



ARBITRATION INSTITUTE

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FINAL AWARD

Made on 10 March 2017

Seat of arbitration: Stockholm, Sweden

ARBITRATION CASE V 2015/014

CLAIMANTS:

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Claimants' counsel:

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RESPONDENT:

THE CZECH REPUBLIC

Respondent's counsel:

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ARBITRAL TRIBUNAL:

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

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I. INTRODUCTION

1. This matter arises under an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic dated 10 July 1990 (the “*BIT*”).
2. The Claimants, Mr. Ivan Peter Busta and Mr. James Peter Busta, are two nationals of the United Kingdom.¹ The Respondent is the Czech Republic.
3. Between 1990 and 2002, the Claimants were in the business of the wholesale of automobile parts and accessories in the Czech Republic. They conducted part of this business through a joint venture with a Czech company called VDI Kyjovan (“*Kyjovan*”).
4. This dispute arises out of events that occurred in March 2000, when Kyjovan began moving goods owned by one of the Claimants’ companies out of a warehouse that the company had leased from a company owned by Kyjovan and the Claimants. The Claimants submit that the Police did not intervene in the process, taking the view that Kyjovan was acting pursuant to a local building authority’s call to repair the warehouse.
5. The Police subsequently located the goods at two other warehouses. The goods were taken into Police custody and subsequently returned to the Claimants. The Parties dispute whether or not all of the goods were returned. The Claimants allege that goods were not returned which had a value of CZK 63 million, approximately two-thirds of the value of the goods that were taken. The Respondent alleges that all of the goods that were taken from the warehouse were returned.
6. The Claimants argue that the loss of approximately two-thirds of the goods resulted from the failure of the Police to prevent the removal of the goods from the warehouse by Kyjovan, and the fact that they took custody of the goods “*en bloc*” without making an itemised list as required by Czech law. The Claimants claim that this constitutes expropriation under Article 5 of the BIT, and breach of the fair and equitable and full protection and security standards contained in Article 2(2) of the BIT by the Respondent.
7. The Respondent objects to the Tribunal’s jurisdiction and the admissibility of the Claimants’ claims. The Respondent also denies any breach of the BIT and seeks a dismissal of the Claimants’ claims on their merits. In particular, the Respondent denies that there was any failure by the Police when Kyjovan moved the goods out of the warehouse, or subsequently when the Police took custody of the goods from Kyjovan. In any event, the Respondent denies that the Claimants have suffered any loss and argues that all of the goods were returned.

¹ Passport of James Peter Busta (**Exhibit C-2**); Passport of Ivan Peter Busta (**Exhibit C-3**).

II. PROCEDURAL HISTORY

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

8. On 6 May 2014, the Claimants and one other claimant filed a Request for Arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce (the “*SCC*”). They nominated Professor August Reinisch as arbitrator.
9. On 10 June 2014, the Respondent filed its Answer to the Request for Arbitration. The Respondent nominated Professor Philippe Sands as arbitrator.
10. The SCC divided the proceedings into two matters due to the different nature of the claims and the fact that the claims were presented by different claimants. After, the claimants failed to pay the advance on costs requested by the SCC, the SCC decided to dismiss the claims.
11. On 6 January 2015, the claimants wrote to the SCC advising that they wished to pursue the claims and re-submitted the Request for Arbitration without amendment. At that point, the claimants agreed that the proceedings should be divided into two matters and that the seat of the arbitration should be Stockholm. The claimants nominated Professor Reinisch as arbitrator in both proceedings and advised that they had no objections to the appointment of Professor Sands as arbitrator by the Respondent in both proceedings.
12. On 13 January 2015, the SCC transmitted the Request for Arbitration in this proceeding to the Respondent.
13. On 2 February 2015, the Respondent filed its Answer to the Request for Arbitration in this proceeding. The Respondent again nominated Professor Sands as arbitrator, and agreed that the proceedings be divided into two and that the seat of the arbitration be Stockholm.
14. On 25 February 2015, Professor Sands confirmed his acceptance to sit as arbitrator in the arbitration.
15. On 26 February 2015, Professor Reinisch confirmed his acceptance to sit as arbitrator in the arbitration.
16. On 17 March 2015, the SCC wrote to Dr. Yas Banifatemi advising that it wished to appoint her as chairperson in the arbitration.
17. On 24 March 2015, Dr. Banifatemi confirmed her acceptance to sit as chairperson in the arbitration.
18. On 26 March 2015, the SCC referred the case to the Tribunal.

B. The Procedural Timetable and Conduct of the Arbitration

19. On 29 April 2015, the Tribunal invited the Parties to seek to agree a procedural timetable for the conduct of the arbitration, in accordance with Article 23 of the

Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“*SCC Rules*”).

20. On 11 May 2015, the Claimants advised the Tribunal that the Parties had been unable to reach agreement on the procedural timetable and requested the Tribunal to set a schedule to guarantee the issuance of the final award by 25 September 2015, in accordance with the six-month time period prescribed in Article 37 of the SCC Rules. The Claimants also proposed that the Tribunal hold a hearing and that this arbitration and the related arbitration, 2014/181, be heard together.
21. On 15 May 2015, the Respondent replied to the Claimants’ proposals of 11 May 2015. The Respondent indicated that it might request bifurcation of the proceeding and proposed alternate timetables accounting for this possibility. The Respondent submitted that this arbitration and the related arbitration, 2014/181, should be heard separately.
22. On 1 June 2015, the Tribunal issued Procedural Order No. 1 by which it appointed, with the Parties’ consent, Ms. Zoe Brentnall as the administrative secretary to the Tribunal.
23. On the same day, the Tribunal issued Procedural Order No. 2, by which it confirmed that the cases should be heard separately, as determined by the SCC. However, it decided that the two cases should be conducted following the same procedural timetable, with the hearings occurring sequentially. The Tribunal also invited the Respondent to file a request for bifurcation of the proceedings by 22 June 2015 or to notify the Tribunal and the Claimant that it would not seek bifurcation. The Tribunal further advised that it would request the SCC to grant an extension of the time limit for making a final award under Article 37 of the SCC Rules.
24. On 20 June 2015, the Respondent requested bifurcation the proceedings between jurisdiction and merits.
25. On 6 July 2015, the Claimants responded to the Respondent’s request for bifurcation and requested the Tribunal to decline to bifurcate.
26. The Tribunal fixed the procedural timetable by way of Procedural Order No. 3 dated 28 July 2015. By the same Procedural Order, the Tribunal denied the Respondent’s request to bifurcate the proceedings and fixed the procedural timetable.
27. On 18 August 2015, the Tribunal asked the Parties to reserve the period from 1 to 7 September 2016 for an oral hearing.
28. On 25 August 2015, the Tribunal asked the SCC for an extension of the time limit for making a final award to 31 December 2016.
29. On 3 September 2015, the SCC granted the Tribunal an extension for making a final award to 2 January 2017.
30. On 18 December 2015, the Tribunal advised the Parties that the commitments of one of the Members of the Tribunal would require long-haul travel on the days immediately prior to and on the morning of 1 September 2016. As a result, the Tribunal verified

with the Parties the possibility of hearing the matter on alternative dates in September 2016, including the period from 19 to 23 September 2016.

31. On 23 December 2015, the Claimants advised that they would be available during the period from 19 to 23 September 2016.
32. On the same day, the Respondent advised that it would not be available during the period from 19 to 23 September 2016, but that it could be available during the period from 3 to 7 October 2016.
33. On 15 January 2016, the Tribunal requested the Claimants to advise whether they would be available for a hearing from 3 to 7 October 2016, which the Claimants confirmed on 22 February 2016.
34. On 26 February 2016, the Tribunal confirmed that the matter would be heard from 3 to 7 October 2016.

C. Further Developments Prior to the Hearing

35. On 16 September 2015, the Claimants submitted their Statement of Claim with exhibits. The Claimants filed one expert report and no witness statements.
36. On 29 October 2015, the Claimants requested the exclusion of counsel for the Respondent, Zeiler.partners, on the basis that the relationship between a lawyer at that firm and the arbitrator appointed by the Claimants, Professor Reinisch, could give rise to reasonable doubts regarding the impartiality and independence of Professor Reinisch.
37. After hearing the Respondent on the issue, and receiving confirmation by Zeiler.partners that the designated lawyer at the firm would not participate in the present proceedings in any capacity, the Tribunal denied the Claimants' application to exclude Zeiler.partners in Procedural Order No. 4.
38. On 11 December 2015, the Respondent submitted its Statement of Defence and Memorial on Jurisdiction with exhibits. The Respondent filed one witness statement and no expert reports.
39. On 8 January 2016, the Parties made requests for the production of documents from each other.
40. The Parties' filed objections to each other's requests for the production of documents on 15 January 2016.
41. The Parties filed responses to each other's objections on 22 January 2016.
42. The Tribunal directed the Parties to produce documents by Procedural Order No. 5 dated 5 February 2016. The Parties were ordered to produce documents by 19 February 2016.
43. On 15 February 2016, the Claimants requested an extension of the deadline for the production of documents ordered to be produced.

44. On 17 February 2016, the Respondent advised that it did not object to the requested extension.
45. On 18 February 2016, the Tribunal granted the extension and directed that both Parties complete document production by 19 March 2016.
46. On 18 March 2016, the Claimants submitted their Statement of Reply and Counter-memorial on Jurisdiction with exhibits. The Claimants filed two expert reports and five witness statements.
47. On 18 March 2016, the Claimants wrote to the Tribunal advising it of the status of their production of documents and requesting an extension to the date for the production of documents to 29 March 2016.
48. On 23 March 2016, the Respondent wrote to the Tribunal with respect to the status of the Claimants' document production and reserved the right to request an extension to the date for filing its Statement of Rejoinder and Reply on Jurisdiction.
49. The Claimants, at the Tribunal's invitation, addressed the Respondent's allegations regarding the status of the Claimants' document production by letter dated 25 March 2016.
50. On 14 April 2016, the Respondent wrote to the Tribunal noting that the Claimants had not produced any documents in response to certain requests and stating that it would make further comments on this point in its next submission.
51. On 13 May 2016, the Respondent requested a two-week extension, to 10 June 2016, of the deadline for filing its Statement of Rejoinder and Reply on Jurisdiction.
52. The Claimants objected to the extension sought by the Respondent on 17 May 2016.
53. On 18 May 2016, the Tribunal granted the extension requested by the Respondent and pushed back, at the same time, the deadline for the filing of the Claimants' Statement of Surrejoinder on Jurisdiction by two weeks, to 24 June 2016.
54. On 1 June 2016, the Claimants requested an extension of the deadline for the filing of their Statement of Surrejoinder on Jurisdiction by one month, to 25 July 2016.
55. The Respondent advised that it did not object to the requested extension and this was granted by the Tribunal on 8 June 2016.
56. On 10 June 2016, the Respondent submitted its Statement of Rejoinder and Reply on Jurisdiction with exhibits and one expert report. The Respondent did not file any witness statements.
57. On 25 July 2016, the Claimants submitted their Statement of Surrejoinder on Jurisdiction. The Respondent objected to part of the content of the Claimants' Statement of Surrejoinder on Jurisdiction on the basis that it addressed the merits of the dispute.

58. After hearing the Claimants, by Procedural Order No. 6 dated 11 August 2016, the Tribunal directed the Claimants to re-submit their Statement of Surrejoinder on Jurisdiction, addressing issues of jurisdiction only.
59. On 11 August 2016, the Claimants re-submitted their Statement of Surrejoinder on Jurisdiction. By letter of the same date, the Claimants set out the basis on which they had included arguments on the merits in their initial Statement of Surrejoinder and requested the Tribunal to advise when and how the Claimants could amend or supplement their claim pursuant to Article 25 of the SCC Rules.
60. On 12 August 2016, the Respondent replied to the Claimants' letter of 11 August 2016.
61. On 25 August 2016, the Tribunal reiterated to the Parties that the procedural timetable had set a specific sequence of submissions such that the Claimants' final submission on the merits was its Statement of Reply. Further, the Tribunal noted that the Claimants had not sought to amend or supplement their claim within the meaning of Article 25 of the SCC Rules, such that further submissions on the merits were not justified at that time. Finally, the Tribunal emphasised that the Claimants would have the opportunity to further address evidentiary questions at the hearing if they so wished.
62. On 23 August 2016, the Tribunal invited the Parties to agree upon a protocol for the hearing providing for the order of the appearance of the witnesses, the manner in which the hearing should be structured given that this case and case 2014/181 were to be heard in parallel, and the time set aside for opening and closing presentations.
63. The Parties set out their respective positions on these matters by correspondence dated 6, 8, 9 and 12 September 2016.
64. The Tribunal held a pre-hearing telephone conference on 26 September 2016 to hear the Parties further on these matters.
65. On 27 September 2016, the Tribunal issued Procedural Order No. 7 by which it made directions for the organisation of the hearing. Among other things, the Tribunal directed the Claimants to submit a brief statement not exceeding 10 pages of the evidence that Mr. Ivan Busta would give at the hearing by close of business on 28 September 2016.
66. The next day, the Claimants submitted a statement of the evidence that Mr. Busta would give at the Hearing.

D. The Hearing

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

For the Claimants:

Jaroslav Broz Jr.

JUDr. Jaroslav Broz Snr.
Ivan Busta
James Busta

For the Respondent:

Dr. Alfred Siwy
Alexander Zojer
Tomas Muzar
Anna Bilanova

69. The following persons were examined:

On behalf of the Claimants:

Ivan Busta
Jan Kubik
Lubomir Kocman
Marketa Kunzova
Jiri Skolek
Jana Marouskova
JUDr. Alexander Nett (by video-conference)

On behalf of the Respondents:

Tomas Grivna

70. The hearing was transcribed by Mr. Trevor McGowan of The Court Reporter Ltd. Consecutive interpretation services were provided by Ina Maertens and Mojmir Kallus.

E. Developments Following the Hearing

1. Developments concerning the BIT's *travaux préparatoires*

71. On 19 October 2016, the Tribunal issued Procedural Order No. 8 whereby, referring to the positions taken by the Parties at the Hearing regarding the interpretation of the BIT, it invited the Parties to search for the *travaux préparatoires* regarding Article 2(2) of the BIT and, to the extent they could be located, to make them available to the Tribunal by 11 November 2016.
72. On 8 November 2016, the Respondent advised that it had obtained relevant *travaux préparatoires* in Czech, and requested until 22 November 2016 to have the documents translated into English.
73. On 11 November 2016, the Respondent provided copies of the relevant *travaux préparatoires* in Czech, and on 22 November provided English translations of those documents.
74. On 28 November 2016, the Claimants advised that they had searched for *travaux préparatoires* but had been unable to locate any. The Claimants argued that the Respondent had submitted only *travaux préparatoires* that were advantageous to its position and requested the Tribunal to request the United Kingdom to submit *travaux*

préparatoires and a statement of how the United Kingdom understands Article 2(2) of the BIT.

75. On 5 December 2016, the Respondent asked the Tribunal to disregard the Claimants' request on the bases that there was no reason why the Claimants could not obtain the *travaux préparatoires*, the Tribunal is not empowered to obtain a statement from the United Kingdom and, in any event, such a statement would be irrelevant.
76. On 19 December 2016, the Tribunal advised that it had noted both Parties' submissions concerning the *travaux préparatoires*, and that it would consider the weight and relevance to be given to the material submitted by the Respondent.

2. Costs Submissions

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

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

85. On 19 December 2016, the Tribunal wrote to the SCC explaining the developments that had occurred since the Hearing and requesting an extension to the time for making a Final Award to 17 February 2017.
86. On 20 December 2016, the SCC referred the Tribunal's request to the Parties and invited them to submit any comments by 23 December 2016.
87. On 28 December 2016, the SCC granted the Tribunal the requested extension of time for making the Final Award to 17 February 2017.

88. On 9 February 2017, the Tribunal closed the arbitral proceedings.
89. On 10 February 2017, the Respondent advised the Tribunal that it had on that day received a copy of an Award on Jurisdiction in the matter of *A11Y Ltd v. Czech Republic* relating to the interpretation and scope of Article 2(3) of the BIT. The Respondent requested the Tribunal to re-open the proceedings and grant the Respondent leave to submit the decision as a legal exhibit in support of its case on the basis that Article 2(3) of the BIT is one of the provisions relied upon by the Claimants in this proceeding.
90. At the Tribunal's invitation, on 13 February 2017, the Claimants provided comments on the Respondent's request. The Claimants argued that there were no grounds for re-opening the proceedings, referring, among other things, to the fact that the matter had been thoroughly addressed by both Parties in their submissions and that the Tribunal remained obliged to reach a correct and just interpretation of the BIT irrespective of the interpretation reached by the tribunal in *A11Y Ltd v. Czech Republic*.
91. On 13 February 2017, the Tribunal wrote to the SCC requesting a further extension of the time limit for making a Final Award, to 10 March 2017, on the basis that the Tribunal had been seized of additional requests by the Parties concerning costs and the re-opening of the proceedings, and that the work schedules of its members had compelled travel and thus timing difficulties.
92. The same day the SCC referred the Tribunal's request to the Parties and invited any comments by 15 February 2017.
93. On 15 February 2017, both Parties having agreed to the requested extension, the SCC determined 10 March 2017 to be the time limit for rendering the Final Award.
94. On 16 February 2017, the Tribunal, having considered the Parties' respective submissions, declined to re-open the proceedings. As a result, it confirmed that the Award of 9 February 2017, which was attached to the Respondent's letter of the same date, would not be considered by the Tribunal.

III. JURISDICTION OF THE ARBITRAL TRIBUNAL

95. As a preliminary question, the Tribunal notes that, in this matter, the Respondent has not challenged the existence of an investment made by the Claimants, which takes the form of shares in Sprint CR, a company incorporated by the Claimants in the Czech Republic.
96. On the other hand, the Respondent submits that the Tribunal does not have jurisdiction to determine the Claimants' claims for breach of the BIT on the following bases:
- (a) the BIT was terminated upon the Respondent's accession to the European Union in May 2004; and
 - (b) in any event, Article 8(1) of the BIT (the dispute resolution provision) only provides jurisdiction to determine the Claimants' claim for breach of Article 5 and not Article 2(2).

97. The Tribunal addresses each of these arguments in turn.

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

98. The Respondent argues that the BIT was terminated when it became a Member State of the European Union (“*EU*”) on 1 May 2004 by virtue of Article 59 of the Vienna Convention on the Law of Treaties (“*VCLT*”).²

99. In the alternative, the Respondent argues that, even if the BIT was not terminated, Article 8(1) is no longer valid by virtue of Article 30(3) of the VCLT.³

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

(a) The Parties’ Positions

100. Article 59 of the VCLT provides:

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

101. The Respondent argues that the BIT and the EU Treaties relate to the same subject-matter, in that they protect investments made by the nationals of one Member State in the territory of another Member State.⁴ In particular, the Respondent points to:

- (a) Article 49 of the Treaties on the Functioning of the European Union (“*TFEU*”) *et seq* which provide the right of establishment and prohibit restrictions on the rights of nationals of a Member State in the territory of another Member State, and Article 16(2) of the Charter of Fundamental Rights which recognizes the freedom to conduct business in accordance with EU law and national laws and practices. The Respondent argues that these provisions are the equivalent of Article 2(1) of the BIT in that they create favourable conditions for investors of other EU Member States;⁵
- (b) Article 18 of the TFEU which prohibits discrimination between nationals of Member States based on their nationality. The Respondent argues that this provision is equivalent to Articles 2(2) and 3 of the BIT;⁶

² Statement of Defence and Memorial on Jurisdiction, Section 2.3.

³ Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.3.

⁴ Statement of Defence and Memorial on Jurisdiction, Section 2.3; Statement of Rejoinder and Reply on Jurisdiction, Section 2.3.2.

⁵ Statement of Rejoinder and Reply on Jurisdiction, ¶ 106.

⁶ Statement of Rejoinder and Reply on Jurisdiction, ¶ 107.

- (c) Article 17 of the Charter of Fundamental Rights which provides that no one shall be deprived of his or her possessions. The Respondent argues that this provision is equivalent to Article 5 of the BIT;⁷ and
- (d) Article 63 of the TFEU *et seq* which grants the freedom of movement of capital between Member States. The Respondent argues that this provision is equivalent to Article 6 of the BIT, which guarantees the unrestricted transfer of investments and returns.⁸
102. Accordingly, the Respondent argues, the protection offered by the EU treaties is equivalent to that offered by the BIT and therefore the latter is no longer in force by virtue of Article 59 of the VCLT.
103. The Claimants submit that the BIT remains in force despite the Respondent's accession to the EU.⁹
104. First, the Claimants point out that the process prescribed for termination of the BIT in Article 14 – notably written notice from one party to the other – has not been followed.¹⁰ The Claimants note that Article 65(1) of the VCLT contains the same notice requirement for termination.¹¹ Therefore, the Claimants say, the BIT must still be effective.
105. Second, the Claimants submit that the TFEU does not regulate the “*same subject-matter*” as the BIT, as required by Article 59 of the VCLT.¹² The Claimants submit that “*same subject-matter*” must be read strictly such that “*same*” should be treated as meaning “*identical*”.¹³ The Claimants submit that the objects of the BIT and the TFEU are not the same: specifically, it cannot be said that the object of TFEU is the protection of foreign investment. In addition, the Claimants say that investor rights under the BIT are wider and more specific than under the TFEU. In particular, the Claimants deny that the TFEU protects against expropriation, and note that it does not provide an equivalent of Article 8(1) of the BIT, the dispute resolution clause.¹⁴

⁷ Statement of Rejoinder and Reply on Jurisdiction, ¶ 108.

⁸ Statement of Defence and Memorial on Jurisdiction, ¶ 105; Statement of Rejoinder and Reply on Jurisdiction, ¶ 109.

⁹ Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 103-141; Statement of Surrejoinder, ¶¶ 45-84. The Claimants argue that the Czech-Cyprus bilateral investment treaty also remains in force for the same reasons. The Claimants rely upon the Czech-Cyprus bilateral investment treaty in arguing the Tribunal has jurisdiction to determine their claims for breach of Article 2(2) of the BIT.

¹⁰ Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 107-110.

¹¹ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 110. Article 65(1) of the VCLT provides: “*A Party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it, or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.*”

¹² Statement of Reply and Counter-memorial on Jurisdiction, ¶ 114.

¹³ Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 115-117; Statement of Surrejoinder, ¶¶ 61, 63.

¹⁴ Statement of Defence and Memorial on Jurisdiction, ¶¶ 121--122, 140; Statement of Surrejoinder, ¶¶ 66-68.

106. Third, the Claimants say that even if the BIT has been terminated, it would still be in force pursuant to Article 14 which provides that its provisions will remain in effect for fifteen years from the date of termination.¹⁵
107. Fourth, the Claimants invoke Article 65(4) of the VCLT which provides that “*nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.*” They argue that this means that, even if the BIT has been terminated, the Tribunal’s jurisdiction to determine claims for breaches of the BIT would remain intact.¹⁶
108. Fifth, the Claimants argue that the question of whether accession to the EU terminates bilateral investment treaties entered into by Member States has already been considered and answered in the negative. The Claimants refer to *Eastern Sugar* and *EUREKO v. Slovakia* in this regard.¹⁷
109. By way of reply, the Respondent submits that neither Article 14 of the BIT nor Article 65 of the VCLT apply in these circumstances.¹⁸ The Respondent argues that Article 14 only applies in the circumstances of ordinary termination following the procedure in the BIT, which is not the case here.¹⁹ The Respondent says that Article 65(1) of the VCLT only applies to disputes under Part V of the VCLT (which is not the case here), and Article 65(4) does not apply in circumstances where the dispute settlement clause itself is invalid.
110. The Respondent submits that the requirement that the two treaties relate to the “*same subject-matter*” does not mean that the two treaties must be co-extensive in all respects.²⁰ The Respondent concedes that the scope of the TFEU is substantially wider than that of the BIT, but maintains that it nevertheless has the purpose and effect of promoting and protecting investments of one Member State’s investors in other Member States.
111. The Respondent further concedes that EU law does not provide for an investor-State arbitration mechanism, but argues that it nevertheless grants access to effective dispute settlement before domestic courts of Member States and the EU courts.²¹
112. Finally, in its Statement of Surrejoinder on Jurisdiction, and at the Hearing, the Claimants referred to a further provision of the TFEU which they say supports their position. That is Article 351, which provides:

“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or

¹⁵ Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 109, 134; Statement of Surrejoinder, Section 4.4.

¹⁶ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 111.

¹⁷ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 113.

¹⁸ Statement of Rejoinder and Reply on Jurisdiction, Section 2.3.1.

¹⁹ Statement of Rejoinder and Reply on Jurisdiction, ¶ 91.

²⁰ Statement of Rejoinder and Reply on Jurisdiction, Section 2.3.2.

²¹ Statement of Rejoinder and Reply on Jurisdiction, ¶ 110.

more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.”²²

(b) The Tribunal’s Decision

113. The Tribunal was not convinced by the Respondent’s interpretation, which was barely pursued at the Final Hearing.
114. *First*, as a treaty law matter, assuming there is no incompatibility between the provisions of subsequent treaties, there are two conditions under Article 59 of the VCLT for a treaty to be terminated by the effect of the conclusion of a later treaty: the two treaties under consideration – here, the BIT concluded in 1990 and the TFEU which was acceded by the Czech Republic in 2004 – must “*relat[e] to the same subject matter*” and it must “*appear[] from the later treaty or [be] otherwise established that the parties intended that the matter should be governed by that treaty*”.
115. The Tribunal does not find that the BIT and the TFEU have the same subject matter. The object and purpose of the BIT is the “*promotion and protection of investments*”, whereas the TFEU is concerned with the “*functioning of the European Union*”. Article 1(1) of the TFEU further makes clear that it is designed to “*organise[] the functioning of the Union and determine[] the areas of, delimitation of, and arrangements for exercising its competences*.”
116. Even assuming, as argued by the Respondent, a substantive overlap between certain provisions of the TFEU and those of the BIT – the right of establishment under Article 49 TFEU as the substantive equivalent of the promotion of investments under Article 2(1) of the BIT; the prohibition of discrimination under Article 18 TFEU as the substantive equivalent of Articles 2(2) and 3 of the BIT on fair and equitable treatment, national treatment and most-favored-nation treatment; the prohibition of deprivation of possession under Article 17 of the Charter of Fundamental Rights as the substantive equivalent of prohibition of expropriation under Article 5 of the BIT; and Article 63 TFEU on the freedom of movement and capital as the substantive equivalent of the repatriation of investment and returns under Article 6 of the BIT – the Tribunal does not find that it appears from the TFEU itself, or that it is otherwise established that the parties to the TFEU intended the promotion and protection of investments to be governed by that instrument. In fact, the TFEU does not address the subject of the promotion and protection of investments at all. In any event, the Tribunal is not convinced that the above TFEU provisions are substantive equivalents of the provisions of the BIT, in particular in light of the absence of an important substantive protection in the TFEU, that of investors’ access to an international and neutral dispute resolution forum in the form of international arbitration.
117. *Second*, in the absence of an automatic termination resulting from the operation of Article 59 of the VCLT, the Tribunal notes that the parties to the BIT, the Czech Republic and the United Kingdom, never sought to terminate the BIT following the procedures set out by that instrument. In this respect, the Tribunal notes that provisions such as the survival clause contained at Article 14 of the BIT show the significance, for the parties to the BIT, of a lasting protection, over a period of fifteen years, of investments made in reliance on the BIT’s regime. Against this background,

²² Statement of Surrejoinder, ¶ 76; Tr. 3 October 2016, 9:2-5.

the notion that the provisions of the BIT would vanish by the effect of the mere existence of the TFEU, without any of the treaty law safeguards and mechanisms being triggered, can hardly be reconciled with the requirements of legal certainty and transparency, or with the actual requirements of the VCLT.

118. The Tribunal concludes, on these bases, that the BIT was not terminated *in toto* pursuant to Article 59 of the VCLT and the Respondent's jurisdictional objection on this basis is dismissed.

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

(a) The Parties' Positions

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

120. Article 30(3) of the VCLT provides in relevant part:

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

121. The Respondent argues that the dispute resolution provision in Article 8(1) of the BIT is not compatible with Articles 344 and 267 of the TFEU.²³

122. Article 344 of the TFEU provides that “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.” The Respondent says that Article 8(1) of the BIT is incompatible with this provision because it stipulates an agreement of Member States to submit disputes to arbitration and therefore provides a method of settlement other than those provided by the EU treaties.²⁴

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

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

(a) the interpretation of the Treaties;

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

²³ Respondent's Statement of Reply and Counter-memorial on Jurisdiction, Section 2.3.3.

²⁴ Respondent's Statement of Reply and Counter-memorial on Jurisdiction, ¶ 118.

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

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

124. The Respondent argues that the survival of Article 8(1) of the BIT would mean that Member States could erode the application of Article 267 of the TFEU by transferring disputes from national courts to arbitral tribunals. To the extent the BIT would give the Tribunal the discretion to decide on matters concerning EU treaties, this would be incompatible with Article 267 of the TFEU.²⁵
125. The Claimants respond that Article 344 of the TFEU only covers disputes among Member States, and not individuals and Member States as is the case under Article 8(1) of the BIT.²⁶ Therefore, Article 344 does not apply to the case at hand. The Claimants also argue that the EU has never had any competence, whether exclusive or shared, in the field of arbitration as a dispute settlement method.²⁷

(b) The Tribunal’s Decision

126. Given its earlier finding that the BIT and the TFEU do not have the same subject matter (*see supra*, paragraphs 114-116), the Tribunal does not find that there is an incompatibility between the dispute resolution mechanisms under Article 8(1) of the BIT and Articles 344 and 267 of the TFEU.
127. The Tribunal further notes that Article 344 of the TFEU concerns EU Members States’ undertaking to submit to the dispute resolution mechanism of the TFEU for the “*interpretation or application of the Treaties* [namely, the TFEU and the Treaty on European Union, as per Article 1(2) of the TFEU]”; likewise, Article 267 of the TFEU concerns the exclusive jurisdiction of the EU Court of Justice for “*the interpretation of the Treaties*”. The Tribunal notes, in this respect, that it is called to interpret and apply the BIT, not the TFEU or the Treaty on European Union. Conversely, and subject to its determination of the Respondent’s remaining jurisdictional objections, this Tribunal has jurisdiction only to determine matters of interpretation and application of the BIT between the disputing Parties and in relation to the present dispute.
128. As a result, this Tribunal having and exercising jurisdiction under the BIT does not create an incompatibility with Article 267 of the TFEU and the EU Court of Justice’s jurisdiction to interpret and apply the TFEU. The Respondent’s jurisdictional objection on this basis is therefore dismissed.

²⁵ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 119.

²⁶ Statement of Surrejoinder, ¶ 55.

²⁷ Statement of Surrejoinder, ¶ 56.

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

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

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

130. The Respondent argues that the Tribunal does not have jurisdiction to determine claims for breach of Article 2(2) of the BIT. According to the Respondent, pursuant to Article 8(1) the Tribunal may hear claims for breaches of Articles 2(3), 4, 5, and 7 of the BIT only.²⁸

131. Although implicitly admitting that Article 8(1), on its face, does not provide jurisdiction to hear claims for breaches of Article 2(2), the Claimants argue that the Tribunal has jurisdiction to determine alleged breaches of Article 2(2) through two avenues.²⁹

132. First, the Claimants observe that the bilateral investment treaty between the Respondent and Cyprus contains a more favourable dispute resolution clause which they, as United Kingdom nationals, may invoke by virtue of Article 3 of the BIT (the “most-favoured-nation” provision).³⁰

133. Second, and in the alternative, the Claimants argue that Articles 2(3) and 8(1) of the BIT, when read together, provide jurisdiction to hear claims for breaches of Article 2(2).³¹

134. The Respondent argues that the Tribunal does not have jurisdiction to determine claims for breaches of Article 2(2) of the BIT. The Respondent states that pursuant to Article 8(1) the Tribunal may hear claims for breaches of Articles 2(3), 4, 5, and 7 of the BIT only.³²

135. The Tribunal considers below each of the arguments put forward by the Claimants.

²⁸ Statement of Defence and Memorial on Jurisdiction, Section 2.1; Tr. 3 October 2016, 52:18-69:19.

²⁹ Statement of Claim, Section IV.4.1; Statement of Reply and Counter-memorial on Jurisdiction, Part 1; Statement of Surrejoinder, ¶¶ 39-43.

³⁰ Statement of Claim, Section IV.4; Statement of Reply and Counter-memorial on Jurisdiction, Part 1; Hearing Tr. 3 October 2016, 6:21-8:23; Hearing Tr. 6 October 2016, 51:5-56:15.

³¹ Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 94-102.

³² Statement of Defence and Memorial on Jurisdiction, Section 2.1; Tr. 3 October 2016, 52:18-69:19.

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

(a) The Parties' Positions

136. The Claimants argue that Article 3 of the BIT (the most-favoured-nation provision) allows it to rely on the more favourable dispute resolution clause contained in the Czech-Cypriot BIT.³³

137. Article 3 of the BIT provides:

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

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

138. The Claimants observe that Article 8(2)(d) of the Czech-Cypriot BIT confers more favourable dispute resolution rights. In particular, they note that this provision covers, broadly, *“any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment”*. The Claimants also observe that, contrary to the BIT in this case, Article 8(3) of the Czech-Cypriot BIT provides that *“arbitral awards shall be final and binding on both parties to the dispute and shall be enforceable in accordance with the domestic legislation”*.³⁴ Accordingly, according to the Claimants, Article 3 of the BIT should operate to broaden the types of disputes that can be arbitrated under Article 8(1) of the BIT to include those that can be arbitrated under the Czech-Cypriot BIT.³⁵

139. The Claimants make several textual and contextual arguments in support of this interpretation.

140. First, the Claimants argue that the words *“enjoyment”* and *“treatment”* in Article 3 must entail enforcement of an investor's rights, and therefore must cover dispute resolution.³⁶ They further state that the term *“most-favoured”* must be given full effect such that every rule which is more favourable to nationals of a third State must be able to be relied upon by the Claimants.³⁷

³³ Statement of Claim, Section IV.4; Statement of Reply and Counter-memorial on Jurisdiction, Section 1.

³⁴ Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 6-9.

³⁵ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 5.

³⁶ Statement of Claim, ¶ 89.

³⁷ Statement of Reply and Counter-memorial on Jurisdiction, Section 1.4.1.

141. Second, the Claimants invoke the principle of *expressio unius* in support of their position.³⁸ The Claimants note that Article 7 of the BIT expressly excludes customs unions and tax treaties from the scope of application of Article 3(2). The Claimants argue that if the parties to the BIT had likewise intended to exclude the dispute resolution clause from Article 3(2), they would have done so expressly. The Claimants note that this was the reasoning of the tribunal in *RosinvestCo v. Russia* in relation to similar clauses in the UK-USSR bilateral investment treaty.
142. Third, the Claimants argue that the UK model BIT which was published shortly after the BIT was concluded suggests that the UK had always understood the most-favoured-nation provision in the bilateral investment treaties it concluded as including dispute resolution.³⁹ Article 3(3) of the UK model BIT of 1991 provided: “*For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provision of Article 1 to 11 of this Agreement.*”
143. Fourth, the Claimants emphasise the “*inextricable link*” between access to arbitration and their substantive rights as investors.⁴⁰ They say that neither diplomatic protection nor the domestic courts are viable means of resolving this dispute, and note that they have been litigating this matter for 20 years before the Respondent’s courts. They submit that without access to arbitration, their substantive rights as investors are not real or effective.
144. Fifth, the Claimants invoke Article 18 of the TFEU which imposes a duty on the Respondent not to discriminate against nationals of EU Member States on the basis of nationality.⁴¹ The Claimants argue that this must entail incorporation of the dispute resolution clause from the Czech-Cypriot BIT into this BIT, since any other interpretation would discriminate against UK citizens compared to Cypriots.
145. The Claimants affirm that their position is supported by the *National Grid v. Argentina* decision, which was based on the UK-Argentina BIT. The Claimants state that the most-favoured-nation clause in that BIT was identical to the Article 3 of this BIT, and that the tribunal allowed extension of the clause to dispute resolution on the basis that the investors’ substantive rights would not be enforceable.⁴² The Claimants also refer to *Gas Natural, RosinvestCo v. Russia, Maffezini, Impregilo* and *Siemens v. Argentina* which they say support the inclusion of dispute resolution in the most-favoured-nation clause.⁴³
146. The Respondent argues that Article 3 of the BIT does not apply to the dispute resolution provision in Article 8(1) for four reasons.⁴⁴

³⁸ Statement of Reply and Counter-memorial on Jurisdiction, Section 1.4.2; Statement of Surrejoinder on Jurisdiction, Sections 1.1 and 1.2.

³⁹ Statement of Claim, ¶ 91.

⁴⁰ Statement of Reply and Counter-memorial on Jurisdiction, Section 1.3.

⁴¹ Statement of Reply and Counter-memorial on Jurisdiction, Section 1.4.3.

⁴² Statement of Claim, ¶ 93.

⁴³ Statement of Claim, ¶¶ 93-95.

⁴⁴ Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.

147. First, the Respondent argues that the wording of Article 3 makes clear that it does not apply to dispute resolution.⁴⁵ In particular, the Respondent makes the following points.
- (a) Article 3 only applies to rights granted under the domestic law of the host State (“*under its law*”). The Respondent says that this means that all an investor can ask for is for the host State to not apply its domestic law less favourably to an investor than it does to investors of third States, or grant the latter rights under its domestic law that it does not grant to the former. Article 3 therefore does not permit the Claimants to invoke a right under an international treaty.
 - (b) The term “*treatment*” in Article 3 refers only to substantive rights and does not include the right to arbitration. The Respondent refers to *Daimler v. Argentina* in this regard.
 - (c) Article 3(2) refers to “*management, maintenance, use, enjoyment or disposal of their investments*” and therefore not to dispute resolution. This contrasts to other most-favoured-nation provisions which refer to treatment “*in all matters*” and which have, in limited circumstances, been found to apply to dispute resolution. The Respondent refers to *Plama v. Bulgaria* and *Wintershall v. Argentina* in this regard.
148. Second, the Respondent takes the view that the BIT’s *travaux préparatoires* and the treaty practice of the parties to the BIT show that they did not intend for Article 3 in this BIT to apply to the dispute resolution clause.⁴⁶
149. As regards the BIT’s *travaux*, the Respondent argues that they show that Czechoslovakia (as it was at the time) was hesitant to conclude BITs with broad dispute resolution clauses at the time this BIT was negotiated. In addition, continues the Respondent, the BIT’s *travaux* show that Czechoslovakia insisted on limiting the wording of the broad most-favoured-nation clause of the UK model BIT to treatment granted under domestic law.⁴⁷
150. As regards the treaty practice of the parties to the BIT, the Respondent’s view is that it confirms its position.⁴⁸ The Respondent points out that after the publication of the UK model BIT in 1991, the UK deleted Article 3(3) in subsequent treaties when it agreed on a narrow dispute resolution clause.⁴⁹ The Respondent also notes that both parties had commonly used broad dispute resolution clauses and argues that they must therefore be taken to have deliberately limited the dispute resolution clause in this BIT.⁵⁰

⁴⁵ Statement of Defence and Memorial on Jurisdiction, Section 2.2.1.2.1; Statement of Rejoinder and Reply on Jurisdiction, Sections 2.2.1-2.2.3.

⁴⁶ Statement of Defence and Memorial on Jurisdiction, Section 2.2.1.2.2; Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.5.

⁴⁷ Hearing Tr. 3 October 2016, 59:1-17.

⁴⁸ Statement of Defence and Memorial on Jurisdiction, Section 2.2.1.2.2; Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.6; Tr. 6 October 2016, 35:6-19.

⁴⁹ Statement of Defence and Memorial on Jurisdiction, ¶ 91; Tr. 6 October 2016, 44:14-45:9.

⁵⁰ Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.6; Hearing Tr. 3 October 2016. 57:7-15.

151. In this relation, the Respondent referred during the Hearing to the award in *Venezuela US SRL* in which the tribunal found that even if the most-favoured-nation clause does refer to dispute resolution, that is not sufficient to substitute consent to arbitrate.⁵¹
152. Third, the Respondent argues that the context of Article 3 within the BIT shows that it does not apply to dispute resolution.⁵² The Respondent points out that adopting the interpretation advocated by the Claimants would mean that the limitation in Article 8(1) would have no meaning or effect, which would be contrary to basic principles of treaty interpretation.
153. The Respondent argues that, in light of the specific wording of Article 3, the *expressio unius* principle should not apply to broaden the scope of the Article. In this regard, the Respondent submits that the reasoning of the tribunal in *RosinvestCo v. Russia* is flawed and should not be followed. The Respondent refers to *Austrian Airlines v. Slovakia* and *EURAM v. Slovakia* in which it says that tribunals deciding very similar provisions held that the narrowing of the dispute resolution provisions indicated that the parties to the relevant BIT did not intend the most-favoured-nation clause to apply to it, and that the application of *expressio unius* makes no sense.⁵³
154. Fourth, the Respondent maintains that international arbitration practice underlines that Article 3 cannot be used to import dispute resolution clauses.⁵⁴ The Respondent refers to *Hochtief v. Argentina*, *Wintershall v. Argentina*, *Telenor Mobile v. Hungary* and *Plama v. Bulgaria* which it says established that in the absence of a very clear indication in the most-favoured-nation clause, it cannot be assumed that the clause was intended to apply to substitute consent to arbitration when such consent was lacking in the basic treaty.
155. According to the Respondent, the case law referred to by the Claimants does not assist them. In particular, the Respondent argues that in none of these cases was the jurisdiction of the tribunal based on the dispute resolution clause of a third treaty, and that the tribunals merely found that procedural obstacles could be overcome by reliance on the most-favoured-nation clause.⁵⁵
156. The Respondent denies that the exclusion in Article 8(1) means that investors are left without any means of enforcing the substantive rights not referred to in that Article. In response to the Tribunal's questions at the Hearing, the Respondent suggested that investors could invoke diplomatic protection, or seek protection in another forum such as the national courts.⁵⁶ In any event, the Respondent argues that the enforceability of

⁵¹ Tr. 6 October 2016, 45:10-46:5.

⁵² Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.4.

⁵³ Statement of Defence and Memorial on Jurisdiction, Section 2.2.1.2.3; Hearing Tr. 3 October 2016, 63:9-64:14.

⁵⁴ Statement of Defence and Memorial on Jurisdiction, Section 2.2.1; Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.8.

⁵⁵ Statement of Defence and Memorial on Jurisdiction, Section 2.2.2.1.

⁵⁶ Hearing Tr. 3 October 2016, 54 :10-18; Hearing Tr. 5 October 2016, 177:12-17; Hearing Tr. 6 October 2016, 49:16-50:12.

certain substantive rights in the BIT is beside the point and cannot undo the plain wording of Article 8(1).⁵⁷

157. By way of reply, the Claimants make the following points.⁵⁸
158. First, they reject the Respondent's contention that the term "*treatment*" in Article 3 refers only to substantive rights and not to procedural rights, including the right to arbitrate. The Claimants argue that the term should be interpreted in accordance with the purpose of the BIT to encompass the protection of investors and investments, and thus also the procedural rights granted in the arbitration clause. They say that the purpose of Article 3 is non-discrimination among the nationals of third States, and that this calls for an extensive interpretation rather than a restrictive one.
159. Second, the Claimants argue that the application of the *expressio unius* principle is required by the VCLT. Referring to *Austrian Airlines* and *EURAM v. Slovakia* decisions, which have been relied upon by the Respondent, the Claimants maintain that they did not follow the method of treaty interpretation mandated by Article 31 and 32 of the VCLT, and therefore do not represent good precedent.
160. Third, the Claimants submit that the *travaux préparatoires* of the BIT are of no or minimal assistance in this case as they were not prepared by the Respondent but by its predecessor, the Czech and Slovak Federal Republic.⁵⁹ As far as the Respondent is concerned, it maintains that, although the *travaux* were prepared in 1988 and 1989 by the predecessor communist Government, it is unlikely that the BIT was negotiated by the new non-communist Government that came into power at the end of December 1989 alone, with the BIT being signed in July 1990.⁶⁰ The *travaux* can therefore serve as an aid to interpretation of the BIT, continues the Respondent.
161. Fourth, the Claimants concede that Article 3 is limited to rights granted by Czech law, but submit that international treaties form part of Czech law pursuant to Article 10 of the Czech Constitution which provides: "*Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.*"⁶¹ Thus, the Claimants say, Article 3(2) of the BIT applies to the provisions of the Czech-Cypriot BIT, and as a result the right to arbitrate is part of Czech domestic law.
162. The Claimants also emphasise that Article 38 of the Czech Bill of Rights guarantees the right to a "*lawful*" judge.⁶² They say that case law has established that a "judge" under

⁵⁷ Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.7.

⁵⁸ Statement of Surrejoinder on Jurisdiction, Section 1.

⁵⁹ Statement of Reply and Counter-memorial on Jurisdiction, Section 1.4.4. The Claimants initially disputed that, under Article 32 of the VCLT, recourse could be had to *travaux* where a meaning had already been derived by interpretation in accordance with Article 31 of the VCLT. The Claimants subsequently accepted that *travaux* "*may serve as confirmation of the interpretation result under the general rule of interpretation.*" See Statement of Surrejoinder, ¶ 18.

⁶⁰ Statement of Rejoinder and Reply on Jurisdiction, Section 2.2.5.

⁶¹ Statement of Surrejoinder, Section 1.4 (translation provided by the Claimants); Tr. 6 October 2016, 43:10-21.

⁶² Statement of Surrejoinder, ¶ 32.

Article 38 includes an international judge. By analogy, the Claimants say, this must extend to international arbitrators. The Claimants submit in this regard that the Arbitral Tribunal is the sole body which may provide legal protection to the Claimants' investment.

(b) The Tribunal's Decision

163. Although it was impressed by the extensive and sophisticated character of the Parties' arguments relating to the scope of Article 8(1) of the BIT, the Tribunal has found the answer to this question to be straightforward, given the language used in the BIT.
164. Article 8(1) of the BIT sets out the types of disputes that can be submitted to arbitration. These are “[d]isputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former”. Thus, Article 8(1) expressly provides that only certain types of breaches can be submitted to arbitration: those concerning Article 2(3) (the effect of specific agreements entered into by investors); Article 4 (compensation for losses, in situations of armed conflict, national emergency or civil disturbances); Article 5 (expropriation); and Article 6 (repatriation of investment and returns).
165. The Tribunal finds, in light of the express language of, and comprehensive enumeration under, Article 8(1), that the standards of fair and equitable protection and full protection and security, which are contained in Article 2(2) of the BIT, are excluded from the scope of the Respondent's consent to arbitration and cannot, accordingly, provide a basis for a claim under the BIT.
166. Likewise, the majority of the Tribunal has found it determinative that the most-favoured-nation provisions at Article 3 of the BIT are excluded from the scope of Article 8(1), which defines the jurisdiction of this Tribunal. In the majority's view, it follows from this specific exclusion that an investor, such as the Claimants in this case, cannot rely on Article 3 of the BIT to import more favourable dispute resolution provisions found in another investment treaty.
167. Given that the BIT expressly excludes Article 3 from the scope of investor-State arbitration, the majority of the Tribunal has found that the questions of the scope of Article 3 (the meaning of “*treatment*”, “*under its laws*”, or “*management, maintenance, use, enjoyment or disposal*”), the impact of the UK model BIT on the interpretation of this BIT, or whether access to arbitration is a procedural or substantive right become moot. The majority recognises, in the latter respect, that the exclusion of Article 2(2) from the scope of investor-State arbitration results in situations where an investor is not able to enforce the standards under that provision. On this issue, the Respondent pointed to the avenues of diplomatic protection or recourse to national courts during the Hearing. However, the text of Article 8(1) of the BIT does not set forth any such recourse, with the consequence that breaches of Article 2(2) cannot be remedied through judicial or arbitral proceedings. That said, the Tribunal is bound by the express language of the BIT, which reflects a choice made by its drafters, and cannot rewrite Article 8(1) or substitute provisions taken from other investment treaties for those that have expressly been included by the drafters of the BIT. In the majority's view, this ends this Tribunal's inquiry.

168. Professor Reinisch took the view that the fact that Article 8(1) does not encompass the BIT's most-favoured-nation clause does not, *per se*, exclude this Tribunal's jurisdiction (to the extent the most-favoured-nation clause were to be read to include access to dispute settlement). Because the effect of a most-favoured-nation clause is a question of how it is formulated, he noted that, in the present case, Article 3 of the BIT expressly relates the most-favoured-nation treatment to treatment "*under* [a Contracting Party's] *laws*", which implies that such treatment only concerns treatment under the domestic law of the Contracting Parties. Thus, investors are entitled to claim that under the host State's law they should receive the same treatment as investors from third countries; however, this provision cannot be understood as permitting an investor to demand treatment which the host State has promised to third party investors in any international agreement like a BIT with a third country.
169. It follows from the above that the Tribunal does not have jurisdiction to hear claims based on Article 2(2) of the BIT through the operation of Article 3 of the BIT.

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

(a) The Parties' Positions

170. The Claimants also argue that Articles 8(1) and 2(3) may be read together to confer jurisdiction to hear claims for breach of Article 2(2).⁶³
171. Article 2(3) provides:
- "Investors of one Contracting Party may conclude with the other Contracting Party specific agreements, the provisions and effect of which, unless more beneficial to the investor, shall not be at variance with this Agreement. Each Contracting Party shall, with regard to investments of investors of the other Contracting Party, observe the provisions of these specific agreements, as well as the provisions of this Agreement."*
172. The Claimants rely on the second sentence of the provision, and submit that "*the provisions of this Agreement*" must include Article 2(2) of the BIT. They submit that this provision, therefore, provides an alternative ground on which the Tribunal can hear claims for breach of Article 2(2).
173. The Respondent argues that the Claimants' interpretation of Article 2(3) is based on an improper reading of the second sentence of the Article.⁶⁴ The Respondent notes that all the first sentence does is to provide that investment contracts between an investor and the host State cannot contain terms that are less beneficial for the investor than the BIT itself. The Respondent submits that the second sentence is the necessary corollary of the first, and provides that the host State shall observe the provisions of those investment contracts that it concludes and the provisions of the BIT where they are more favourable. Thus, the Respondent argues that Article 2(3) only applies to situations where there is a specific investment agreement.

⁶³ Statement of Surrejoinder, ¶¶ 39-43.

⁶⁴ Tr. 3 October 2016, 64:15-65.

174. The Respondent further argues that the adoption of the Claimants' interpretation would lead to strange results. First, it would mean that the express limitation in Article 8(1) would have no meaning or effect. Second, Article 2(3) itself would be redundant since all of the provisions of the BIT are already binding on the host State.⁶⁵

(b) The Tribunal's Decision

175. The Tribunal was not convinced by the Claimants' interpretation of Article 2(3).

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

177. *Second*, and in any event, the Tribunal does not find that Article 2(3) has the scope which the Claimants suggest. The object of this provision appears to be to impose upon the parties to the BIT an obligation to recognise the existence of specific agreements benefiting investors and establish the principle according to which the provisions of such specific agreements or the BIT apply, whichever are more favourable. Any other interpretation would render meaningless Article 2(3) or the exclusions under Article 8(1) of the BIT.

178. It follows that the Tribunal cannot have jurisdiction over breaches of Article 2(2) through the operation of Article 2(3) of the BIT.

* * *

179. Having found that it has jurisdiction to hear this dispute, but only insofar as alleged breaches of Article 5 of the BIT are concerned, the Tribunal will proceed to the determination of the Respondent's objections to the admissibility of the Claimants' claim.

IV. ADMISSIBILITY OF THE CLAIMANTS' CLAIM

180. The Respondent submits that the Claimants' claims are inadmissible for the following reasons:

(a) The Respondent submits that the Claimants, as shareholders, do not have standing to bring claims for expropriation in respect of loss or damage suffered by the company in which they own shares.

(b) The Respondent notes that the company has commenced proceedings in the Czech courts seeking compensation for the same alleged loss suffered as a result of the same events. The Respondent requests the Tribunal to dismiss the Claimants' claims on the basis of the doctrine of *lis pendens* and submits that the initiation of proceedings in two fora constitutes an abuse of process. In the

⁶⁵ Tr. 3 October 2016, 68:13-69:19.

alternative, the Respondent requests the Tribunal to stay these proceedings pending resolution of the proceedings before the Czech courts.

A. Whether the Claimants as Shareholders Have Standing to Bring Claims for Expropriation in Respect of Loss or Damage to Company Assets

1. The Parties' Positions

181. The Claimants' claim for expropriation relates to the loss of goods which were owned by a company in which the Claimants were shareholders (Sprint CR spol. s.r.o. or "*Sprint CR*"). Specifically, the Claimants claim that the assets of Sprint CR were expropriated and seek compensation for the value of those assets.⁶⁶ The Claimants do not claim that their shares in Sprint CR have been expropriated.
182. The Claimants take the view that they have standing to bring this claim under Article 5(2) of the BIT.⁶⁷ Article 5(2) provides that the provisions of Article 5(1) "*shall also apply where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares.*"
183. The Claimants urge the Tribunal to take a purposive approach to the interpretation of the BIT, and note that the express purpose of the BIT to create "*favourable conditions for greater investment*" and "*the stimulation of business initiative*" militates towards interpreting Article 5(2) in the way the Claimants advocate.⁶⁸ The Claimants emphasise that together they own 100 percent of the shares in Sprint CR, and that the goods at issue were the only tangible property of Sprint CR.⁶⁹ As such, the Claimants submit that "*there is an inextricable link between their shareholding and the assets of the company*" and that "*this situation requires the individual consideration where legal formalism leading to separating shareholders and the assets of the company makes little sense. Thus, the economic reality should prevail of the legal form.*"⁷⁰
184. The Claimants refer to *Barcelona Traction*, *AWG v. Argentina*, *GAMI Investments v. Mexico*, *SD Meyers v. Canada*, and *Azurix Corp. v. Argentina*, among others, in support of their position.⁷¹
185. The Respondent argues that the Claimants do not have standing to bring a claim in respect of loss or damage to the assets of Sprint CR, and that only losses incurred by the Claimants based on a diminution in the value of the shares would grant them standing to raise claims.⁷²

⁶⁶ Statement of Surrejoinder, Section 4.

⁶⁷ Statement of Claim, ¶¶ 122-140; Statement of Surrejoinder, Section 4.

⁶⁸ Statement of Claim, ¶¶ 130-131.

⁶⁹ Tr. 3 October 2016, 11:15-12:16.

⁷⁰ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 180.

⁷¹ Statement of Claim, ¶¶ 122-140; Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 172-189; Surrejoinder, Section 4.

⁷² Statement of Defence and Memorial on Jurisdiction, Section 4.2.1; Statement of Rejoinder and Reply on Jurisdiction, Section 4.4.

186. The Respondent argues that Article 5(2) of the BIT does not assist the Claimants in this respect.⁷³ The Respondent says that Article 5(2) merely provides that shareholders can raise a claim for “indirect expropriation”, *i.e.* if they own shares in a company the assets of which are expropriated, they have standing to raise a claim for expropriation.⁷⁴ The Respondent says that the shareholders in such a circumstance must still establish that the expropriatory acts taken against the company had an expropriatory effect on their shares. In other words, the shareholders must establish that they have been substantially deprived of the value of its shares due to the expropriatory acts directed against the assets of the company.⁷⁵
187. At the Hearing, the Respondent accepted that, under its interpretation, Article 5(2) is not strictly necessary given that it is now established in international law that shareholders may bring claims for both direct and indirect expropriation.⁷⁶ Therefore, maintains the Respondent, Article 5(2) functions as a “*for the avoidance of doubt*” provision.⁷⁷ The Respondent takes the further position that Article 5(2) was included because, at the time the BIT was drafted, the ability of shareholders to bring claims for indirect expropriation had not yet been clarified in international law.⁷⁸
188. The Respondent argues that even if the Claimants’ claim was for the expropriation of their shareholding, it would still fail. The Respondent argues that the Claimants would have to show that the measures taken against Sprint CR had an expropriatory effect on their shares by reducing their value to zero, which they have not done.⁷⁹
189. The Respondent refers to *RosInvestCo v. Russia*, *El Paso v. Argentina*, *Enkev Beheer B.V. v. Poland* and *ST-AD v. Bulgaria* in support of its position.⁸⁰

2. The Tribunal’s Decision

190. The Tribunal first notes that its jurisdiction extends to claims which, as argued, are susceptible to being determined on the merits under the substantive provisions of the BIT. Here, the Claimants’ claim relates to the expropriation of the assets of the company they fully own, namely a claim for indirect expropriation.
191. Indirect expropriation is precisely the subject of Article 5(2) of the BIT, which recognises that the Treaty’s substantive provisions of Article 5(1) apply to the expropriation of “*the assets of a company which is incorporated or constituted under the law in force in any part of*” of host State’s territory, here the Czech Republic. As the Respondent has conceded, Article 5(2) functions as a “*for the avoidance of doubt*” provision, having been included in the BIT at a time when the ability of shareholders to bring claims for

⁷³ Statement of Defence, Section 4.3.

⁷⁴ Statement of Defence and Memorial on Jurisdiction, ¶ 238; Tr. 6 October 2016, 62:8-25.

⁷⁵ Statement of Defence and Memorial on Jurisdiction, ¶ 242; Tr. 6 October 2016, 59:6-7.

⁷⁶ Tr. 6 October 2016, 59:22-61:4.

⁷⁷ Tr. 6 October 2016, 63:1-6.

⁷⁸ Tr. 6 October 2016, 59:22-63:11.

⁷⁹ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 336; Tr. 6 October 2016, 37:14-39:1.

⁸⁰ Statement of Defence and Memorial on Jurisdiction, Section 4.2.1; Statement of Rejoinder and Reply on Jurisdiction, Section 4.2; Tr. 6 October 2016, 38:15-24.

indirect expropriation had not yet been clarified in international law; as also conceded by the Respondent, arbitral case law has long accepted that shareholders may bring claims for indirect expropriation.

192. Finally, the Tribunal notes that it is undisputed that the Claimants' investment in the Czech Republic is constituted by their 100% shareholding in Sprint CR, a Czech company, and that the assets which are claimed to have been expropriated belonged to Sprint CR.
193. In light of the above, the Tribunal does not find it necessary that the Claimants show, for purposes of their indirect expropriation claim, that there has been a loss of value of their shares in Sprint CR. The Respondent's objection to the admissibility of the Claimants' claim is therefore rejected on this basis.

B. Whether the Doctrine of *Lis Pendens* Applies

1. The Parties' Positions

194. The Respondent argues that a claim for the loss allegedly suffered by Sprint CR as a result of the events at issue in this case is already pending before the Czech courts. The Respondent therefore requests that the Tribunal dismiss the Claimants' claim on the basis of the doctrine of *lis pendens*.⁸¹
195. On 23 January 2001, Sprint CR filed a claim against the Respondent for damages in the amount of CZK 69,269,343 and interest with the District Court in Prague 7.⁸² In April 2015, the Court declined the Respondent's application to strike out the claim.⁸³ The Respondent has since appealed that decision.⁸⁴
196. The Respondent argues that the doctrine of *lis pendens* applies where both proceedings: (i) are based on the same legal grounds; (ii) are directed at obtaining the same relief; (iii) are pending between the same parties; and (iv) are pending in the same legal order.⁸⁵
197. The Respondent maintains that the first two criteria are plainly met: (i) both claims are based on alleged violations of the BIT, although in the Czech court proceedings several provisions of Czech law have also been invoked; and (ii) the claimants in each case seek damages in the same sum, although the Claimants in this case also seek moral damages.
198. With respect to the third and fourth criteria, the Respondent submits that these should be applied pragmatically to avoid the prospect of double-recovery. The Respondent accepts that the claimants in each proceeding are legally distinct, although they are "*economically closely connected*" such that they should be considered the same party for the purpose of the doctrine. The Respondent contends that the "*same legal order*" criterion

⁸¹ Statement of Defence and Memorial on Jurisdiction, Section 4.5.1.

⁸² Decision of the District Court of Prague 7 dated 23 April 2015 (**Exhibit C-42**).

⁸³ Decision of the District Court of Prague 7 dated 23 April 2015 (**Exhibit C-42**).

⁸⁴ Submission of the Applicant dated 20 July 2015 (**Exhibit R-28**).

⁸⁵ Statement of Defence and Memorial on Jurisdiction, Section 4.5.1.

should not be applied formalistically, but that the Tribunal should look to the fact that the Claimants are seeking compensation for the same loss in two fora.

199. The Claimants reject the Respondent's arguments.
200. First, the Claimants argue that there is no general principle of *lis pendens* in international law.⁸⁶ The Claimants cite several treatises in support of this.
201. Second, the Claimants contend that there is no basis in the BIT or the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce for a stay of these proceedings on the basis of *lis pendens*.⁸⁷
202. Nor, according to the Claimants, do the present circumstances qualify as *lis pendens* under Swedish law, that being the law of the seat in this proceeding.⁸⁸ The Claimants cite a Swedish court decision of *CME v. the Czech Republic* in support of this.⁸⁹
203. Third, the Claimants argue that, in any event, the test for *lis pendens* is not met.⁹⁰ In particular, the Claimants take the view that:
- (a) the “*same legal order*” criterion is not satisfied, these proceedings being before an international tribunal and the other proceedings being before domestic courts;
 - (b) the claimants in each case are not the same legal entity. The Claimants argue that the Respondent is seeking to conflate the legal identities of the Claimants and Sprint CR for the purposes of its *lis pendens* argument, while at the same time seeking to deny them for the purpose of its argument that the Claimants as shareholders do not have standing to claim for the loss suffered by Sprint CR; and
 - (c) the causes of action in each of the proceedings are different. More precisely, in the Czech court proceedings, Sprint CR alleges breach of Czech domestic law, while in the present arbitral proceedings the Claimants alleges breach of an international treaty.⁹¹
204. The Claimants finally emphasise that the action before the Czech courts was commenced in 2001, and that the courts' failure to provide quick and effective protection is the reason they commenced this arbitration.⁹²
205. In reply, the Respondent submits that the doctrine of *lis pendens* is “*predominantly acknowledged*” in international law and cites several arbitral decisions in support of this.⁹³

⁸⁶ Statement of Reply and Counter-memorial on Jurisdiction, Section 4.2.1.

⁸⁷ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 161.

⁸⁸ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 171.

⁸⁹ *Ibid.*

⁹⁰ Statement of Reply and Counter-memorial on Jurisdiction, Section 3; Statement of Surrejoinder, Section 5.3; Tr. 3 October 2016, 9:12-10:4.

⁹¹ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 164.

⁹² Tr. 3 October 2016, 10:5-23.

⁹³ Statement of Rejoinder and Reply on Jurisdiction, Section 4.2.1.

The Respondent emphasises that there is a genuine prospect of double compensation such that the criteria that the proceedings concern the same parties and be conducted in the same legal order ought to be applied pragmatically.⁹⁴

206. The Claimants argue that the cases cited by the Respondent concern dual proceedings between international tribunals, not between international tribunals and national courts, and therefore do not establish the existence of *lis pendens* in international law.⁹⁵
207. The Claimants add that *GAMI v. Mexico* established that an arbitral tribunal does not have to take into account any national proceedings.⁹⁶
208. Further, they argue that the Respondent's invocation of the national proceedings in these proceedings contradicts Article 27 of the VCLT, which provides that "*a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*".⁹⁷
209. Finally, the Claimants submit that the jurisprudence of the European Court of Human Rights ("ECHR") is instructive on this issue.⁹⁸ Referring to *Yukos v. Russia*, they argue that the ECHR has found that parallel arbitration proceedings commenced by shareholders are no obstacle to deciding proceedings to which the company is a party, notwithstanding that both proceedings arise out of identical facts.

2. The Tribunal's Decision

210. The Tribunal notes that the notion of *lis pendens*, both in domestic law and in international law, concerns situations in which two judicial organs have equal title to make a determination over the same dispute. In other words, there can be no *lis pendens* when the jurisdiction of each court or tribunal is established on a different basis (or involves a different cause of action), between different parties, with a view to obtaining different remedies.
211. The Parties are not in dispute that *lis pendens* assumes that the different proceedings (i) are based on the same legal grounds (or involve the same cause of action, a test which the Claimants equate with the next criterion, that of the relief sought); (ii) are directed at obtaining the same relief; and (iii) are pending between the same parties. The Parties have, in addition, referred to a requirement of the two proceedings being pending in the same legal order. The Tribunal will consider each of these conditions in turn, and notes that it is only when they are cumulatively met that *lis pendens* may come into play.
212. *First*, the Tribunal notes that the two proceedings are pending in distinct legal orders, given that the Czech court proceedings are subject to the Czech domestic legal order, whereas the present arbitration is an international proceeding, with a seat in Stockholm. In this regard, the Tribunal notes that it is not uncommon, in international arbitration where shareholder claims are recognised, that parallel proceedings be initiated by the

⁹⁴ Statement of Rejoinder and Reply on Jurisdiction, Section 4.2.2.

⁹⁵ Statement of Surrejoinder on Jurisdiction, Section 5.2.

⁹⁶ Statement of Surrejoinder on Jurisdiction, Section 5.4.

⁹⁷ Statement of Surrejoinder on Jurisdiction, ¶ 115.

⁹⁸ Statement of Surrejoinder on Jurisdiction, ¶¶ 116-118.

shareholders on the international plane and by the local company on the domestic one, although these questions often arise in relation to so-called fork-in-the-road provisions which are not present in the BIT.

213. *Second*, the claimants in each proceeding are distinct. There is no doubt that, in this arbitration, the claims are brought by two individuals, Messrs Busta, in their capacity as shareholders in Sprint CR. In the Czech proceeding, it is Sprint CR who is bringing the claim under Czech law. The Tribunal notes that the Respondent accepts that the claimants in each proceeding are legally distinct, but argues that they are “*economically closely connected*” and that, as a result, they should be considered the same party for the present purposes. In this respect, the Claimants have rightly pointed out that the Respondent cannot, at the same time, argue that the claimants in each proceeding should be assumed to be the same for the purposes of *lis pendens* while arguing, for purposes of their inadmissibility objection based on indirect expropriation, that they are distinct.
214. *Third*, the causes of action in each proceeding are different. The Czech court proceedings are based on breaches of Czech domestic law concerning the responsibility of the State for wrongful acts or administrative procedures, whereas these arbitral proceedings concern the Czech Republic’s international responsibility under international law for breaches of the BIT. The Tribunal notes that, although Sprint CR has also referred to the BIT in the Czech proceedings, the legal basis of its claim in those proceedings is a breach of Czech law.⁹⁹
215. *Finally*, as regards the remedies sought, the Tribunal notes that there is no dispute between the Parties that, in the Czech court proceedings, Sprint CR is seeking damages in the same amounts as the damages sought in these proceedings by the Claimants, although the Claimants are also seeking moral damages before this Tribunal. Assuming this partial identity of the remedies sought – which in any event is not sufficient for purposes of *lis pendens*, given that the other cumulative conditions are not met – the Tribunal notes the following two additional points.
216. Firstly, the Claimants have emphasised that the reason why this arbitration was brought is because the action before the Czech courts, which was commenced more than 16 years ago, has not yielded results so far. At the same time, after the Czech courts refused to strike out the claim in April 2015, Sprint CR decided to maintain its action in the Czech Republic. Therefore, while the Tribunal will address this question as one of merits, in the event the Claimants reach that stage, it also notes that the Respondent’s *lis pendens* objection is based on the reality of two parallel claims brought on different bases.
217. Secondly, the Respondent’s concern for double compensation is one that goes to the merits of the claim, given that, before such a situation arises, each proceeding must have resulted in an actual compensation decision which, in turn, must have resulted in actual payment. In other words, this Tribunal cannot dismiss the Claimants’ claim as inadmissible – a decision that would have radical consequences – in the absence of actual – as opposed to hypothetical – risk of double compensation. On this basis, the Tribunal will bear the Respondent’s objection in mind in the event the Claimants reach the merits stage and prevail in that regard through a decision on damages.

⁹⁹ Statement of Surrejoinder on Jurisdiction, ¶ 110.

218. On the basis of the above, the Respondent’s objection to the admissibility of the Claimants’ claim based on *lis pendens* is dismissed.

C. Whether the Proceedings Constitute an Abuse of Process *in Eventu*

1. The Parties’ Positions

219. The Respondent submits that if the Tribunal determines that it has jurisdiction to hear the Claimants’ claims and decides not to stay the proceedings on the basis of *lis pendens*, the Claimants’ initiation of overlapping claims in two fora would constitute an abuse of process.¹⁰⁰
220. The Respondent relies upon *Ampal v. Egypt* in this regard. It argues that the fact that the Claimants have not terminated or at least stayed the proceedings commenced by Sprint CR before the Czech courts renders the continuation of these proceedings inadmissible.
221. The Claimants deny that they have committed any abuse of process.¹⁰¹
222. First, they argue that the case cited by the Respondent concerns “*forum/treaty shopping*” amongst international tribunals, whereas these proceedings are the only proceedings before an international tribunal.
223. Second, they contend that there is a presumption of good faith which the Respondent must rebut to establish any abuse of process by the Claimants, and that the Respondent has failed to do so.
224. Third, the Claimants submit that the principle of abuse of process is too unsettled to constitute a legal ground to stay the present proceedings. They argue that doing so would lead to a denial of justice to the Claimants.

2. The Tribunal’s Decision

225. Having found that the conditions for *lis pendens* were not met in this case, and that therefore there was no duplication of actions, the Tribunal finds that the Claimants cannot be said to have committed an abuse of process in bringing the present claim.
226. For an abuse of process to exist, a claimant must have engaged in conduct that can be characterised as abusive.¹⁰² As mentioned before, to the extent both the BIT and arbitral case law allow shareholder claims, that shareholders have brought an international arbitration proceeding while a domestic court action brought by the local company is pending cannot, as such and without more, be characterised as abusive. This is especially the case where the local court proceedings have been pending since January 2001, namely for over 16 years. As also mentioned above, it will be this Tribunal’s task, in the event the Claimants’ indirect expropriation claim reaches the

¹⁰⁰ Statement of Rejoinder and Reply on Jurisdiction, Section 4.2.3.

¹⁰¹ Statement of Surrejoinder on Jurisdiction, Section 6.

¹⁰² For discussion on the nature of abuse of process in international arbitration, see E. Gaillard, “Abuse of Process in International Arbitration”, *ICSID Review* (2017), pp. 1-21.

merits stage and is successful, to ensure that any decision made by this Tribunal will not result in double compensation by the effect of the pending domestic proceedings.

227. On the basis of the above, the Respondent's objection to the admissibility of the Claimants' claim based on abuse of process is rejected.

D. Whether the Proceedings Should be Stayed *in Eventu*

1. The Parties' Positions

228. In the alternative to dismissal of the proceedings on the basis of *lis pendens*, the Respondent requests the Tribunal to stay these proceedings until the proceedings in the Czech courts have been completed.¹⁰³
229. The Respondent argues that if the Tribunal were to award the Claimants damages in this proceeding, this would potentially lead to double compensation of the shareholders of Sprint CR and the Tribunal should therefore await the outcome of the proceedings in the Czech courts.
230. Conversely, the Respondent submits that any compensation awarded to the Claimants in these proceedings would most likely have no impact on Sprint CR's claim before the Czech courts. The risk of double-recovery would therefore persist.
231. The Claimants request the Tribunal to dismiss the Respondent's request.¹⁰⁴ They argue that they have brought these proceedings "*as a last resort*" because they have been unable to obtain justice at the national level. The Claimants note that the proceedings before the Czech courts have been ongoing for over 16 years, and that they have recently been returned to the court of first instance. They submit that there is no reasonable prospect of the proceedings before the Czech courts being concluded within any reasonable time and that staying these proceedings would be a denial of justice.
232. In reply, the Respondent emphasises that staying the proceedings is the only means of eliminating the risk of double-recovery by the Claimants.¹⁰⁵

2. The Tribunal's Decision

233. To the extent this head of admissibility objection concerns the question of double compensation, which has already been addressed, the Tribunal incorporates by reference its reasoning at paragraph 217 above.
234. The Tribunal will simply add that, in light of the great length of the Czech court proceedings, namely over 16 years since Sprint CR initiated its action against the Respondent for failure to comply with Czech law, and the fact that such action is still at the first instance stage, with no certainty as to when the proceedings may be completed and no commitment by the Respondent as to the prospects of prompt

¹⁰³ Statement of Defence and Memorial on Jurisdiction, Section 4.5.2.

¹⁰⁴ Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 167-171.

¹⁰⁵ Statement of Rejoinder and Reply on Jurisdiction, Section 4.2.4

completion, the Tribunal does not find a stay of the arbitration to be an adequate remedy in the circumstances.

235. On the basis of the above, the Tribunal dismisses the Respondent's request for a stay of the arbitration until a decision is rendered in the Czech court proceeding brought by Sprint CR.

V. MERITS

A. Summary of the Parties' Positions

236. Between 1990 and 2002, the Claimants, through various entities owned by them, were in the business of the wholesale of automobile parts and accessories in the Czech Republic. Part of this business was conducted jointly with a Czech company called VDI Kyjovan ("*Kyjovan*").
237. Relations between the Claimants and Kyjovan became hostile during this period. This dispute arises from events which occurred in March 2000, when Kyjovan began moving the goods out of a warehouse occupied by the Claimants' company, Sprint CR. Kyjovan claimed that this was done on the basis that the warehouse was damaged and collapsing.
238. Upon discovering that Kyjovan was moving the goods out of the warehouse, the Claimants called the Police. The Police, however, did not intervene and took the view that Kyjovan was acting pursuant to the local building authority's call to repair the warehouse.
239. The Police subsequently located the goods at another warehouse, and Kyjovan voluntarily handed them over to the Police's custody. They were subsequently returned to the Claimants, although the Parties dispute whether all of the goods were returned or not. The Claimants allege that goods worth CZK 63 million (i.e. two-thirds of the value of the goods taken) were not returned. The Respondent alleges that all of the goods that were taken from the warehouse were returned.
240. The Claimants argue that the failure of the Police to prevent the removal of the goods from the warehouse, and the fact that they took custody of the goods "*en bloc*" without making an itemised list as required by Czech law, resulted in the loss of approximately two-thirds of the goods, measured by value. The Claimants claim that this constitutes expropriation.
241. The Respondent denies that there was any failure by the Police in relation to Kyjovan's removal of the goods or in taking custody of the goods. The Respondent states that the Police reasonably formed the view that the goods were being moved pursuant to authorisation from the local building authority, and that the Police subsequently took custody of the goods in compliance with the law. In any event, the Respondent denies that any loss was suffered as all of the goods were returned. Even if two-thirds of the goods were missing (measured by value), the Respondent denies that this would be sufficient basis for a claim for expropriation.

B. Facts

1. Entities at play

242. The Claimants are shareholders of Anglia Auto Accessories Ltd (“**Anglia Auto**”), a company incorporated in the United Kingdom.
243. In 1990, Anglia Auto entered into a joint venture agreement with Kyjovan, a privately-owned cooperative in the Czech Republic which was in the manufacturing business.¹⁰⁶
244. Pursuant to this agreement, Anglia Auto and Kyjovan incorporated Sprint a.s., a company also registered in the Czech Republic. Anglia Auto held 55 percent of the shares in Sprint a.s. and Kyjovan held 45 percent.¹⁰⁷ Sprint a.s. was in the business of the wholesale of automobile accessories and tools.
245. At some time prior to October 1992, one or both of the Claimants incorporated SPRINT spol. s.r.o., a company registered in the Czech Republic.¹⁰⁸
246. On 6 May 1996, the Claimants incorporated a further company in the Czech Republic, called SPRINT CR spol. s.r.o. (“**Sprint CR**”).¹⁰⁹ The Claimants were the sole shareholders of Sprint CR and one of the Claimants, Mr. Ivan Peter Busta, was its CEO.¹¹⁰ Sprint CR was also in the business of the wholesale of automobile accessories and tools.¹¹¹
247. By agreement dated 30 May 1996, Sprint spol. s.r.o. agreed to sell to Sprint CR its automobile parts and accessories.¹¹² Sprint CR thereafter became the Claimants’ trading entity.

2. Ownership of the Warehouse

248. The Claimants argue that, pursuant to the joint venture agreement between Anglia Auto and Kyjovan, Kyjovan was obliged to assign a production plant (including a warehouse) and surrounding land that it owned to Sprint a.s.¹¹³ The assignment was

¹⁰⁶ Statement of Claim in 2014/181, ¶ 12; Tr. 5 October 2016, 89:9-90:18; Tr. 6 October 2016, 71:2-72:25.

¹⁰⁷ Statement of Claim in 2014/181, ¶ 12.

¹⁰⁸ Lease agreement between Sprint a.s. and Sprint spol. s r.o. dated 23 October 1992 (**Exhibit C-53**); Statement of Claim, ¶ 57; Statement of Reply and Counter-memorial on Jurisdiction, ¶ 57.

¹⁰⁹ Certificate of Incorporation for Sprint CR spol. s.r.o. (**Exhibit C-1**).

¹¹⁰ *Ibid.*

¹¹¹ Statement of Claim, ¶ 12.

¹¹² Purchase agreement between Sprint spol. s.r.o and Sprint CR dated 30 May 1996 (**Exhibit C-79**); Statement of Claim, ¶ 57; Statement of Reply and Counter-memorial on Jurisdiction, ¶ 57.

¹¹³ Statement of Claim in 2014/181, ¶ 20.

never made formally.¹¹⁴ Anglia Auto and Kyjovan disputed this issue before the courts in the Czech Republic until 2012, when Sprint a.s. was wound up.¹¹⁵

249. The Claimants argue that the property was intended to be owned by Sprint a.s. and point to the minutes of a general meeting of Sprint a.s. on 29 October 1992:¹¹⁶

“After detailed discussion both shareholders have approved that the joint stock company Sprint will continue its activities by leasing the technological equipment and storage areas. [...] The shareholder VDI Kyjovan declares that he considers its investment – manufacturing hall – included into property of the company Sprint a.s., incl. the land delimited on the geometric plan.”

250. The Claimants also point to the fact that Kyjovan offered to purchase the property from Sprint a.s. in 9 December 1992 as further evidence that both parties considered Sprint a.s. to be the beneficial owner.¹¹⁷

251. Despite the dispute regarding the ownership of the property, on 23 October 1992, Sprint a.s. and Sprint spol. s.r.o. entered into an agreement for the lease of the warehouse on the property, as lessor and lessee respectively, for a term of five years.¹¹⁸

252. In December 1997, Sprint a.s. entered into a further lease agreement with Sprint CR for the warehouse, an adjacent office building, and the areas adjacent to the warehouse and the office building.¹¹⁹ The lease recorded that the area of the warehouse was 860 square metres.¹²⁰ The lease stated that the area would be used for the purpose of operating warehouses.¹²¹

253. According to the Respondent, Kyjovan never agreed to the lease to Sprint CR, and reacted by invoicing Anglia Auto for the period from 1 November 1997 to 31 January 2000.¹²² The Respondent says these sums were never paid,¹²³ although it has not offered evidence of this statement.

¹¹⁴ Extract from the Land Register on 4 September 2001 (**Exhibit R-9**), showing Kyjovan as the owner of the property.

¹¹⁵ In 1994, Sprint a.s. commenced an action in the Regional Court of Brno to have the property transferred into its name, though this was not successful: Statement of Claim in 2014/181, ¶ 20; Decision of the District Court of Hodonin dated 23 May 2012 (**Exhibit R-8**).

¹¹⁶ Minutes of general meeting of Sprint a.s. dated 29 October 1992 (**Exhibit C-51**), p. 2; Statement of Reply and Counter-memorial on Jurisdiction, ¶ 212.

¹¹⁷ VDI Kyjovan’s offer to purchase the property from Sprint a.s. dated 9 December 1992 (**C-77**).

¹¹⁸ Lease agreement between Sprint a.s. and Sprint spol. s.r.o. dated 23 October 1992 (**Exhibit C-53**).

¹¹⁹ Lease agreement between Sprint a.s. and Sprint CR spol. s r.o. dated 17 December 1997 (**Exhibit C-54**).

¹²⁰ Lease agreement between Sprint a.s. and Sprint CR spol. s r.o. dated 17 December 1997 (**Exhibit C-54**), clause I(a).

¹²¹ Lease agreement between Sprint a.s. and Sprint CR spol. s r.o. dated 17 December 1997 (**Exhibit C-54**), clause I.

¹²² Statement of Defence and Memorial on Jurisdiction, ¶ 119; Civil motion commenced by Sprint CR and Sprint a.s. against Kyjovan dated 14 March 2000 (**Exhibit C-10**).

¹²³ Statement of Defence and Memorial on Jurisdiction, ¶ 119.

254. In response, the Claimants refer to the decision of the District Court of Hodonin dated 15 February 2000 as evidence of the legitimacy of Sprint CR's occupation of the warehouse as lessee.¹²⁴ This decision was made at the application of Sprint a.s. in relation to a dispute with Kyjovan concerning the supply of electricity, water and gas to the property. In particular, the Claimants refer to the Court's statement that "*there is no dispute between the parties that the Plaintiff [Sprint a.s.] uses the hall in the premises of the Defendant [Kyjovan] and that he rented this hall to the company Sprint CR spol. s.r.o.*"¹²⁵
255. The Respondent has refrained from taking a position on the merits of the dispute over the ownership of the warehouse.¹²⁶ In light of the above Court decision of 15 February 2000, which has not been challenged and in relation to which no contrary evidence was offered by the Respondent, it can be assumed that the warehouse was validly leased to Sprint CR by Sprint a.s.

3. Events Preceding 9 March 2000

(a) Kyjovan's Lease of Warehouses in Kelcany

256. On 8 February 2000, Kyjovan applied to the District Court of Hodonin for an order that Sprint a.s. vacate the warehouse.¹²⁷ Kyjovan sought the order on the basis that Sprint a.s. had no right to lease the warehouse to Sprint CR and on the basis that the roof had been damaged by weather conditions, which could pose a safety threat for which Kyjovan (as the claimed owner of the warehouse) considered it would be liable.¹²⁸

"The inspection performed by the owner's safety engineer – based on reaction of the staff and roof cracking – revealed damage of the roof due to climactic conditions and Ivan Peter Busta was asked by the written letter sent by Kyjovan, v.d.i. to adopt the relevant approach to this fact, because it is he who uses the hall illegally. The hall is owned by Kyjovan, v.d.i. and therefore responsibility for property and health or lives of the persons moving there is vested to its owner. Mr. Ivan Peter Busta did not respond to this call anyhow. With respect to the arisen situation the Board of the Plaintiff ordered elaboration of the expert report focused on technical state of the hall by the relevant specialist – expert – incorporated in the field in question in the relevant list of experts. As soon as the expert report is elaborated, it will be delivered to the court. Because the owner of the hall things [sic] justly that further realization of manufacturing, business or other activities can result in jeopardizing health and lives of the persons moving in the hall in question and with respect to the fact that the unauthorized user is not interested in cooperation concerning removal of technical defects and also with respect to the fact that the owner is obliged to ensure safety of the building (hall), the owner came to the conclusion that possible jeopardizing of health and lives of the persons must be avoided immediately."

¹²⁴ Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 217-218.

¹²⁵ Decision of District Court of Hodonin dated 15 February 2000 (**Exhibit C-52**); Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 217-218.

¹²⁶ Statement of Rejoinder and Reply on Jurisdiction, ¶ 134.

¹²⁷ Claim filed by Kyjovan dated 8 February 2000 (**Exhibit C-59**).

¹²⁸ *Ibid.*

257. On 22 February 2000, Kyjovan arranged to lease warehouses in Kelcany.¹²⁹ The minutes of the meeting between Kyjovan and the owner of the warehouses record that Kyjovan was entitled to “bring[] in the goods” during the period of 1 March until 1 April 2000.¹³⁰ Kyjovan entered into a formal lease agreement for the warehousing in Kelcany on 8 March 2000.¹³¹ This recorded that “the total area of the Subject of Lease amounts in total to 360m²” though it is not clear whether the lease was referring to one or two warehouses.¹³² Mr. Busta confirmed during the Hearing that the goods were moved to two warehouses in Kelcany, each being “roughly 300 metres square”.¹³³
258. As is explained further below, the Claimants say that Kyjovan’s application to the court, and its leasing of the Kelcany warehouses, indicate that Kyjovan planned to clear the goods from the warehouse used by Sprint CR well before the warehouse was damaged on 5 March.¹³⁴

(b) The Damage of 5 March 2000 to the Warehouse

259. It is undisputed that, on 5 March 2000, the warehouse was damaged during works being carried out by Kyjovan. The Parties dispute whether this damage was caused deliberately or accidentally.
260. The Claimants argue that Kyjovan caused the damage deliberately.¹³⁵ The Claimants take the position that this was done in order to trigger an evacuation of the warehouse.¹³⁶
261. Mr. Kubik, the warehouse manager employed by Sprint CR and one of the Claimants’ witnesses, testified that on 5 March 2000, three “blocks or panels” appeared suddenly beside the warehouse.¹³⁷ Mr. Kubik said that the panels were not owned by Sprint CR, and that he did not know why the panels were there.¹³⁸ Mr. Kubik explained further that there was no obvious work going on which would require the panels to be present.¹³⁹ Mr. Kubik testified that at that time the warehouse was in “excellent condition”.¹⁴⁰

¹²⁹ Minutes of meeting of VDI Kyjovan dated 22 February 2000 (**Exhibit C-60**).

¹³⁰ *Ibid.*

¹³¹ Lease agreement entered into VDI Kyjovan as lessee for a warehouse in Kelcany dated 8 March 2000 of (**Exhibit C-61**).

¹³² *Ibid.*

¹³³ Tr. 5 October 2016, 49:4-9 (cross-examination).

¹³⁴ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 228; Tr. 3 October 2016, 27:17-28:5.

¹³⁵ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 223.

¹³⁶ *Ibid.*

¹³⁷ Tr. 4 October 2016, 80:20-21 (direct examination); 86:3-87:5 (in response to Tribunal questions); 87:22-88:4 (in response to Tribunal questions); 94:22-95:2 (in response to Tribunal questions).

¹³⁸ Tr. 4 October 2016, 87:23-88:4 (in response to Tribunal questions); 90:24-91:2 (cross-examination).

¹³⁹ Tr. 4 October 2016, 87:23-88:4 (in response to Tribunal questions); 90:24-91:2 (cross-examination).

¹⁴⁰ Tr. 4 October 2016, 80:14-16 (direct examination).

262. According to Mr. Kubik, shortly after the panels appeared, the warehouse sustained surface damage to a wall.¹⁴¹ Mr. Kubik stated that he did not witness the damage occurring, but believed that the warehouse had been “*hit*” with the panels that had appeared next to it shortly beforehand.¹⁴² In Mr. Kubik’s view, it was evident that the warehouse was damaged at that point, but not to such a degree that it would endanger its own construction or the surroundings, including the adjacent buildings.¹⁴³ Mr. Kubik stated that the panels disappeared after the damage was sustained.¹⁴⁴ His “*personal belief*” was that Kyjovan had intentionally caused the damage to the warehouse using the panels.¹⁴⁵
263. The Respondent argues that the damage was caused “*during preparatory works for the construction of a parking lot on the premises of Kyjovan*”.¹⁴⁶ Specifically, the Respondent says that during the preparatory works “*a sudden blow of wind caused several panels to fall from a crane, thereby damaging the supporting structure of the warehouse.*”¹⁴⁷ The Respondent bases its account on a subsequent Police report dated 28 July 2000 closing an investigation into criminal activity by Kyjovan on 9 March 2000, which stated:¹⁴⁸

“When panels were unloaded on 05/03/2000 during preparatory works for construction of a parking lot within the premises of VDI Kyjovan Kyjov, damaged was caused to the hall in which SPRINT CR, s.r.o., Sumavska 29, Brno, stored its goods. The damage was caused during a sudden blow of wind, when a panel suspended from a crane began rotating round its axis and hit with one of its ends the casing of the hall where one of the supporting structures columns is located.”

264. The Police report stated that the circumstances surrounding the unloading of the panels had been investigated, including the “*atmospheric situation*” as described by the Czech Institute of Hydrometeorology, the crane operator and Mr. Jelinek, a technician employed by Kyjovan.¹⁴⁹

“Investigated in this context were also the circumstances preceding the unloading of panels; it was determined that the crane to unload the panels had been ordered by phone on 03/03/2000 from Pozemni stavitelstvi, spol. S.r.o., Rodinova 2, Hodonin; the work was reported in the record of vehicle operation, and the course of unloading and the atmospheric situation at the moment and place were described accordingly with the report issued by the Czech Institute of Hydrometeorology also by the crane operator Karel Kopriva and by the investment technician Frantisek Jelinek.”

¹⁴¹ Tr. 4 October 2016, 88:1-4; 89:22-90:5 (in response to Tribunal questions).

¹⁴² Tr. 4 October 2016, 88:5-14 (in response to Tribunal questions).

¹⁴³ Tr. 4 October 2016, 88:20-23 (in response to Tribunal questions).

¹⁴⁴ Tr. 4 October 2016, 90:21-91:2 (cross-examination).

¹⁴⁵ Tr. 4 October 2016, 90:13-91:2 (cross-examination).

¹⁴⁶ Statement of Defence and Memorial on Jurisdiction, ¶ 122.

¹⁴⁷ *Ibid.*

¹⁴⁸ Decision of the Police of Hodonin dated 28 July 2000 (**Exhibit R-10**).

¹⁴⁹ *Ibid.*

265. The Claimants submit that the assertion that the damage was caused accidentally, by a sudden gust of wind on 5 March 2000, is implausible in light of the actions taken by Kyjovan in the weeks prior to 5 March 2000, notably:¹⁵⁰ (i) its application on 8 February 2000 to the Court for an order that Sprint a.s. vacate the warehouse on the basis that the roof had been damaged due to wind conditions;¹⁵¹ and (ii) Kyjovan's negotiation of a lease for the warehouse in Kelcany with the lessor's permission to move goods into the warehouse at any time during the period 1 March 2000 until 1 April 2000.¹⁵²
266. The Claimants also point out that after the goods were moved out, on 13 March 2000, Kyjovan agreed with the lessor of the warehouse in Kelcany that only four people were authorised to enter the warehouse.¹⁵³ On the same day, Kyjovan withdrew its application for an order that Sprint a.s. vacate the warehouse.¹⁵⁴ The Claimants say that both of these facts support their view that Kyjovan planned the clearance of the warehouse used by Sprint CR.¹⁵⁵

(c) Mr. Belik's Report of 6 March 2000

267. On 6 March 2000, an engineer hired by Kyjovan, Vit Belik, inspected the warehouse.¹⁵⁶ Mr. Belik's report of the inspection stated that it was conducted "*in response to an incident which occurred when panels were being stored on 5 March 2000. A reinforced panel that was being moved by a crane hit the wall of the warehouse by the third pole from the north gable on the eastern wall.*"
268. Mr. Belik proposed two measures, namely removal of the stored goods from the damaged sections of the warehouse, and an examination of the structural elements and joints:¹⁵⁷

“Measures proposed:

1. *The stored goods must be removed from the damaged sections, as well as the racks, access by persons and employees must be prevented in order to ensure their safety and to prevent any further damage to property and to enable the building to be cleared immediately.*
2. *The supporting structure must be uncovered in all areas where the damage was discovered and check the geometry of the structural elements and the state of the structural joints. The exact method and extent of the repair work and a surveyors report will be drawn up on the basis of these findings.”*

¹⁵⁰ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 228.

¹⁵¹ Claim filed by Kyjovan dated 8 February 2000 (**Exhibit C-59**).

¹⁵² Minutes of meeting of VDI Kyjovan dated 22 February 2000 (**Exhibit C-60**).

¹⁵³ Agreement dated 13 March 2000 (**Exhibit C-62**).

¹⁵⁴ Withdrawal of claim dated 13 March 2000 (**Exhibit C-63**).

¹⁵⁵ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 228.

¹⁵⁶ Record of Mr. Belik's inspection of the warehouse on 6 March 2000 (**Exhibit R-11**).

¹⁵⁷ Record of Mr. Belik's inspection of the warehouse on 6 March 2000 (**Exhibit R-11**) (emphasis in original).

269. Mr. Belik's report concluded that:¹⁵⁸

“The extent of damage to the building warrants classification of an emergency situation. The problems identified pose a threat to human health and safety. Potential environmental risks – snow and wind – mean that the building must be cleared immediately, without undue delay, to prevent the building from collapsing.

The Kyjov Building Authority must be informed of this situation, as well as the relevant public authorities and the occupational health and safety office, and the building must be cleared and restored immediately.”

270. According to the Police report of 28 July 2000, Mr. Kubik was present during Mr. Belik's inspection.¹⁵⁹ The report also states that “*the executive of SPRINT CR*” was informed about the situation by Mr. Kubik and Mr. Jelinek, a technician.¹⁶⁰ Mr. Kubik did not provide any testimony on this question, and was not questioned about it at the Hearing.

271. In a criminal complaint he initiated on 9 March 2000, Mr. Busta stated that he was told about the damage to the warehouse on 6 March 2000 by Ms. Kunzova, the accountant employed by Sprint CR.¹⁶¹ He also stated that he contacted Mr. Jelinek and met with him on 7 March 2000. According to Mr. Busta's statement in the criminal complaint, Mr. Jelinek assured Mr. Busta that the warehouse would be repaired the following week commencing on 13 March 2000. Mr. Busta further stated that he asked Mr. Jelinek to remove the racks and calculate the damage to the goods.

(d) The Building Authority's Call for Repair

272. Kyjovan sent Mr. Belik's report to the Kyjov Building Authority on 7 March 2000.¹⁶²

273. The following day, on 8 March 2000, the Building Authority conducted an inspection of the warehouse.¹⁶³ It subsequently issued a “call” to repair of the warehouse to Kyjovan.¹⁶⁴ The call to repair stated:

“The Kyjov Building Authority, as the competent building authority, calls on you, in accordance with Section 102 paragraph 1 of Act No. 50/1976 Coll. on town and country planning and building regulations (the Building Act) as amended – in the full wording published under no. 197/1998 Coll., to remove the damage to the industrial building located on lot no. 883/1, listed in the proposal for measures drawn up by Ing. Arch. V. Belik, authorized engineer and structural

¹⁵⁸ *Ibid.*

¹⁵⁹ Decision of the Police of Hodonin dated 28 July 2000 (**Exhibit R-10**), p. 2 of the English translation.

¹⁶⁰ *Ibid.*

¹⁶¹ Criminal complaint by Mr. Busta against Mr. Pucek dated 9 March 2000 (**Exhibit C-4**).

¹⁶² Building Authority's call to repair the warehouse dated 8 March 2000 (**Exhibit R-12**) (“*On 7 March 2000, the Building Authority in Kyjov received from the owner of the Kyjovan v.d. Kyjov building a report which states that works involving a crane resulted in damage being done to the steel structure of a warehouse*”); Statement of Defence and Memorial on Jurisdiction, ¶ 125.

¹⁶³ Building Authority's call to repair the warehouse dated 8 March 2000 (**Exhibit R-12**).

¹⁶⁴ *Ibid.*

surveyor. On 7 March 2000, the Building Authority in Kyjov received from the owner of the Kyjovan v.d. Kyjov building a report which states that works involving a crane resulted in damage being done to the steel structure of a warehouse. On 8 March 2000, the Building Authority carried out an on-site inspection and subsequently called on the building owner to organize repairs, with the participation of the authorized engineer, as stated in the proposal for measures.”¹⁶⁵

274. Later that day, Kyjovan’s Board held an extraordinary meeting and resolved to empty the warehouse, restrict access to it and repair the damage.¹⁶⁶ The minutes record that Kyjovan had decided that:

“[G]iven the seriousness of the damage to the warehouse and the possible risk to the health and lives of individuals as set out in the Report drafted by Ing. Arch. Vít Belík dated 6 March 2000 and, in particular, with regard to the contents of the invitation by the Municipal Authority – Kyjov Building Authority, ref. no. 1765/2000 to immediately clear the premises and to restrict its further use during the period required for the repairs.”

275. Mr. Busta and two employees of Sprint CR, Ms. Kunzova (the company’s accountant) and Mr. Kubik (the warehouseman employed by Sprint CR from 1999 to 2002), all testified during the Hearing that they were allowed to continue working in the warehouse until 9 March 2000.¹⁶⁷ This is not disputed by the Respondent.

276. On 9 March 2000, Kyjovan issued a “notice of emergency condition” in relation to the warehouse. The notice stated that the warehouse had been damaged on 5 March 2000 “during manipulation with the crane”, and referred to Mr. Belík’s report of 6 March 2000, and the Building Authority’s call to repair of 8 March 2000. The notice further stated that Kyjovan intended to comply with the call to repair on 9 March 2000:¹⁶⁸

“By notice of 8 March 2000, the Building Authority in Kyjov had requested us, in accordance with § 102 para 1 of Act No. 50/1976 Coll. <the Building Code> as amended, to arrange for removal of defects as stated in the record of authorized structural engineer Mr. Ing. Arch. Belík.

We started preparations in order to comply with the notice which we wanted to put into realization on 9 March 2000.”

¹⁶⁵ *Ibid.*

¹⁶⁶ Minutes of the meeting of VDI Kyjovan’s board of directors dated 8 March 2000 (**Exhibit R-13**).

¹⁶⁷ Tr. 5 October 2016, 44:6-13 (Mr. Busta, in cross-examination); Tr. 4 October 2016, 81:9-13; 94:22-95:10 (Mr. Kubik, in direct examination and in response to Tribunal questions); Tr. 4 October 2016, 103:5-11 (Ms. Kunzova, in direct examination).

¹⁶⁸ Notice of Emergency Situation issued by VDI Kyjovan dated 9 March 2000 (**Exhibit R-14**); Statement of Defence and Memorial on Jurisdiction, ¶ 127.

277. The notice went on to record that Kyjovan had discovered on the evening of 8 March 2000 that the warehouse had started to collapse, and that the board had unsuccessfully sought to contact Mr. Busta:¹⁶⁹

“At 17:30 on 8 March 2000 Mr. Ivo Drabek, a door guard in service at this time found out that the damaged warehouse was starting to collapse and notified Ms. Vladimira Chytilova, Kyjovan employee in charge of protection of health and safety at work, who immediately informed by telephone call chairman of the cooperative, Mr. Josef Pucek, who summoned board of directors for a meeting at 18.00.

Board of directors tried to secure presence of the statutory body <i.e. Busta> of the unauthorized lessee <i.e. Sprint CR> in the abovementioned warehouse, however it was not possible to get hold of him, therefore it decided based on the notice of Building Authority in Kyjov to request a cooperation of the representative of Municipal Office in Kyjov. In the presence of independent persons and independent agency CZ GUART, s.r.o., the warehouse was entered, the video recording and photo-documentation were made, the record concerning the storage of goods and materials was drafted, all of which is enclosed.

Today, i.e. 9 March 2000, in the presence of Ing. Arch. Belik we want to continue with repair works that were started yesterday.”

278. Neither Mr. Ivo Drabek nor Ms. Vladimira Chytilova gave evidence in this proceeding.
279. The Claimants argue that the Building Authority did not call for the removal of the goods from the warehouse, and that this cannot therefore have been the justification for Kyjovan’s actions on 9 March 2000.¹⁷⁰ In this regard, the Claimants rely on a letter from the Building Authority to Sprint a.s. dated 9 October 2000 which stated: *“The Building Authority in Kyjov never issued direction for the removal of your company from the building, issued was only a request for repair of the damaged place.”*¹⁷¹
280. The Claimants also refer to a letter from the Czech Chamber of Chartered Engineers and Technicians Engaged in Construction dated 20 March 2001 issued in response to a complaint subsequently made by Sprint CR concerning Mr. Belik. It stated: *“In case of any accident, when the persons are endangered and where there is risk of delay, the building authority can issue the order only and exclusively on the basis of the local investigation. It means that the minutes contested by you are not decisive for the building authority for issuing the call concerning removal of defects.”*¹⁷²
281. The Claimants also point out that, under Section 97 of the Building Act then in force, the Building Authority would have had to issue an order to clear the building, if that is

¹⁶⁹ Notice of Emergency Situation issued by VDI Kyjovan dated 9 March 2000 (**Exhibit R-14**); Statement of Defence and Memorial on Jurisdiction, ¶ 127.

¹⁷⁰ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 225.

¹⁷¹ Letter from the Building Authority dated 9 October 2000 (**Exhibit C-57**).

¹⁷² Letter from the Czech Chamber of Chartered Engineers and Technicians Engaged in Construction to Sprint CR dated 20 March 2001 (**Exhibit C-58**).

what it intended.¹⁷³ The call to repair issued under Section 102(1) of the Building Act could not order clearance of the warehouse.¹⁷⁴

282. In reply, the Respondent argues that the warehouse was not cleared in execution of the call by the Building Authority, but subsequent to Mr. Belik's proposal to clear the building.¹⁷⁵
283. The Respondent also submits that the question of whether the Building Authority would have been entitled to order the warehouse to be cleared is irrelevant, since such a decision was never issued and the Respondent has never alleged otherwise.¹⁷⁶
284. The Czech Chamber of Chartered Engineers and Technicians Engaged in Construction, in responding to Sprint CR's complaint against Mr. Belik in March 2001, confirmed that the Building Authority's obligation is to perform an investigation before issuing a call to repair, but that the fact that it issued a call to repair "*confirms seriousness of the situation and correctness of actions of Ing. arch. Belik.*"¹⁷⁷
285. On 9 August 2000, Mr. Busta also filed a criminal complaint against Mr. Belik and the head of the local Building Authority, Mr. Susak, in respect of their involvement in the events.¹⁷⁸ The criminal complaint was dismissed on the basis that there was no evidence that Mr. Belik's actions were inadequate, or that the Building Authority had failed to conform to the applicable building regulations in issuing the call to repair.¹⁷⁹

4. The Events of 9 March 2000

286. On either the evening of 8 March 2000 or the early morning of 9 March 2000, Kyjovan began moving the goods out of the warehouse in the presence of private security. This is common ground between the Parties.
287. Mr. Kubik and Ms. Kunzova testified that they arrived at the premises in the early morning of 9 March 2000 for work and were prevented from entering the grounds.¹⁸⁰ Ms. Kunzova said that she was told there was an emergency, although she could see that about 150 people were moving around inside the premises, some of whom were clad in black.¹⁸¹ She testified that she believed that those clad in black were security personnel and that the rest were Kyjovan's employees, based on how they were dressed

¹⁷³ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 227.

¹⁷⁴ *Ibid.*

¹⁷⁵ Statement of Rejoinder and Reply on Jurisdiction, ¶¶ 139-140.

¹⁷⁶ Statement of Rejoinder and Reply on Jurisdiction, ¶ 140.

¹⁷⁷ Letter from the Czech Chamber of Chartered Engineers and Technicians Engaged in Construction to Sprint CR dated 20 March 2001 (**Exhibit C-58**).

¹⁷⁸ Decision of District Prosecutor dated 1 December 2000 (**Exhibit C-76**).

¹⁷⁹ *Ibid.*

¹⁸⁰ Tr. 4 October 2016, 95:6-10 (Mr. Kubik, in response to Tribunal questions); Tr. 4 October 2016, 103:1-4 (Ms. Kunzova, in direct examination).

¹⁸¹ Tr. 4 October 2016, 103:1-4 (direct examination) ("On 9th March, we were prevented from entering the compound. We were told there was an emergency, but I could see that about 150 people were moving around in that area.")

and the fact that they had “*employee cars*”.¹⁸² Ms. Kunzova also testified that she saw “*big trucks laden with our [Sprint CR’s] goods being taken out*”.¹⁸³

288. Ms. Kunzova says that she called the Police at around 6.00 am and explained that goods were being moved out of the warehouse and that she believed that theft was occurring, and asked the Police to come to the premises.¹⁸⁴
289. Mr. Busta testified that on that morning, he was called in Brno by another of his employees who reported that they were prevented from entering the area of the warehouse, that there were Police and that an emergency situation was claimed.¹⁸⁵ Mr. Busta explained that he instructed the employee to call the Police.¹⁸⁶
290. In response to the call, the officer in charge, Mr. Prochazka, sent two Police officers to the warehouse to investigate.¹⁸⁷ In a statement given in October 2000 in connection with the criminal complaint that Mr. Busta subsequently made against the Police, Mr. Prochazka said that the two officers returned approximately one hour later and reported that Kyjovan had been moving items from the warehouse since the previous day and that they had authorisation for this from the Kyjov Building Authority as the building was damaged.¹⁸⁸
291. Mr. Prochazka further stated that, as criminal charges had previously been filed on several occasions by Sprint CR and Kyjovan against each other, he sent the officers back to Kyjovan for a copy of the documents authorising the removal of the goods, which they did.¹⁸⁹
292. Mr. Prochazka also stated that he tried not to intervene given the disputes that had been going on between the two companies for a number of years. Mr. Prochazka stated that he called Mr. Pucek, the Chairman of Kyjovan, and requested him to stop moving the goods until the Police had verified that Kyjovan’s actions were authorised.¹⁹⁰ By this time, however, according to Mr. Prochazka, around two-thirds of the goods had been removed.¹⁹¹
293. At the Hearing, Ms. Kunzova testified that the two Police officers who were sent to the premises sat in their car and watched.¹⁹² Ms. Kunzova stated that she spoke with them and explained that she believed Sprint CR’s goods were being stolen and that the

¹⁸² Tr. 4 October 2016, 116:1-21 (in response to Tribunal questions).

¹⁸³ Tr. 4 October 2016, 120:14-16 (in response to Tribunal questions).

¹⁸⁴ Tr. 4 October 2016, 118:1-9 (in response to Tribunal questions).

¹⁸⁵ Criminal complaint against the police dated 20 March 2000 (**Exhibit C-8**); Tr. 5 October 2016, 75:2-7 (in response to Tribunal questions).

¹⁸⁶ Tr. 5 October 2016, 75:13-17 (in response to Tribunal questions).

¹⁸⁷ Statement of Mr. Procházka dated 17 October 2000 (**Exhibit R-16**).

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Tr. 4 October 2016, 118:13-15 (in response to Tribunal questions).

Sprint CR employees also had personal belongings in the warehouse.¹⁹³ She further testified that the Police responded that the matter would have to be investigated,¹⁹⁴ and that her impression was that the Police were “*not very eager to do anything*” and that “*their approach seemed to be very passive*”.¹⁹⁵ Ms. Kunzova testified that she left at around 11.00 am.¹⁹⁶

294. According to Mr. Busta, the two Police officers sent by Mr. Prochazka were still present at the warehouse when he arrived on the premises.¹⁹⁷ Mr. Busta testified that he told the Police that a court judgment he had obtained in a dispute against Kyjovan (*i.e.* the court decision of 15 February 2000) proved that he was authorised to use the warehouse and offices, and showed this to them.¹⁹⁸ It is common ground between the Parties that the Police saw this court judgment.¹⁹⁹
295. Mr. Busta testified that he was then forcibly removed from the premises by the private security personnel who were present.²⁰⁰ He further testified that the Police officers saw him being forcibly removed from the premises but did not intervene,²⁰¹ and that he was carried down the road away from the warehouse where the security personnel released him.²⁰² In his statement of 17 October 2000, Mr. Prochazka denied that there had been any physical attack on Mr. Busta, but the Tribunal was not offered direct evidence in support of this statement, or countering Mr. Busta’s testimony.
296. In his criminal complaint against the Police made on 20 March 2000, Mr. Busta said that he called Mr. Prochazka and asked him to intervene in the removal of the goods,²⁰³ but that Mr. Prochazka declined to intervene on the basis that Kyjovan had authorisation for its actions.²⁰⁴ Mr. Busta testified that he explained that he had a court judgment proving that he was legitimately occupying the property, and that Mr. Prochazka’s response was that he could not decide what was or was not a legally valid

¹⁹³ Tr. 4 October 2016, 119:6-12 (in response to Tribunal questions).

¹⁹⁴ Tr. 4 October 2016, 119:15-18 (in response to Tribunal questions).

¹⁹⁵ Tr. 4 October 2016, 119:13-22 (in response to Tribunal questions).

¹⁹⁶ Tr. 4 October 2016, 119:4-5; 119:23-120:2 (in response to Tribunal questions).

¹⁹⁷ Tr. 5 October 2016, 76:15-18 (in response to Tribunal questions).

¹⁹⁸ Criminal complaint against the police dated 20 March 2000 (**Exhibit C-8**). This was the Decision of the District Court of Hodonín dated 15 February 2000 (**Exhibit C-52**); Tr. 5 October 2016, 36:22-39:11 (cross-examination); **Exhibit R-18** (“the informer submitted a preliminary decision from the District Court in Hodonin dated 15 February 2000, ref. no. 5C 532/98 in his preliminary contacts with the above-mentioned police officers”).

¹⁹⁹ Tr. 5 October 2016, 36:22-25 (cross-examination).

²⁰⁰ *Ibid.*

²⁰¹ Tr. 5 October 2016, 77:5-78 (in response to Tribunal questions); Criminal complaint against the police dated 20 March 2000 (**Exhibit C-8**).

²⁰² Tr. 5 October 2016, 79:5-17 (in response to Tribunal questions).

²⁰³ Criminal complaint against the police dated 20 March 2000 (**Exhibit C-8**); *see also* Tr. 5 October 2016, 85:10-22 (in response to Tribunal questions).

²⁰⁴ *Ibid.*

document.²⁰⁵ In his statement of October 2000, Mr. Prochazka explained that “*the decisive factor*” for the Police was the decision by the Building Authority.²⁰⁶

297. Mr. Busta testified that shortly afterwards two Police officers came by and informed him that if he made any attempt to go inside the property or interfere with the activities of Kyjovan there, he would be charged with hooliganism.²⁰⁷
298. The Respondent has relied on a statement made by Mr. Belik on 9 March 2000 according to which, once half of the warehouse had been cleared, Mr. Belik made a further inspection during which he reported that he found damage that had not been obvious during the inspection on 6 March 2000.²⁰⁸ Mr. Belik made further recommendations for the repair of the building.²⁰⁹ At the Hearing, Mr. Busta testified that he believed that the 9 March 2000 report of Mr. Belik had been fabricated to create the false impression that there was damage that did not exist, in order to justify the removal of the goods.²¹⁰
299. The Respondent suggests that not all of the goods in the warehouse were removed on 9 March 2000.²¹¹ The Respondent points to Mr. Busta’s letter of 5 October 2000 to the Regional Prosecuting Attorney, in which Mr. Busta, in complaining about the Police’s conduct, stated: “*The Police has again not proceeded transparently, because it has drawn up the minutes [...] that VDI Kyjovan again dictated the conditions that the Complainant represented by Ivan Peter Busta could not enter the Kyjovan premises where one part of the goods was stored*”.²¹²
300. When questioned about this at the Hearing, Mr. Busta said that he did not know whether goods were left in the warehouse, and observed that “*it would have been somewhat surprising if all had been removed to the last degree*”.²¹³ Mr. Busta explained that he never accessed the warehouse again as he was afraid to return to it in light of the events that had taken place.²¹⁴ Mr. Kubik and Ms. Kunzova also confirmed that no one had access to the warehouse from 9 March 2000.²¹⁵

²⁰⁵ Criminal complaint against the police dated 20 March 2000 (**Exhibit C-8**).

²⁰⁶ Statement of Mr. Procházka dated 17 October 2000 (**Exhibit R-16**).

²⁰⁷ Tr. 5 October 2016, 81:12-17 (in response to Tribunal questions); Criminal complaint against the police dated 20 March 2000 (**Exhibit C-8**).

²⁰⁸ Mr. Belik’s proposal of 9 March 2000 (**Exhibit R-15**).

²⁰⁹ *Ibid.*

²¹⁰ Tr. 5 October 2016, 41:25-46:12 (cross-examination).

²¹¹ Tr. 5 October 2016, 59:14-60:22 (cross-examination); Tr. 6 October 2016, 21:25-22:20 (Respondent’s submissions).

²¹² Request for an investigation dated 5 October 2000 (**Exhibit C-29**).

²¹³ Tr. 5 October 2016, 60:1-22 (cross-examination and in response to Tribunal questions).

²¹⁴ Tr. 5 October 2016, 61:15-19 (in response to Tribunal questions).

²¹⁵ Tr. 4 October 2016, 93:18-94:4 (in response to Tribunal questions); Tr. 4 October 2016, 121:7-9 (in response to Tribunal questions).

301. The Claimants argue that the accounting documents of Sprint CR, which were kept in an adjacent building, were also removed, as were four cars.²¹⁶ In his testimony, Mr. Kubik stated that, given that these cars were parked at the adjacent building where the accounting documents were kept, there was no possibility of them being damaged if the warehouse was to collapse.²¹⁷

5. Kyjovan Hands Over the Goods to the Police

302. According to the Respondent, the Police contacted Kyjovan and determined that the goods removed from the warehouse were stored in two warehouses in Kelcany.²¹⁸

303. It is undisputed that, on 14 April 2000, Mr. Pucek voluntarily handed over to the Police seven computer units, a box containing 93 floppy discs, and a key to a room within the warehouses containing what the Respondent says was the remainder of the goods.²¹⁹ The Police sealed the room and delivered the computer units and floppy discs to Mr. Busta.²²⁰

6. The Police Take Custody of the Goods

304. It is undisputed that, on 18 April 2000, Mr. Pucek, the Chairman of Kyjovan, handed to the Police the keys to the two warehouses in Kelcany containing the goods. He signed a delivery report describing what he had handed over.²²¹ This stated:

“On 08.03.2000 the shown things were moved out of the hall as stated above, because the hall was in the emergency state with imminent loss of property values as well as jeopardy of persons. I am speaking about:

- video record made after opening the hall prior to start of clearing the hall (cassette BASF EQ 240)*
- passenger car Peugeot 309 of cream colour, license plate D 213 BDX*
- pickup DAF 400 of red colour, license plate H 811 HBJ*
- pickup FORD transit of yellow colour, license plate C 32 LHJ*
- remaining part of furniture and equipment from offices in the outbuilding*
- all the goods moved out of the damaged hall.*

All things except the video record are stored in two halls within the premises of the company Zemedelske stavby (Agricultural Structures) Kelcany, both halls are locked and secured against entering. I also deliver keys from both halls [...]

I state to the delivered things that they have been given into custody of the Police; VDI Kyjovan Kyjov applies the lien to them through KOS Brno and has filed the motion to KOS Brno for issue of the payment order.”

²¹⁶ Statement of Claim, ¶ 13; Civil motion commenced by Sprint CR and Sprint a.s. against Kyjovan dated 14 March 2000 (**Exhibit C-10**).

²¹⁷ Tr. 4 October 2016, 91:12-22 (in response to Tribunal questions).

²¹⁸ Statement of Defence and Memorial on Jurisdiction, ¶ 161. The Claimants do not contest this.

²¹⁹ Record regarding handing over of items, dated 14 April 2000 (**Exhibit C-23**).

²²⁰ *Ibid.*

²²¹ Record regarding handing over of items, dated 18 April 2000 (**Exhibit C-24**).

305. The delivery report records that it was signed in the presence of a Police officer and accepted by Lieutenant Kupec. Mr. Busta was not present during the making of the report, but was given a copy of it by the Police later that day.²²²
306. The Claimants argue that the Police failed to comply with the Czech Criminal Procedure Code in taking custody of the goods from Kyjovan in that they did not draw up an itemised list of the goods they were receiving. Instead, the Police received them *en bloc*, together with a statement from Mr. Pucek in his delivery report that this comprised “*all the goods moved out of the damaged hall.*” The Claimants submit that the Police thereby destroyed the opportunity to establish whether all of the goods that had been removed from the warehouse were being returned, or whether some had been retained by Kyjovan.²²³
307. The Respondent denies that the Police were obliged to draw up a list of the goods received from Kyjovan, given their volume (for this purpose, the Respondent notes that the Claimants say 873,166 items were removed from the warehouse).²²⁴ In any event, the Respondent points out that a list was ultimately drawn up when the goods were returned to the Claimants.
308. The Parties’ respective positions concerning the legality of the Police’s conduct in taking custody of the goods are considered in **Part V.C** below.

7. The List of Goods of 18 April 2000

309. At the Hearing, Mr. Busta testified that on 18 April 2000, he, Ms. Kunzova and two other Sprint CR employees accompanied the Police to the Kyjov premises, where the Police removed five computers from the office building.²²⁵ Mr. Busta says that this was at the Police’s invitation.²²⁶
310. According to his testimony, Mr. Busta, his employees and the Police officers then went to the Police headquarters where they connected the computers. Four of the computers were damaged but the central computer was still functioning.²²⁷ This was the computer from which a list of goods dated 18 April 2000 was printed, in the presence of Mr. Busta and Ms. Kunzova.²²⁸ The value of the goods in the list was recorded to be CZK 99,067,410.²²⁹ The Police drew up a protocol recording this, which stated:²³⁰

²²² Tr. 5 October 2016, 85:23-86:9; 88:14-89:1 (in response to Tribunal questions); Record regarding handing over of items, dated 18 April 2000 (**Exhibit C-24**).

²²³ Statement of Claim, ¶¶ 43-49.

²²⁴ Statement of Defence and Memorial on Jurisdiction, Section 3.1.6.2.

²²⁵ Tr. 5 October 2016, 48:21-49:9 (cross-examination); 86:16-87:15 (in response to Tribunal questions).

²²⁶ Tr. 5 October 2016, 87:19-88:5 (in response to Tribunal questions).

²²⁷ Tr. 5 October 2016, 86:22-87:3 (in response to Tribunal questions).

²²⁸ Tr. 5 October 2016, 86:24-87:3; List printed off goods printed from computer dated 18 April 2000 (**Exhibit C-26**); Record regarding the printing of the list of goods dated 18 April 2000 (**Exhibit C-27**).

²²⁹ Record regarding the printing of the list of goods dated 18 April 2000 (**Exhibit C-27**).

²³⁰ *Ibid.*

“Investigator of the District Bureau of Investigation Hodonin conducts investigation of theft of the goods from the warehouse hall in Kyjov of the harmed organization SPRINT CR s.r.o.

In the case above the list of goods stored and present in the warehouse at the moment of theft was printed from the delivered computers in presence of CEO of the company SPRINT CR s.r.o., Mr. Ivan Peter Busta and in presence of the accountant of the harmed company, Marketa Kunzova. List of goods was printed after connection of the computers, this operation was performed by the specialist of the analytical department of the District Bureau of Investigation, Mr. Oldrich Junec. The list of goods, where value of the goods in the warehouse is calculated, amounts to CZK 99,067,410 and is attached to the file material.”

311. The Parties dispute who printed the list. The Claimants state that it was printed by the Police.²³¹ This is corroborated by Ms. Kunzova who said that it was printed out “*by an expert from the police*” in her presence.²³² The Respondent submits that it was printed by employees of Sprint CR in the presence of the Police.²³³
312. The Police protocol dated 18 April 2000 stated that the list was printed following connection of the computers by a specialist of the analytical department of the District Bureau of Investigation, Mr. Oldrich Junec.²³⁴ Mr. Junec has filed a witness statement in this proceeding stating that he had reviewed the protocol of 18 April 2000 and that he did not print the list but merely connected the computer to the printer.²³⁵
313. More importantly, the Parties dispute whether the list contained all of the goods that were in the warehouse on 9 March 2000 and which were removed by Kyjovan.
314. The Claimants state that the list accurately records the identity and value of the goods stored in the warehouse on 9 March 2000.
315. The Respondent submits that the list does not, and suggests the list also contains goods stored in other warehouses owned by Sprint CR.²³⁶ The Respondent points firstly to the fact that in the civil and criminal complaints filed by the Claimants following 9 March 2000, they stated a far lower value of the goods than CZK 99,067,410.²³⁷ In particular:
- (a) On 9 March 2000, Mr. Busta filed a criminal complaint against Kyjovan in which he stated that the goods were worth CZK 40 million.²³⁸

²³¹ Statement of Claim, ¶ 40.

²³² Tr. 4 October 2016, 103:17-20 (direct examination).

²³³ Statement of Defence and Memorial on Jurisdiction, ¶ 189.

²³⁴ Record regarding the printing of the list of goods dated 18 April 2000 (**Exhibit C-27**).

²³⁵ Witness statement of Oldrich Junec dated 10 December 2015, ¶ 4.

²³⁶ Statement of Defence and Memorial on Jurisdiction, ¶ 197.

²³⁷ Statement of Defence and Memorial on Jurisdiction, ¶¶ 191-196.

²³⁸ Criminal complaint by Mr. Busta dated 9 March 2000 (**Exhibit C-4**).

- (b) On 12 March 2000, Mr. Busta filed a further criminal complaint against Kyjovan in relation to the four cars belonging to Sprint CR, which he said were collectively worth CZK 325,000.²³⁹
- (c) On 14 March 2000, Mr. Busta filed a request for an interim injunction against Kyjovan at the District Court of Hodonin, to which he appended a list of the inventory of the warehouse as at 11 February 2000, which amounted to CZK 23,228,430.93.²⁴⁰
- (d) On 20 March 2000, Mr. Busta filed a criminal complaint against the Kyjovan Police stating that he had previously thought the value of the goods was CZK 40 million, but that he had “*established that the standard list of the stock in the warehouse does not contain the goods which [are] kept un-packed or which [do] not need Czech manuals and printed labels*” and that these items had an additional value of CZK 10 million.²⁴¹
316. The Respondent also refers to the fact that the list of 18 April 2000 stated in the top left-hand corner that it showed goods stored in “*all warehouses*”.²⁴² The Respondent notes that Sprint CR had 70 sales outlets in the Czech Republic at this time,²⁴³ and suggests that the list of 18 April 2000 included goods stored in all of those warehouses.²⁴⁴
317. The Claimants submit that Mr. Busta’s estimations of the value of the goods in the weeks following 9 March 2000 were made at a time when he was focused on recovering the goods themselves.²⁴⁵ Further, the Claimants state that Mr. Busta at this time did not know of the extent to which Kyjovan had taken the goods on 9 March 2000, as he was not allowed to enter the premises.²⁴⁶ The Claimants stress that Mr. Busta’s estimates were rough and the purpose of providing them was simply to initiate court or Police action.²⁴⁷
318. The Claimants say that the list of 11 February 2000 was “*internal working material*” produced “*at a certain stage in the performance of the inventory process and is not therefore under any circumstances [a] list of goods that would include final amounts of goods in the warehouse.*”²⁴⁸ Ms. Kunzova testified that this list was produced during a sample stock-taking exercise which showed that the stock-keeping was in good order.²⁴⁹

²³⁹ Criminal complaint by Mr. Busta dated 12 March 2000 (**Exhibit C-5**).

²⁴⁰ Civil motion commenced by Sprint CR and Sprint a.s. against Kyjovan dated 14 March 2000 (**Exhibit C-10**); List of goods (**Exhibit R-27**).

²⁴¹ Criminal complaint against the police dated 20 March 2000 (**Exhibit C-8**).

²⁴² List of goods (**Exhibit C-27**).

²⁴³ Statement of Claim, ¶ 64.

²⁴⁴ Statement of Defence and Memorial on Jurisdiction, ¶ 198.

²⁴⁵ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 326.

²⁴⁶ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 328.

²⁴⁷ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 329.

²⁴⁸ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 335.

²⁴⁹ Tr. 4 October 2016, 104:11-23 (cross-examination).

319. The Claimants instructed an accountant, Mr. Kocman, to compare the list of 11 February 2000 to the list printed on 18 April 2000 and the list created by the Claimants showing the returned goods.²⁵⁰ Mr. Kocman determined that there were 1,146 items that were not included in the 11 February 2000 list but which were not recorded in the 18 April 2000 list, and which were returned by the Police.²⁵¹ The Claimants say that if the list of 11 February 2000 was a true record of the goods in the warehouse on 9 March 2000, then the Police would have returned goods to Sprint CR that were not in the warehouse on 9 March 2000.²⁵²
320. The Claimants deny that the list of 18 April 2000 included goods stored in other warehouses owned by Sprint CR. The Claimants clarify that the 70 sale outlets referred to in their Statement of Claim were in fact 70 retail business partners of Sprint CR, *i.e.* places at which Sprint CR's goods were sold, and were not further warehouses. The Claimants state that Sprint CR also had a showroom in Brno, where negligible amounts of goods were stored for the purpose of display.²⁵³ The Claimants say that the indication of “*all warehouses*” in the top-left corner of the list of 18 April 2000 is the function of the computer software that Sprint CR was using, and indicated that they had not differentiated the list by suppliers or types of goods.²⁵⁴
321. Mr. Kubik and Ms. Kunzova both testified that they were not aware of any other warehouse while they were working there, and to their recollection all of the goods belonging to Sprint CR were stored at the warehouse in Kyjov.²⁵⁵ Ms. Marouskova, a customer of Sprint CR from 1998, testified that she was not aware of the existence of any other warehouse and that she went to the warehouse in person and could personally select any goods that she was ordering.²⁵⁶
322. The Respondent maintains that it sought to verify the accuracy of the list of goods of 18 April 2000 by requesting the Claimants to produce all documents that could serve as evidence of Sprint CR's ownership of the goods in the list.²⁵⁷ This request was granted by the Tribunal, and the Claimants produced over 200 invoices issued by Sprint CR's suppliers from 1996 to 2000. The Respondent says that these invoices only amount to two-thirds of the value stated on the list of goods of 18 April 2000.²⁵⁸

²⁵⁰ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 339; Expert opinion of Ing. Kocman (**Exhibit C-72**). On the return of the goods, *see below* ¶¶ 325 to 335.

²⁵¹ Second expert opinion of Ing. Kocman (**Exhibit C-72**).

²⁵² Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 336, 338, 339; **Exhibit C-36**.

²⁵³ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 332.

²⁵⁴ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 334.

²⁵⁵ Tr. 4 October 2016, 97:3-13; Witness statement of Jan Kubik dated 3 February 2016, ¶ 3; Tr. 4 October 2016, 102:22-24 (Ms. Kunzova in direct examination).

²⁵⁶ Tr. 4 October 2016, 73:1-12 (cross-examination); Witness statement of Ms. Marouskova dated 26 February 2016, ¶ 3.

²⁵⁷ Statement of Rejoinder and Reply on Jurisdiction, Section 3.7.1.

²⁵⁸ *Ibid.*

323. The Respondent also notes that the Claimants' expert, Mr. Kocman, states that he received 17 binders of invoices for the relevant period.²⁵⁹ The Respondent submits that the Claimants failed to produce all of these documents in document production (the Respondent states that it received only two binders) and requests the Tribunal to draw a negative inference that the list of 18 April 2000 shows items not owned by Sprint CR and that the list therefore cannot serve as a basis for the existence or calculation of the alleged loss of the Claimants.²⁶⁰
324. After the list of goods was printed at the Police station, Mr. Busta says that he went with the Police to Kelcany where they met Mr. Pucek. Mr. Busta stated that "*at first sight it was evident that all the goods could not have been there. They were spread in two small halls, each of them being roughly 300 metres square. And the halls included the four cars which were towed away.*"²⁶¹

8. Return of the Goods to Sprint CR

325. On 1 November 2000, the Police and Mr. Busta agreed on the procedure for returning the goods in Police custody to Sprint CR.²⁶² In particular, they agreed that Mr. Busta would "*engage the necessary number of employees so that the delivered goods may be accepted – item by item, in the kind and quantity, i.e. so that qualitative and quantitative acceptance may be performed duly.*"²⁶³ Any potential damage to the goods was to be analysed by an expert.²⁶⁴
326. The goods were handed over by the Police to employees of Sprint CR at the warehouse in Kelcany.
327. Ms. Kunzova was present during the return of the goods. In her testimony, she explained that the Police officers quoted the product codes on the goods to her and she manually recorded these.²⁶⁵ Ms. Kunzova said that she subsequently entered the total number of product codes that she had recorded into the Sprint CR accounting software.²⁶⁶ The software then calculated the discrepancy between the 18 April 2000 list and the product codes entered from the return of the goods.²⁶⁷

²⁵⁹ First expert opinion of Ing. Kocman (**Exhibit C-39**), p. 1 of the English translation; Statement of Claim, ¶ 64; Tr. 3 October 2016, 143:21-144:12 (in response to Tribunal questions).

²⁶⁰ Statement of Rejoinder and Reply on Jurisdiction, Section 3.7.1; Tr. 3 October 2016, 103:8-24.

²⁶¹ Tr. 5 October 2016, 49:4-9 (cross-examination).

²⁶² Record regarding returning of the goods, dated 1 November 2000 (**Exhibit C-31**).

²⁶³ *Ibid.*

²⁶⁴ On 3 April 2001, an expert hired by Mr. Busta, Mr. Sterba, reported that the damage amounted to CZK 5,611,000: **Exhibit C-38**.

²⁶⁵ Tr. 4 October 2016, 109:10-110:2 (cross-examination); 112:4-113:1 (in response to Tribunal questions).

²⁶⁶ Tr. 4 October 2016, 112:25-113:1 (in response to Tribunal questions).

²⁶⁷ Tr. 4 October 2016, 114:14-18 (in response to Tribunal questions).

328. The return of the goods was completed in August 2001.²⁶⁸ Mr. Busta created a list comparing the list of 18 April 2000 to the list of the goods returned and concluded that there was a difference in value of CZK 63,658,343.²⁶⁹
329. The Respondent notes that the comparative list created by Mr. Busta indicates 32,866 items that were returned which were not on the 18 April 2000 list.²⁷⁰ The Respondent submits that this indicates that the list of 18 April 2000 is not a reliable record of what was in the warehouse on 9 March 2000. The Respondent put this to Ms. Kunzova at the Hearing, who explained that this may have been due to errors in the goods read out by the Police during the return of the goods to Sprint CR. Ms. Kunzova explained that *“the codes were in many places damaged because the goods were stored in an inappropriate place, under inappropriate conditions; for instance, it was freezing. So the labels were damaged often.”*²⁷¹ Ms. Kunzova explained that *“there were different police officers, taking turns different days, and none of them actually was familiar with the structure of our codes; and neither did I know all the codes by heart. So in some cases there may have been mistakes made.”*²⁷²
330. Ms. Kunzova further testified that there were also some goods stored in the Kelcany warehouse without any codes and that this could also have led to discrepancies:²⁷³
- “And the problem was that in some cases the goods were stored in that other warehouse without any codes. For instance, there were some nuts, and they all look alike, but they may have different codes. So while some of the nuts were reported on the one code, they in fact should have been registered under several different codes. So that’s why the discrepancies could have occurred.”*
331. In response to questions from the Tribunal, Ms. Kunzova explained further that due to the way the return of the goods was carried out – with the Police quoting product codes and Ms. Kunzova manually recording them – she was unable to perform any immediate direct comparison between the codes of the goods being returned and the codes listed in the 18 April 2000 list.²⁷⁴
332. Ms. Kunzova said that when she noticed the discrepancies following entry of the product codes into the Sprint CR accounting software, she brought this to Mr. Busta’s attention.²⁷⁵

²⁶⁸ Record regarding finishing of the returning of the goods, dated 8 August 2001 (**Exhibit C-35**).

²⁶⁹ Record regarding finishing of the returning of the goods, dated 8 August 2001 (**Exhibit C-35**); List showing the difference between the list printed on 18 April 2000 and those returned to Sprint (**Exhibit C-36, C-37**).

²⁷⁰ List showing the difference between the list printed on 18 April 2000 and those returned to Sprint (**Exhibit C-36, C-37**); Statement of Rejoinder and Reply on Jurisdiction, Section 3.7.3.

²⁷¹ Tr. 4 October 2016, 109:10-18 (cross-examination).

²⁷² Tr. 4 October 2016, 109:21-110:2 (cross-examination).

²⁷³ Tr. 4 October 2016, 113:16-23 (in response to Tribunal questions).

²⁷⁴ Tr. 4 October 2016, 112:10-17 (in response to Tribunal questions).

²⁷⁵ Tr. 4 October 2016, 114:19-22 (in response to Tribunal questions).

333. Ms. Kunzova stated that it was “*impossible*” that there were goods returned which were not on the 18 April 2000 list because she had never accounted for goods in any other warehouse.²⁷⁶

9. Mr. Busta’s Criminal Complaint Against the Police

334. On 20 March 2000, Mr. Busta made a criminal complaint against the Police in respect of the events of 9 March 2000.²⁷⁷ Mr. Busta provided a detailed account of the events and alleged that the Police failed to prevent the theft of the goods in the warehouse by Kyjovan. In particular, Mr. Busta reported “*abuse of authority by a public servant*” and “*obstructing the action of a public servant through negligence*”.
335. This complaint was dismissed by the Brno Investigating Authority on 21 November 2000.²⁷⁸ The Investigating Authority concluded that “*there is no suspicion that the criminal act has taken place*” and therefore “*there is no reason to deal otherwise with this case.*” The Investigating Authority noted that during its investigation “*a number of actions were taken to clarify the matter, the victim, the suspected culprits and other witnesses were questioned, an expert report was requested, documentation and written evidence was procured, the police and investigative files were applied for and verified.*”
336. In its report, the Investigating Authority cited the statement of Major Prochazka, in which he explained that for the Police on 9 March 2000 “*the decisive factor was the decision by the Building Authority [...] the police officers acted in accordance with the law and with all appropriate regulations.*” The Investigating Authority also considered the statement of Mr. Susak, the Director of the Kyjov Building Authority, who stated that “*the clearance of the building as a result of damage caused by an accident was authorized.*”
337. The Investigating Authority concluded that the Police, having been presented with the Building Authority’s call to repair, could not have intervened in the removal of the goods from the warehouse.
338. The Investigating Authority’s decision to set aside the complaint was upheld by the District Prosecutor’s Office in Hodonin on 23 March 2001.²⁷⁹ This decision again referred to Major Prochazka’s statements, “*who points at the fact that it is generally known that Sprint CR s.r.o. and VDI Kyjovan Kyjov have been in dispute for many years and, given the seriousness of the situation, he concluded that any decision could only be taken after a full investigation of the entire incident*”.
339. Mr. Busta also complained about the mode by which the Police had taken custody of the goods from Kyjovan. In October 2000, Mr. Busta wrote to the Regional Prosecuting Attorney’s Office requesting an investigation into the procedure adopted by the Police for the taking of the goods from Kyjovan (*i.e. en bloc* and without an

²⁷⁶ Tr. 4 October 2016, 115:17-24 (in response to Tribunal questions).

²⁷⁷ Criminal complaint against the police dated 20 March 2000 (**Exhibit C-8**).

²⁷⁸ Decision of Brno Investigating Authority dated 21 November 2000 (**Exhibit R-17**).

²⁷⁹ Decision of the District Prosecutor’s Office in Hodonín dated 23 March 2001 (**Exhibit R-18**).

itemised list), and requesting that the Police adopt a thorough method for returning the goods to Sprint CR.²⁸⁰

340. On 30 October 2000, the Regional Prosecuting Attorney's Office agreed that the Police had proceeded contrary to the Rules of Criminal Procedure in taking custody of the goods without establishing an itemised list: "*It has been established that delivery of the things in question was accompanied by two Protocols which do not contain description of the delivered things so that they may be identified in quantity in kind. The investigator has thus proceeded contrary to provisions of §79(5) of the Rules of Criminal Procedure.*"²⁸¹ The Police were directed to "*hand over all delivered things to the harmed person and their acceptance by the harmed person shall be subject to the protocol with precise identification of the kind and quantity of the things in question.*"²⁸²
341. Sprint CR subsequently made a further criminal complaint against the Police, Kyjovan and its employees on 31 March 2001 in relation to the missing goods.²⁸³
342. The Police investigation into the complaint was suspended on 20 December 2001 on the basis that no evidence of criminal behaviour had been found.²⁸⁴ Mr. Busta complained about this decision to the District Public Prosecutor's Office, but this complaint was dismissed.²⁸⁵

10. Mr. Busta's Criminal Complaints Against Kyjovan

343. On 9 March 2000, Mr. Busta went to the Police station and reported that Kyjovan had committed theft, burglary, and restriction of personal freedom.²⁸⁶ Mr. Busta reported that Kyjovan has transported goods out of the warehouse and to an unknown place, and that these goods were worth approximately CZK 40 million.
344. Mr. Busta and the Sprint entities subsequently made several further criminal reports against Kyjovan.
- (a) On 12 March 2000, Mr. Busta reported the theft of the four cars that had been on the premises on 9 March 2000.²⁸⁷
 - (b) On 14 March 2000, Sprint CR and Sprint a.s. made their own criminal reports against Kyjovan in respect of the events of 9 March 2000.²⁸⁸
 - (c) On 19 March 2000, Mr. Busta made a criminal report against Mr. Pucek.²⁸⁹

²⁸⁰ Request for investigation dated 5 October 2000 (**Exhibit C-29**).

²⁸¹ Response to request for investigation (**Exhibit C-30**).

²⁸² *Ibid.*

²⁸³ Sprint CR's criminal complaint against the police, VDI Kyjovan and its employees dated 30 March 2001 (**Exhibit C-74**).

²⁸⁴ Decision of the Regional Investigation Authority Brno dated 20 December 2001 (**Exhibit R-34**).

²⁸⁵ Complaint against the Investigation Authority's decision dated 28 January 2002 (**Exhibit R-35**); Decision of the District Public Prosecutor's Office dated 30 April 2002 (**Exhibit R-36**).

²⁸⁶ Criminal complaint by Mr. Busta against Mr. Pucek (chairman of VDI Kyjovan) dated 9 March 2000 (**Exhibit C-4**).

²⁸⁷ Criminal complaint by Mr. Busta against VDI Kyjovan dated 12 March 2000 (**Exhibit C-5**).

²⁸⁸ Criminal complaint by Sprint CR spol. s.r.o. and Sprint a.s. against VDI Kyjovan dated 14 March 2000 (**C-6**).

- (d) On 25 May 2000, Mr. Busta made a further criminal report stating that the office used by Sprint CR had also been robbed and accounting documents, computers, and other office equipment had been stolen.²⁹⁰
345. On 28 July 2000, the Police officer in charge of the investigation into the criminal complaints filed a report closing the investigation.²⁹¹ The Police officer concluded that no criminal offence by Kyjovan was suspected. The report described the investigations undertaken by the Police, including questioning of Mr. Belik, and statements from the warehouse keeper, Jan Kubik.
346. On 5 October 2000, Mr. Busta complained to the High Prosecuting Attorney's Office about the decision to close the investigation into Kyjovan's criminal conduct.²⁹² It is not clear whether Busta received a response to this.

11. Mr. Busta's Interim Injunction Proceedings Against Kyjovan

347. On 14 March 2000, Mr. Busta requested an interim injunction against Kyjovan.²⁹³
348. Mr. Busta subsequently filed a motion to exclude the judge assigned to the proceedings, Judge Bucek, from hearing the matter on the basis that Judge Bucek had a brother in the local Police department against whom Mr. Busta had filed criminal complaints and was therefore potentially biased.²⁹⁴ The record indicates, and the Respondent concedes, that Judge Bucek did have a brother in the local Police department.²⁹⁵
349. Judge Bucek denied the allegation of bias despite the family relationship and sent the matter to the Regional Court in Brno for decision.²⁹⁶ The Regional Court found no reason to exclude Judge Bucek.²⁹⁷
350. In May 2000, Mr. Busta made a further submission in respect of Judge Bucek, to the District Court of Hodonin, arguing that the Judge had concealed his family relationship with a member of the local Police department.²⁹⁸ The District Court referred the submission to the Regional Court for decision, which again rejected Mr. Busta's

²⁸⁹ Criminal complaint against Mr. Pucek dated 19 March 2000 (**Exhibit C-7**).

²⁹⁰ Criminal complaint regarding robbing of the offices including accounting, dated 25 May 2000 (**Exhibit C-9**).

²⁹¹ Decision of the Police of Hodonin dated 28 July 2000 (**Exhibit R-10**).

²⁹² Complaint in relation to the 28 July 2000 decision to close the police investigation against VDI Kyjovan, dated 5 October 2000 (**Exhibit C-11**).

²⁹³ Civil motion commenced by Sprint CR and Sprint a.s. against Kyjovan dated 14 March 2000 (**Exhibit C-10**).

²⁹⁴ Official record by Judge Bucek dated 16 March 2000 (**Exhibit C-13**).

²⁹⁵ Statement of Defence and Memorial on Jurisdiction, ¶ 146; Decision of the Regional Court Brno of 26 April 2000 (**Exhibit R-19**).

²⁹⁶ Official record by Judge Bucek dated 16 March 2000 (**Exhibit C-13**).

²⁹⁷ Decision of the Regional Court Brno of 26 April 2000 (**Exhibit R-19**).

²⁹⁸ Mr. Busta's submission to the District Court of Hodonin dated 18 May 2000 (**Exhibit C-14**).

complaint and stated that Judge Bucek had not denied the existence of his family relationship but denied that it constituted bias.²⁹⁹

351. Sprint CR appealed to the Constitutional Court claiming that its constitutional rights had been infringed by the Regional Court. The Constitutional Court rejected Sprint CR's allegation that its constitutional rights had been infringed and dismissed the claim.³⁰⁰
352. In August 2000, Mr. Busta published an article in a Czech newspaper describing his negative experiences of doing business in the Czech Republic and seeking protection through the judicial system.³⁰¹ Mr. Busta suggested in the article that politicians were involved in the case to his detriment.
353. In response to the article, the judges of the District Court of Hodonin made a collective declaration that their attitudes had been "*affected*" by the article "*to such an extent that [they were] no more able to decide impartially*".³⁰² Accordingly, the judges asked for "*exclusion from hearing of all cases and for assigning the case to another court*."³⁰³ The Regional Court of Brno agreed that the judges' ability to make impartial decisions in the circumstances had been put into doubt and that the matter should be heard by the District Court of Jihlava.³⁰⁴
354. The Claimants successfully challenged the Regional Court's decision in the Constitutional Court. In July 2001, the Court found that the lower courts had violated the Claimants' constitutionally guaranteed right that no one may be deprived of the jurisdiction of a lawful judge.³⁰⁵ The Regional Court's decision was annulled.
355. In March 2001, Kyjovan was declared bankrupt. The application for an interim injunction was not determined until 2012, when the District Court dismissed the application.³⁰⁶ The Respondent argues that this decision made clear that the grounds for the application were too vague to grant the injunction, and that no other decision would have been taken had the application been decided in March 2000.³⁰⁷

C. Analysis

1. The Claimants' Position

356. The Claimants take the position that the Respondent expropriated Sprint CR's goods, in breach of Article 5(1) of the BIT. Article 5(1) provides in relevant part:

²⁹⁹ Decision of the Regional Court Brno of 22 June 2000 (**Exhibit R-20**).

³⁰⁰ Decision Czech Constitutional Court of 19 September 2000 (**Exhibit R-21**).

³⁰¹ Article dated 18 August 2000 (**Exhibit C-18**).

³⁰² Letter from the District Court of Hodonin judges dated 21 September 2000 (**Exhibit C-19**).

³⁰³ *Ibid.*

³⁰⁴ Decision of the Regional Court Brno of 5 December 2000 (**Exhibit R-22**).

³⁰⁵ Decision Constitutional Court of 3 July 2001 (**Exhibit C-20**; **Exhibit R-23**).

³⁰⁶ Judgment of the District Court of Hodonin of 14 March 2012 (**Exhibit R-45**).

³⁰⁷ Statement of Rejoinder and Reply on Jurisdiction, ¶ 176.

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

357. The Claimants submit that the Tribunal should consider the conduct of the Respondent as a whole. In particular, the Claimants ask the Tribunal “*not to look on each omission or interaction individually, but in their complexity, in the fullness of time of the undertaking of Mr. Busta in the Czech Republic.*”³⁰⁸ The Claimants submit that, viewed as a whole, it is clear that the Respondent’s “*organs have failed to protect [the Claimants’] property, with the consequence of expropriation.*”³⁰⁹
358. The Claimants submit that expropriation may occur through both acts and omissions.³¹⁰ In support of this, the Claimants cite the statement of the arbitral tribunal in *EUREKO v. Poland* that “*it is obvious that the rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions. Many international arbitral tribunals have held so.*”³¹¹ The Claimants also emphasise that the intention of the Respondent is immaterial to determining expropriation and that what matters is the effect of the measures taken by the host State.³¹² They cite *Biloune v. Ghana Investment Centre* and *Generation Ukraine v. Ukraine* in this regard.
359. The Claimants argue that the Respondent indirectly expropriated the Claimants’ investment through the “*acquiescence of the Police*” in Kyjovan’s removal of the goods owned by Sprint CR from the warehouse on 9 March 2000, and the “*lack of any protection to the property and due care in taking and returning of the goods by the Police*”, *i.e.* the taking of the goods from Kyjovan *en bloc* without establishing an itemised list.³¹³
360. The Claimants argue that the Police failed to act in accordance with Czech law on both counts. They rely on the opinion of their legal expert, Dr. Nett, in this regard.³¹⁴
361. With respect to the events on 9 March 2000, the Claimants say that the Police breached Czech law by failing to prevent Kyjovan from removing the goods from the warehouse.³¹⁵ The Claimants emphasise that the Police knew that there was a dispute between Mr. Busta and Kyjovan, and that Mr. Busta showed them the decision of the District Court recording the right of Sprint a.s. to occupy the warehouse. They also

³⁰⁸ Tr. 3 October 2016, 15:23-16:5 (Claimants’ submissions).

³⁰⁹ *Ibid.*

³¹⁰ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 379.

³¹¹ *Ibid.*

³¹² Statement of Claim, Section IV.6.5; Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 391; Tr. 3 October 2016, 11:8-14 (Claimants’ submissions).

³¹³ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 381.

³¹⁴ Expert opinion of Dr. Nett dated 22 February 2016.

³¹⁵ Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 229- 239; Tr. 3 October 2016, 18:12-19:24, 37:2-37 (Claimants’ submissions).

note that there was never any dispute about who owned the goods in the warehouse.³¹⁶ In these circumstances, the Claimants say that the Police should have come to the view that Kyjovan was not entitled to remove the goods.³¹⁷ The Claimants note that the Police asked Kyjovan to stop the removal, thus recognising that there was an issue as to the legality of Kyjovan's actions.³¹⁸

362. Further, the Claimants state that the Building Authority's call to repair did not authorise Kyjovan to remove the goods from the warehouse, as the Building Authority itself subsequently clarified.³¹⁹ The Claimants say that the Police therefore had no document authorising the removal of the goods that they were witnessing.
363. The Claimants' legal expert, Dr. Nett, testified that the Police in these circumstances should have taken measures aimed at preserving the *status quo* on 9 March 2000, and investigated the alleged robbery in order to determine whether a crime was in fact taking place.³²⁰ Dr. Nett's view is that in permitting Kyjovan to remove the goods from the warehouse, the Police breached Section 158(1) of the Criminal Procedure Code, which requires the Police to investigate suspected crimes.³²¹
364. With respect to the taking of the goods from Kyjovan on 18 April 2000, the Claimants submit that the Police failed to act in accordance with Section 79(5) of the Criminal Procedure Code,³²² which provides that: "*The report on the surrender and seizure of a thing shall give also an accurate description of the thing surrendered or seized which is sufficient to identify such thing.*"³²³ The Claimants say that the Police ought to have created a list describing each of the goods that was being handed over, and that the delivery report signed by Mr. Pucek stating merely that "*all goods moved out of the damaged hall*" were being handed over was insufficient.³²⁴
365. The Claimants rely upon the opinion of Dr. Nett in this regard.³²⁵ In Dr. Nett's view, the Police were obliged by Section 158 of the Criminal Procedure Code to verify the list of goods printed from the Sprint CR computer on 18 April 2000 with the assistance of the Sprint CR employees who were present, including Ms. Kunzova.³²⁶ Once the Police were satisfied that the list was correct, Dr. Nett said that they should have called upon Kyjovan to surrender those items in the list.³²⁷ The list could therefore have

³¹⁶ Tr. 3 October 2016, 27:3-28:16 (Claimants' submissions).

³¹⁷ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 231; Tr. 3 October 2016, 27:3-28:24.

³¹⁸ Decision of the District Prosecutor's Office in Hodonín of 23 March 2001 (**Exhibit R-18**).

³¹⁹ Letter from Building Authority dated 9 October 2000 (**Exhibit C-57**).

³²⁰ Tr. 5 October 2016, 3:1-4:6 (direct examination).

³²¹ Expert opinion of Dr. Nett dated 22 February 2016, p. 10; Tr. 5 October 2016, 3:20-4:6 (direct examination).

³²² Statement of Claim, Section III.2; Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 197-205, 253-265; Tr. 3 October 2016, 19:25-21:25 (Claimants' submissions).

³²³ **Exhibit C-22**.

³²⁴ Record regarding handing over of items, dated 18 April 2000 (**Exhibit C-24**).

³²⁵ Expert opinion of Dr. Nett dated 22 February 2016.

³²⁶ Tr. 4 October 2016, 14:3-16:20; 17:18-18:18.

³²⁷ Tr. 4 October 2016, 15:7-14.

been used to satisfy the requirements of Section 79(5) of the Criminal Procedure Code.³²⁸

366. The Claimants also rely upon the finding of the District Investigator's Office of 30 October 2000 according to which: *"It has been established that delivery of the things in question was accompanied by two Protocols which do not contain description of the delivered things so that they may be identified in quantity and kind. The investigator has thus proceeded contrary to provisions of § 79 para. 5 of the Rules of Criminal Procedure Code."*³²⁹
367. The Claimants say that the Police's failure to abide by Section 79(5) *"created an entirely undesirable state of affairs in which Kyjovan VDI formally handed over "all goods", which surrender the Police officially (legally) approved in the form a report on the handing over (taking) of the goods, although it is not possible to determine, from the receipt of "all goods" in such an unidentified state, the actual extent of the goods handed over."*³³⁰
368. The Claimants also submit that the Police's protocol of the handing over of the goods *"exonerated Kyjovan, VDI of its liability for the difference between the amount of the goods it took control of and what it declared to the Police that it handed over 'en bloc'."*³³¹ They say that this foreclosed the possibility of them pursuing civil or criminal action against Kyjovan.
369. The Claimants emphasise that the goods were being handed over by Kyjovan voluntarily.³³² It therefore would have been possible for the Police to take custody of the goods gradually and make a list in accordance with Section 79(5) of the Criminal Procedure Code. The Claimants also emphasise that the goods were being handed over in the situation in which there was a criminal complaint by Mr. Busta against Kyjovan in respect of the goods.³³³ In these circumstances, the Claimants say that it was incumbent on the Police to ensure that all of the goods that were taken were being returned.
370. The Claimants also maintain that the Police acted arbitrarily in that they failed to use the information they obtained from the return of the goods, and took no action when the shortfall in the returned goods was revealed.³³⁴ The Claimants point out that no further investigation was undertaken into Kyjovan or into the Police's conduct, and the Police did not take any steps to seek to find the missing goods.³³⁵
371. The Claimants submit that the Czech courts subsequently failed to provide any compensation to the Claimants, despite numerous actions by Mr. Busta. On this basis, the Claimants submit that the Police and courts in relation to the recusal of the judges

³²⁸ Tr. 4 October 2016, 14:21-15:2.

³²⁹ Response to request for an investigation dated 30 October 2000 (**Exhibit C-30**); Tr. 3 October 2016, 19:25-21:1.

³³⁰ Statement of Claim, ¶ 48; Statement of Reply and Counter-memorial on Jurisdiction, ¶ 264.

³³¹ Statement of Claim, ¶ 47.

³³² Tr. 3 October 2016, 21:2-11.

³³³ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 262.

³³⁴ Tr. 3 October 2016, 22:15-24:6 (Claimants' submissions).

³³⁵ Tr. 3 October 2016, 23:25-24:2 (Claimants' submissions).

*“created only mere illusion of the performance of their power, and became themselves intervenors into the property of the Claimants.”*³³⁶

372. The Claimants argue that the Respondent’s conduct caused the loss of around two-thirds of the value of the goods owned by Sprint CR, and that this constituted a “*substantial part*” of the “*key assets*” of Sprint CR.³³⁷ The Claimants submit that expropriation can be made out where the investor has been deprived “*totally or in a big part*” of its investment.³³⁸ They submit that it is not necessary to show that all of the goods owned by Sprint CR were lost by the Respondent.

2. The Respondent’s Position

373. The Respondent submits that the Claimants’ claim for expropriation fails at several hurdles.

374. First, the Respondent submits that the Claimants have not been substantially deprived of their investment, whether that is defined as the goods owned by Sprint CR or the shares they held in Sprint CR or the goods owned by Sprint CR itself.³³⁹ The Respondent submits that expropriation requires the entirety of the investor’s investment to have been taken, and that expropriation of only part of the investment is not sufficient. The Respondent refers to *Tecmed v. Mexico*, *LG&E v. Argentina*, *Pope & Talbot v. Canada*, *Telenor v. Hungary* and *Charanne v. Spain* in this regard.

375. On this basis, the Respondent argues that loss of two-thirds of the value of the goods of Sprint CR does not amount to substantial deprivation sufficient to constitute expropriation.³⁴⁰ The Respondent suggests that investors whose assets had been partially expropriated could nevertheless find relief under the standards of fair and equitable treatment and full protection and security, although it concedes that an investor under this BIT case would not be able to enforce claims for breaches of those standards.³⁴¹ The Respondent submits that this would not affect the fact of the breach, however.³⁴²

376. Further, the Respondent notes that the Claimants do not allege that any loss of goods, even if established, had any effect on their shares or on the profit of Sprint CR.³⁴³ In this regard, the Respondent notes that the annual statements of Sprint CR show that in 2001 it made an operating net profit of CZK 9,967,000.³⁴⁴

³³⁶ Tr. 3 October 2016, 24:2-6 (Claimants’ submissions).

³³⁷ Statement of Claim, ¶ 161; Statement of Reply and Counter-memorial on Jurisdiction, ¶¶ 381, 384-386.

³³⁸ Statement of Reply and Counter-memorial on Jurisdiction, ¶ 387.

³³⁹ Statement of Defence and Memorial on Jurisdiction, Section 4.6; Statement of Rejoinder and Reply on Jurisdiction, 4.3.1; Section Tr. 6 October 2016, 64:7-68:3.

³⁴⁰ Tr. 6 October 2016, 39:8-21 (Respondent’s submissions).

³⁴¹ Tr. 6 October 2016, 65:23-25; 66:1-4.

³⁴² Tr. 6 October 2016, 66:1-4.

³⁴³ Statement of Rejoinder and Reply on Jurisdiction, Section 4.3.1.

³⁴⁴ Annual Statement of Sprint CR dated 2001 (**Exhibit R-44**).

377. Second, the Respondent submits that the Claimants have failed to establish that the conduct of the Police was contrary to Czech law.³⁴⁵ The Respondent relies upon the opinion of its legal expert, Dr. Grivna, in this regard.³⁴⁶
378. In particular, the Respondent submits that the Police acted reasonably and lawfully in permitting Kyjovan to remove the goods from the warehouse on 9 March 2000.³⁴⁷ The Respondent emphasizes that the Police were presented with Mr. Belik’s report of 6 March 2000 which noted that the building was a threat to health and safety, and the Building Authority’s call to repair issued to Kyjovan. The Respondent submits that the Police were not in a position to question the validity of either of these documents, nor to decide on the ownership of the warehouse.³⁴⁸ In these circumstances, the Respondent argues, the Police’s decision to allow Kyjovan to clear the warehouse cannot be considered a misapplication of Czech law.
379. Dr. Grivna explained at the Hearing that his opinion that the Police’s conduct was reasonable was based solely on the documents that he understood were received by the Police on 9 March 2000³⁴⁹ – namely Mr. Belik’s report of 6 March 2000³⁵⁰ and the Building Authority’s call to repair of 8 March 2000.³⁵¹ On the basis of these documents, Dr. Grivna considered that a state of “*necessity*” had arisen such that, under Section 14 of the Criminal Code, removal of the goods from the warehouse, even if ordinarily unlawful, would not be considered a criminal act.³⁵²
380. In taking custody of the goods, the Respondent submits that the Police were not required by Section 79(5) of the Criminal Procedure Code to establish an itemised list of the goods given their volume (873,166 items).³⁵³ The Respondent relies upon a decision of the Czech Constitutional Court, which it says established that if due to the large number of items (in that case, 5,000), it is not possible to produce a list, the Police are not required to do so.³⁵⁴ The Respondent also relies on a further decision of the Constitutional Court, which it says established that if the Police cannot produce a list during a house search, they may do so at a later point in time.³⁵⁵
381. The Respondent also submits that the purpose of Section 79(5) of the Criminal Procedure Code is to ensure the availability of items for criminal proceedings, not to

³⁴⁵ Statement of Rejoinder and Reply on Jurisdiction, Section 4.3.2; Tr. 6 October 2016, 13:17-14:14.

³⁴⁶ Expert opinion of Dr. Grivna dated 9 June 2016 (**Exhibit R-33**); Tr. 4 October 2016, 2:25-4:5 (Dr. Grivna).

³⁴⁷ Statement of Defence and Memorial on Jurisdiction, Section 3.1.3; Statement of Rejoinder and Reply on Jurisdiction, Section 3.2.3; Tr. 3 October 2016, 80:13-82:12; Tr. 6 October 2016, 13:17-14:14.

³⁴⁸ Tr. 4 October 2016, 12:12-13:20.

³⁴⁹ Tr. 4 October 2016, 12:25-13:20; 14:5-24; 15:20-24.

³⁵⁰ Record of Mr. Belik’s inspection of the warehouse on 6 March 2000 (**Exhibit R-11**).

³⁵¹ Building Authority’s call to repair the warehouse dated 8 March 2000 (**Exhibit R-12**).

³⁵² Expert opinion of Dr. Grivna, ¶¶ 72-73; Exhibit C-82.

³⁵³ Statement of Defence and Memorial on Jurisdiction, Section 3.1.6.2; Statement of Rejoinder and Reply on Jurisdiction, Section 3.5.4; Tr. 3 October 2016, 90:2-94:6.

³⁵⁴ Judgment of Czech Constitutional Court, IV.US 349/09, part IV (**Exhibit RL-24**).

³⁵⁵ Judgment of Czech Constitutional Court, III. US 1033/07 (**Exhibit RL-25**); Tr. 6 October 2016, 14:21-25.

facilitate the settling of claims by injured parties against possible perpetrators.³⁵⁶ The Respondent submits that this is evident from Section 79(6), which provides that the Police must hand this list over to the party surrendering the items, and not to the owner of the items. The Respondent says that the Claimants therefore have no entitlement to such a list.

382. Further, and in any event, the Respondent points out that the Police did ensure that a list of the goods was produced when they returned the goods to Sprint CR.³⁵⁷ The Respondent says that this list shows precisely which goods were taken over by the Police from Kyjovan and therefore fulfilled the Police's obligation under Section 79(5) of the Criminal Procedure Code.³⁵⁸

383. The Respondent further argues that, even if the Police were obliged to draw up a list of the goods taken from Kyjovan, the Claimants have failed to demonstrate why this caused their loss.³⁵⁹ The Respondent says that drawing up the list in the way the Claimants argue should have occurred would have taken nine months (based on the time it took for the goods to be returned to Mr. Busta, when a list was created), by which time it would have been January 2001, merely two months before Kyjovan went bankrupt.³⁶⁰ Thus, says the Respondent, Sprint CR would not have been able to enforce any claim against Kyjovan for the shortfall even if the Police had drawn up a list of the goods taken from Kyjovan.

384. In any event, the Respondent denies that the Police “*exonerated*” Kyjovan in taking custody of the goods and argues that it remained open to the Claimants to bring civil action against Kyjovan for any goods it believed were not returned.³⁶¹ The Respondent says that the protocol of the handing over of the goods to the Police makes clear that it is merely a record of what Mr. Pucek stated to the Police (*i.e.* that he was handing over “*all goods*”), and that the Police have taken no position on its accuracy.

385. Third, the Respondent submits that the Claimants' claim is based upon an omission, and that it is “*very doubtful*” that a mere omission can constitute expropriation by a State.³⁶² The Respondent cites in this regard *Eudoro Armando Olguin v. Paraguay*:

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

³⁵⁶ Statement of Rejoinder and Reply on Jurisdiction, Section 3.5.2; Tr. 4 October 2016, 4:19-5:6.

³⁵⁷ Statement of Defence and Memorial on Jurisdiction, Section 3.1.6.2; Statement of Rejoinder and Reply on Jurisdiction, Section 3.5.5.

³⁵⁸ Tr. 4 October 2016, 5:18-6:8.

³⁵⁹ Statement of Rejoinder and Reply on Jurisdiction, ¶ 199; Tr. 3 October 2016, 94:13-95:14.

³⁶⁰ Tr. 3 October 2016, 94:13-95:14.

³⁶¹ Statement of Defence and Memorial on Jurisdiction, Section 3.1.6.1; Statement of Rejoinder and Reply on Jurisdiction, Section 3.5.5.2; Tr. 6 October 2016, 16:21-17:14.

³⁶² Tr. 6 October 2016, 36:20-37:2.

386. The Respondent also cites *Sea-Land Service Inc. v. Iran*, in which it says that the Iran-US Claims Tribunal held that the inaction of a State, even if it is aware of circumstances having a severe impact on the investor's investment, "can hardly justify a finding of expropriation."³⁶³
387. The Respondent states that this position is supported by scholarly commentary, notably in *McLachlan, Shore & Weininger*.³⁶⁴

"[...] the Olguin 'teleologically driven' test is to be preferred: the Olguin test is more closely connected to the historical origins of expropriation claims; [...] it further recognizes that for most tribunals an assessment of indirect expropriation in any of its forms has not somehow been disconnected from a requirement of State conduct of some sort."

3. The Tribunal's Decision

388. The Tribunal notes at the outset that the Claimants' expropriation case is centered on the conduct of the Police at the time when Kyjovan removed Sprint CR's goods from the warehouse and when the goods were taken into Police custody from Kyjovan. The Claimants generally refer to the Czech courts' failure to provide compensation to the Claimants, but they have not set out specifically any expropriation claim in that relation, and have not indicated the precise basis on which the courts' action could be said to have contributed to an expropriation of the goods belonging to Sprint CR. The Claimants have asked this Tribunal to consider the Respondent's conduct as a whole, rather than by reference to individual acts, but the facts complained of all specifically concern the conduct of the Police. The Tribunal will, on this basis, focus its analysis on the actions (or inactions) of the Police between 9 March 2000, when goods were taken from the warehouse, and 8 August 2001, when the return of goods to Sprint CR was completed.
389. The Tribunal further notes that, for an expropriation to occur, in the form of direct or creeping expropriation, there must be a permanent and irreversible deprivation. The Tribunal refers in this respect to consistent arbitral case law which establishes that an expropriation takes place where an investor has been permanently deprived of the value of its investment in whole or in significant part.³⁶⁵ This is reflected in the *Plama v. Bulgaria* decision, which has set out the decisive elements in the evaluation of allegations of expropriation: "(i) substantially complete deprivation of the economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof (i.e., approaching total impairment); (ii) the irreversibility and permanence of the contested measures (i.e., not ephemeral or temporary); and (iii) the extent of the loss of economic value experienced by the investor."³⁶⁶

³⁶³ Statement of Rejoinder and Reply on Jurisdiction, ¶ 411.

³⁶⁴ Statement of Rejoinder and Reply on Jurisdiction, ¶ 412; McLachlan, Shore, Weininger, *International Investment Arbitration – Substantive Principles*, OUP 2007, p. 291 (**Exhibit RL-33**).

³⁶⁵ For example: *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, (**Exhibit RL-39**), ¶ 116; *Wena Hotels Ltd v Egypt* 41 ILM 896 (2002) (**Exhibit RL-128**), ¶ 99; *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, (**Exhibit RL-40**), ¶ 20.32.

³⁶⁶ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

390. Here, the Claimants argue that goods stored at the warehouse prior to 9 March 2000 were not returned to Sprint CR, representing a total value of approximately CZK 63 million, namely two-thirds of the value of all the goods that had been taken.³⁶⁷ The Respondent denies that any goods were missing, and takes the position that all goods were ultimately returned to Sprint CR. The Tribunal notes, based on the Claimants' case as argued, that loss amounting to two-thirds of the total value of Sprint CR's property would represent a substantial loss of economic value. The questions this Tribunal has to answer are therefore: (a) whether Sprint CR incurred a substantial loss; and (b) whether, to the extent the removal of the goods was at the instance of Kyjovan – which is undisputed between the Parties – any wrongdoing can be attributed to the Police, through its actions or inaction, such that the Czech Republic's international responsibility would be engaged for breaches of the BIT.

(a) The removal and return of the goods

391. The difficulty which the Tribunal has had to face is that, although the Parties have referred to a number of lists of goods, there seems to be no common ground between them as to which list – if any – may be treated as reliably representing the number of goods in the warehouse at any point in time. Relatedly, the evidence before the Tribunal is not such as to allow it easily to ascertain with any degree of certainty the goods that were taken, the goods that were returned, and the discrepancy – if any – between the former and the latter.

392. The Claimants rely on the protocol drawn up in the presence of the Police on 18 April 2000, which states a total value of over CZK 99 million. In turn, the Respondent relies on lists referred to by Mr. Busta for purposes of civil and criminal complaints in March 2000, subsequent to the removal of the goods but before the protocol of 18 April 2000. In particular, the Respondent refers to two different values introduced by Mr. Busta in those proceedings, namely a statement of 9 March for purposes of a criminal complaint referring to a total value of CZK 40 million, and an inventory of 11 February 2000 appended to an interim injunction request of 14 March for a total value of over CZK 23 million.

393. The Tribunal is not convinced that statements made by Mr. Busta on 9 March 2000, the day the goods were taken from the warehouse, or shortly thereafter on 14 March 2000, in circumstances of uncertainty and when a clear account of the goods may not have been readily available, offer a basis on which to establish a clear and reliable account of exactly which goods were present in the Kyjov warehouse on 9 March 2000. In particular, the Tribunal is not convinced that the February list, as testified by Ms. Kunzova, was anything other than an indicative working document drawn up during a sample-taking exercise (*see above*, paragraph 318). The Tribunal is more persuaded by the exercise undertaken in the presence of the Police, on 18 April 2000, with the resulting list assumed to correspond more closely to the actual goods that were stored at the Kyjov warehouse on 9 March, when the goods were removed by Kyjovan.

³⁶⁷ The Tribunal notes that the Claimants have not identified the actual items that are alleged to not have been returned, although the information is likely to have been available to them based on the various existing lists of goods.

394. At the same time, the Tribunal notes the Respondent's objection to the Claimants' failure to produce all documents that could have served as evidence of Sprint CR's ownership of the goods appearing on the April list, following an order for production by this Tribunal. On this basis, the Respondent asks the Tribunal to draw an adverse inference that the April list shows items not owned by Sprint CR. The Respondent further explains that the discrepancies between the lists can be explained by the fact that the April list contains goods stored in other warehouses owned by Sprint CR.
395. The Tribunal notes that the Claimants have not been able to offer an explanation as to why the Respondent received only 2 binders of invoices, which the Respondent says establish two-thirds of the value stated on the April list, when the Claimants' expert, Mr. Kocman, received 17 binders. However, the Tribunal has had difficulty drawing an adverse inference, on this basis alone, to the effect that the April list shows items not owned by Sprint CR. Unlike the list drawn up at the time the goods were returned to Sprint CR, which was prepared in reference to physical goods, there seems to have been little scope for manipulation as regards the April list, which was simply printed at the Police headquarters from a laptop belonging to Sprint CR (*see supra*, paragraphs 309 to 312). The difference between the Parties appears to be limited to the question of who printed the list. Further, it was clarified at the Hearing that the Kyjov warehouse was the only one where the goods were originally maintained; the Claimants' witnesses convincingly testified in this respect that they were not aware of any other warehouse; these included Sprint CR's employees, namely Mr. Kubik, the warehouse manager, and Ms. Kunzova, Sprint CR's accountant, as well as Ms. Marouskova, a customer of Sprint CR.³⁶⁸
396. The Tribunal further notes that, while the Respondent has focused on the accuracy of the April list,³⁶⁹ other points have remained obscure and unexplained. For example, the Respondent did not seem to take note of Mr. Busta's testimony that, when he went to Kelcany, he found that "*all the goods could not have been there*", with the goods dispatched between two small halls, each "*being roughly 300 metres square*" and containing the four cars that had been towed away by Kyjovan.³⁷⁰ This seems to correspond to the fact that the lease document for the warehouses leased by Kyjovan in Kelcany in February 2000 records them as having an area of 360 square metres (*see supra*,

³⁶⁸ Tr. 4 October 2016, 97:3-13 ("THE CHAIRPERSON: One last question, Mr Kubik. In paragraph 3 of your statement you say: 'I can confirm reliably that no other warehouse was used by the company Sprint CR ...' On what basis do you make that statement? MR. KUBIK: On the basis of the fact that I was working there, and I was not aware of any other warehouse. THE CHAIRPERSON: So to your recollection, all of the goods belonging to Sprint were kept at the warehouse in Kyjovan? MR. KUBIK: Yes."); Tr. 4 October 2016, 102:22-24 ("DR BROZ: Okay. Can you tell us how many warehouses company Sprint was using, and if in the warehouse in Kyjov any other company was storing its goods? MS. KUNZOVA: There was only one warehouse. It was located in Kyjov, in the compound of the Kyjovan company, and only goods owned by Sprint were stored in that warehouse."); Tr. 4 October 2016, 73:8-12 ("MR. ZOJER: But you cannot exclude the possibility that there would be other warehouses somewhere in Czechoslovakia, back at that time, which were owned and operate by Sprint CR? MS. MAROUSKOVA: I can't give an answer to that question. I only know that the goods which I ordered came from that warehouse.").

³⁶⁹ The Tribunal notes in this respect the Respondent's further point that 32,866 items returned were not on the list of 18 April 2000 (C 36 and C 37). However, at the Hearing, Ms. Kunzova credibly explained this discrepancy based on damages to the codes of the goods, and the lack of familiarity of different police officers with the code structure (*see supra*, paragraphs 327-331).

³⁷⁰ Tr. 5 October 2016, 49:4-9 (cross-examination).

paragraph 257). Although the overall size of the Kelcany warehouses more or less corresponds to the area of the Kyjov warehouse used by Sprint CR, which was 860 square metres (*see supra*, paragraph 252), it was not clear to the Tribunal whether all the goods stored in the Kyjov warehouse could likewise have been stored in the Kelcany warehouses, bearing in mind that, in addition to the goods themselves, Kyjovan had taken and transferred other property such as a car and pickups, as well as office furniture and equipment (*see supra*, paragraphs 301 and 304, and record regarding handing over of items, dated 18 April 2000 (**Exhibit C-24**)). In particular, the Parties did not elucidate whether, between the time when the goods were taken by Kyjovan on 9 March and their hand-over to the Police on 18 April, there were circumstances in which the goods may have been partly dispatched to the Kelcany warehouses, which were put under Police custody on 18 April, and partly stored in other locations not under Police custody. This may have explained the discrepancy in the missing goods which the Claimants argue represent over CZK 63 million in value, as between the Police protocol of 18 April 2000 established on the basis of the content of Sprint CR's computers, and the list of physical goods returned by the Police on 8 August 2001.

397. The Tribunal concludes, based on the facts and circumstances of the case, that a discrepancy is likely to have existed between the goods removed by Kyjovan on 9 March 2000 and the goods returned to Sprint CR on 8 August 2001. The nature of that discrepancy, and its extent, as well as whether the discrepancy is attributable to the Respondent is a matter to which the Tribunal now turns.

(b) The Police's conduct in relation to the removal and return of the goods

398. As a preliminary matter, the Tribunal has taken notice of the diverging case law relied on by each Party: some require the positive conduct of State organs for an expropriation to exist (*Olguin v. Paraguay*), while others admit that an omission may suffice to engage a State's responsibility for an act of expropriation (*EUREKO v. Poland*).
399. For its part, this Tribunal notes that a State's international responsibility can be engaged by both action and inaction of its organs. Article 2 of the Articles on Responsibility of States for Internationally Wrongful Acts provides in this respect that “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”³⁷¹
400. The Tribunal further notes that it is undisputed between the Parties that a State's police authorities are organs of that State.³⁷² On this basis, the Tribunal does not find any obstacle, from an international law perspective, for the Respondent's responsibility to

³⁷¹ International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, Article 2 (emphasis added).

³⁷² International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, Article 4: “1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

be engaged for the actions or inaction of its Police forces. Whether or not such actions or inaction are factually established is another matter.

(1.) *Police conduct during Kyjovan's removal of the goods from the warehouse*

401. The Tribunal first notes the suspicious nature of the circumstances preceding and immediately following the removal of the goods by Kyjovan. The Tribunal notes in particular the following circumstances:

- On 8 February 2000: Kyjovan applied to the District Court of Hodonin for an order that Sprint a.s. vacate the Kyjov warehouse, alleging that Sprint a.s. had no right to lease the warehouse to Sprint CR and that the roof had been damaged by weather conditions which could pose a threat to safety (*see supra*, paragraph 256);
- On 22 February 2000: Kyjovan agreed to lease two warehouses in Kelcany, a mere 2 weeks before it removed Sprint CR's goods from the Kyjov warehouse on 9 March 2000. Kyjovan agreed with the owner of the warehouses that Kyjovan would be entitled to "*bring[] in the goods?*" during the period of 1 March until 1 April 2000 (*see supra*, paragraph 257);
- On 3 March 2000: Kyjovan ordered by phone the delivery of a crane to unload the panels (*see supra*, paragraph 264);
- On 5 March 2000: three panels suddenly appeared next to the Kyjov warehouse, while there were no apparent reasons for them to be there (*see supra*, paragraph 261);
- Shortly thereafter, although no eye witness seemed to have noticed this, the Kyjov warehouse was damaged as if "*hit?*" by panels (*see* Mr. Kubik's testimony, described *supra* paragraph 262); in the arbitration, the Respondent took the view, based on a July 2000 Police report, that the damage was caused by "*preparatory works for the construction of a parking lot on the premises of Kyjovan?*" (*see supra*, paragraph 263);
- On 6 March 2000: Kyjovan asked Mr. Belik, an engineer, to inspect the Kyjov warehouse; following his inspection, Mr. Belik recommended the removal of the goods from the damaged sections and the clearance of the building; Mr. Jelinek, a technician employed by Kyjovan, assured Mr. Busta that the repairs would commence the following week (*see supra*, paragraphs 267 to 271);
- On 7 March 2000: Kyjovan sent to the Building Authority a report on the damage (*see supra*, paragraph 272);
- On 8 March 2000: the Building Authority conducted an inspection of the Kyjov warehouse and issued a call to repair to Kyjovan (which the Claimants say did not include an instruction to clear the warehouse); the same day, Kyjovan's Board resolved to empty the Kyjov warehouse (*see supra*, paragraphs 273 to 277);

- On 8 March 2000: Kyjovan entered into the formal lease agreement for the warehouses in Kelcany, one day before it removed Sprint CR's goods on 9 March 2000 (*see supra*, paragraph 257);
- On the evening of 8 March 2000: Kyjovan started removing the goods;³⁷³
- On 9 March 2000: Kyjovan issued a “notice of emergency condition” and continued the removal of goods from the warehouse early in the morning, with the assistance of private security personnel and without Sprint CR having been notified (though the “notice of emergency condition” recorded that Kyjovan sought to contact Mr. Busta the prior day) (*see supra*, paragraphs 276 to 277);
- On 13 March 2000: Kyjovan agreed with the Kelcany lessor that only four persons would have access to the warehouse, and withdrew its court application for Sprint a.s. to vacate the Kyjov warehouse (*see supra*, paragraph 266).

402. Given that the Claimants take issue with the circumstances in which the Police witnessed and then decided not to intervene in the removal of the goods from the Kyjov warehouse, the Tribunal has carefully considered those circumstances:

- The removal of the goods was reported to the Police on the morning of 9 March 2000 by either or both of Ms. Kunzova, the company's accountant, and Mr. Busta. Ms. Kunzova testified that she called the Police, told them that she believed theft was taking place and asked them to come to the premises.³⁷⁴
- Ms. Kunzova testified that the two Police officers sent to the premises sat in their car and watched the removal of the goods.³⁷⁵ Ms. Kunzova testified that she spoke to them and explained that she believed Sprint CR's goods were being stolen and that the Sprint CR employees also had personal belongings in the warehouse.³⁷⁶ According to Ms. Kunzova, the officers responded that the matter would have to be investigated.³⁷⁷
- The Police officer in charge, Mr. Prochazka, sent two Police officers to the warehouse to investigate. In a statement given in October 2000, Mr. Prochazka said that the two officers returned approximately one hour later and reported that Kyjovan had been moving items from the warehouse since the previous day and that it had authorisation for this from the Kyjov Building Authority as the building was damaged.³⁷⁸ Mr. Prochazka stated that he sent the officers back to Kyjovan for a copy of the documents

³⁷³ Decision of the District Prosecutor's Office in Hodonín dated 23 March 2001 (**Exhibit R-18**).

³⁷⁴ Tr. 4 October 2016, 118:1-9 (in response to Tribunal questions).

³⁷⁵ Tr. 4 October 2016, 118:13-15 (in response to Tribunal questions).

³⁷⁶ Tr. 4 October 2016, 119:6-12 (in response to Tribunal questions).

³⁷⁷ Tr. 4 October 2016, 119:15-18 (in response to Tribunal questions).

³⁷⁸ Statement of Mr. Procházka dated 17 October 2000 (**Exhibit R-16**).

authorising the removal of the goods, which they did (*see supra* paragraph 290).

- The Police were given a copy of the Kyjov Building Authority’s call to repair the warehouse, addressed to Kyjovan.³⁷⁹ This called on Kyjovan, as the registered owner of the property, to “*remove the damage*” to the warehouse. It stated specifically: “*On 8 March 2000, the Building Authority carried out an on-site inspection and subsequently called on the building owner to organise repairs, with the participation of the authorised engineer, as stated in the proposal for measures.*” The “*proposal for measures*” referred to in the call to repair can reasonably be assumed to be the report prepared by the engineer Mr. Belik on 6 March 2000, which Kyjovan had sent to the Building Authority on 7 March 2000, and which contained a sub-heading “*Measures proposed*”.³⁸⁰ The Tribunal has been unable to determine whether the Police were also given a copy of Mr. Belik’s 6 March 2000 report.
- The Police were given, by Mr. Busta when he arrived at the premises, a copy of the 15 February 2000 court judgment as proof that he was authorised to use the warehouse and offices.³⁸¹ This stated: “*there is no dispute between the parties that the Plaintiff [Sprint a.s.] uses the hall in the premises of the Defendant [Kyjovan] and that he rented this hall to the company Sprint CR spol. s.r.o.*”. The Police were thus aware that Mr. Busta considered Kyjovan’s removal of the goods to be unauthorised, and were also aware that Kyjovan and Sprint CR had a history of disputes (*see supra* paragraph 294).
- Mr. Prochazka stated in his October 2000 statement that he called Mr. Pucek, the Chairman of Kyjovan, and requested him to stop moving the goods until the Police had verified that Kyjovan’s actions were authorised.³⁸² It is not clear whether this took place before or after the Police received the copy of the Kyjov Building Authority’s call to repair. Nor is it clear what Mr. Pucek’s response was.
- According to Mr. Prochazka’s October 2000 statement, the “*decisive factor*” in the Police’s decision not to intervene was “*the decision by the Building Authority*”.³⁸³
- Mr. Prochazka further stated that a “*Warrant Officer*” came from Hodonin “*to investigate the whole matter*” and that the Police then “*invited Mr Busta and Mr Pucek to sign the official reports in accordance with Section 158/3 of the Criminal Code and began to investigate the matter.*”³⁸⁴ No further evidence of such “*official reports*” has been submitted by the Parties, however.

³⁷⁹ Building Authority’s call to repair the warehouse dated 8 March 2000 (**Exhibit R-12**).

³⁸⁰ Record of Mr. Belik’s inspection of the warehouse on 6 March 2000 (**Exhibit R-11**).

³⁸¹ Decision of District Court of Hodonin dated 15 February 2000 (**Exhibit C-52**).

³⁸² Statement of Mr. Procházka dated 17 October 2000 (**Exhibit R-16**).

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

403. In view of these circumstances, the Tribunal will consider: (i) first, whether, as the Claimants contend, the Police decision not to intervene in Kyjovan's removal of the goods was a breach of Section 158(1) of the Czech Criminal Procedure Code; and, (ii) second, whether, as the Respondent contends, the removal of the goods was justified due to a "*state of necessity*" having arisen under Section 14 of the Czech Criminal Code.

404. The text of Section 158(1) has not been submitted as an exhibit by either Party, although it was summarised by the Claimants' legal expert, Dr. Nett, in his report. The Tribunal has relied on the following English translation of Section 158(1).³⁸⁵

"The Police authority is obliged, based on their own findings, criminal reports, and incentives from other persons and authorities, which may lead to conclusions on a suspicion that a criminal offence has been committed, to make all necessary investigations and take measures to reveal the facts indicating that a criminal offence has been committed and aimed towards identifying the offender; they are obligated to take the necessary measures for prevention of criminal activity. The appointed authorities of the Prison Service of the Czech Republic shall inform the General Inspection of Security Forces without undue delay after they initiate such investigation."

405. This is consistent with the summary given by Dr. Nett:³⁸⁶

"Pursuant to § 158(1) of the Rules of Criminal Procedure the police authority shall undertake – following from its own findings, information of the crime and instigations by other persons and bodies, on the basis of which suspicion of committing a crime can be concluded – all necessary investigations and measures to reveal the facts indicating that a crime has been committed and to identify the offender, and shall also take the necessary measures to prevent the criminal activity."

406. The Respondent's legal expert, Dr. Grivna, has not given evidence on the operation of Section 158(1).

407. The Tribunal considers that two questions arise in relation to the operation of Section 158(1).

408. The first question is whether Section 158(1) is engaged only when the Police in fact suspect that a crime has taken place, or whether it is also engaged when the Police are in possession of information which is capable of giving rise to suspicion of a crime, whether or not the Police in fact hold that suspicion. In the Tribunal's view, the latter is indicated by both the wording of Section 158(1) itself – "*based on their own findings, criminal reports, and incentives from other persons and authorities, which may lead to conclusions on a suspicion that a criminal offence has been committed*" – and the summary given by Dr. Nett – "*following from its own findings, information of the crime and instigations by other persons and bodies, on the basis of which suspicion of committing a crime can be concluded*".³⁸⁷ In other words, the

³⁸⁵ This was obtained from the website www.legislationline.org.

³⁸⁶ Expert opinion of Dr. Nett dated 22 February 2016, p. 9.

³⁸⁷ Emphasis added.

enquiry is whether a crime could have been suspected on the basis of the information available to the Police, at the time the events occurred as well as later.

409. The second question is whether the obligations described in Section 158(1) – “to make all necessary investigations and take measures to reveal the facts indicating that a criminal offence has been committed and aimed towards identifying the offender” and to “take the necessary measures for prevention of criminal activity” – only applies *ex post facto*, i.e. upon receipt of a criminal complaint regarding past events, or whether it also requires the Police to halt conduct that is alleged to be criminal. Dr. Nett has not specifically opined on this. His view was generally that the Police did not take the “necessary measures for prevention criminal activity” on 9 March 2000.³⁸⁸ At the Hearing, Dr. Nett explained that:³⁸⁹

“In this particular instance, the police should have taken measures aimed at preserving the status quo, which means that they should document the condition at the time of their arrival, and document this by drawing up a written protocol. The Criminal Procedure Code valid at the time provided also for the possibility to invite a consultant, which could be helpful in assessing the damage to the building. In this case under review, the police did not avail themselves of this opportunity to invite a consultant. Likewise, they did nothing to properly document the condition at the time of the incident.”

410. Dr. Nett’s position is therefore that the Police should have taken action on 9 March 2000, while the goods were being removed, but should not necessarily have halted the removal of the goods.
411. On this basis, the Tribunal’s enquiry is whether (i) a crime could have been suspected on the basis of the information available to the Police on 9 March 2000 and, if so (ii) whether the Police fulfilled their obligations under Section 158.
412. *First*, it is common ground between the Parties that the Police had the following information on 9 March 2000:
- The Building Authority’s call to repair the warehouse, issued to Kyjovan as the registered owner of the property. This noted that the Building Authority had requested Kyjovan to “organise repairs, with the participation of the authorised engineer, as stated in the proposal for measures.”;
 - The statements of Mr. Busta and Ms. Kunzova that they believed theft of Sprint CR’s goods was occurring;
 - Knowledge that Sprint CR had not consented to the removal of the goods;
 - A 15 February 2000 court judgment stating that “there is no dispute between the parties that the Plaintiff [Sprint a.s.] uses the hall in the premises of the Defendant [Kyjovan] and that he rented this hall to the company Sprint CR spol. s.r.o.”;
 - Knowledge of the history of disputes between Kyjovan and Sprint CR.

³⁸⁸ Expert opinion of Dr. Nett dated 22 February 2016, p. 9.

³⁸⁹ Tr. 4 October 2016, 3:20-4:6.

413. The Tribunal has been unable to identify any evidence to indicate whether or not the Police also had at their disposal the 6 March 2000 report of the engineer Mr. Belik, in which he recommended that the building be cleared. In the absence of such evidence, the Tribunal has proceeded on the assumption that the Police did not receive this report and was not aware of its existence.
414. In relation to the Building Authority's call to repair, the Tribunal notes the Building Authority's clarification issued to Sprint a.s. on 9 October 2000 that "*the Building Authority never issued direction for the removal of your company from the building, issued was only a request for repair of the damaged place.*"³⁹⁰
415. Having carefully considered all of the evidence submitted to it, the Tribunal finds it difficult to avoid the conclusion that the Police should have suspected that a crime was being committed, on the basis of the information available to it on 9 March 2000. Central to the Tribunal's conclusion is the fact that the occupant of the property, and the owner of the goods, told the Police that the goods were being stolen, and that the call to repair did not direct Kyjovan to empty the building, only to repair the damage.
416. *Second*, the Tribunal notes the following circumstances, which occurred after 9 March 2000 but which are relevant in considering the Police's conduct in relation to the events of 9 March 2000:
- According to Mr. Prochazka's October 2000 statement, following the removal of the goods, the Police "*invited Mr Busta and Mr Pucek to sign the official reports in accordance with Section 158/3 of the Criminal Code and began to investigate the matter.*" Section 158(3) provides "*the Police authority shall draw up a record about initiation of acts of criminal proceedings for clarification and verification of the facts reasonably implying that a criminal offence has been committed, which shall state the matters of facts, for which the proceedings is being initiated, and the manner of their discovery.*"³⁹¹
 - The Police subsequently contacted Kyjovan, determined that the goods were located in two warehouses in Kelcany and took custody of them from Kyjovan (*see supra* paragraphs 302 and 303). In the circumstances, it cannot be said that the Police were inactive following the removal of the goods.
 - The Police also commenced an investigation into whether Kyjovan had committed a crime in the removal of the goods, after Mr. Busta initiated a criminal complaint against Kyjovan on 9 March 2000. This investigation was closed on 28 July 2000 when it was concluded that there was no basis at that time on which to suspect that Kyjovan had committed a criminal offence.³⁹² This was based on the finding that Kyjovan sought neither to appropriate the goods nor to use them.
 - On 20 March 2000, Mr. Busta made a criminal complaint against the Police in relation to their failure to intervene to prevent Kyjovan's removal of

³⁹⁰ Letter from the Building Authority dated 9 October 2000 (**Exhibit C-57**).

³⁹¹ This was obtained from the website www.legislationline.org.

³⁹² Decision of the Police of Hodonin dated 28 July 2000 (**Exhibit R-10**).

goods on 9 March 2000.³⁹³ This was dismissed by the Brno Investigating Authority on 21 November 2000.³⁹⁴ The Authority concluded that “*there is no suspicion that the criminal act has taken place*” and therefore “*there is no reason to deal otherwise with this case.*”³⁹⁵ The Authority noted that during its investigation “*a number of actions were taken to clarify the matter, the victim, the suspected culprits and other witnesses were questioned, an expert report was requested, documentation and written evidence was procured, the police and investigative files were applied for and verified.*”³⁹⁶ The Authority’s report further stated that the statements it obtained, including from the Building Authority’s Jiri Susak, “*are identical in that they confirm that the clearance of the building as a result of damage caused by an accident was authorised.*”³⁹⁷

- The Investigating Authority’s decision to set aside the complaint was upheld by the District Prosecutor’s Office in Hodonin on 23 March 2001.³⁹⁸ This decision again referred to Major Prochazka’s statements, “*who points at the fact that it is generally known that Sprint CR s.r.o. and VDI Kyjovan Kyjov have been in dispute for many years and, given the seriousness of the situation, he concluded that any decision could only be taken after a full investigation of the entire incident, which highlights the fact that the police only intervened when about 2/3 of the storage area of the warehouse in question had been removed by VDI Kyjovan Kyjov, because the notice submitted by Ivan Peter Busta only arrived on 9 March 2000, while the items started to be removed from the warehouse on 8 March 2000, because although the informer submitted a preliminary decision from the District Court in Hodonin dated 15 February 2000, ref. no. 5C 532/98 in his preliminary contacts with the above-mentioned police officers, this only concerns supplies of electricity, connections to the water supply and gas supply and does not address undisturbed access to the VDI Kyjovan site in the cadastral area of Netvice on the part of the informer*”.
- Sprint CR made a further criminal complaint against the Police and Kyjovan in March 2001.³⁹⁹ This was investigated by the Brno Regional Investigating Authority, and in December 2001 suspended on the basis that there was no evidence that crimes had been committed.⁴⁰⁰ The resolution suspending the investigation records that “*many actions necessary for the clarification of the matter have been performed, interrogations of the plaintiff, the suspects and other witnesses have been performed, expert statements have been requested, written materials and deed evidence have been secured, police and investigation documents have been requested and verified.*”⁴⁰¹

³⁹³ Criminal complaint against the police dated 20 March 2000 (**Exhibit C-8**).

³⁹⁴ Decision of Brno Investigating Authority dated 21 November 2000 (**Exhibit R-17**).

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ Decision of the District Prosecutor’s Office in Hodonin dated 23 March 2001 (**Exhibit R-18**).

³⁹⁸ *Ibid.*

³⁹⁹ Sprint CR’s criminal complaint against the police, VDI Kyjovan and its employees dated 30 March 2001 (**Exhibit C-74**).

⁴⁰⁰ Decision of the Regional Investigation Authority Brno dated 20 December 2001 (**Exhibit R-34**).

⁴⁰¹ *Ibid.*

- In January 2002, Mr. Busta complained about the decision of the Regional Investigating Authority to suspend the investigation, though in April 2002 this too was dismissed.⁴⁰²
417. It follows from the above that the conduct of both Kyjovan and the Police on 9 March 2000 was in due course investigated and found not to have been criminal or in breach of Czech law. In particular, the Police were found to have acted appropriately on the basis of the information available to them at the time of the events as well as later, and in particular having regard to the Building Authority's call to repair the damaged building.
418. The Tribunal acknowledges that Mr. Busta's interactions with the investigating authorities and the courts in relation to the removal of the goods were at times troubling, notably in circumstances when the Judge assigned to hear Sprint CR's application for interim relief was identified as being the brother of one of the local Kyjov Police officers.
419. That being said, the Claimants have not specifically relied upon the conduct of the Czech courts in advancing their claim for expropriation in this case. Nor is it immediately obvious that the Tribunal should be sitting as – in effect – an appeal court that would review the Police investigations which took place, having regard to the fuller assessment of the facts in the period around the time of the events in question.
420. With the benefit of hindsight, the Tribunal is able to identify shortcomings in the Police conduct on 9 March 2000, particularly in light of the protestations of Mr. Busta. However, viewed from the perspective of the events as they occurred on 9 March 2000, and particularly given the Building Authority's call to repair the building addressed to Kyjovan, it is difficult for this Tribunal, without more, to affirm definitively that a loss of part of the goods, which were removed by Kyjovan in circumstances which have not definitely been established to have been illegal, is directly attributable to the conduct of the Police, such that this would constitute an act of expropriation.
421. In this regard, the Tribunal faced a further difficulty, namely the lack of any evidence presented by the Claimants as to what exactly they allege to have been the difference between what they say was stored in the Kyjov warehouse on 9 March (presumably based on the April list) and what they say was returned to them later on. The Tribunal has noted the Claimants' allegation as to the monetary value of the goods they allege were missing (based on **Exhibit C-36**, which is an untranslated list prepared by Mr. Busta comparing the April list with what was returned, but which provides no total numbers and was unusable for the Tribunal), as well as Ms. Kunzova's and Mr. Busta's testimonies as to their general impressions regarding the volume of the goods returned; the Tribunal, however, had difficulty with the absence of clear and reliable evidence as to which actual goods are alleged to have been missing, particularly given that such evidence was likely available to the Claimants, at the very least based on the April list. In the circumstances, the Tribunal was not in a position to ascertain what precisely was taken by way of expropriation (in the sense of goods said to have been taken and then not returned). As a result, the Tribunal could also not conclude, as a matter of

⁴⁰² Complaint against the Investigation Authority's decision dated 28 January 2002 (**Exhibit R-35**); Decision of the District Public Prosecutor's Office dated 30 April 2002 (**Exhibit R-36**).

fact, that an expropriation occurred, in circumstances in which the burden of proof falls on the Claimants and the evidence they have tendered is, on this element, not adequate.

422. The Tribunal does not express views as to whether its conclusion might have been different had it had jurisdiction to determine whether the fair and equipment treatment and full protection and security standards provided for in Article 2(2) of the BIT had been complied with. However, to the extent those standards are excluded from the scope of the arbitration agreement, the Tribunal's enquiry stops at an assessment of whether or not there has been an act of expropriation.
423. For the sake of completeness, the Tribunal addresses the Respondent's argument that Kyjovan's removal of the goods was justified under former Section 14 of the Criminal Code, as a state of "*necessity*" had arisen due to the damage to the warehouse. Section 14 is entitled "*Extreme Necessity*" and provides:⁴⁰³

"An otherwise criminal act, by which a person averts a danger directly threatening an interest protected under this code, shall not be considered a crime. However, it shall not be regarded as a matter of extreme necessity if, in the given circumstances, the danger could have been averted otherwise, or if the resulting consequence is clearly as serious or even more serious than the one which had threatened."

424. The Tribunal notes that, having been introduced in the Respondent's Statement of Rejoinder, the Claimants did not have an opportunity to brief this issue.
425. In any event, the Tribunal is not convinced, based on the evidence before it, that the damage to the warehouse was such that "*a state of necessity*" had arisen which required the immediate removal of the goods. The Tribunal bases this view on the following factors:
- The Sprint CR employees were allowed to continue working in the warehouse for three days following the alleged damage, until 9 March 2000.
 - Mr. Kubik, the warehouse manager employed by Sprint CR, and Ms. Marouskova, a customer of Sprint CR, both testified that the warehouse was in good condition in March 2000, and there was no sense that it was on the verge of collapse.
 - In response to questions from the Tribunal, Dr. Grivna agreed that a state of necessity arises very rarely: Dr. Grivna explained that he had only encountered them four or five times in his 15 years of practice as a criminal lawyer, and in none of those cases was there an immediate threat of collapse of a building.⁴⁰⁴ Dr. Grivna also agreed that if a building was threatened with collapse, one would not expect only two Police officers to be sent to investigate.⁴⁰⁵

⁴⁰³ Exhibit C-82.

⁴⁰⁴ Tr. 4 October 2016, 24:11-25:15.

⁴⁰⁵ Tr. 4 October 2016, 25:7-15.

(2.) *Police conduct in relation to taking custody of the goods from Kyjovan on 18 April 2000*

426. The Tribunal recalls the process by which the Police took custody of the goods from Kyjovan, and returned them to Sprint CR:

- On 18 April 2000, Mr. Pucek, the Chairman of Kyjovan, gave the Police the keys to the two warehouses in Kelcany which contained the goods. Mr. Pucek signed a delivery report which referred to “*all the goods moved out of the damaged hall*” (*see supra* paragraph 304);
- That same day, a list of goods was printed from a Sprint CR computer at the Police station, in the presence of Mr. Busta and Ms. Kunzova. The Claimants say that this was the list of the goods that had been in the warehouse prior to removal by Kyjovan (*see supra* paragraphs 310-313).
- On 1 November 2000, the Police and Mr. Busta agreed a protocol for the procedure of returning the goods to Sprint CR.⁴⁰⁶ According to this protocol, the vehicles and racks were to be returned on 7 November 2000 and the return of the goods would commence on 20 November 2000 (*see supra* paragraph 325).
- The return of the goods was completed by 8 August 2001. The goods were returned by Police officers reading out product codes and Sprint CR employees noting them down by hand. The codes were then entered into a Sprint CR computer which produced a comparison against the 18 April 2000 list (*see supra* paragraph 327-329).

427. The Claimants argue that, in taking custody of the goods, the Police failed to comply with Section 79(5) of the Czech Criminal Procedure Code, which provides: “*The report on the surrender and seizure of a thing shall give also an accurate description of the thing surrendered or seized which is sufficient to identify such thing.*” In particular, the Claimants submit that the Police should have created an itemised list of the goods that were being handed over by Kyjovan on 18 April 2000, so that any shortfall could be identified immediately and a claim against Kyjovan pursued. Dr. Nett took the view that this could have been done by comparing the goods handed over by Kyjovan to the list of goods printed from the computer.

428. The Respondent has argued that it was not possible for the Police to draw up an itemised list of the goods when they took custody from Kyjovan, given their volume. The Respondent has adopted for this purpose the number of items alleged by the Claimants to have been removed by Kyjovan from the warehouse, as recorded in the computer print-out of 18 April 2000, namely 873,166. In support of its view, the Respondent has referred to two Constitutional Court decisions which it says establish that in circumstances where large numbers of goods are seized, the Police are not obliged to draw up an itemised list immediately but may do so at a later date.⁴⁰⁷

⁴⁰⁶ Record regarding returning of the goods, dated 1 November 2000 (**Exhibit C-31**).

⁴⁰⁷ Judgment of the Czech Constitutional Court, IV.US 349/09, part IV (**Exhibit RL-24**); and Judgment of the Czech Constitutional Court, III. US 1033/07 (**RL-25**).

429. The Tribunal first notes that both of the Constitutional Court decisions referred to by the Respondent concerned the feasibility of drawing up detailed descriptions of items seized during the course of a house search. The Tribunal is not persuaded that these decisions apply to the case at hand, which concerns the voluntary handover of goods. At the same time, the Tribunal accepts that the volume of the goods at issue will necessarily influence the feasibility of drawing up an itemised list. The Tribunal was faced with the difficulty that the Claimants did not provide an account of the number of goods they argue were handed over to the Police by Kyjovan (although it appears that it would have been possible for the Claimants to do so based on the various lists at their disposal); rather, the Claimants have only referred to the value of the goods they say were missing. It was therefore not possible for the Tribunal to assess with any confidence whether it was feasible for the Police to draw up an itemised list of goods on 18 April 2000. Even assuming that only one-third of the goods that had been in the Kyjov warehouse were handed over by Kyjovan, based on the print-out of 18 April 2000 containing 873,166 items, this would have meant close to 300,000 items.
430. In any event, the Tribunal notes that the Regional Prosecuting Attorney's Office, upon receipt of a complaint from Mr. Busta, determined in October 2000 that the Police should have drawn up an itemised list upon taking custody of the goods from Kyjovan, and that their failure to do so was in breach of Section 79(5). In a letter to Mr. Busta, the Prosecuting Attorney explained:⁴⁰⁸
- “It has been established that delivery of the things in question was accompanied by two Protocols which do not contain description of the delivered things so that they may be identified in quantity and kind. The investigator has thus proceeded contrary to provisions of § 79 para. 5 of the Rules of Criminal Procedure Code.”*
431. The Prosecuting Attorney explained further that an itemised list was to be produced upon return of the goods to Sprint CR: *“The investigator has been ordered to proceed as follows: to hand over all delivered things to the harmed person and their acceptance by the harmed person shall be subject to the protocol with precise identification of the kind and quantity of the things in question.”*⁴⁰⁹
432. This itemised list was ultimately produced, following completion of return of the goods in August 2001. The question is thus whether the fact that the Police did not produce this list when they took custody of the goods from Kyjovan in April 2000 was of any consequence to the Claimants.
433. The Claimants have argued that by accepting the goods *en bloc*, without making an itemised list, the Police “*exonerated*” Kyjovan from any liability with respect to the shortfall, and thus foreclosed the possibility of pursuing civil or criminal action against Kyjovan.
434. The Tribunal does not agree that the Police's acceptance of the goods from Kyjovan *en bloc* had the effect of exonerating Kyjovan. Rather, the possibility of pursuing civil action against Kyjovan for the shortfall seems to have been foreclosed by the fact that

⁴⁰⁸ Response to request for an investigation dated 30 October 2000 (**Exhibit C-30**); Tr. 3 October 2016, 19:25-21:1.

⁴⁰⁹ *Ibid.*

it went into bankruptcy on 31 March 2001. Had the Police set about creating an itemised list of the goods on 18 April 2000, this would have been unlikely to have been completed before January 2001 (based on the length of time it took to create this list during the return of the goods to Sprint CR, *i.e.* close to ten months). It is not clear whether Kyjovan was solvent in January 2001 and, in any event, obtaining a court judgment in Sprint CR's favour regarding any shortfall would no doubt have taken some time.

435. Sprint CR did in fact pursue further criminal action against both Kyjovan and the Police, when in March 2001 it made a further criminal complaint in relation to the removal of the goods on 9 March 2000.⁴¹⁰ The complaint alleged that goods in the value of CZK 70 million were missing, though it is not clear how this figure was calculated given that the return of the goods to Sprint CR by the Police was still underway at that time. The Regional Investigation Authority in Brno commenced an investigation following this complaint, but this was suspended on 20 December 2001 on the basis that no evidence that crimes had been committed.⁴¹¹ In January 2002, Mr. Busta complained to the District Public Prosecutor's Office about the decision to suspend the investigation, although this too was dismissed.⁴¹²
436. For the foregoing reasons, the Tribunal has not been able to identify any loss suffered by the Claimants as a result of the Police not making an itemised list of the goods handed over by Kyjovan in April 2000. Accordingly, the Tribunal finds that the Police's failure to produce an itemised list of the goods that it took custody of from Kyjovan in April 2001 is not capable of constituting expropriation.

* * *

437. It results from the above that, despite the suspicious nature of the circumstances in which Kyjovan removed the goods from the Kyjov warehouse on 9 March 2000, the Claimants have not established that the conduct of the Police, both on that date and subsequently, amounted to an act of expropriation. The Claimants' claims are therefore rejected on their merits.

VI. COSTS

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

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

⁴¹⁰ Sprint CR's criminal complaint against the police, VDI Kyjovan and its employees dated 30 March 2001 (**Exhibit C-74**).

⁴¹¹ Decision of the Regional Investigation Authority Brno dated 20 December 2001 (**Exhibit R-34**).

⁴¹² Complaint against the Investigation Authority's decision dated 28 January 2002 (**Exhibit R-35**); Decision of the District Public Prosecutor's Office dated 30 April 2002 (**Exhibit R-36**).

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

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

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

Dr. Yas Banifatemi:

- *Fee:* EUR 99 394
- *Expenses* EUR 650
- *Per diem allowance* EUR 1 000

Prof. August Reinisch:

- *Fee* EUR 59 636

Prof. Philippe Sands QC:

- *Fee* EUR 59 636
- *Expenses* £ 384,91
- *Per diem allowance* EUR 1 000

Stockholm Chamber of Commerce Administrative fee: EUR 27 122

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

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

1. The Claimants' Cost Submissions

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

444. The Claimants claim the following costs and expenses:

- (a) 10 percent plus VAT of the amount awarded to the Claimants as its legal fees;
- (b) costs of external consultations regarding international law, in the sum of CZK 235,500 or EUR 8,715;
- (c) Advance on costs paid by the Claimants in the sum of EUR 140,500 and EUR 31,555;

- (d) 50 percent of the cost incurred by the Claimants in travelling from Brno to Vienna and back, in the sum of 2,827 CZK or EUR 104 (the other 50 percent being claimed in the 2014/181 proceeding);
 - (e) the fare of taxis taken by the witnesses in the sum of CZK 10,000 or EUR 370;
 - (f) 50 percent of the cost incurred by the Claimants for accommodation, in the sum of EUR 420 (the other 50 percent being claimed in the 2014/181 proceeding);
 - (g) 50 percent of the cost incurred by the Claimants for the court reporter, being EUR 4,581.36 (the other 50 percent being claimed in the 2014/181 proceeding); and
 - (h) 50 percent of the cost incurred by the Claimants for interpreters, being 6,750 CZK or EUR 2,498 (the other 50 percent being claimed in the 2014/181 proceeding).
445. The Claimants provided invoices for the claimed expenses on 27 January 2017.
446. On 24 January 2017, the Respondent requested leave to respond to the Claimants' submission on costs. The Tribunal granted this leave on 25 January 2017, and granted the Claimants a right of reply to the response made by the Respondent.
447. On 27 January 2017, the Respondent submitted that the Claimants' counsel had rendered legal services on the basis of a contingency fee arrangement and that this is prohibited by Article 3.3 of the Code of Conduct of Lawyers of the EU, which is incorporated into the Czech Code of Professional Conduct by Article 2(2). The Respondent thus submitted that the Claimants cannot recover any contingency fee paid to its counsel for legal services as costs in the arbitration.
448. The Claimants replied on 1 February 2017, and made the following points.
- (a) The Claimants referred to the 10 percent fee arrangement in its Statement of Claim. This is the first time that the Respondent has argued it is not recoverable. The Respondent should be taken to have waived its right to file this objection by Article 31 of the SCC Rules, which provides that: "*A party, who during the arbitration fails to object without delay to any failure to comply with the arbitration agreement, these Rules or other rules applicable to the proceedings, shall be deemed to have waived the right to object to such failure.*"
 - (b) The fee arrangement is permitted under Article 10(5) of the Czech Code of Professional Conduct, which it says provides: "*The lawyer shall be entitled to negotiate a contractual fee determined by a share of the value of the case or result of the case if the level of such a negotiated fee is adequate under the provision of paragraphs 2 and 3. However, a contractual fee determined by a share of the result of the case may not be usually considered appropriate if this share is higher than 25%.*"
 - (c) The Code of Conduct of Lawyers of the EU only applies where a lawyer of one Member State is providing professional services in a Member State other than his or her own, and therefore does not apply in this case.
 - (d) The fee arrangement was the only way that the Claimants could have afforded to proceed with the arbitration.

2. The Respondent's Cost Submissions

449. The Respondent claims reimbursement of its full costs and expenses in the sum of EUR 179,531.99 and CZK 6,480,026.97. Like the Claimants, the Respondent has not set out the standard applying to allocation of costs.
450. The Respondent's costs and expenses comprise the following:
- (a) The advance on costs paid to the SCC in the sum of EUR 172,055;
 - (b) Costs and disbursements incurred for legal representation in the amount of CZK 5,743,648.37 (fees excluding VAT);
 - (c) Expert fees for JUDr. Tomas Grivna, the legal expert engaged by the Respondent, in the sum of CZK 652,632.16;
 - (d) Costs of co-counsel who provided advice on matters of Czech national law, in the amount of CZK 3,250;
 - (e) Internal costs incurred in translating Czech documents into English, in the amount of CZK 70,794.44;
 - (f) Additional costs incurred through an external translation agency, in the sum of CZK 9,702;
 - (g) Three quarters of the total cost incurred by the Respondent for the court reporter in both this case and the 2014/181 case, being EUR 6,872.04; and
 - (h) 50 percent of the travel and accommodation expenses for the oral hearing incurred in relation to both this case and the 2014/181 case, being EUR 604.95.
451. The Respondent's statement of costs was accompanied by the relevant invoices.

3. The Tribunal's Decision

452. The Tribunal notes that both Parties have sought the full reimbursement of their costs and expenses, without setting out the applicable standard in light of the circumstances of the case.
453. The Tribunal has considered all of the circumstances to determine the most appropriate allocation of costs in this arbitration. The Tribunal has in particular been mindful of the following factors: the complexity of the legal and factual issues which the Tribunal was called to determine; the reasonableness of the positions taken by both Parties in relation to the legal issues at stake; the fact that the Parties have had to investigate and present underlying facts that go back 20 years; and the highly professional, graceful and helpful manner in which counsel on both sides acted throughout the arbitration proceedings.
454. The Tribunal also notes that each Party has partly prevailed and partly failed on its contentions: the Claimants have prevailed overall on an issue of jurisdiction as well as issue of admissibility, whereas the Respondent has prevailed partly on jurisdiction and fully on the merits.

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

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VII. TRIBUNAL'S DECISION

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

- (1.) Rejects the Respondent's objection to jurisdiction based on the termination of the BIT upon the Respondent's accession to the EU in May 2004, and decides that it has jurisdiction to determine the present dispute;
- (2.) Decides that its jurisdiction extends solely to alleged breaches of Article 5 of the BIT;
- (3.) Rejects the Respondent's objections to the admissibility of the claims;
- (4.) Dismisses the Claimants' claims on the merits;
- (5.) Decides that each Party shall bear its own costs;
- (6.) Decides that the Parties are jointly and severally liable to pay the costs of the Arbitration, namely the costs of the Arbitral Tribunal and the Arbitration Institute of the Stockholm Chamber of Commerce, which have been set as follows:
 - The Fee of Dr. Banifatemi amounts to EUR 99,394 and compensation for expenses of EUR 650 as well as per diem allowance of EUR 1,000, in total EUR 101,044;
 - The Fee of Prof. Reinisch amounts to EUR 59,636;
 - The Fee of Prof. Sands amounts to EUR 59,636 and compensation for expenses of £ 384.91, as well as a per diem allowance of EUR 1,000, in total EUR 60,636 and £ 384.91;
 - The Administrative Fee of the SCC amounts to EUR 27,122.

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

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

Done in: Stockholm

Date: 10 March 2017

Prof. August Reinisch (arbitrator)



Prof. Philippe Sands QC (arbitrator)



Dr. Yas Banifatemi (Chairperson)


