para. 87.

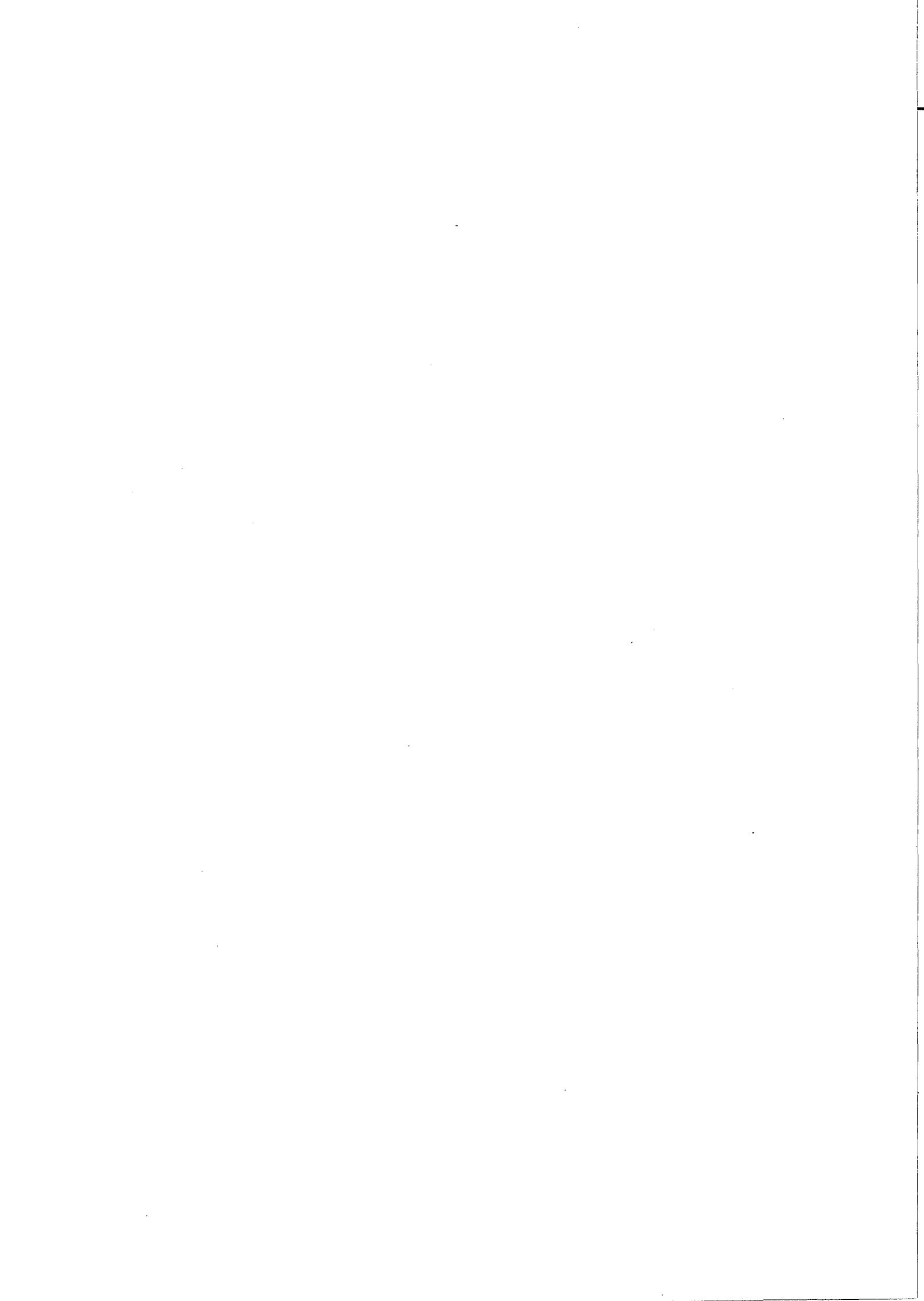
¹⁸⁹¹ Reply, ¶210.

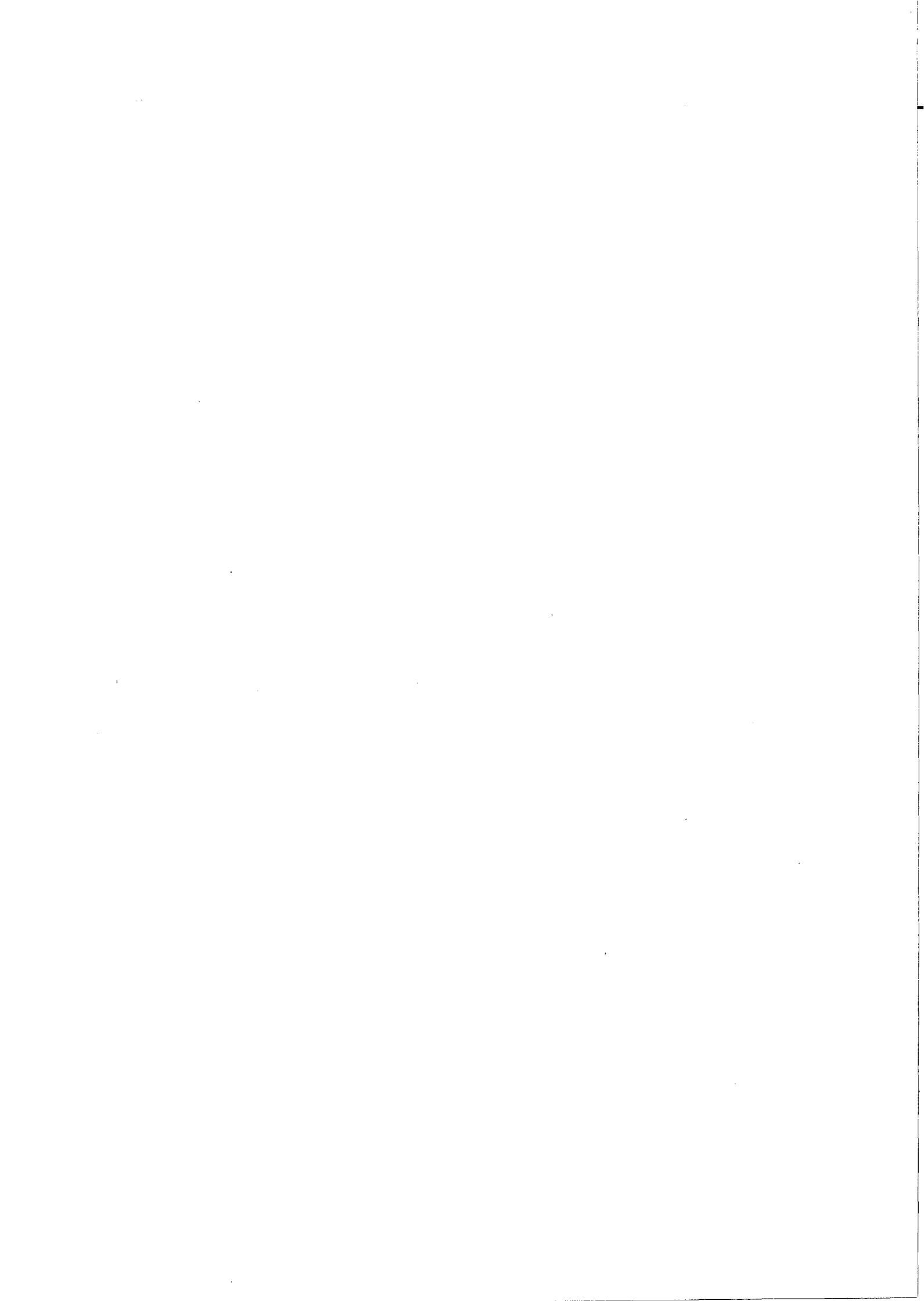


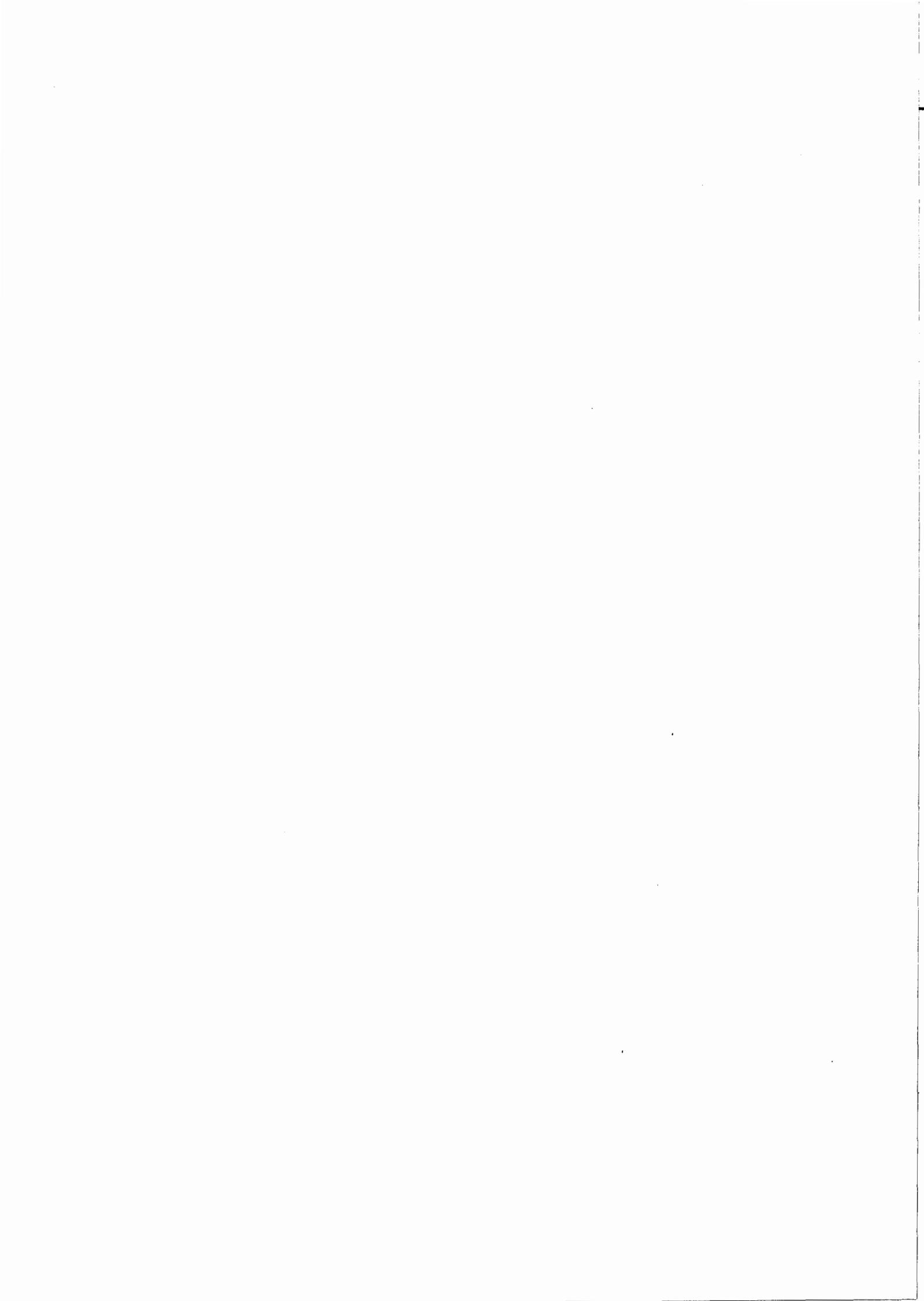


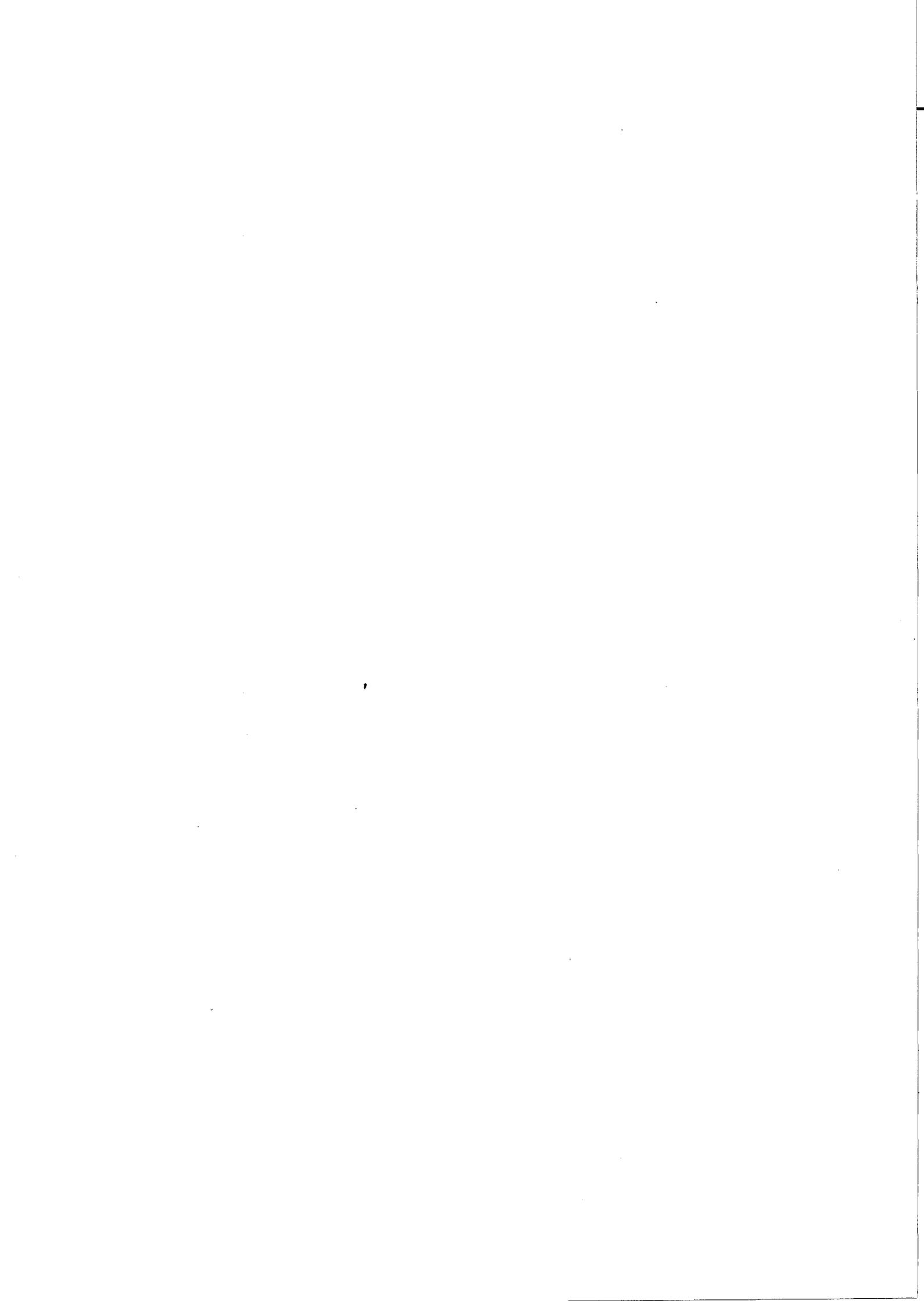


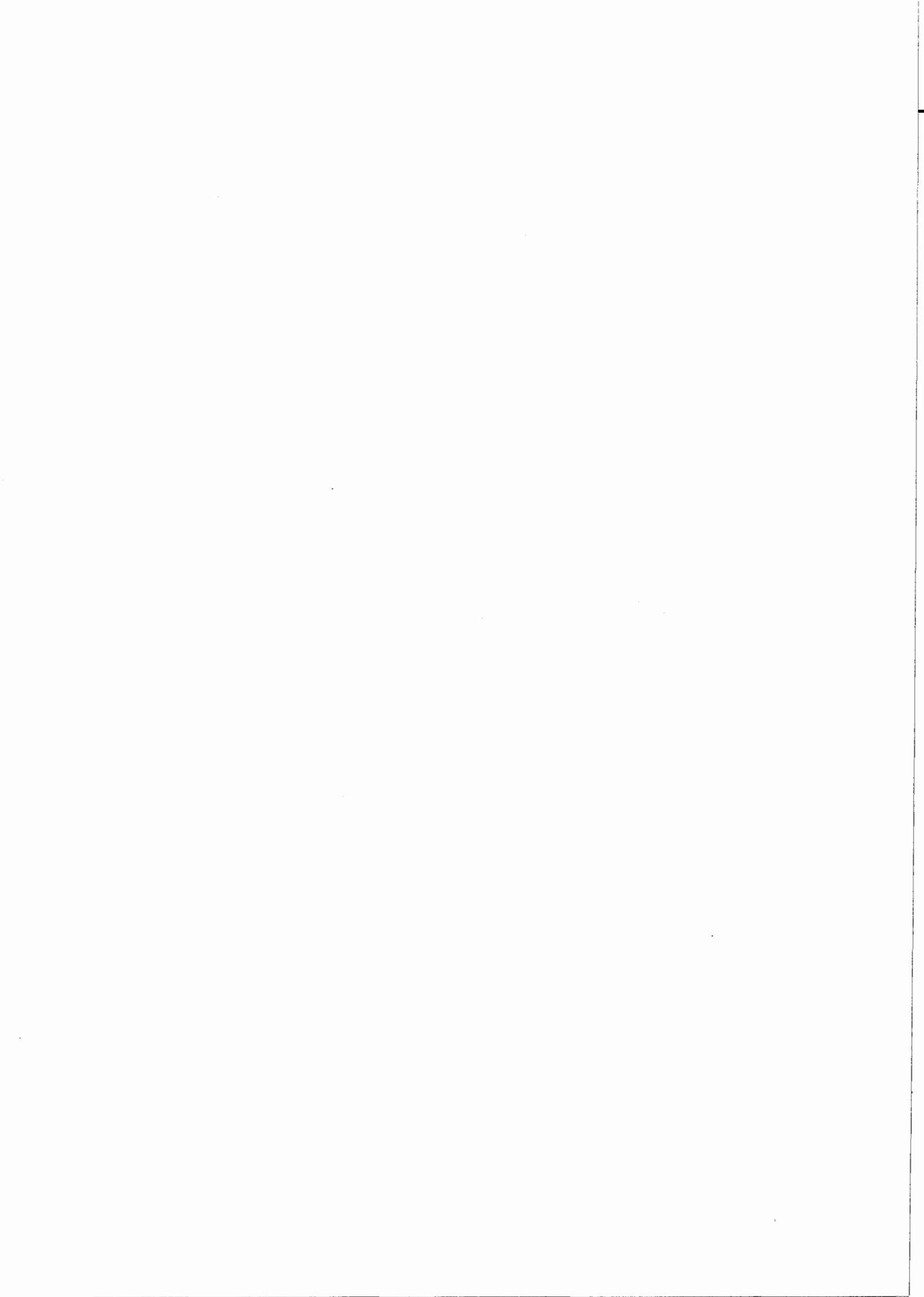














**PART VI
COSTS**

A. THE COSTS OF THE ARBITRATION (EXCLUDING THE COSTS OF LEGAL REPRESENTATION AND ASSISTANCE OF THE PARTIES)

6.1 The Parties have made the following payments by way of advance of the costs of the arbitration:

April 2010:	Claimants	€ 150,000;	Respondent	€ 150,000
July 2011:	Claimants	€ 200,000;	Respondent	€ 200,000
October/December 2011:	Claimants	€ 100,000;	Respondent	€ 100,000
April/May 2013:	Claimants	€ 90,000;	Respondent	€ 90,000

6.2 The total advanced by the Parties therefore amounts to € 1,080,000, of which each Party has paid € 540,000.

6.3 The fees of the members of the Tribunal are fixed as follows:

Sir Franklin Berman KCMG QC,	€ 253,750.00
Professor Andreas Bucher	€ 253,900.00
Mr J. Christopher Thomas QC	€ 214,813.49

6.4 For the purposes of Article 38 of the UNCITRAL Rules, the costs of the arbitration (other than the costs of legal representation and assistance of the successful party) are in total € 1,060,196.43 made up as follows:

Fees of the members of the Tribunal (para. 6.3, above)	€ 722,463.49
Expenses of members of the Tribunal	€ 28,879.85
Fees and expenses of Mr Simon Olleson, Assistant / Legal Secretary to the Tribunal (inclusive of VAT)	€ 166,157.41
Hearing Costs (Court reporter; interpretation; hearing facilities, Tribunal's hotel accommodation for hearings and site visit)	€ 118,780.53
Copying of Core Bundle	€ 11,685.31
Registry Fees (PCA)	€ 11,682.50

Miscellaneous costs (bank charges on deposits;
courier expenses; conference calls) € 547.34

B. THE PARTIES' CLAIMS FOR COSTS

6.5 Amongst the other relief sought, each Party has asked for its costs on an indemnity basis; the Claimants did so in their Request for Arbitration and Statement of Claim, and their Memorial and their Reply, whilst the Respondent did so in its Answer to the Statement of Claim, Counter-Memorial and Rejoinder.

6.6 Pursuant to the request sent on behalf of the Tribunal dated 26 March 2013, the Parties submitted their respective schedules of their legal costs and disbursements on 24 April 2013.

6.7 The costs claimed by the Claimants totalled € 941,204.60, comprising:

- a. € 518,365.40 in respect of the fees and expenses of Counsel
- b. € 376,120.82 in respect of experts' fees and expenses; and
- c. € 46,718.38 in respect of disbursements (translation; copying and courier fees; and witness travel costs).

The Claimants later clarified that no claim was made in respect of VAT.

6.8 The costs claimed by the Respondent totalled CZK 89,477,833.12 (approximately € 3,454,742.59 using the exchange rate of €1 = approximately CZK 25.9 as at the date of the submission), comprising

- a. CZK 38,466,037.03 (approximately € 1,485,175.17), in respect of the fees and expenses of Counsel;
- b. CZK 30,874,399.40 (approximately € 1,192,061.76) in respect of experts' fees and expenses;
- c. CZK 5,230,709.74 (approximately € 201,957.91) in respect of disbursements; and in addition
- d. CZK 14,906,686.96 (approximately € 575,547.76) in respect of VAT.

6.9 As noted above (paragraphs 1.143-1.150), the Respondent waived its right to present comments on the Claimants' costs, whilst the Claimants' provided their comments on the costs claimed by the Respondent on 8 May 2013. Thereafter, on 10 May 2013, the Tribunal authorized a further exchange of submissions limited to certain specific points raised by the Claimants in their comments, with the Respondent filing its response to the Claimants' comments on 17 May 2013, followed by the Claimants' rejoinder on 29 May 2013.

C. SUBMISSIONS OF THE PARTIES AS TO COSTS

1. The Claimants' Comments, 8 May 2013

- 6.10 The Claimants noted a "substantial discrepancy" between the Parties' respective costs, in particular as regards attorney's fees, the cost of experts, and VAT. Specifically, the Claimants noted that
- a. the Respondent's legal costs were approximately three times their own;
 - b. the Respondent's expert fees were approximately four times their own;
 - c. the Respondent's costs included a sum in excess of € 500,000 in respect of VAT, whilst the Claimants had not included VAT, inasmuch as "most of the VAT paid could be reclaimed from tax authorities".
- 6.11 In the Claimants' submission, the Respondent had no basis to claim reimbursement of VAT which was an "attempt at unjust enrichment" to the extent that it related to VAT paid for services provided in the Czech Republic, since any VAT paid by the Respondent to its advisers had to be accounted for by the adviser to the Czech tax authorities, such that the VAT "effectively went from one of Respondent's pockets to the other". The Claimants invoked Article 38(e) of the UNCITRAL Rules in support of the argument that only legal and other expenses in fact incurred by a party were covered, and that the cost of VAT was not incurred where the money in question "effectively remains with the Party".
- 6.12 The Claimants further argued that to the extent that the sums claimed were, on the other hand, for VAT paid on services provided outside the Czech Republic, the Respondent should be put to the proof of that.
- 6.13 The Claimants argued finally that Article 38(e) of the UNCITRAL Rules should be so interpreted as to cover the costs of legal representation only to the extent that the Tribunal determined the amount of such costs to be reasonable, and submitted that the unreasonableness of the Respondent's cost claims for legal representation was established by their disproportion, by a factor of three to one, by comparison with their own.
- 6.14 The Claimants submitted that the level of the Respondent's costs was "further proof" of a tendency to over-litigate, which had been apparent throughout the proceedings. They maintained that if a party conducted an arbitration without regard to cost, and thus caused both parties "extra and unnecessary expenses", it did so at its own risk, and that the ensuing costs should be borne by that party alone. They referred specifically to:
- a. **Attorney's fees:** it had been the Respondent's "choice and risk to involve a large team of attorneys from multiple jurisdictions thereby causing, inter alia, disproportionate and not warranted travel, coordination and other costs"; by contrast, the Claimants' in-house resources had been "taken up completely over long periods of time", but no account was taken of that in their own costs submission; the Tribunal

should however take account of the fact that “parts of Claimants’ business were at times paralyzed for any other business than this arbitration”;

- b. **Experts’ fees:** there was no reasonable explanation for the disproportion between expert costs, given that the Claimants’ valuation expert was “a reputable company with experienced claim valuation specialists” who had conducted “an independent audit”, whilst the Respondent’s expert had “only verified its outcome”;
- c. **Document production:** the document production phase had been prolonged by the Respondent’s “numerous requests and issues raised, including, for example, Respondent’s request that the Tribunal find that Claimants did not submit a request for document production at all, the numerous legal issues raised by Respondent, the disproportionate requests to produce with which Claimants had to deal and the general objections raised for most of Claimants’ requests”; the Claimants’ in-house legal team had been taken up for weeks at a time dealing exclusively with the Respondent’s requests, and the Claimants had in fact requested at the time that the Respondent “be stopped in this strategy of causing a massive expenditure of time, internal resources and costs”.
- d. **Submissions and core bundle:** the Respondent’s Counter-Memorial had been excessive in size, consisting of 15 binders; whilst the Claimants had proposed only 71 documents for inclusion in the core bundle, the Respondent had proposed 446 documents; the resulting cost of approximately £10,000 for the production of copies of the core bundle was absolutely disproportionate given the actual use made thereof at the hearing.

2. The Respondent’s Reply on Costs, 17 May 2013

- 6.15 Pursuant to the Tribunal’s direction, the Respondent’s Reply on costs was limited to the issues of 1) the disproportion between the parties’ respective costs claims; 2) the Czech Republic’s claim for reimbursement of VAT; and 3) the conduct of the disclosure phase.
- 6.16 As to the disproportion between the parties’ costs claims, the Respondent submitted that its overall costs of less than € 3.5 million were “absolutely standard for an investment arbitration” and were in fact very reasonable given the fact-intensive character of the dispute. All of the relevant facts had been new to the Czech Republic, and had required carefully study and assessment by its legal team.
- 6.17 The above, as well as other factors, explained the discrepancy between the parties’ respective costs: the Respondent had had to learn all the relevant facts, which had to be gathered from the various administrative bodies, as well as documents produced by the Claimants pursuant to the Tribunal’s orders, whereas the Claimants had known all relevant facts before the arbitration was begun.
- 6.18 The Respondent further submitted that it had relied almost exclusively on external counsel and experts, whilst the Claimants had used its internal team, without claiming their costs, so that the Claimants’ was a partial costs claim only. The reliance on external counsel and experts was

fully justified, as the Respondent did not have the internal resources available in particular to analyse the evidence, whereas there was no comparable need for Claimants' external counsel to analyse the proceedings to which Claimants had been party. The Respondent submitted that it had also had to retain external experts "to match the Claimants' knowledge of the various commercial and technical aspects of their own business". The Claimants had been free to divide the work between their internal team and external counsel and experts as they saw fit, but the fact that the Respondent had relied on external assistance did not render its higher costs unreasonable.

- 6.19 The Respondent argued that it had incurred higher costs because of the way in which the Claimants had pleaded the case, suggesting that the Claimants had pleaded the case in a "conclusory manner", for example merely pointing to the overall length of the administrative proceedings and what they alleged were incorrect decisions, whilst it had fallen to the Respondent to establish the full factual background and describe the "intense procedural activity in each of the underlying administrative proceedings and provide the respective evidence in order to defend against the Claimants' conclusory allegations of delays"; the process had been time-consuming and had involved high translation costs.
- 6.20 The discrepancy between the costs of the parties' respective valuation experts explained itself by reference to the obviously differing scope, level of detail, and sophistication of their reports. The Respondent's expert had done much more than merely critically assess and rectify the assumptions made by the Claimants' expert, and in addition had prepared "an independent comprehensive analysis and two new valuations". The Respondent also emphasized that, although the Claimants' experts had presumably had access to the Claimants' accounting documents, analyses and other information relating to the project, its own expert had had to gather those facts from the "limited documents" produced by the Claimants, publicly available materials, and expert reports of the property experts.
- 6.21 Finally, the Respondent rejected the allegations of over-litigation, which were "utterly non-specific, unsupported by any evidence and patently incorrect". Its team was of a standard size, and no larger than that of the Claimants, came only from the Czech Republic and the US, whilst the Claimants' team had members from Germany and the United Kingdom, so that the allegation that the size and composition of its team had resulted in disproportionate and unwarranted costs was "baseless speculation that the Claimants cannot specify, substantiate or support with any evidence".
- 6.22 The VAT claim was standard practice, and the Respondent had never before faced an objection that such reimbursement would constitute unjust enrichment; its claims for legal costs, including VAT, had been granted in *Phoenix Action*, as well as in the unpublished awards in *Consortium Oeconomicus*, *Voecklinghaus*, *European Media Ventures*, and *Nepolsky*.
- 6.23 The Respondent described how, in accordance with its prevailing public procurement laws, all services relating to its representation in the present proceedings (including services provided by third parties, both inside and outside the Czech Republic) had been rendered and invoiced through the local office of its legal representatives, explaining that all third party services had been charged to the local office, which had paid the invoices, and then charged the relevant amounts to its Ministry of Finance. It further explained that the Ministry of Finance was a

separate accounting unit, and that the costs charged to it in relation to the arbitration had been recorded as expenses of the Ministry in the full amount invoiced, including VAT.

6.24 The VAT had been charged at the applicable statutory rate, and the Respondent's legal advisers were obliged by law to charge VAT on both their own services provided in the Czech Republic, and services provided by third parties outside the Czech Republic. The Respondent noted that, in accordance with the EU VAT Directives, the Ministry when acting as a public authority was not entitled to reclaim input VAT, with the result that the VAT was irrecoverable and constituted a real cost.

6.25 Furthermore:

- a. it was not possible to verify whether all of the VAT paid to its legal advisers was in fact paid to the Czech Tax Authorities, as there was an entitlement to set-off the VAT paid on the inputs against the output tax received; it was moreover not possible to trace the entire chain of VAT payments, and to verify whether each business in the chain had in fact properly self-assessed and paid the correct amount of VAT, so that it was not possible to establish whether the Czech Tax Authorities had in fact received all of the VAT paid to the Respondent's legal advisers;
- b. moreover, even if the tax had been duly paid to the Czech Tax Authorities, it should not be considered not to have been "incurred" as it had actually been paid, independently of whether or not the tax authorities subsequently collected a corresponding amount; the VAT collected by the tax authorities was redistributed to various entities and non-governmental bodies, with a significant part being paid to municipalities and regions, which were separate legal persons with independent budgets, and a small amount was paid to the European Union.
- c. finally, as a matter of Czech law (which Respondent submitted was the applicable law) reimbursement of legal costs, including VAT, was a legal obligation, and could not constitute unjust enrichment.

6.26 The Respondent objected to the Claimants' characterizations of the disclosure exercise, noting that:

- a. the Respondent had requested extensive document production in relation to "several key aspects" of its defence, giving by way of examples the Claimants' time management of the project, the economics of the project, and circumstances and motivations underlying the decision to abandon the project, and the Claimants' decision to excavate in excess of the volume authorized in the Planning Permit. It observed that, by contrast, the Claimants had "always had full access to the files regarding the underlying administrative proceedings";
- b. the Respondent's requests had been fully justified; it observed that it had initially made 29 requests, the Parties had disputed only ten of them, and the Tribunal had granted all but one of the Respondent's requests in its Ruling on Document Production, dated 15 July 2010. In contrast, it noted that the Claimants had initially

made nine requests, of which the Tribunal had rejected five, and granted four “but only with significant limitations”;

- c. the disclosure exercise had not ended in July 2010, and in particular, the Claimants in March/April 2011 had submitted an additional eight document requests in relation to the administrative proceedings in relation to Multi; the Respondent had been unable to comply with those requests due to applicable confidentiality rules, but following the ruling of the Tribunal, the Respondent had promptly produced 136 responsive documents.

On that basis, the Respondent submitted that the document production exercise was “far from one-sided”, and that although its requests had been more extensive than those made by the Claimants, they had been fully justified and necessary for its defence.

3. The Claimants’ Rejoinder on Costs, 29 May 2013

- 6.27 The Claimants’ Rejoinder was in essence a reiteration and repetition of their earlier argument on the “striking disproportion” of the Respondent’s costs. They expressly rejected the Respondent’s justification based on the complexity of the case, which largely resulted from the Respondent’s own litigation tactics, and the Claimants’ counsel and experts had faced the same complexity but had incurred significantly lower costs.
- 6.28 The Claimants rejected the suggestion that the Respondent’s legal and expert team had had, uniquely, to learn the facts, noting that the same was true of their own team. They likewise rejected the Respondent’s suggestion that the difference in costs was in part due to the fact that Claimants had used its internal team, noting that the “overwhelming part” of the work had been done externally; the Claimants’ external counsel had not been involved in the project or the underlying administrative proceedings, and thus had had to study and assess the facts once they had been instructed.
- 6.29 As regards the discrepancy between the costs of the valuation experts, the Claimants asserted that their expert had carried out its own research, and had not simply relied on data provided by the Claimants.
- 6.30 Finally, the Claimants denied that there was any “standard” level of fees in investment arbitration, the only applicable standard being what a prudent and diligent party would have spent for the protection and enforcement of its interests; their own costs were a suitable benchmark in that regard.
- 6.31 As to the VAT question, relying upon the Respondent’s explanation of the way in which its external counsel and experts had charged for their costs, the Claimants asserted that the Respondent had “admitted that any and all services were rendered within the Czech Republic”, that all VAT was incurred within the Czech Republic, and that, as a result, the Respondent paid to its advisers’ Czech office the VAT incurred on the fees invoiced by its advisers which they were obliged to account for to the tax authorities. They submitted that the services rendered to the Respondent by its advisers’ Czech office and the VAT thereon were “the only ones relevant for the Respondent’s request for reimbursement of VAT in the present case”, and that

based on those statements, the claim was clearly baseless; the Tribunal should, moreover, take into account that the Respondent had claimed reimbursement of sums which it knew were not due.

- 6.32 The Claimants submitted that those considerations were sufficient to dispose of the Respondent's claim in respect of VAT; however, in addition, "for the sake of precaution and completeness only", the Claimants also responded to the Respondent's arguments as to the "second 'cycle'" of VAT.
- 6.33 In that context, they asserted that, whether third parties providing services to the Czech office of the Respondent's legal advisers were domiciled within or outside the Czech Republic, the Respondent's legal advisers could, in either case, reclaim the VAT paid by them from the tax authorities.
- 6.34 On that basis, the Claimants submitted that VAT payments and refunds "create a cycle independent of the charging of the fees and disbursements" by the Respondent's legal advisers to the Respondent. They likewise rejected the Respondent's argument that, within the second cycle, it was impossible to ascertain whether the full amount of the VAT charged had in fact been received by the Czech tax authorities, since that boiled down to suggesting that the Claimants should compensate the Respondent for the effects of potential tax fraud of other taxpayers.
- 6.35 That the VAT received by the tax authorities was distributed to municipalities, regions and the EU did not change the fact that the VAT initially went back to the central Government and was thus not "incurred" by the Respondent.
- 6.36 As for the Respondent's reliance on the argument that there would be no unjust enrichment as a matter of Czech law because Czech law treated the reimbursement of costs as a legal obligation, the Claimants argued first, that that was beside the point, as the issue in dispute was precisely whether there was a legal obligation of reimbursement under Article 38(e) of the UNCITRAL Rules, and second, that the qualification under Czech law was in any case irrelevant as the proceedings were governed by the BIT, the UNCITRAL Rules, and French law as the *lex arbitri*.
- 6.37 As to the authorities cited by the Respondent, in *Phoenix Action* it was possible that the VAT had not been incurred in the Czech Republic, but in another State; the Award was silent on the point. The others were unpublished awards, which could not be relied on as it was not possible to verify the Respondent's assertions.

D. THE TRIBUNAL'S DECISION ON COSTS

1. Applicable Rules, and Issues for Decision

- 6.38 As regards the applicable rules and principles governing its powers to apportion costs, the Tribunal recalls that:

- a. pursuant to Article 38(e) of the UNCITRAL Rules, the costs of legal representation and assistance of the successful party are to form part of the costs of the arbitration only to the extent that the Tribunal determines that the amount of such costs is reasonable, taking into account the circumstances of the case;
 - b. it has a wide power under Article 40 of the UNCITRAL Rules to apportion both the costs of the arbitration generally and the costs of legal representation and assistance of the successful party, if it considers that to be reasonable in the circumstances.
- 6.39 The first issue which arises is which party is to be regarded as the “successful party” for this purpose.
- 6.40 Although an argument might be made in favour of proceeding on an issue-by-issue basis in assessing which party had been successful, the Tribunal is of the view that such an approach is not appropriate in the present case; it plainly results from the decisions recorded in Parts III, IV, and V above that, overall, the Respondent is the successful party, having won its case on the merits, even though the Claimants were successful in their opposition to the Respondent’s objections to the Tribunal’s jurisdiction. More precisely, the Respondent’s principal jurisdictional objections based on the lack of an investment and the illegality of the Claimants’ investment were rejected, and its other objections *ratione materiae* and *ratione temporis* were in part admitted by the Claimants, and in part joined by the Tribunal to the merits, whereas the Tribunal has rejected all of the Claimants’ claims alleging breach of the BIT and its claims for damages on their merits, as well as, in the alternative, on the basis of a lack of causation.
- 6.41 The Tribunal will return to the question of the Parties’ respective success on particular issues in the context of its discussion of apportionment below.
- 6.42 It remains however for the Tribunal to decide:
- a. whether the VAT paid by the Respondent to its legal advisers falls properly within the costs of legal representation and assistance foreseen by Article 38(e);
 - b. whether the Respondent’s costs of legal representation and assistance are reasonable, within the meaning of Article 38(e) of the Rules;
 - c. whether, taking account of the circumstances of the case, it is reasonable for the Tribunal to apportion either the costs of the arbitration, or the Respondent’s costs of legal representation and assistance, or both, bearing in mind the applicable principles set out in paragraph 6.38 above.

2. Recoverability of VAT

- 6.43 It is convenient first to consider the question whether, in principle, the VAT charged by the Respondent’s legal advisers in respect of counsel’s fees and third party services should be regarded as forming part of the Respondent’s costs of legal representation and assistance within the meaning of the UNCITRAL Rules.

- 6.44 Although the matter is not explicitly so phrased in Article 38(e) of the UNCITRAL Rules,¹⁹⁷⁴ the Respondent did not dispute that Article 38(e) was limited to the costs that had been ‘incurred’ by the successful party. It is in any case, in the opinion of the Tribunal, necessarily implicit that Article 38(e) relates to reimbursement (whether in whole or in part) of what it has in fact cost the successful party to prepare and argue its case. Does that therefore encompass VAT on legal fees and disbursements paid by a State to its legal advisers in circumstances in which the legal advisers are then under a legal obligation to account for the VAT to the same State’s tax authorities?
- 6.45 That question appears to be one of first impression; neither of the Parties has drawn the Tribunal’s attention to any decision in which the issue had been expressly raised and dealt with by an arbitral tribunal, nor is the Tribunal itself aware of any such decision. Conversely, and without casting doubt upon the Respondent’s assertion that it had in fact recovered VAT in the cases in question, the decisions that were cited by the Respondent offer the present Tribunal very little assistance.
- 6.46 The Respondent relied specifically on the Award in *Phoenix Action*. However the Award contains no discussion of whether VAT should in principle be recoverable in circumstances such as the present, and the point appears not to have been raised by the Claimant in that case. Moreover the Award does not disclose on its face whether the amounts claimed by the Respondent in that case did in fact include sums paid by it in respect of VAT charged by its advisers, nor whether such VAT as it recovered was attributable to fees incurred in the Czech Republic, or alternatively outside the Czech Republic.
- 6.47 *Phoenix Action* aside, the other arbitral decisions cited by the Respondent are unpublished and have not been provided to the Tribunal. The Tribunal has, as a result, not been able to consider how the issue of recoverability of VAT was raised by the successful party, resisted by the unsuccessful party, or decided by the tribunal. It would not be proper, therefore, for the Tribunal to take those decisions into account. The question accordingly falls to be decided on first principles.
- 6.48 The Tribunal initially saw some force in the Respondent’s argument that it was not in any case possible to ascertain whether the VAT was in fact eventually received by the State, since its legal advisers would have been able to set off against it the input tax they had paid. The Tribunal was rather less impressed by the further argument based on the difficulty of ascertaining whether third parties in the supply chain had in fact correctly accounted for the amount of VAT due.
- 6.49 However, the Tribunal has in the end reached the conclusion that a Respondent State ought not in principle be allowed to recover as costs sums which, although paid out, it is entitled by law (its own law) to be paid back via the liability of the payee to account for the VAT charged by it.
- 6.50 It reaches that conclusion on the basis that, for the purposes of public international law, a State is treated as a single legal person. In consequence, it is irrelevant whether under Czech law the Ministry of Finance is entitled to recoup input VAT or whether the Ministry is a separate

¹⁹⁷⁴ At least in the English language version; the French text is more direct.

accounting unit. If the organs or constituent entities of a State are liable in law to pay VAT in respect of services provided to them, then the correct analysis is that the State as such must be regarded as both paying VAT and then recovering back the VAT paid, with the net result that the State has incurred no overall financial detriment that can rank as part of its 'costs' for legal representation and assistance in the conduct of an arbitration. In the view of the Tribunal, that conclusion stands irrespective of whether the repayment operates by way of output tax on services provided, or by way of a reverse charge in respect of services provided by third parties located outside the Czech Republic.

6.51 The Tribunal regards it as beside the point that an individual entity providing services may be entitled to set off any input tax it has itself been charged when remitting to the State the VAT received. That is, in the Tribunal's view, essentially an accounting operation as between the individual taxpayer and the tax authorities. The economic reality is however that the cumulative total of the VAT due on the underlying transactions remains unaffected, as does the fact that the tax levied ultimately finds its way into the hands of the State. It follows that, in the absence of specific proof to the contrary in particular cases, the VAT levied on legal advice and services to the State cannot be treated as part of the costs envisaged in Article 38(e) of the Rules.

6.52 The Respondent has affirmed that all such services in the present case were invoiced through the offices of its legal advisers located within the Czech Republic, and that the VAT claimed consists solely of the output tax charged by its legal advisers on the fees charged by them and disbursements made. The Tribunal expresses no view on the situation where the service provider is based outside the territory of the Respondent State. In those circumstances it is possible that different considerations may apply.

3. Reasonableness of the Costs Claimed by the Respondent.

6.53 The Tribunal begins by noting that there has been no suggestion that the sums claimed by the Respondent were not in fact properly incurred by it. The only issue thus relates to whether the costs incurred were reasonable.

6.54 As to the reasonableness of the sums claimed by the Respondent (excluding the VAT element; see above), the Tribunal is of the view that, having regard to the circumstances of the case, the costs claimed by the Respondent are not in principle unreasonable.

6.55 It will be convenient to take separately the legal costs and expenses, and the costs of expert evidence, in that order.

6.56 The Claimants point to the marked discrepancy between the levels of the claims put in by the Parties in respect of their legal representation. The existence of this discrepancy is undeniable, but is not in itself proof of unreasonableness. One of the reasons for the discrepancy is that, as the Claimants have themselves explained, some of the work undertaken by them on the case, in particular in relation to disclosure, was done in-house. It is also not clear to the Tribunal whether the Claimants have in fact claimed in full for all of the legal costs they incurred (including their in-house costs), which, if so, would further undermine the usefulness of a bare comparison between the two figures.

- 6.57 As to the nature and origin of the legal fees and expenses incurred, the Tribunal starts from the proposition that litigating parties are entitled to be represented in a manner of their own choosing. This is a basic right, figuring in various permutations in the leading contemporary human rights conventions. To impose a cost penalty on a party to an investment arbitration for choosing one way or another would clearly act as a brake on the exercise of this basic right, which could in some circumstances be severe. The Tribunal does not believe that it was in any way reprehensible that the two Parties in the present arbitration opted for different solutions both as to the mixture of in-house and external legal resources employed, and as to the origin and identity of their external legal advisers and counsel, and sees no sign that the choices each of them made led in themselves to any over-litigation of the case. The Tribunal cannot therefore entertain the Claimants' criticism that it was in some way unreasonable for the Respondent to retain Counsel from different jurisdictions, with the travel and coordination costs which that necessarily entailed.
- 6.58 It is a common feature of investment arbitration that Parties choose to be represented by Counsel and advisers based outside their own countries, as indeed happened in the present case for Claimant and Respondent alike. It is a further feature of investment arbitration that hearings may be held at locations other than those in which the Parties or their Counsel are based, leading to additional costs for travel and accommodation for representatives of the Parties and for witnesses, irrespective of who the legal counsel are. Once the Tribunal laid down in Procedural Order No.1 that the seat of the arbitration would be Paris, and that hearings would in principle be held in London, it became inevitable that both Parties would incur at least some additional travel and accommodation costs.
- 6.59 The Tribunal cannot therefore see any basis, quantitative or qualitative, for a finding that the scale of the Respondent's costs was in itself unreasonable.
- 6.60 Further, the Tribunal notes that the Claimants did not attempt to quantify more closely the extent to which the Respondent's costs should be considered unreasonable, other than the comparison with their own claimed costs. But, in the view of the Tribunal, the standard under the UNCITRAL Rules for assessing the reasonableness or otherwise of a successful Party's costs is an objective one, which depends on the nature of the case which the successful Party had to establish or, as the case may be, to meet, not simply on a comparison with the level of the costs incurred by the opposing Party.
- 6.61 The criterion should in other words be, in a case of genuine doubt as to the reasonableness of a Party's legal costs, an assessment of the amount of work which would reasonably have been required in order adequately to defend the interests of the Party concerned. Many aspects of the present arbitration were relatively straightforward. Such complexities as there were derived mainly from the intricacies (which are quite substantial) of Czech planning legislation, and to a lesser extent from the need to unravel the internal decision-making processes of the Claimant group of companies. Both of these elements were however givens of the situation that had led to the dispute which was brought to arbitration. And both meant, inevitably, that a considerable effort in time and resources would be spent by both Parties in establishing, to the satisfaction of the Tribunal, not merely what had actually happened, but its relevance in law to the legal framework of the BIT under which the arbitration was brought.

- 6.62 That being so, the Tribunal does not find any basis to conclude in general terms that either Party was responsible for ‘over-litigating’ the case. To the extent that a criticism of that kind finds ground at all, it is in the extensive disputes in which the Parties enmeshed themselves over document production. In that regard, however, the Tribunal does not believe that the criticism can be levelled at one Party only. The Claimants’ specific complaint as to the effects on its own in-house legal function of having to handle the question of disclosure is in no way linked to the reasonableness of the costs incurred by the Respondent, and would at most have been relevant to the reasonableness of the Claimants’ own costs claims.
- 6.63 As to the costs incurred in respect of experts, the Tribunal notes (as above) that it is not disputed that the costs claimed in that respect were in fact incurred. The Claimants’ criticisms focused in particular upon the difference between the level of fees of the Parties’ respective valuation and tax experts, although the Tribunal notes that the fees paid by the Respondent to its experts in all fields were consistently higher than those paid by the Claimants to its experts in the same field.
- 6.64 In the Tribunal’s view, the Claimants have not put forward any cogent reasons for suggesting that the costs claimed by the Respondent in respect of expert fees are unreasonable, and does not accept in that connection the Claimants’ proposition that its valuation experts “conducted an independent audit” whilst the Respondent’s experts “only verified its outcome”; it seems to the Tribunal, from the scope of the reports, that both Parties’ experts carried out extensive amounts of work.
- 6.65 In the Tribunal’s view, the overall level of the fees claimed by the Respondent in respect of the fees paid to its valuation and tax experts, although at the upper end of the bracket which might have been expected in a dispute of this type, cannot be characterized as having been unreasonable, and the same is true in respect of the fees in respect of the other experts.
- 6.66 The Tribunal is not therefore minded to disallow for cost allocation purposes any part of the Respondent’s claimed expenses. The Respondent’s costs of legal representation and assistance, excluding the VAT element, which are to be treated as forming part of the costs of the arbitration therefore amount to CZK 74,571,146.17, which, converted into Euros using the exchange rate ruling on the day prior to the date on which this Award is made,¹⁹⁷⁵ is equivalent to € 2,888,898.86.
- 6.67 The question that remains is accordingly that whether the Respondent’s costs should be apportioned in part.

4. Apportionment of Costs

- 6.68 The question whether to depart from the general principle that the unsuccessful party should pay the costs of the arbitration and the question whether to apportion the successful party’s costs of legal representation and assistance are similar in nature. The only difference is that there is a rebuttable presumption under the UNCITRAL Rules that the costs of the arbitration

¹⁹⁷⁵ I.e. € 1 = CZK 25.813, being the reference exchange rate for 18 September 2013, as published by the European Central Bank (<http://www.ecb.europa.eu/stats/exchange/eurofxref/html/index.en.html>).

should follow the event, but no equivalent presumption for apportionment of the costs of representation. Nevertheless, both raise issues of apportionment, and both are remitted under the Rules to the wide discretion of an arbitration tribunal, based upon its assessment of reasonableness, taking into account the circumstances of the case. The Tribunal is accordingly of the view that the relevant criteria are in both cases essentially the same, and include in both cases the extent to which the successful party has succeeded on the principal questions in issue in the dispute.

6.69 In the present case, there are various circumstances which, in the view of the Tribunal, confirm the appropriateness of the presumption that the costs of the arbitration should follow the event, and at the same time confirm both that there should be some apportionment of those costs and that, while the Respondent is entitled to recover the costs of defending itself, there should be some apportionment of those costs as well.

6.70 First and foremost, the Respondent has totally succeeded on the merits. More specifically, a central element in the Claimants' case revolved around accusations of serious misconduct on the part of a number of Czech public officials as well as third parties. If anything, this element became even more central to the Claimants' case as it was presented at the oral hearings. The Tribunal has however found earlier in this Award that the Claimants' entire case of corruption was devoid of any real evidential support – so much so that the Tribunal was led on occasion to wonder whether some of these insinuations of corruption ought ever properly to have been made at all. But this cannot alter the fact that the case was made, and relied upon, and the Respondent had to meet it. The Tribunal has already set out at paragraphs 4.871 and following the serious view an investment tribunal is bound to take of corruption and the special duty that this imposes on it to scrutinize with care the evidence led before it on that matter. But that is not the same as saying that an investment tribunal can or should condone the bringing of wide-ranging imputations of corruption without direct evidence to back them up, nor can it ignore a party's persistence in such allegations once it has become clear that the necessary evidence is not available. Corruption is not always easy to prove, the Tribunal is mindful of that. That does not however mean that corruption may be alleged without proof. The Tribunal has, at all events, not allowed its judgement to be clouded by mere imputations of impropriety, and has decided the case in strict objectivity on the basis of the evidence led before it.

6.71 Moreover, other aspects of the conduct of the Claimants in the present proceedings are open to criticism as prejudicial to the orderly conduct of the arbitration, all of which had implications as to costs. Prime amongst these rank the attempts to introduce new claims both late and out of time; the continued reliance on an unsigned witness statement which Mr Kytlička had indicated he did not endorse; and the recruitment of a law student in an attempt to obtain evidence under false pretences.

6.72 Set against this, however, is the fact that the Respondent maintained formally in being its jurisdictional objections (even though certain among them were no longer being pursued in any depth by the time of the oral hearings), and that, as indicated, the Tribunal has found in the Claimants' favour in that respect.

6.73 Furthermore, the Respondent is not immune from criticism of its own over the cost implications of certain aspects of its conduct of the proceedings. The Tribunal sets aside in

this respect the unedifying argument that emerged between the Parties as to the propriety of Ms Němcová's involvement as legal representative of the ECE companies which in the end was not being pursued in the decisive stages of the proceedings. It does however regard at least some part of the Claimants' strictures over the document production phase as well-founded, although, as already indicated, it is of the view that both Parties are to blame and that each contributed to the wide-ranging disputes over document production in which the Parties and Tribunal became bogged down, leading eventually and inevitably to the modification of the procedural timetable originally provided for in Procedural Order No. 1 and, as a consequence, the vacation of the hearing window that had been foreseen for March 2011.

6.74 Having given careful consideration to the matters set out in paragraphs 6.70-6.73 above, the Tribunal has come to the view that in broad terms they cancel one another out in the sense that, when all of the circumstances of the case are taken into account, they give no grounds for departing from the presumption that the costs of the arbitration should be borne by the unsuccessful party, and that accordingly the Claimants should reimburse the Respondent its share of these costs. At the same time the Tribunal is of the view that these same circumstances, taken as a whole, do require an apportionment both of the costs of the arbitration and of the Respondent's costs of legal representation and assistance, and that the appropriate allocation is 85% : 15%.

5. Conclusion

6.75 The Tribunal accordingly orders that the Claimants are to make payment to the Respondent in the sums of :-

- a. € 371,068.75, being 35% of the costs of the arbitration (excluding the Respondent's costs of legal representation and assistance); and
- b. € 2,455,564.03, being 85% of the Respondent's costs of legal representation and assistance (exclusive of VAT) (CZK 63,385,474.24), converted into Euros at the exchange rate ruling on the day prior to the date on which this Award is made.

6.76 The total sum payable to the Respondent by the Claimants under paragraph 6.75 above is € 2,826,632.78, and will carry simple interest at the rate of 4% per annum as from the date of this Award.

PART VII

CONCLUSION AND OPERATIVE PART

For the foregoing reasons, the Tribunal holds:

A. As to jurisdiction:

1. that the Claimants' respective shareholdings and other participatory interests in Tschechien 7 and ECE Praha constitute an investment within the meaning of Article 1(1) of the BIT and that that the Respondent's objection to jurisdiction based on the Claimants' lack of an investment is therefore rejected;
2. that the Respondent's objection to jurisdiction on the basis of illegality is rejected;
3. that the Respondent's objections to jurisdiction *ratione materiae* and *ratione temporis* are joined to the merits;
4. that as a consequence it has jurisdiction to rule upon the merits of the Claimants' claims.

B. As to the merits:

1. that the Claimants' new claims for breach of:
 - i. Article 3 (Most-Favoured Nation Treatment);
 - ii. Article 2(3) (Full Protection) and Article 4(1) (Full Protection and Security); and
 - iii. Article 7(1) (the obligation to observe any obligation assumed with regard to investments of investors)are disallowed pursuant to Article 20 of the UNCITRAL Arbitration Rules;
2. that the Claimants' claim for breach by the Respondent of Article 2(1) (the obligation to admit investments in accordance with its legislation) is deemed to have been abandoned, and thus fails *in limine*;
3. that the Claimants' claims for breach by the Respondent of:
 - i. Article 2(1) (the obligation to accord fair and equitable treatment);
 - ii. Article 4(2) (the prohibition of expropriation);
 - iii. Article 2(2) (prohibition of impairment of the management, maintenance, use or enjoyment of investments by arbitrary or discriminatory measures)

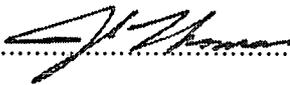
fail in their entirety and are rejected.

4. that, therefore, the Respondent's objections to jurisdiction *ratione materiae* and *ratione temporis* do not call for a ruling from the Tribunal.
- C. In accordance with Article 38 of the UNCITRAL Rules, the total costs of the arbitration, including the Respondent's costs of representation and assistance, are fixed at € 3,949,095.29.
- D. In accordance with paragraphs 6.75 and 6.76 above, the Claimants are to pay the Respondent the sum of € 2,826,632.78 in respect of the costs of the arbitration (including the Respondent's costs of legal representation and assistance).
- E. Interest is to run on the sum payable under paragraph D above at the rate of 4% per annum from the date of the present Award until payment.

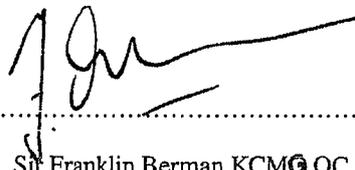
Done at the place of arbitration, Paris, France on the 19th day of September, 2013



Professor Andreas Bucher



Mr J Christopher Thomas QC



Sir Franklin Berman KCMG QC