

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER ARTICLE 8(2)(A) OF THE AGREEMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE CZECH AND SLOVAK FEDERAL REPUBLIC FOR THE PROMOTION AND PROTECTION OF INVESTMENTS AND THE UNCITRAL ARBITRATION RULES (1976)**

**A11Y LTD.**

**v.**

**CZECH REPUBLIC**

**(ICSID Case No. UNCT/15/1)**

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**DECISION ON JURISDICTION**

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***Tribunal***

Yves Fortier, PC, CC, OQ, QC, Presiding Arbitrator  
Stanimir A. Alexandrov, Arbitrator  
Anna Joubin-Bret, Arbitrator

***Secretary to the Tribunal***

Jara Mínguez Almeida

***Assistant to the Tribunal***

Annie Lespérance

*Place of Arbitration:* Paris, France  
*Date of dispatch to the Parties:* 9 February 2017

## REPRESENTATION OF THE PARTIES

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### **Representing Respondent:**

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## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

|                                  |   |
|----------------------------------|---|
| Amended Memorial                 | Claimant's Amended Memorial, filed on 11 January 2016   |
| C-                               | Claimant's Exhibit  |
| CL-                              | Claimant's Legal Authority  |
| Claimant                         | A11Y LTD.   |
| Claimant's Skeleton Argument     | Claimant's Skeleton Argument, filed on 20 September 2016  |
| Counter-Memorial on Jurisdiction | Claimant's Counter-Memorial on Jurisdiction and Request for Endorsement of the Claimant's Right to Amend the Memorial, filed on 11 January 2016       |
| Hearing                          | Hearing on Jurisdiction held on 28 and 29 September 2016 at ICC hearing facilities in Paris, France   |
| ICSID, or the Centre             | International Centre for Settlement of Investment Disputes  |
| Memorial on the Merits           | Claimants' Memorial, filed on 30 May 2015   |
| Notice of Arbitration            | Claimant's Notice of Arbitration, filed on 14 October 2014  |
| Parties                          | Claimant and Respondent   |
| PO 1                             | Procedural Order No. 1, issued by the Tribunal on 23 March 2015   |
| PO 2                             | Procedural Order No. 2 – Decision on Bifurcation, issued by the Tribunal on 5 October 2015  |
| PO 3                             | Procedural Order No. 3 – Amendment to the Procedural Timetable, issued by the Tribunal on 11 December 2015  |
| PO 4                             | Procedural Order No. 4 – Decision on Claimant's Request for Endorsement of its Right to Amend its Memorial, issued by the Tribunal on 1 February 2016 |

|                                |  |
|--------------------------------|--|
| PO 5                           | Procedural Order No. 5 – Decision on Respondent’s Document Production Requests, issued by the Tribunal on 18 February 2016   |
| PO 6                           | Procedural Order No. 6 – Organization of the Hearing on Jurisdiction, issued by the Tribunal on 18 February 2016   |
| R-                             | Respondent’s Exhibit   |
| Reply on Jurisdiction          | Respondent’s Reply on Jurisdiction, filed on 25 April 2015   |
| Rejoinder on Jurisdiction      | Claimant’s Rejoinder on Jurisdiction, filed on 25 July 2016  |
| Respondent                     | Czech Republic   |
| Respondent’s Skeleton Argument | Respondent’s Skeleton Argument, filed on 20 September 2016   |
| RL-                            | Respondent’s Legal Authority   |
| Statement of Defence           | Respondent’s Counter-Memorial (Statement of Defence), filed on 31 August 2015  |
| Transcript                     | Transcript of the hearing in September 2016  |
| Treaty or BIT                  | Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments with Protocol, 10 July 1990 |
| UNCITRAL Rules                 | The United Nations Commission on International Trade Law’s Arbitration Rules as adopted by the General Assembly Resolution 31/98 on 15 December 1976   |
| VCLT or Vienna Convention      | Vienna Convention on the Law of Treaties as entered into force on 27 January 1980  |

## **I. INTRODUCTION AND PARTIES**

1. This case concerns a dispute submitted pursuant to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments dated 10 July 1990 (the “BIT” or “Treaty”), which entered into force on 26 October 1992, and the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the “UNCITRAL Rules”).
2. The claimant is A11Y LTD. and is hereinafter referred to as “A11Y” or the “Claimant.”
3. The Claimant is a limited liability company incorporated under the laws of the United Kingdom with its registered address at 6 Bexley Square, Salford, Manchester, United Kingdom, M3 6BZ.
4. The respondent is the Czech Republic and is hereinafter referred to as “Czech Republic” or the “Respondent.”
5. The Claimant and the Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above on page (i).
6. The Parties’ specific requests for relief are set forth in Section III below, and a fuller summary of their positions is contained in Section IV below. In its analysis, the Tribunal has considered not only the positions of the Parties as summarised in this Decision, but the numerous detailed arguments made in the Parties’ written and oral pleadings as well. To the extent that these arguments are not referred to expressly, they should be deemed to be subsumed into the Tribunal’s analysis.

## **II. PROCEDURAL HISTORY**

7. The Claimant commenced this arbitration by filing a Notice of Arbitration on 10 October 2014 pursuant to Article 3 of the UNCITRAL Rules. In accordance with Article 3(4) of the UNCITRAL Rules, the Claimant proposed that the dispute be heard and decided by three arbitrators, and appointed Dr. Stanimir Alexandrov as arbitrator.

8. On 11 November 2014, the Respondent appointed Ms. Anna Joubin-Bret as arbitrator.
9. On 19 December 2014, the two party-appointed arbitrators appointed the Honourable L. Yves Fortier PC, CC, OQ, QC, as President of the Tribunal.
10. On 16 January 2015, the Parties informed the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) that they had reached an agreement on 12 January 2015 that ICSID would administer the case.
11. By letter of the same date, the Secretary-General accepted the Parties’ invitation to provide full administrative services in relation to this proceeding. Ms. Martina Polasek, ICSID Senior Legal Counsel as she then was, was designated to serve as Secretary of the Tribunal. The Parties were later informed, on 28 July 2015, that Ms. Jara Mínguez Almeida, ICSID Legal Counsel, would replace Ms. Martina Polasek as Secretary of the Tribunal.
12. The Tribunal held a first session with the Parties on 9 March 2015 by telephone conference. At the session, the Parties confirmed that the Members of the Tribunal had been validly appointed and agreed, *inter alia*, that (i) the applicable Arbitration Rules would be the UNCITRAL Arbitration Rules 1976, except as modified by agreement of the Parties in accordance with Article 8(2)(a) of the Treaty, (ii) the procedural language would be English and (iii) the place of arbitration would be Paris, France. The Parties’ agreement on procedural matters, and the Tribunal’s determination of the schedule, were embodied in **Procedural Order No. 1** of 23 March 2015.
13. During the first session, the Parties and the Tribunal also discussed the Claimant’s request of 8 March 2015 for an initial hearing to provide the Tribunal with an introduction to the accessibility technology behind the Claimant’s alleged investment. The Parties filed additional observations on the Claimant’s request by communications of 12 and 16 March 2015. In Procedural Order No. 1, the Tribunal denied the Claimant’s request for an initial hearing as it was unable to determine whether it would be useful, relevant and appropriate at that stage of the proceeding and invited the Claimant to renew its request, if it so wished, following the Respondent’s filing of its Statement of Defence.

14. On 30 May 2015, the Claimant filed its Memorial on the Merits pursuant to paragraph 14.2 of Procedural Order No. 1. The Memorial was accompanied by:

- Expert Report on the Assessment of Damage of Prof. Robert C. Lind, Mr. Pavel Urban and Dr. Pavel Vacek dated 30 May 2015;
- Witness Statement of Mr. Jan Buchal dated 30 May 2015;
- Witness Statement of Mr. Hynek Hanke dated 28 May 2015;
- Witness Statement of [...] dated 22 May 2015;
- Witness Statement of [...] dated 25 May 2015;
- Witness Statement of [...] dated 20 May 2015;
- Witness Statement of [...] dated 21 May 2015;
- Witness Statement of [...] dated 28 May 2015;
- Witness Statement of [...] dated 25 May 2015;
- Witness Statement of [...] dated 25 May 2015;
- Factual Exhibits C-1 through C-41; and
- Legal Authorities CL-1 through CL-32.

15. In accordance with paragraph 14.3 of Procedural Order No. 1, the Respondent filed its Statement of Defence on 31 August 2015, which contained its Request for the Bifurcation of the proceeding between jurisdictional and merits phases. The Statement of Defence was accompanied by:

- Factual Exhibits R-1 through R-28; and
- Legal Authorities RL-1 through RL-93.

16. On 15 September 2015, in accordance with paragraph 14.4 of Procedural Order No. 1, the Claimant filed its Response to the Request for Bifurcation, which was accompanied by:

- Factual Exhibits C-42 through C-53; and

- Legal Authorities CL-33 through CL-40.
17. On 21 September 2015, Ms. Annie Lespérance was appointed as Assistant to the Tribunal with the agreement of the Parties.
  18. On 5 October 2015, the Tribunal issued **Procedural Order No. 2** granting the Respondent's Request for Bifurcation in respect of three of its four objections to jurisdiction, namely the scope of application of Article 8(1) of the Treaty, whether the Claimant is a foreign investor and whether the Treaty is superseded by EU Law. The Respondent's objection pertaining to whether the Claimant had made an investment in the Czech Republic was joined to the merits.
  19. On 4 December 2015, the Claimant instructed Withers LLP and Lucas Bastin of Quadrant Chambers as its new counsel. In view of this change of counsel, the Claimant requested the Tribunal to extend the deadline for the filing of its Counter-Memorial on Jurisdiction until 11 January 2016. On 9 December 2015, the Respondent filed observations on the Claimant's request for an extension and made its own requests in the event the extension was granted. On 11 December 2015, the Tribunal issued **Procedural Order No. 3**, in which it granted the Parties' requests and amended the procedural timetable.
  20. On 11 January 2016, the Claimant filed its Counter-Memorial on Jurisdiction pursuant to paragraph 5 of Procedural Order No. 3, and a Request for Endorsement of the Claimant's Right to Amend the Memorial. The Counter-Memorial on Jurisdiction was accompanied by:
    - Factual Exhibits C-54 through C-62;
    - Legal Authorities CL-41 through CL-105.

The Amended Memorial was accompanied by:

- Legal Authorities CL-106 through CL-118.
21. The Respondent submitted its comments on the Claimant's Request for Endorsement of the Claimant's Right to Amend the Memorial on 20 January 2016. The Respondent objected to the admission of new claims. In the event the Tribunal should admit the Claimant's new

claims, the Respondent requested an opportunity to be heard in a further submission following the Claimant's comments on the Respondent's jurisdictional objections arising from the Claimant's new claims. On the same day, the Tribunal invited the Claimant to file any comments it may have on the Respondent's letter.

22. By its letter of 26 January 2016, the Claimant maintained its request and “*propose[d] that the Respondent articulate any new jurisdictional objections that the Respondent can conceive in the Respondent's Reply on Jurisdiction, which was scheduled for 25 April 2016. Thereafter, the Tribunal [could] decide whether additional round(s) of pleadings [were] necessary in the circumstances.*”
23. On 1 February 2016, the Tribunal issued **Procedural Order No. 4**. The Tribunal decided that (i) the Claimant's Request for Endorsement of its Right to Amend its Memorial was granted; (ii) the Claimant's Amended Memorial was admitted into the record; (iii) the Respondent may include any additional jurisdictional objections arising from the Claimant's amended claims in its Reply on Jurisdiction to be filed on 25 April 2016; (iv) the Claimant may respond to the Respondent's Reply on Jurisdiction, including any additional jurisdictional objections arising from its amended claims in its Rejoinder on Jurisdiction to be filed on 25 July 2016; and (v) no later than one week following the filing of the Claimant's Rejoinder on Jurisdiction, the Respondent may seek leave from the Tribunal to file a brief reply submission limited to the Claimant's response to the Respondent's additional jurisdictional objections arising from the Claimant's amended claims. Should the Respondent file such a request and should the Tribunal accede to it, the Tribunal would afford the Claimant with an opportunity to comment on the Respondent's further reply submission.
24. As contemplated in paragraph 5 of Procedural Order No. 3, on 12 February 2016, the Respondent submitted its document production requests.
25. On 18 February 2016, the Tribunal issued its decisions with respect to document production requests in **Procedural Order No. 5**, including Annex A, listing the documents which the Claimant was ordered to produce.

26. On 25 April 2016, the Respondent filed its Reply on Jurisdiction pursuant to paragraph 5 of Procedural Order No. 3. The Reply on Jurisdiction was accompanied by:
- Factual Exhibits R-29 through R-39; and
  - Legal Authorities RL-94 through RL-124.
27. On 25 July 2016, the Claimant filed its Rejoinder on Jurisdiction pursuant to paragraph 5 of Procedural Order No. 3. The Rejoinder on Jurisdiction was accompanied by:
- Factual Exhibits C-63 through C-74; and
  - Legal Authorities CL-119 through CL-137.
28. On 7 September 2016, on behalf of the Tribunal, the President held a Pre-Hearing organizational meeting with the Parties by telephone conference. On 8 September 2016, the Tribunal issued **Procedural Order No. 6** regarding the organization of the Hearing on Jurisdiction.
29. On 20 September 2016, pursuant to paragraph 28 of Procedural Order No. 6, the Parties filed skeleton arguments.
30. A hearing on the Bifurcated Jurisdictional Objections took place in Paris on 28 and 29 September 2016. In addition to the Members of the Tribunal, the Secretary of the Tribunal, and the Assistant to the Tribunal, present at the hearing were:

| <b>CLAIMANT</b>                      |                    |
|--------------------------------------|--------------------|
| <b>Mr./Ms. First Name/ Last Name</b> | <b>Affiliation</b> |
| <i><b>Counsel:</b></i>               |                    |
| Mr. Hussein Haeri                    | Withers LLP        |
| Mr. David Walker                     | Withers LLP        |
| Ms. Ruzin Dagli                      | Withers LLP        |
| Mr. Lucas Bastin                     | Quadrant Chambers  |
| <i><b>Parties:</b></i>               |                    |
| Mr. Jan Buchal                       | A11Y LTD.          |
| Mr. Boris Dušek                      | A11Y LTD.          |
| Mr. Hynek Hanke                      | A11Y LTD.          |
| [...]                                | A11Y LTD. (carer)  |

|                 |           |
|-----------------|-----------|
|                 |           |
| <i>Witness:</i> |           |
| Mr. Jan Buchal  | A11Y LTD. |

| <b>RESPONDENT</b>                    |                                    |
|--------------------------------------|------------------------------------|
| <b>Mr./Ms. First Name/ Last Name</b> | <b>Affiliation</b>                 |
| <i>Counsel:</i>                      |                                    |
| Mr. Alfred Siwy                      | zeiler.partners Rechtsanwälte GmbH |
| <i>Parties:</i>                      |                                    |
| Ms. Hana Křížová                     | Czech Ministry of Finance          |
| Ms. Anna Bilanová                    | Czech Ministry of Finance          |

| <b>COURT REPORTER</b> |                        |
|-----------------------|------------------------|
| Ms. Claire Hill       | The Court Reporter LLC |

| <b>INTERPRETER</b> |                         |
|--------------------|-------------------------|
| Ms. Martina Parker | Independent Interpreter |

31. The Parties filed their submissions on costs on 21 October 2016.
32. By letter dated 27 October 2016, the Respondent submitted that it considered that a decision on costs in an interim decision would be premature and prejudicial to its rights.
33. By letter dated 2 November 2016, the Claimant responded to the Respondent's letter.

### **III. PARTIES' REQUESTS FOR RELIEFS**

#### **A. Respondent's Request for Relief**

34. The Respondent requests the Tribunal to:
  - (1) declare that it lacks jurisdiction to hear Claimant's claims and hence to dismiss its claims; and

- (2) order Claimant to reimburse Respondent for all costs, fees and expenses incurred in relation to these proceedings.<sup>1</sup>

**B. Claimant’s Request for Relief**

35. The Claimant seeks the following relief from the Tribunal:

- (1) a declaration that the Tribunal has jurisdiction over the entirety of the Dispute;
- (2) an order that the Respondent pay the costs of this bifurcated jurisdictional proceeding, including the costs of the Tribunal and ICSID, and the legal and other costs incurred by the Claimant; and
- (3) such further declaration, order, or relief as the Tribunal may deem appropriate.<sup>2</sup>

**IV. JURISDICTION**

36. Three of the Respondent’s jurisdictional objections have been bifurcated. In addition to those three objections, the Respondent, in its Reply on Jurisdiction, advanced a further objection that the Claimant, prior to initiating the arbitration, did not adhere to the cooling-off period of four months. The Respondent’s four jurisdictional objections and the Claimant’s comments thereon are summarized below in the order in which they were presented by the Respondent in its pleadings.

**A. The Scope of Application of Article 8(1) of the Treaty**

**(1) The Parties’ Positions**

a. Respondent’s Position

37. The Respondent submits that Article 8(1) of the Treaty constitutes an offer of the Respondent to arbitrate “[d]isputes between an investor of one Contracting Party and the

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<sup>1</sup> Reply on Jurisdiction, p. 57.

<sup>2</sup> Claimant’s Skeleton Argument, para. 194.

*other Contracting Party concerning an obligation of the latter under Article 2(3), 4, 5 and 6 of the Agreement [...]”.*<sup>3</sup>

38. The Respondent argues that the ordinary meaning of the language used in Article 8(1) is “*blatantly clear: Respondent offered to arbitrate disputes deriving from alleged violations of article 2(3) of the BIT (addressing obligations deriving from contracts concluded between investors and host states), article 4 of the BIT (compensation for losses from armed conflict, state of national emergency or civil disturbances), article 5 (expropriation) and article 6 (free transfer of investment and returns). Only such disputes shall be submitted to arbitration under paragraph (2) [of Article 8] [...]”.*<sup>4</sup>
39. According to the Respondent, the Claimant initially alleged violations by the Respondent of (i) Article 2(2) of the Treaty, including violations of the fair and equitable treatment (“FET”) standard and the prohibition of unreasonable and discriminatory measures, and (ii) the national treatment standard included in Article 3(1) of the Treaty.
40. The Claimant, in its Amended Memorial, now also claims that its investment has been expropriated pursuant to Article 5(1) of the Treaty.
41. Therefore, according to the Respondent, “*article 8(1) of the BIT does not apply to any of the Claimant’s claims but for its claim for expropriation*”<sup>5</sup> and consequently the Tribunal lacks jurisdiction over the Claimant’s claims under Articles 2(2) and 3(1) of the Treaty.
42. In support of its argument, the Respondent relied on, *inter alia*, the decision in *Nagel v Czech Republic*<sup>6</sup> involving the very same Treaty under which the Claimant in the present proceeding is submitting its claims. In that decision the Tribunal concluded as follows:

*271. [...] Indeed, Article 8(1) only states that disputes under Articles 2(3), 4, 5, and 6 may be submitted to arbitration and there is nothing in the text*

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<sup>3</sup> Statement of Defence, para. 26. See Treaty at CL-1.

<sup>4</sup> Statement of Defence, para. 27.

<sup>5</sup> Reply on Jurisdiction, para. 2.

<sup>6</sup> Statement of Defence, para. 29. *Mr. William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, RL-10.

*to indicate that the arbitration may also include other questions arising under the Treaty. The Arbitral Tribunal therefore concludes that Mr Nagel's claims under Articles 2(2), 3(1) and 3(2) are not admissible in the present arbitration and must be rejected.*

43. In response to the Claimant's arguments that (i) Article 2(3) of the Treaty should be interpreted as a "gate" to the other provisions of the Treaty and that (ii) in any event, the most-favored-nation ("MFN") clause attracts the more favourable dispute resolution provision found in the Netherlands-Czech BIT, the Respondent argues the following.

*(i) Scope of Article 2(3) of the Treaty*

44. The Respondent submits that the correct interpretation to be given to Article 2(3) of the Treaty is the following:

*Article 2(3) refers to situations in which the investor and the host state conclude specific agreements. Its first sentence stipulates that such agreements can be more advantageous for the investor but may not be at variance with the BIT otherwise. Its second sentence then sets out that the host state shall observe the provisions of such specific agreements and the provisions of the BIT. This wording leaves little doubt that the second sentence refers to the first and must be read in connection with it. It obliges the host state to adhere to its contractual arrangements and, consonant with the first sentence, to the provisions of the BIT where these are more advantageous to the partner of its agreement. The provision, however, is limited to situations in which a specific agreement has been concluded.<sup>7</sup>*

*[...]*

*Claimant's interpretation of the BIT assumes that article 8(1) of the BIT was drafted for the purpose of limiting the jurisdiction of the Arbitral Tribunal to certain disputes, while article 2(3) was inserted for the*

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<sup>7</sup> Respondent's Skeleton Argument, para. 6.

*purpose of establishing the jurisdiction of the tribunal over all disputes deriving from the BIT. Claimant's interpretation therefore implies that the limitation included in article 8(1) are meaningless. [...]*<sup>8</sup>

(ii) *Scope of the MFN clause*

45. The Respondent submits that the Claimant cannot invoke the MFN clause of the Treaty to rely on the dispute resolution provision of the Netherlands-Czech BIT for the following three reasons.
46. First, the Respondent argues that the MFN clause cannot be interpreted to allow the invocation of a right to arbitration in a third treaty as this would leave the limitations of Article 8(1) without any meaning:

*Article 8(1) of the BIT grants the investor the right to arbitrate disputes deriving from alleged breaches of articles 2(3), 4, 5 and 6 of the BIT. It is therefore evident that the parties to the BIT agreed that the host state shall only consent to arbitration of those disputes. Claimant's interpretation of the MFN clause would render this clear and unambiguous restriction completely meaningless.*<sup>9</sup>

47. The Respondent relies, *inter alia*, on the tribunal's decision in *Austrian Airline v Slovakia* in support of its argument<sup>10</sup>. The tribunal, in that decision, wrote:

*Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause.*<sup>11</sup>

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<sup>8</sup> Respondent's Skeleton Argument, para. 8.

<sup>9</sup> Respondent's Skeleton Argument, para. 14.

<sup>10</sup> Respondent's Skeleton Argument, para. 15.

<sup>11</sup> *Austrian Airlines v. The Slovak Republic*, UNCITRAL *Ad Hoc* Arbitration, Final Award, 9 October 2009, para. 135, Exhibit RL-5.

48. Second, the Respondent avers that MFN clauses do not permit investors to invoke arbitration clauses in order to import into the Treaty consent to arbitration where none exists in the basic Treaty. The Respondent asserts that “[a]n investor can rely on an MFN clause to import dispute resolution provisions if they allow the claimant to exercise a right to arbitrate existing under the basic treaty in a more favourable way”.<sup>12</sup> As it is clear that Article 8(1) of the Treaty does not include the Respondent’s consent to arbitrate disputes under Article 2(2), 3(1) and 3(2) of the Treaty, the Respondent argues that the MFN clause cannot be invoked to import consent from the Netherland-Czech BIT.<sup>13</sup>

49. In support of its argument, the Respondent relies, *inter alia*, on the tribunal’s decision in *EURAM v Slovakia* where that tribunal wrote:

*As regards those categories of disputes, there is no offer of arbitration at all. Acceptance of the Claimant’s argument would therefore mean that the MFN clause completely transformed the scope of the arbitration provision [...].*

*The Tribunal therefore considers that the special character of the provision for investor-State arbitration and the radical nature of the transformation in that provision which acceptance of the Claimant’s argument would entail, both militate against attributing to Article 3 of the BIT the effect suggested by the Claimant unless there are clear indications that such was the intention of the States Parties.*<sup>14</sup>

50. Third, the Respondent argues that the MFN clause in the present case only applies to treatment under domestic law and does not apply to arbitration. According to the Respondent, the MFN clause contains a “significant limitation”:

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<sup>12</sup> Respondent’s Skeleton Argument, para. 28.

<sup>13</sup> Respondent’s Skeleton Argument, para. 33.

<sup>14</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, paras. 448 et seq., **Exhibit CL-93**.

*It expressly refers to treatment “under its law”. Hence, all an investor can ask for is that its treatment by application of domestic law is no less favourable than that of other investors. [...]*

*If the limitation is to have any meaning at all, it must refer to treatment under domestic law as opposed to treatment under international treaties. If the latter were supposed to be included in the formulation, it would have no meaning of its own. As the right to arbitration Claimant is relying on is incorporated not in domestic law but in an international treaty, the MFN clause cannot serve as a basis for importing it.<sup>15</sup>*

b. Claimant’s Position

51. The Claimant submits at the outset that the Respondent has conceded in its Reply on Jurisdiction that the Tribunal has jurisdiction over the Claimant’s expropriation claim under Article 5 of the Treaty. As such, says the Claimant, “*there is no disagreement on the existence of the Arbitral Tribunal’s jurisdiction, or that this arbitration will be proceeding to the next phase on liability and damages. What remains in dispute in the present jurisdictional phase is only the scope of the Arbitral Tribunal’s jurisdiction.*”<sup>16</sup>
52. The Claimant accepts that, “*on its face, Article 8(1) contains reference only to Articles 2(3), 4, 5 and 6.*” However, submits the Claimant, “*the Respondent ignores the [...] fact that Article 2(3) serves as a ‘gate’ towards all standards of protection contained in various articles of the BIT*”<sup>17</sup> and that accordingly, the Tribunal has jurisdiction over the entirety of the Claimant’s claims.
53. Article 2(3) of the Treaty provides that:

*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*

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<sup>15</sup> Respondent’s Skeleton Argument, paras. 23-24.

<sup>16</sup> Claimant’s Skeleton Argument, para. 4.1

<sup>17</sup> Response to the Request for Bifurcation, para. 2.

*with this Agreement. Each Contracting Party shall, with regard to investments investors the other Contracting Party, observe the provisions these specific agreements, as well as the provisions this Agreement. (Claimant's emphasis)*

54. According to the Claimant, “*the Respondent’s obligation under Article 2(3) to observe ‘the provisions of this Agreement’*” applies to all the provisions of the Agreement. As such, this undoubtedly includes Articles 2(2), 3(1), 3(2) and 5 of the BIT”.<sup>18</sup> In addition, argues the Claimant, this obligation is mandatory in view of the use of the plain meaning of the word “shall” (observe ... the provisions of this Agreement) in the provision.<sup>19</sup>
55. The Claimant’s position that the Respondent’s breaches of Articles 2(2), 3(1), 3(2) and 5 of the Treaty (i.e., “provisions of this Agreement”) also breached the observance of undertakings clause in Article 2(3) of the Treaty is further supported in the jurisprudence argues the Claimant. The Claimant relies on the Tribunal’s conclusion in *Eureko v Poland*:

*... the Tribunal concludes that the actions and inactions of the Government of Poland are in breach of Poland's obligations under the Treaty —those that have been held to be unfair and inequitable and expropriatory in effect —also are in breach of its commitments under Article 3.5 of the Treaty to ‘observe any obligations it may have entered into with regards to investments of investors’ of the Netherlands.*<sup>20</sup>

56. The Claimant also submits that its argument is not impacted by the *Nagel* award since nothing in that award suggests that counsel for the claimant in that case made the same argument that the Claimant is now making before this Tribunal. Moreover, according to the Claimant, this issue was not a crucial one in that case as the *Nagel* tribunal proceeded to the merits and dismissed the claims on their merits.<sup>21</sup>

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<sup>18</sup> Claimant’s Skeleton Argument, para. 11.

<sup>19</sup> Claimant’s Skeleton Argument, para. 13.

<sup>20</sup> *Eureko B.V. v. Republic of Poland*, ad hoc proceeding, Partial Award, 19 August 2005, ¶ 260, CL-48.

<sup>21</sup> Response to the Request for Bifurcation, para. 5.

57. Alternatively, the Claimant invokes the MFN clause in Article 3 of the Treaty to attract the more favorable dispute resolution provision found in the Netherlands-Czech BIT. Article 8 of that Treaty provides that “all disputes” between an investor and the host state can be resolved through investment arbitration.<sup>22</sup>
58. The Claimant submits that the case law supports the proposition that MFN treatment does extend to treatment under a dispute resolution provision.<sup>23</sup>
59. While the Claimant concedes that some tribunals have refused to use an MFN clause to expand a dispute resolution provision, the Claimant argues that “*these tribunals reached such a view not because a ‘host state’s consent to arbitrate’ in a dispute resolution provision cannot be broadened by an MFN provision, but rather because an MFN provision cannot be used to summon into existence rights which did not previously exist.*”<sup>24</sup>
60. In the present case, the Claimant asserts that it “*is not seeking to use the MFN provision to arrogate to itself rights that it does not otherwise have. It only seeks more favourable treatment in relation to rights that already exist in, and from which it already benefits under, the BIT.*”<sup>25</sup>
61. In this respect, the Claimant argues that (i) it has a right to initiate international arbitration under Article 8 of the Treaty,<sup>26</sup> (ii) it has the substantive rights set out in Articles 2 to 6 of the Treaty,<sup>27</sup> and (iii) it merely seeks to create a direct connection between these two sets

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<sup>22</sup> Response to the Request for Bifurcation, para. 6.

<sup>23</sup> Claimant’s Skeleton Argument, para. 27. See Claimant’s Counter-Memorial on Jurisdiction, paras. 73-80, citing *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, CL-65, paras. 53-94; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, CL-67, paras. 52 - 66; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICISD Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, CL-67, paras. 52 - 68; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, CL-69, paras. 56 - 111; *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2006, CL-53, paras. 41 - 49; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction For Lack Of Consent, 3 July 2013, CL-69, paras. 13 - 97.

<sup>24</sup> Claimant’s Skeleton Argument, para. 30.

<sup>25</sup> Claimant’s Skeleton Argument, para. 33.

<sup>26</sup> Claimant’s Skeleton Argument, para. 34.

<sup>27</sup> Claimant’s Skeleton Argument, para. 35.

of existing rights through the MFN clause.<sup>28</sup> In other words, submits the Claimant, “[t]his connection of the Claimant's existing rights is (only) a treatment of the Claimant in relation to rights it already has under the BIT, and for which it may benefit from more favourable treatment given to investors of other nationalities in other BITs signed by the Respondent.”<sup>29</sup>

62. The Claimant also submits that Article 7 of the Treaty explicitly lists exceptions to the application of MFN treatment. The list does not include dispute resolution.
63. For the foregoing reasons, the Claimant submits that the Tribunal has jurisdiction over all of the Claimant’s claims.

## **(2) The Tribunal’s Analysis**

64. The provision of the Treaty in virtue of which the Tribunal derives its competence is Article 8 which gives an investor the right to submit a dispute under the Treaty to arbitration.
65. Article 8(1) of the Treaty provides as follows:

*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.*

66. Both Parties agree that Article 8(1) does not refer to all disputes under the Treaty but provides that only disputes concerning an obligation of a Contracting Party under Articles 2(3), 4, 5 and 6 of the Treaty which have not been amicably settled shall be submitted to arbitration if either party to the dispute so wishes.

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<sup>28</sup> Claimant’s Skeleton Argument, para. 36.

<sup>29</sup> Claimant’s Skeleton Argument, para. 36.

67. Both Parties agree that the Tribunal has jurisdiction over the Claimant's expropriation claim under Article 5 of the Treaty.
68. Both Parties also agree that the Tribunal has jurisdiction under Article 8(1) of the Treaty over the observance of specific undertakings obligation pursuant to Article 2(3) of the Treaty.
69. The Parties disagree, however, as to whether the Tribunal has jurisdiction over the Claimants' claims based on Article 2(2) (fair and equitable treatment and full protection and security) and Article 3 (national treatment) of the Treaty.

- a. Scope of Article 2(3) of the Treaty

70. On the basis of the plain and ordinary meaning of Article 8(1), the Respondent argues that only disputes under Articles 2(3), 4, 5 and 6 of the Treaty can be the subject of arbitration and that therefore the Tribunal lacks jurisdiction over the Claimant's claims under Articles 2(2), and 3 of the Treaty.
71. The Claimant, on the other hand, interprets Article 2(3) of the Treaty, to which Article 8(1) refers specifically, as meaning that the Respondent has the obligation to observe all the provisions of the Treaty which include Articles 2(2), 3(1) and 3(2), not only Article 5.
72. Article 2(3) of the Treaty provides as follows:

*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.*

73. The Tribunal must therefore determine the meaning and the scope of Article 2(3) of the Treaty. Which obligations are covered by the second sentence of Article 2(3) of the Treaty, having regard to the text of Article 8(1) which provides that "*Disputes between an investor*

*of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3) [...] shall [...] be submitted to arbitration*”? (Tribunal’s emphasis)

74. The Parties agree that Article 2(3) combines (i) a floor provision and (ii) an umbrella clause.
75. A floor provision often, as in this case, refers to specific agreements and provides that the terms of a specific agreement (or undertaking) entered into between the State and an investor cannot be less favourable than the Treaty. If the terms of a specific agreement (or undertaking) are less favorable than those of the Treaty, the more favorable provisions of the Treaty will apply.
76. An umbrella clause is typically found in an investment treaty as part of the general obligations of treatment of an investment and is not usually combined with a floor provision. A typical umbrella clause reads as follows: “*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*”.<sup>30</sup>
77. The Claimant, when it analysed the second sentence of Article 2(3), argued that this sentence not only obliges the Respondent to observe the provision of any specific agreement which may have been entered into between the Respondent and UK investors, but also “*(...) serve[d] as a ‘gate’ towards all standards of protection contained in various articles of the BIT*.”<sup>31</sup> This is so by virtue of the last 8 words in Article 2(3): “*as well as the provisions of this Agreement*”.
78. While the Tribunal agrees with the Claimant that, with regard to investments of investors of the other Contracting Party, the standard umbrella clause applies to the obligations contained in specific agreements, it cannot agree with the Claimant that the last 8 words in Article 2(3), “*as well as the provisions of this Agreement*”, import into the Treaty the

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<sup>30</sup> See for example, Article 2(2) of the UK Model BIT, Exhibit R-29.

<sup>31</sup> Response to Request for Bifurcation, para. 2.

obligation of the Respondent to observe all standards of protection in the Treaty, including Articles 2(2), and 3.

79. The Tribunal is of the view that, in the present case, the obligation to observe the provisions of the Treaty in Article 2(3) is required by the combination of the floor provision and the umbrella clause for the following reasons.
80. Firstly, the scope of Article 2(3) is limited to investors that have specific agreements with the host state. The floor provision covers only investors with specific agreements and the umbrella clause refers to “these specific agreements.” It is with respect to such investors that Article 2(3) requires the Contracting Parties to observe both the provisions of the specific agreements and the provisions of the Treaty.
81. As noted earlier, a typical umbrella clause such as the one found in the model UK BIT provides that: “*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*”.<sup>32</sup>
82. “Any obligation” can refer not only to contractual obligations but also to treaty obligations. The Contracting States in the present Treaty merely spelled out what those obligations consist of, namely obligations under specific agreements as well as obligations under the Treaty in order to ensure that a tribunal seized of a contractual dispute brought under the Treaty by virtue of the umbrella clause will not be limited to the application of the contract itself but also to “the provisions of this Agreement”.
83. Secondly, the Tribunal notes that the Claimant’s interpretation would lead to an illogical result. In order to arbitrate a claim on the basis of the State’s obligation to grant fair and equitable treatment to the investment of an investor such as the Claimant in this case, a claimant would merely have to invoke a breach of Article 2(3).
84. By so doing, the claimant would override the specific and limited consent to arbitration found in Article 8(1) of the Treaty.

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<sup>32</sup> Tribunal’s emphasis.

85. This is precisely the interpretation which the *Nagel* tribunal, analysing the very same Treaty as that invoked in the present case, concluded, in clear terms, had to be rejected. The tribunal said:

*271. [...] Indeed, Article 8(1) only states that disputes under Articles 2(3), 4, 5, and 6 may be submitted to arbitration and there is nothing in the text to indicate that the arbitration may also include other questions arising under the Treaty. The Arbitral Tribunal therefore concludes that Mr. Nagel's claims under Articles 2(2), 3(1) and 3(2) are not admissible in the present arbitration and must be rejected.*<sup>33</sup>

86. Thirdly, the Tribunal must give Article 8(1) an *effet utile*. The Claimant's interpretation would render the limited consent to arbitration in Article 8(1) without any effect.
87. Fourthly, if the Tribunal accepted the Claimant's interpretation, it would lead to another illogical outcome. It would mean that, as the Claimant has done in the present case, an investor claiming a breach of the fair and equitable treatment standard under Article 2(2) of the Treaty (or of any other substantive protection of the Treaty) could also argue that this breach constitutes a breach of Article 2(3) since the Contracting State has not observed the "provisions of this Agreement".
88. A breach of Article 2(3) can only be invoked by an investor who has a specific agreement with the Contracting State. The second sentence of Article 2(3) allows this investor to invoke not only a breach of the specific agreement but also a breach of the Treaty as a result of the breach of the specific agreement.
89. The Tribunal's interpretation does not provide investors who have specific agreements with a Contracting State preferred treatment compared to investors who don't have such agreements. The investor who has a specific agreement with the State will be able to submit its dispute to arbitration under the Treaty by alleging that the breach of the specific agreement by the State constitutes a breach of the Treaty by virtue of the umbrella clause.

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<sup>33</sup> *Mr. William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, RL-10, at para. 271. Emphasis added.

In other words, while the investor's contractual claims remain, the umbrella clause in Article 2(3) gives the investor a second legal basis on which he can argue a treaty or "umbrella clause" claim.

90. In summary, the Tribunal concludes that it has jurisdiction over alleged violations of Articles 2(3), 4, 5 and 6 of the Treaty but not over violations of other Articles of the Treaty.
91. The Claimant confirmed at the hearing that it is not advancing any claims under the Treaty pursuant to a specific agreement with the Czech Republic. In view of the Tribunal's finding that Article 2(3) of the Treaty is only applicable in a dispute where there is a specific agreement, the Claimant's request for relief for a "*declaration that the Czech Republic has breached Article 2(3) of the Treaty by failing to observe the provisions of the Treaty set out in sub-clauses (a) to (d) above*"<sup>34</sup> fails and the Tribunal so finds.
92. The Tribunal will now proceed with its analysis of the Claimant's alternative argument. In this section, the Tribunal will determine whether the MFN clause can broaden the scope of Article 8(1) of the Treaty which would enable the Tribunal to confirm that it has jurisdiction over the Claimant's claims under Articles 2(2) and 3 of the Treaty.

b. Scope of the MFN clause

93. Article 3 of the Treaty provides for most-favoured-nation treatment as follows:

*3(1) Each Contracting Party shall ensure that under its law investments or returns of investors of the other Contracting Party are granted treatment no less favourable than that which it accords to investments or return of*

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<sup>34</sup> Claimant's Amended Memorial, para. 150 (e). The Tribunal recalls that sub-clauses (a) to (d) of para. 150 of the Claimant's Amended Memorial read as follows:

*"(a) a declaration that the Czech Republic has breached Article 2(2) of the Treaty by failing to accord Claimant's investment fair and equitable treatment;*  
*(b) a declaration that the Czech Republic has breached Article 2(2) of the Treaty by impairing Claimant's management, maintenance, use, enjoyment or disposal of its investment by unreasonable and discriminatory measures;*  
*(c) a declaration that the Czech Republic has breached Article 3 of the Treaty by failing to provide national treatment;*  
*(d) a declaration that the Czech Republic has breached Article 5(1) of the Treaty by imposing measures having effect equivalent to expropriation of the Claimant's investment in the Czech Republic;"*

*its own investors or to investments or returns of investors of any third State.*

*3(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.*

94. The Claimant invokes this most-favored-nation clause to attract the more favorable dispute resolution provision found in the Netherlands-Czech BIT which provides that “all disputes” can be resolved through arbitration.
95. The Tribunal is of the view that an MFN clause can, *a priori*, apply to dispute settlement.
96. The Final Report of the ILC Study Group on the Most-Favoured-Nation clause is instructive in this respect:

*95. Key to the decision in Maffezini is the conclusion that dispute settlement provisions are, in principle, part of the protection for investors and investments provided under bilateral investment agreements. Hence dispute settlement provisions by definition are almost always capable of being incorporated into an investment agreement by virtue of an MFN provision. Under an investment agreement, to use the language of article 9 of the 1978 draft articles, dispute settlement falls “within the limits of the subject matter” of an MFN clause.*

*96. The conclusion that procedural matters, specifically dispute settlement provisions, are by their very nature of the same category as substantive protections for foreign investors has been an important part of the reasoning in some subsequent decisions of investment tribunals. In Siemens, the tribunal stated that dispute settlement “is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause.” The tribunal in AWG said that it could find “no basis for*

*distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty.*"<sup>35</sup>

97. A review of arbitral decisions on the issue of the scope of the MFN clause reveals that, where tribunals have declined to apply the MFN clause to dispute settlement, the *ratio decidendi* was either that (i) the MFN clause was invoked to override public policy considerations such as a substitution of the consent to arbitrate where none exists in the basic Treaty, and/or (ii) its scope of application was limited by the wording used in the applicable Treaty. This is consistent with the ILC Study Group's conclusion that "*dispute settlement provisions by definition are almost always capable of being incorporated into an investment agreement by virtue of an MFN provision.*"<sup>36</sup>
98. Arbitral rulings draw a distinction between the application of an MFN clause to a more favorable dispute resolution provision where the investor has the right to arbitrate under the basic treaty, albeit under less favorable conditions, and the substitution of non-existent consent to arbitration by virtue of an MFN clause. While case law confirms that the former is possible, it has almost consistently found that the latter is not.
99. In this respect, the Tribunal notes, in particular, the reasoning of the tribunals in *Hochtief v. Argentina*,<sup>37</sup> *EURAM v Slovakia*<sup>38</sup> and *Plama v Bulgaria*<sup>39</sup>.
100. In *Hochtief*, the tribunal found that:

*In the present case, it might be argued that the MFN clause requires that investors under the Argentina-Germany BIT be given MFN treatment during the conduct of an arbitration but that the MFN clause can-not create a right to go to arbitration where none otherwise exists*

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<sup>35</sup> International Law Commission Final Report of the Study Group on the Most-Favoured-Nation Clause, CL-70. Emphasis added by the Tribunal.

<sup>36</sup> Id. Emphasis added by the Tribunal.

<sup>37</sup> *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, CL-68.

<sup>38</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, CL-93.

<sup>39</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, CL-37.

*under the BIT. The argument can be put more generally: the MFN clause stipulates how investors must be treated when they are exercising the rights given to them under the BIT but does not purport to give them any further rights in addition to those given to them under the BIT.*

*The question is, does the MFN clause in question here create new rights where none previously existed? and if not, is the right to have unilateral recourse to arbitration without the 18-month litigation period a distinct, new right or is it rather a matter of the manner in which those who already have a right to arbitrate are treated?*

*In the view of the Tribunal, it cannot be assumed that Argentina and Germany intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the extent of the legal rights of third parties. Non-statutory concessions to third party investors could, in principle, form the basis of a complaint that the MFN obligation has not been secured. In contrast (to take an example comparable to the ILC example concerning commercial treaties and extradition), rights of visa-free entry for the purposes of study, given to nationals of a third State, could not form the basis of such a complaint under the BIT. The MFN clause is not a renvoi to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.<sup>40</sup>*

101. In *EURAM*, the tribunal found that:

*While the present BIT does, of course, contain a provision for investor-State arbitration, the substantive scope of that provision is strictly*

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<sup>40</sup> *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, CL-68, paras. 79 et seq.

*limited. It encompasses disputes regarding Article 5 of the BIT and certain aspects of Article 4 but, as the Tribunal has found in Chapter V(A) of the Award, it excludes disputes regarding other aspects of Article 4 and alleged violations of the other provisions of the BIT. As regards those categories of disputes, there is no offer of arbitration at all. Acceptance of the Claimant's argument would therefore mean that the MFN clause completely transformed the scope of the arbitration provision.*

[...]

*The Tribunal therefore considers that the special character of the provision for investor-State arbitration and the radical nature of the transformation in that provision which acceptance of the Claimant's argument would entail, both militate against attributing to Article 3 of the BIT the effect suggested by the Claimant unless there are clear indications that such was the intention of the States Parties.<sup>41</sup>*

102. In *Plama*, the tribunal noted that:

*[n]owadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.<sup>42</sup>*

[...]

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<sup>41</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, CL-93, paras. 448 and 450.

<sup>42</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, CL-37, para. 198.

*When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto (as in the case of BITs based on the UK Model BIT). This matter can also be viewed as forming part of the nowadays generally accepted principle of the separability (autonomy) of the arbitration clause. Dispute resolution provisions constitute an agreement on their own, usually with interrelated provisions.<sup>43</sup>*

103. In the present case, it is clear that the Contracting Parties' consent to arbitrate expressed in Article 8 of the Treaty is limited. The Contracting Parties explicitly agreed in this provision that they would consent to arbitrate disputes arising out of a certain and limited number of articles of the Treaty. The Tribunal is therefore of the view that, under the Treaty, the Contracting Parties have not provided their consent to arbitrate disputes arising out of any provisions of the Treaty not explicitly mentioned in Article 8.
104. The arbitral jurisprudence cited above confirms that where there is no consent to arbitrate certain disputes under the basic Treaty, an MFN clause cannot be relied upon to create that consent unless the Contracting Parties clearly and explicitly agreed thereto.
105. The Tribunal notes that the 1991 UK model treaty and most treaties concluded by the UK include a third sub-paragraph in Article 3 which reads as follows:

*3(3) For avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.*

106. In the present Treaty, such a paragraph was not included. A review of treaties concluded by the UK shows that, where the scope of the dispute settlement provision is limited, there is

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<sup>43</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, CL-37, para. 212.

no such paragraph. Accordingly, the Tribunal finds that the absence of the “For avoidance of doubt” paragraph in the present Treaty demonstrates the clear intention of the contracting parties to give its full application to Article 8(1). In addition, in the view of the Tribunal, the wording of Article 8(1) is crystal clear and leaves no doubt as to the express limits of the dispute settlement clause. As the *Maffezini* tribunal found, to override the Contracting States consent by virtue of an MFN provision would “*upset the finality of arrangements that many countries deem important as a matter of public policy*”.<sup>44</sup>

107. For the foregoing reasons, the Tribunal is of the view that the scope of Article 8(1) of the Treaty cannot be expanded by virtue of the MFN clause. Accordingly, the Tribunal lacks jurisdiction over the Claimant’s claims under Articles 2(2) and 3 of the Treaty by virtue of the MFN clause and it so finds.
108. Arbitrator Alexandrov takes a different view with respect to some elements of the analysis relating to the application of the MFN clause. He agrees with the underlying premise that “an MFN clause can, *a priori*, apply to dispute settlement” (paragraph 95) and that “where tribunals have declined to apply the MFN clause to dispute settlement, the *ratio decidendi* was either that (i) the MFN clause was invoked to override public policy considerations such as a substitution of the consent to arbitrate where none exists in the basic Treaty, and/or (ii) its scope of application was limited by the wording used in the applicable Treaty” (paragraph 97). He differs from his colleagues on two points. First, he believes that the analysis of the MFN clause here should begin with a textual interpretation of its terms. The clause refers to “treatment” and the first question to be addressed should be whether that term includes dispute settlement. Another question of treaty interpretation that should be addressed relates to the fact that the exceptions to MFN treatment listed in Article 7 do not mention dispute settlement. Second, the presence of the limitations (i) and (ii) referred to in paragraph 97 of the Decision (and quoted above) has not been established in this case. Consent clearly exists in the Treaty; the objection raised by the Respondent relates to the scope of consent rather than to its existence. The Decision draws “a distinction between the application of an MFN clause to a more favourable dispute

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<sup>44</sup> *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, CL-63, para. 63.

resolution provision where the investor has the right to arbitrate under the basic treaty, albeit under less favourable conditions, and the substitution of non-existent consent to arbitration by virtue of an MFN clause” (paragraph 98) yet does not consider the argument that the application of the MFN clause here may relate to expanding the scope of consent rather than to “the substitution of non-existing consent.” Finally, arbitrator Alexandrov believes that a more detailed and in-depth study of the history and evolution of UK BITs is necessary before one can reach the conclusion that the introduction of the “for the avoidance of doubt” language was intended to signal a break with the past rather than continuity. Such a study may show that the intent was the opposite: to make express what was presumed, *i.e.*, that the MFN clause covered dispute settlement. He disagrees with the statement in para. 106 of the Decision that “where the scope of the dispute settlement provision [in the UK BITs] is limited, there is no such [‘for the avoidance of doubt’] paragraph.” This statement suggests that there is a pattern in the UK BITs: where the scope of dispute settlement is limited, there is no “for the avoidance of doubt” paragraph; where it is not, there is such a paragraph. In fact, no such pattern exists – there are multiple UK BITs where the scope of dispute settlement is not limited yet there is no “for the avoidance of doubt” paragraph – and, therefore, the Decision’s conclusion in para. 106 remains unsubstantiated.

## **B. Whether the Claimant is a Foreign Investor**

### **(1) The Parties’ Positions**

#### **a. Respondent’s Position**

109. The Respondent submits that the Claimant is not a foreign investor.

110. Article 1(c)(ii)(bb) of the Treaty defines the term “investor” in respect of the United Kingdom as “*corporations, firms, and associations incorporated or constituted under the law in force in any part of the United Kingdom.*”<sup>45</sup>

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<sup>45</sup> Statement of Defence, para. 71. See Treaty at CL-1.

111. The Respondent accepts that the Claimant is an entity incorporated under the law in force in the United Kingdom. However, the Respondent requests the Tribunal to look beyond this formalistic approach to ascertain whether the Claimant is a foreign investor.<sup>46</sup>

112. According to the Respondent:

*...under customary international law, in particular the law on diplomatic protection, there is a clear exception to the rule on determining the nationality of a company by reference to the place of its incorporation: If there are no substantial links between the place of incorporation and the incorporated company, such as property, an office, substantial business activities or residence of shareholders, policy and fairness dictate that the corporate veil can be pierced.<sup>47</sup>*

113. The Respondent requests the Tribunal to pierce the corporate veil, as was done by several other tribunals,<sup>48</sup> in order to ascertain who owns and controls the Claimant. According to the Respondent, such an exercise will reveal that the Claimant is controlled and owned in majority by Mr. Buchal, a Czech national.<sup>49</sup>

114. In addition, the Respondent submits that the Claimant does not serve any commercial purpose in the UK. According to the Respondent, the Claimant is a shell corporation with no business activities in the United Kingdom whatsoever: “[b]y the Claimant’s own account, it conducts all its business in the Czech Republic [through its Czech subsidiary, *AIYY Czech*].”<sup>50</sup>

115. Accordingly, the Respondent argues that the present dispute is of a purely domestic nature: a Czech businessman is conducting business exclusively in the Czech Republic. As a consequence, avers the Respondent, the Claimant cannot be considered a foreign investor

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<sup>46</sup> Statement of Defence, para. 72.

<sup>47</sup> Respondent’s Skeleton Argument, para. 58.

<sup>48</sup> See, *inter alia*, *Mr. Franz Sedelmayer v. The Russian Federation*, SCC Case, Final Award, 7 July 1998, RL-38. Respondent’s Skeleton Argument, para. 60.

<sup>49</sup> Statement of Defence, paras. 65; 98-113.

<sup>50</sup> Statement of Defence, para. 114.

under the Treaty as this would undermine the very purpose of the Treaty by granting a national of a State access to international arbitration against its own home State.<sup>51</sup>

116. For the foregoing reasons, the Respondent submits that the Claimant does not qualify as a foreign investor under the Treaty and therefore the Tribunal lacks jurisdiction to hear its claims.<sup>52</sup>
117. The Respondent also questions in its Skeleton Argument whether the alleged transfer of business by Mr. Buchal from his company Brailcom incorporated in the Czech Republic to the Claimant took place at a time at which the present dispute was foreseeable.<sup>53</sup> In other words, the Respondent questions the nationality planning of Mr. Buchal in the light of the present dispute.

b. Claimant's Position

118. The Claimant asserts that it meets the criteria of Article 1(c)(ii)(bb) of the Treaty and that those criteria are “*both necessary and sufficient*”<sup>54</sup>:

118.1 The Claimant is a private limited company, incorporated in the UK in August 2012 under the UK Companies Act 2006.<sup>55</sup>

118.2 The Respondent itself has certified that the Claimant is a UK company (in the context of registering the Claimant's Czech branch) long before the dispute arose between the Parties. In 17 October 2012, the Czech Commercial Register - maintained by the Municipal Court in Prague - issued a Statement that A11Y LTD is a “foreign legal entity” and that it is registered under the “Law of England and Wales” by the “Commercial Register in Cardiff in Great Britain under the entry number 8165690.”<sup>56</sup>

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<sup>51</sup> Statement of Defence, paras. 121-122.

<sup>52</sup> Statement of Defence, para. 123.

<sup>53</sup> Respondent's Skeleton Argument, para. 67.

<sup>54</sup> Claimant's Skeleton Argument, para. 39.

<sup>55</sup> Certificate of Incorporation of A11Y LTD, 2 August 2012, C-1.

<sup>56</sup> Extract of the Czech Commercial Registry, 17 October 2012, C-2.

118.3 There is a consistent body of jurisprudence supporting that a place of incorporation test in a treaty (such as exists in Article 1(c)(ii)(bb) of the Treaty) should be upheld in accordance with ordinary principles of treaty interpretation. In particular, the Claimant relies on the decision in *Yukos v. Russia* wherein the tribunal opined that: “[t]he Tribunal knows of no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. [...]”<sup>57</sup>

119. For the foregoing reasons, the Claimant submits that it is a foreign investor.

120. The Claimant also denies that its incorporation in the UK on 2 August 2012 was done in bad faith.<sup>58</sup>

## (2) The Tribunal’s Analysis

121. Article 1(c)(ii)(bb) of the Treaty defines the term “investor” in respect of the United Kingdom as “corporations, firms, and associations incorporated or constituted under the law in force in any part of the United Kingdom.”<sup>59</sup>

122. The Tribunal notes that the Respondent agrees that the Claimant fulfils the formal requirement stipulated in Article 1(c)(ii)(bb) of the Treaty for being an investor.<sup>60</sup>

123. The Tribunal recalls that the Claimant submitted at the hearing that under the Treaty, “[t]he test is an incorporation test, the Claimant meets it. That is and should be the beginning and the end of the analysis”.<sup>61</sup> The Tribunal agrees.

124. The Tribunal is of the view that the ordinary meaning of Article 1(c)(ii)(bb) of the Treaty clearly sets an incorporation test in respect of which investors should be protected under the Treaty rather than a test relating to economic control or otherwise.

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<sup>57</sup> *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, CL-36, ¶ 415.

<sup>58</sup> Claimant’s Skeleton Argument, paras 50-52.

<sup>59</sup> Treaty, CL-1.

<sup>60</sup> Statement of Defence, para. 75.

<sup>61</sup> Tr. Day 1/111/20-22.

125. Where a Treaty provides for an incorporation test, arbitral tribunals have consistently upheld such test. Even the Respondent, in its opening submissions during the hearing, recognized this: “*I can state from the outset that I am aware, fully aware, that there are cases that have been decided on very similar facts and that have been decided in claimant’s favour.*”<sup>62</sup>
126. In this respect, the Tribunal refers to and adopts the tribunal’s reasoning in *Saluka v Czech Republic*:

*The parties had complete freedom of choice in this matter, and they chose to limit entitled 'investors' to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the tribunal to add other requirements which the parties could themselves have added but which they omitted to add.*<sup>63</sup>

127. In view of the above, the Tribunal finds that the Claimant meets the definition of investor under the Treaty and is therefore protected under the Treaty.
128. The Respondent also advanced an alternative “bad faith” argument. It submitted the following at the hearing:

*[...] It is undisputed that Claimant was incorporated in August 2012, but at that point in time, and I believe that is also undisputed, it was simply an English company. It had no links whatsoever to the Czech Republic. It had also not made an investment at that point in time in the Czech Republic.*

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<sup>62</sup> Tr Day 1/30/24-25 – Tr Day 1/31/1-2.

<sup>63</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, CL-24, para. 241.

*There is a rule established in particular by the Tribunal of Phoenix v Czech Republic that if you transfer your investment to a foreign company at a point in time in which a dispute is either in full swing or is at least foreseeable, then that is an act of nationality planning and precludes a claimant investor from invoking claims against the host state.*<sup>64</sup>

129. The Tribunal notes that it is undisputed between the Parties that the Claimant was incorporated in August 2012<sup>65</sup> and that, on the Respondent's case, the dispute between the Parties became foreseeable by July 2013.<sup>66</sup>
130. The Tribunal is therefore of the view that the timing of the Claimant's incorporation could not have been done in bad faith since, on the Respondent's own case, there was no pre-existing or foreseeable dispute between the Parties in 2012.
131. Accordingly, the Tribunal rejects the Respondent's bad faith argument.
132. Whether the Claimant, at the time of its incorporation, had made an investment in the Czech Republic is a separate argument. The Tribunal recalls that, in its Procedural Order No. 2, it decided to join this jurisdictional objection to the merits as it is clearly intertwined with the merits. The Tribunal will thus decide this objection in the merits phase of this case.

## **C. The Cooling-Off Period**

### **(1) The Parties' Positions**

#### **a. Respondent's Position**

133. The Respondent submits that the Tribunal lacks jurisdiction over all of the Claimant's claims since the Claimant failed to adhere to the cooling-off period:

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<sup>64</sup> Tr Day 1/37/9-21.

<sup>65</sup> Tr Day 1/37/9-10; Tr Day 1/123/16-18; C-1.

<sup>66</sup> Tr Day 1/38/16-17.

*Article 8(1) stipulates that Claimant has to notify Respondent of a dispute under article 2(3), 4, 5 and 6 of the BIT and is only entitled to initiate arbitration of these disputes after a cooling-off period of four months.*

*In the present case, such notification was never made. On 10 October 2014 a dispute was notified to Respondent. However, this notification alleged one single breach of the BIT, namely a breach of article 2(2). Hence, there never was a valid notification of any dispute under one of the provisions listed in article 8(1).<sup>67</sup>*

134. The Respondent argues that the compliance which such notification periods has been considered by a number of tribunals as a jurisdictional requirement.<sup>68</sup> It relies, *inter alia*, on the tribunal's decision in *Murphy Exploration v Ecuador*:

*[...] the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, "a procedural rule" or a "directory and procedural" rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.<sup>69</sup>*

135. For the foregoing reasons, the Respondent submits that the Tribunal lacks jurisdiction.

b. Claimant's Position

136. The Claimant denies that it failed to adhere to the cooling-off period of four months:

*Article 8(1) of the BIT provides for the submission of disputes to arbitration four months after written notification of a claim. The Respondent neglects to mention that the Claimant notified the*

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<sup>67</sup> Respondent's Skeleton Argument, paras. 71-72.

<sup>68</sup> Respondent's Reply on Jurisdiction, para. 198.

<sup>69</sup> *Murphy Exploration and Production Company International v. Republic of Ecuador*, Award on Jurisdiction, 15 December 2010, RL-109, para. 149 .

*Respondent of a claim by serving a Notice of Dispute on the Respondent on 30 May 2014, which sets out the factual background of the dispute and sought the resolution of the dispute “in an amicable manner”. The subject line of the Notice of Dispute letter was “Notification about existence of dispute on the basis of article 8 of Czech-British Agreement for the Promotion and Protection of Investments.” There cannot therefore be any serious doubt that the Claimant notified the Respondent of a claim under Article 8 of the UK-Czech Republic BIT and sought to resolve the dispute amicably.*

*Nor is the Respondent correct to argue that “the parties have not entered into amicable settlement negotiations.” For example, the Claimant met with the Ministry of Finance of the Czech Republic in July 2014 (after the Claimant’s Notice of Dispute letter of 30 May 2014 and before the Claimant’s Notice of Arbitration of 10 October 2014) to seek to resolve the dispute amicably. However, the Ministry of Finance communicated that “at this time” it would not accept the Claimants proposal for amicable settlement.*

*The Respondent appears to consider that the Claimant was obliged to notify the Respondent of all legal arguments relating to its claim. This is incorrect. [...] As the Tribunal in *Burlington v Ecuador* (which the Respondent cites) noted, a notice of dispute letter “does not require the investor to spell out its legal case in detail during the negotiation process” and “does not even require the investor to invoke specific Treaty provisions at that stage.”<sup>70</sup>*

137. For the foregoing reasons, the Claimant submits that the Tribunal has jurisdiction.

## **(2) The Tribunal’s Analysis**

138. Article 8(1) of the Treaty provides as follows:

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<sup>70</sup> Claimant’s Skeleton Argument, paras 79-81. See *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case ARB/08/5, Decision on Jurisdiction, 2 June 2010, RL-110, ¶ 338.

*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. (Tribunal's emphasis.)*

139. The Tribunal considers that the four-month cooling off requirement of Article 8(1) of the Treaty must be satisfied before an investor is entitled to initiate an arbitration.

140. In the present case, the record reveals the following.

141. On 30 May 2014, the Claimant wrote to the Respondent as follows:

*Subject: **Notification about existence of dispute on the basis of article 8 of Czech-British Agreement for the Promotion and Protection of Investments***

*[...]*

*13. Both of the above mentioned acts of the Ministry undoubtedly constitute a breach of the fair and equitable treatment standard contained in Article 2(2) of the Treaty.*

*14. In accordance with Article 8(1) of the Treaty, I am hereby commencing negotiations about amicable resolution of the dispute between AIIY and Czech Republic. [...]*

*15. At the same time, I reserve the right to provide supplementary facts on which AIIY is basing its international legal claims, and to do so especially in the case of the Czech Republic's failure to provide for a swift remedy to the illegal state that is harming AIIY. Under the same conditions, I reserve the right to invoke breaches of other standards contained in the Treaty.*

16. Finally, please take into account that upon the delivery of this notification the four-month period for amicable resolution of the dispute defined in Article 8(1) of the Treaty commences to run. If this period elapses to no avail, AIIY is prepared to commence an investment arbitration pursuant to the same article of the Treaty. However, I hope that the investment arbitration will not be necessary and that we will solve this dispute in an amicable manner.<sup>71</sup>

142. In his witness statement, Mr. Buchal states the following:

130. We did not make an agreement, so finally the notification of the dispute occurred on May 30, 2014. I still believed in an amicable settlement. I believed that what the “agreement on promotion and protection of investments” orders, that is the 4 month period for finding an amicable settlement, is possible. Therefore I visited with Mr. Sekanina in July 2014 Ministry of finance of the Czech Republic, specifically the director of Section 02- Legal, Mr. Mgr. et Mgr. Petr Horacek and the then-chief of the standalone division of international investments Ms. Mgr. Marie Talasova, LL.M. and again I hoped, I believed in amicable settlement. Mr. Horacek asked me if we could produce more evidence, that I surely understand that they cannot make a decision to pay any amount from the state budget without thorough documentation. I of course gladly admitted that and so within 14 days, we prepared a file of evidence about illegal passing of know-how damaging good name and illegitimate refusal of margin. We presented the file and I believed in honest and just dealing.

131. The answer was however not coming. So we urged it several times, several times it was promised to us and again postponed, that they will respond and will again meet with us. They did not meet by only answered: “After having studied all documents submitted by you I am respectfully informing you by this letter that the Ministry of Finance at

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<sup>71</sup> Notice of Dispute of AIIY LTD, 30 May 2014, C-73.

*this time will not accept the proposal of your client for settlement.*<sup>72</sup>  
(Tribunal's emphasis)

143. On 10 October 2014, more than four months after its notification, the Claimant filed its Notice of Arbitration. The relevant excerpts of the Notice of Arbitration are reproduced below:

[...]

*53. The Claimant submits that, as a result of the measures described in Section III above, the Czech Republic has failed to provide fair and equitable treatment to the Claimant's investment and has interfered, by unreasonable and discriminatory measures, with the operation thereof.*

[...]

*59. The Claimant bases its Notice of Arbitration on Article 8 of the Treaty. In relevant part, Article 8 provides: [...]*

[...]

*61. The period of four months, earmarked by Article 8(1) of the Treaty for the parties to try to reach amicable settlement, expired without success on September 30, 2014.*<sup>73</sup>

144. At the hearing, Mr. Buchal testified that other meetings concerning the dispute had taken place with the Ministry of Finance of the Czech Republic in June 2015 when the present proceedings were pending but to no avail.<sup>74</sup>
145. According to the Respondent, Article 8(1) of the Treaty requires that disputes concerning an obligation under Articles 2(3), 4, 5 and 6 must be notified by the investor to the State. If

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<sup>72</sup> Witness Statement of Mr Jan Buchal, paras. 130-131.

<sup>73</sup> Notice of Arbitration, 10 October 2014, R-39.

<sup>74</sup> Tr. Day 2/12/11-24.

no amicable settlement is reached after four months, then, and only then can an arbitration be initiated avers the Respondent.

146. In the present case, the Respondent argues that the Claimant never notified it of a dispute under any one of these articles. In fact, the Notice of Arbitration of 10 October only notified the Respondent of a dispute under Article 2(2). Accordingly, the Claimant never triggered the cooling-off period of Article 8(1).
147. The Claimant submits that it complied with the cooling-off period. Its Notice of Dispute dated 30 May 2014 states that it was made “*on the basis of article 8 of the [BIT]*”, that “*upon the delivery of this notification, the four-month period for amicable resolution of dispute defined in Article 8(1) of the Treaty commences to run*”, and that it “*reserve[s] the right to invoke breaches of other standards contained in the Treaty*”.<sup>75</sup>
148. Without making any finding as to (i) the validity of the Claimant’s notice of 30 May 2014 pursuant to Article 8(1) of the Treaty or (ii) the characterization of this issue as one of jurisdiction or admissibility or procedure, the Tribunal is of the view that, as of the date of the Notice of Dispute, the Respondent was clearly aware of the existence of a dispute, the facts from which it arose, the legal basis of the dispute (to wit the Treaty) and an estimate of the damages sought. On the basis of this notice, the Parties met in July 2014 and in June 2015 in an attempt to resolve the dispute amicably. The Parties were unable to reach a settlement.
149. In light of the above, the Tribunal considers that it would be futile to decline jurisdiction over the present arbitration in order to allow the Parties to engage in further attempts to reach an amicable settlement.
150. As Christoph Schreuer writes:

*There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature,*

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<sup>75</sup>Notice of Dispute of A11Y LTD, 30 May 2014, C-73.

*compelling the claimant to start the proceedings anew would be a highly uneconomical solution.*<sup>76</sup>

151. Accordingly, the Tribunal denies the Respondent's objection to its jurisdiction on the basis that the Claimant failed to adhere to the cooling-off period.

#### **D. Whether the Treaty is superseded by EU law**

##### **(1) The Parties' Positions**

###### **a. Respondent's Position**

152. The Respondent submits that EU law has superseded the Treaty as of the date of accession of the Czech Republic to the European Union on 1 May 2004. In other words, submits the Respondent, the Treaty is no longer in force between the Contracting States since 1 May 2004. Hence, argues the Respondent, the Claimant is precluded from invoking the Treaty's standards and, in particular, its dispute resolution clause.

153. The Respondent quotes Article 59 of the VCLT in support of its argument: “[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 latter 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.”

154. Alternatively, should the Tribunal find that the Treaty is not terminated by virtue of Article 59 of the VCLT, the Respondent relies on Article 30(3) of the VCLT in support of its following argument: “[A]rticle 30 provides that certain individual provisions of a treaty can be derogated by a later treaty if they relate to the same subject-matter. In that case, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treat.”

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<sup>76</sup> Christoph Schreuer, Ch. 21 Consent to Arbitration, Peter Muchlinski (ed.) and others, *The Oxford Handbook of International Investment Law*, 1<sup>st</sup> ed, Oxford University Press 2008, CL-137, p. 846.

155. According to the Respondent, various provisions of EU law have the same subject-matter as those of the Treaty:

*Article 2(1) of the Czech-UK BIT provides for the promotion and admission of investments from investors of the other contracting state. Corresponding to that article 49 TFEU et seq. states the right of establishment. Additionally article 16(2) Charter of Fundamental Rights recognizes the freedom to conduct a business in accordance with Community law and national laws and practices. Likewise to article 2(1) of the BIT, these provisions of the TFEU clearly create favourable conditions for investors of other EU member states.*

*Article 2(2) of the Czech-UK BIT requires a fair and equitable treatment standard as well as the prohibition of unreasonable or discriminatory measures. Also article 3 of the BIT states that investments or returns of investors of the other contracting party shall not be treated less favourable than investments or returns of domestic investors. Very similarly, EU law in general prohibits any discrimination between EU member states in article 18 TFEU.*

*Article 5 of the BIT prohibits expropriations, except for very limited reasons and only against compensation. Likewise, article 17 Charter of Fundamental Rights clearly states that no one may be deprived of his or her possessions. This rule explicitly and as well general principles of EU Law prohibit expropriations without the payment of compensation.*

*Article 6 of the Czech-UK BIT states the guarantee to investors of the other state to transfer their investments and returns, without restrictions. Equally, article 63 TFEU et seq. provides that all restrictions on the movement of capital between member states shall be prohibited.<sup>77</sup>*

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<sup>77</sup> Respondent's Skeleton Argument, paras. 85-88.

156. Accordingly, argues the Respondent, the Treaty should be considered terminated under Article 59 of the VCLT, or the provisions of the Treaty listed above no longer apply pursuant to Article 30 of the VCLT, since the Treaty's provisions are incompatible with those of EU law.<sup>78</sup>
157. In particular, avers the Respondent, "*the dispute resolution clause in Art 8 of the BIT is incompatible with the later concluded EU treaties, since it infringes both Art 18 TFEU and Art 344 TFEU.*"<sup>79</sup>
158. The Respondent argues that Article 18 of the TFEU prohibits discrimination between nationals of member states based on their nationality. The Treaty in the present case provides the right to arbitration to certain investors, but not to investors from other member states.<sup>80</sup>
159. Article 344 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.*

160. The Respondent avers that "*the General Court explicitly ruled that out-of-court methods for settling disputes provided for in agreements [such as arbitration as provided for in Article 8 of the Treaty] are no longer applicable as of the contracting state's accession to the Union if the subject matter is regulated by EU law.*"<sup>81</sup>
161. Consequently, argues the Respondent, the entire Treaty or, in the alternative, at least Article 8 of the Treaty, is incompatible with the EU Treaties. As a result, avers the Respondent, the Treaty and in particular its dispute resolution clause are superseded by EU

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<sup>78</sup> Respondent's Skeleton Argument, para. 91.

<sup>79</sup> Respondent's Skeleton Argument, para. 92.

<sup>80</sup> Respondent's Skeleton Argument, para. 93.

<sup>81</sup> Respondent's Skeleton Argument, para. 96. See Judgment of the General Court (Third Chamber), 15.4.2011, T-465/08 (Czech Republic v. Commission), RL-118, para. 102 .

law and the Claimant is therefore precluded from invoking the substantial standards and the dispute resolution clause of the Treaty.<sup>82</sup>

162. Alternatively, the Respondent submits that the Treaty was impliedly terminated by the United Kingdom and the Czech Republic upon the latter's accession to the EU:

*In view of the ECJ's repeated emphasis on the precedence of the EU Treaties over other agreements between member states,<sup>83</sup> and the member states' apparent agreement with such interpretation, it is difficult to argue that a BIT provision incompatible with EU law should nevertheless apply. Thus, as far as the Czech Republic is concerned, its termination of the UK-Czech BIT should be implied from its accession to the European Union also by virtue of EU Law.<sup>84</sup>*

163. In view of the above, the Respondent submits that the Tribunal lacks jurisdiction.

b. Claimant's Position

164. At the outset, the Claimant notes the following:

164.1 the Respondent “*does not contest that the UK and Czech Republic have confirmed that the BIT remains in force, or that it and the UK have taken no steps under Article 14 to terminate the BIT*”<sup>85</sup>; and

164.2 the objection regarding intra-EU BITs has failed in numerous past cases.<sup>86</sup>

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<sup>82</sup> Respondent's Skeleton Argument, para. 98.

<sup>83</sup> ECJ, 27.9.1988, C-235/87 (*Matteucci v. Belgium*) para 22, RL-124; ECJ, 27.2.1962, C-10/61 (Commission v Italy), RL-123.

<sup>84</sup> Respondent's Skeleton Argument, para. 100.

<sup>85</sup> Claimant's Skeleton Argument, para. 55. See: List of Current Bilateral Treaties from the Ministry of Finance of the Czech Government Website, <http://www.mfcr.cz/en/themes/trade-defence> [accessed on 11 January 2016], C-61; Email from Treaty Enquiry Service of the Foreign and Commonwealth Office of the UK Government to Mr. Boris Dusek of A11Y LTD, 25 November 2015, [with English translation] (C-62).

<sup>86</sup> Claimant's Skeleton Argument, para. 56. See *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction, 6 June 2016, CL-130, ¶ 89: “*the Tribunal underlines that in all published or known investment treaty cases in which the intra-EU objection has been invoked by the Respondent, it has been rejected.*”

165. Nevertheless, the Claimant submits that, according to the VCLT, the termination of the Treaty pursuant to Article 59 can only be done by having recourse to the procedure set out in Article 65 of the VCLT which provides as follows:

*Article 65*

*Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty*

*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....*

166. Since the Respondent did not comply with Article 65, the Claimant submits that the Tribunal should dismiss the Respondent's objection based on Article 59 of the VCLT.

167. In any event, argues the Claimant, Article 59 can only terminate a treaty if the subsequent treaty concerns the same subject matter. In the present case, avers the Claimant, the Treaty and the TFEU (or EU law or the Charter) do not cover the same subject matter.<sup>87</sup>

168. The Claimant submits that the Respondent's objection on the basis of Article 30(3) of the VCLT should also be dismissed since there is no substantive contradiction between Article 8 of the Treaty and Articles 18 and 344 of the TFEU.<sup>88</sup>

169. For the foregoing reasons, the Claimant submits that the Tribunal has jurisdiction.

## **(2) The Tribunal's Analysis**

170. The Tribunal must decide whether the Czech Republic's accession to the EU means that EU law has superseded the Treaty which is thus no longer in force.

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<sup>87</sup> Claimant's Skeleton Argument, para. 61.

<sup>88</sup> Claimant's Skeleton Argument, para. 77.

171. Investment treaty tribunals have consistently held that EU treaties do not supersede intra-EU BITs. Accordingly, for sake of procedural economy, the Tribunal will limit its analysis to the following.
172. Firstly, investment treaty tribunals have held that no common intention appears from the EU treaties or accession to the EU to terminate intra-EU BITs. In this respect, the Tribunal refers to and adopts *mutatis mutandis* the tribunals' reasoning in the following decisions: *Micula v Romania*, *Eastern Sugar v The Czech Republic*, *Eureko v The Slovak Republic*, *Oostergefel v The Slovak Republic* and *EURAM v The Slovak Republic*.<sup>89</sup>
173. The Tribunal in *EURAM v The Slovak Republic* stated, for instance:

*The Tribunal is not convinced by the Respondent's argument that, by its very nature, the ECT demonstrated an implied intent to terminate the BITs between Members and non-Members of the EU that were transformed into intra-EU BITs by the accession of Slovakia to the EU. The Tribunal considers that nothing in the EU Treaties gives such an indication of intent, rather to the contrary. As rightly emphasised by the Claimant, "nowhere does the Accession Treaty say that ... the] Accession Treaty and EU law 'govern the matter' of bilateral investment treaty protection with its protection standards and enforcement mechanisms. The Accession Treaty and the European Treaties do also not say anything about investment protection for investors of one EU Member State in another Member State."*

174. Secondly, the evidence reveals that the Czech Republic and the UK both consider that the Treaty is in force. Exhibit C-61 is a five-page document printed from the website of the Ministry of Finance of the Czech Republic on 11 January 2016 which lists the bilateral

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<sup>89</sup> *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmili S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, RL-68, para. 321; *Eastern Sugar BV v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, RL-44, para. 167; *A Achmea BV v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko BV v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, RL-43, paras. 244-252; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, CL-94, paras. 80-85; *European American Investment Bank AG (Austria) v. The Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, CL-93, paras. 186-210.

treaties concluded by the Czech Republic. It is recorded that the one concluded with the UK is currently in force. Counsel for the Claimant represented to the Tribunal that this document remains unchanged as of the date of the hearing. Similarly, Exhibit C-62 is an e-mail from the Treaty Public Enquiries Department of the Foreign and Commonwealth Office to a representative of the Claimant dated 25 November 2015 which says “[i]n accordance with our records, the [Treaty] has not been terminated.”

175. In addition, neither Contracting State has taken the steps under Article 14 of the Treaty to terminate it.
176. Accordingly, the Tribunal finds that the Treaty is still in force.
177. Thirdly, in respect of the Respondent’s argument in relation to Article 59 of the VCLT, that “[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) [i]t appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) [t]he 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”, the Tribunal notes that investment treaty tribunals have consistently found that BITs and EU treaties do not relate to the same subject-matter and that there is no incompatibility between the provisions of the EU treaties and BITs. In this respect, the Tribunal refers to and adopts *mutatis mutandis* the tribunals’ reasoning in the following decisions: *Binder v The Czech Republic*, *Eastern Sugar v The Czech Republic*, *Eureko v The Slovak Republic*, *Oostergetel v The Slovak Republic*, and *EURAM v The Slovak Republic*.<sup>90</sup>
178. Accordingly, the Tribunal rejects the Respondent’s objection to the Tribunal’s jurisdiction on the basis that EU law has superseded the Treaty and is no longer in force.

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<sup>90</sup> *Mr. Binder v. The Czech Republic*, UNCITRAL, Award on Jurisdiction, 6 June 2007, CL-39, paras- 63 - 65; *Eastern Sugar BV (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, RL-44, paras. 158-166 and 168 -171; *A Achmea BV v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko BV v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, RL-43, paras. 239-242, 245-263, 273-277 (in relation to Art. 30 VCLT); *Mr. Jan Oostergetel and Mrs. Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, CL-94, paras. 72-79, 86-87, 104 (in relation to Art 30 VCLT); *European American Investment Bank AG (Austria) v. The Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, CL-93, paras. 155-185, 213-234, 268-278 (in relation to Art 30 VCLT).

## V. COSTS

179. The parties simultaneously filed submissions on costs on 21 October 2016.
180. The Claimant requests that the Tribunal rule on the costs of this bifurcated phase in its decision on jurisdiction and order the Respondent to pay the Claimant the costs of the arbitration in the amount of GBP 137,123.44 as well as the Claimant's costs for legal representation and assistance in the amount of GBP 665,981.16, for a total of GBP 803,104.60 in arbitration and legal costs.
181. The Respondent requests that the Tribunal order the Claimant to reimburse the Respondent the amount of USD 200,000 as reimbursement of advance payments in respect of the Tribunal's fees; and the amount of CZK 6, 351,778.84 for legal fees and other expenses by the Respondent in connection with these proceedings.
182. By letter dated 27 October 2016, the Respondent submitted that a decision on costs in an interim decision would be premature. It argued *inter alia* that:

*[...] at the current stage of the proceedings, it is not possible to determine which of the parties will ultimately be successful in the present proceedings. Even if the Arbitral Tribunal should affirm its jurisdiction, there is no indication that Claimant will ultimately be successful in the proceedings; it has merely overcome one set of Respondent's arguments. If jurisdiction is assumed over Claimant's claim for expropriation, Claimant has not even been fully successful in the jurisdictional phase. Respondent, however, considers a decision on costs to be premature while only some of its arguments and objections have been decided on, but the outcome of the case remains open.*

183. Article 40 of the 1976 UNCITRAL Rules provides that:

*Article 40*

*1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*

*2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*

*[...]*

184. According to Article 40 of the 1976 UNCITRAL Rules, the applicable principle is that the unsuccessful party pays the costs of the successful party unless the tribunal considers that apportionment is reasonable, taking into account the circumstances of the case.
185. Without making a determination of whether apportionment would be reasonable in the present case, the Tribunal is of the view that, in the circumstances of this case, it would be premature at this stage to issue any decision with respect to costs.
186. Consequently, costs relating to the bifurcated jurisdictional phase of these proceedings will be considered and allocated at the conclusion of the merits phase of this arbitration.

## VI. DECISION

187. For the foregoing reasons, the Tribunal decides:

- (1) To uphold the Respondent's jurisdictional objection based on the scope of application of Article 8(1) of the Treaty. Accordingly,
  - (a) the Tribunal has no jurisdiction over the Claimant's claims pursuant to Articles 2(2) and 3 of the Treaty;
  - (b) the Tribunal has jurisdiction over the Claimant's claims made under Articles 2(3) and 5 of the Treaty;
- (2) To deny the Claimant's request for relief for a "*declaration that the Czech Republic has breached Article 2(3) of the Treaty by failing to observe the provisions of the Treaty set out in sub-clauses (a) to (d) above*" for the reasons set out in paragraph 91 above;
- (3) To reject the Respondent's jurisdictional objection that the Claimant is not a foreign investor;
- (4) To reject the Respondent's jurisdictional objection that the Claimant failed to adhere to the cooling-off period;
- (5) To reject the Respondent's jurisdictional objection that the Treaty is superseded by EU law;
- (6) To defer its decision on costs related to this phase of the arbitration until the Tribunal's Final Award.

188. After consultation with both Parties a procedural order will be issued regarding the further procedure.

Place of Arbitration: Paris, France

Date: 9 February 2017

[signed]

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Dr. Stanimir Alexandrov  
Arbitrator

[signed]

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Ms. Anne Joubin-Bret  
Arbitrator

[signed]

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The Hon. L. Yves Fortier, PC, CC, OQ, QC  
President