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ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 15019/JHN/GZ

CESKOSLOVENSKA OBCHODNI BANKA, A.S.

(Czech Republic)

vs/

CZECH REPUBLIC - MINISTRY OF FINANCE

(Czech Republic)

This document is an original of the Final Award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.

**International Court of Arbitration
International Chamber of Commerce
Ref No. 15019 | JHN | GZ**

Final Award

of December 20, 2010

in the Arbitration between

Ceskoslovenska Obchodni Banka, A.S. (Czech Republic)

Claimant

and

Czech Republic – Ministry of Finance (Czech Republic)

Respondent | Counterclaimant

together the Parties

before the Arbitral Tribunal composed of

Dr. Markus Wirth, Zurich, Switzerland, Chairman of the Arbitral Tribunal
Prof. Dr. Karl-Heinz Böckstiegel, Bergisch-Gladbach, Germany
Dr. Marc Blessing, Zurich, Switzerland

Place of Arbitration: Vienna, Austria

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LIST OF ABBREVIATIONS AND DEFINED TERMS

Amendment 1	Amendment 1 to the Agreement and State Guarantee of June 19, 2000 (ASG), dated August 31, 2001.
ASG	Agreement and State Guarantee entered into between the Czech Republic, acting through the Ministry of Finance, and Československá obchodní banka, a.s., dated June 19, 2000 and amended on August 31, 2001
Assignment Agreements	Two agreements between Claimant and CKA concluded on February 28, 2002 whereby Claimant assigned J. Ring receivables to CKA, <i>i.e.</i> , Agreement on Assignment No. IPB1001312 and Agreement on Assignment No. IPB1001912, as amended by Amendment 1 dated January 7, 2003
Aval Agreements	Agreement on Assumption of Aval No. 1080-042-97 dated May 23, 1997 and Agreement on Assumption of Aval No. 1080-063-97 dated July 21, 1997 between IPB and J. Ring
Civil Code	Czech Act No. 40/1964. Coll., as amended
CKA	Česká Konsolidační agentura, as of September 1, 2001 the successor of Konsolidační banka s.p.u., as of December 31, 2007 dissolved, Respondent becoming its legal successor
Claimant or CSOB	Československá obchodní banka, a.s
CNB	Česká Národní Banka, the Czech banking regulatory authority
Commercial Code	Czech Act No. 513/1991 Coll., Commercial Code, as amended
CPHB	Claimant's Post-Hearing Brief dated July 15, 2010
CSC	Claimant's Statement of Costs dated August 16, 2010
Declaration on Compensation	Declaration on Compensation for a Guarantee entered into between Claimant and Respondent on June 19, 2000 and amended on July 27, 2000

EC	European Commission
EC Decision	Decision of the European Commission CZ 46/2003 dated July 14, 2004
EC Group	The Czech company EC Group, a.s.
ECT	Treaty establishing the European Community
Final NAV	Final net asset value reflected in Final NAV Statement
Final NAV Statement	Final net asset value Statement dated September 17, 2003
First draft NAV Statement	First draft of the net asset value Statement prepared by Claimant and Arthur Andersen on October 18, 2000
Framework Agreement	Framework Agreement on Assignment Agreements No. IPB 1000112R between Claimant and CKA dated February 23, 2002
Hearing	Evidentiary Hearing held in Prague, Czech Republic on May 3-May 8, 2010
IAS	International Accounting Standards
IAS value	Value of assets and liabilities of IPB's enterprise in consistence with Claimant's accounting policies used in the preparation of Claimant's audited consolidated financial statements prepared under IAS as of December 31, 1999
ICC	International Chamber of Commerce
ICC Court	ICC International Court of Arbitration
ICC Rules	Rules of Arbitration of the International Court of Arbitration of the ICC in force as of January 1, 1998
Indemnity Agreement	Agreement and Indemnity entered into between Česká Narodni Banka (CNB) and Československá obchodní banka, a.s. (CSOB), dated June 19, 2000
Interim NAV Statement	Net asset value statement prepared by Claimant and audited by the report of the Original Auditors dated June 12, 2001
IPB	The Czech bank, Investiční a poštovní banka, a.s.

IPB's Enterprise	IPB's enterprise was understood to be the aggregate of the tangible, personal and intangible components of the ongoing business of IPB at the time of the transfer. All goods, rights and other property values of IPB at a given time belonged to IPB's enterprise. Under the Agreement on the Sale of IPB's enterprise, and by virtue of Czech law, the purchaser of IPB's enterprise (Claimant) became the universal successor of all the rights, obligations and commitments that were part of the IPB enterprise at the time of its transfer
IPBGH	The Czech Company IPB Group Holding, a.s.
Item	Thing, receivable or other right or financially assessable property value or obligation pertaining to the IPB's enterprise as of June 19, 2000, 7:00 AM. (Article 1.1 Restructuring Agreement)
White Items	Items to be retained by Claimant at their adjusted values as at 7:00 AM on June 19, 2000 based on IAS
Black Items	Items to be transferred to CKA by February 28, 2002 or by deadlines agreed between Claimant and CKA
Other Items	Items for which the legal regime and legal form of the transfer from Claimant to CKA could not be determined at August 31, 2001
J. Ring	J. Ring, a.s.
J. Ring Promissory Notes	48 promissory notes issued by J. Ring and avalized by IPB
J. Ring Receivables	Claimant's recourse receivables against J. Ring arising from payment of Promissory Notes
KoB	Konsolidační banka Praha, s.p.u., a special purpose vehicle set up by the State for the purposes of working out bad and doubtful assets; as of September 1, 2001, KoB ceased to exist and CKA became its legal successor
MoF	Czech Republic – Ministry of Finance
NAV	Net Asset Value
NAV Statement	Statement listing all of IPB Enterprises' assets, liabilities and off-balance sheet items as of 7:00

	AM on June 19, 2000
OPC	Úřad pro ochranu hospodářské soutěže, Czech Office for Protection of Economic Competition
OPC Decision	Decision of the Office for Protection of Economic Competition No. VP/S 61/01-160 dated December 15, 2003
Parties	Claimant and Respondent
PRIBOR	Prague Interbank Offered Rate
Rejoinder	Respondents' Rejoinder and Reply to Defense to Counterclaim dated September 30, 2009
Rejoinder to Counterclaim	Claimant's Statement of Rejoinder (to the Reply to the Defense to the Counterclaim) dated November 30, 2009
Reply	Claimant's Reply and Defense to Counterclaim dated June 18, 2009
Reply to New Evidence	Respondent's Reply to New Evidence dated January 11, 2010
Respondent or MoF	The Czech Republic – Ministry of Finance
Restructuring Agreement or ARP	Agreement on Restructuring Plan entered into between Československá obchodní banka, a.s. (CSOB), Konsolidační banka Praha, s.p.u. (KoB), and the Czech Ministry of Finance (MoF), dated August 31, 2001.
RFA	Claimant's Request for Arbitration dated June 13, 2007
RPHB	Respondents' Post Hearing Brief dated July 15, 2010
RSC	Respondent's Statement of Costs dated August 16, 2010
Sale Agreement	Agreement on the Sale of Enterprise entered into between Investiční a poštovní banka, a.s. (IPB) and Československá obchodní banka, a.s. (CSOB), dated June 19, 2000
SoC	Claimant's Statement of Claim dated August 29, 2008
SoDC	Respondents' Statement of Defense and Counterclaim dated December 1, 2008

Standard Agreement	Standard Agreement on transfer of avalist's rights
State Aid Act	Czech Act No. 59/2000 Coll. on State aid, as amended
Tr.	Hearing Transcript
WS	Witness Statement
WT	Witness Testimony
Zero NAV Principle	Zero Net Asset Value Principle: principle underlying the acquisition of IPB by CSOB. The difference between IPB's total assets and IPB's total liabilities as at 19 June 2000, 7:00 AM was to be equal to zero.

I. Introduction

A. The Parties

1. Claimant

- 1 Ceskoslovenska obchodni banka, a.s. (**CSOB or Claimant**) is a corporation organized under the laws of the Czech Republic, with its principal place of business at Radlicka 333/150, 150 57 Prague 5, Czech Republic.
- 2 CSOB is represented in the present proceedings by its duly authorized counsel:

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2. Respondent

- 3 The Czech Republic – Ministry of Finance (**the MoF or Respondent**) with its registered address at Letenská 15, 118 10 Prague 1, Czech Republic.
- 4 The Czech Republic is represented in these proceedings by its duly authorized counsel:

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B. Summary of the Dispute

- 5 The present dispute arises out of the Agreement and State Guarantee between the Czech Republic, acting through the Ministry of Finance, and Ceskoslovenska obchodni banka, a.s., dated June 19, 2000 and amended on August 31, 2001 (the **ASG**). The ASG was one of three key agreements entered into by Claimant on June 19, 2000 in connection with its purchase of the enterprise of Investicni a postovni banka, a.s. (**IPB's Enterprise**), a major Czech bank that was facing significant financial difficulties and had been placed in forced administration. In addition to the ASG, Claimant entered into the Agreement on Sale of Enterprise with IPB (the **Sale Agreement**) and the Agreement and Indemnity with Ceska Narodni Banka (**CNB**), the Czech bank regulatory authority (the **Indemnity Agreement**).
- 6 The purpose of the ASG was to ensure that IPB's Enterprise had zero net asset value as at the transfer to the Claimant, *i.e.* that the real value of its assets equaled the real value of its liabilities.
- 7 On August 31, 2001, the Parties entered into Amendment 1 to the ASG (**Amendment 1**). In addition, also on August 31, 2001, the Parties and Ceska Konsolidační agentura (**CKA**) – formerly Konsolidační banka Praha, s.p.u. (**KoB**) –, a state owned consolidation agency that facilitated the restructuring of the Czech economy through, *inter alia*, the acquisition of bad receivables, entered into the Agreement on Restructuring Plan (the **Restructuring Agreement**).

- 8 At the heart of the present arbitration lies the purpose of the ASG and of Article 2.5 thereof, which was added to the ASG pursuant to Amendment No. 1. According to Claimant, pursuant to Article 2.5 ASG, Respondent undertook to reimburse Claimant *inter alia* in connection with unrealized, invalid or ineffective transfers of assets formerly of IPB from the Claimant to CKA and subsequent repayment of consideration for such assets by Claimant to CKA. In particular, Claimant maintains that, if an Item (as such term is defined in the Restructuring Agreement) that was to be transferred to CKA under the terms of the Restructuring Agreement is not transferred, and Claimant returns the consideration received for the transfer of such Item to CKA, Respondent is to reimburse Claimant for the amount paid by Claimant to CKA, plus interest.
- 9 The subject of this arbitration concerns claims relating to the Czech company J. Ring, a small company the sole business relationship of which appears to have been with IPB. J. Ring went into liquidation in February 2001, and was declared bankrupt in May 2002. In 1997, IPB and J. Ring concluded two Agreements on Assumption of Aval (the **Aval Agreements**) under which IPB avalized *inter alia*, 48 promissory notes issued by J. Ring (the **Promissory Notes**). Having paid the Promissory Notes to their holders as avalist, Claimant obtained recourse receivables against J. Ring (the **J. Ring Receivables**).
- 10 The Parties' present dispute centers on whether Respondent has an obligation under Article 2.5 of the ASG and Article 17 of the Restructuring Agreement to reimburse Claimant for the CZK 1,448,065,053 that Claimant was initially paid by CKA in consideration for the assignment of the J. Ring Receivables under two Assignment Agreements dated February 28, 2002 (the **Assignment Agreements**), but which Claimant was ordered by an arbitral award to repay to CKA, plus interest. As avalist, IPB paid one of the Promissory Notes prior to Claimant's acquisition of IPB's Enterprise. The remaining 47 Promissory Notes were paid by Claimant after the acquisition of IPB's Enterprise.
- 11 Respondent denies any such obligation and has asserted a counterclaim against Claimant based on the agreed purpose of the ASG as a means to ensure that IPB's Enterprise had zero net business asset value. At issue in the counterclaim is Respondent's allegation that the value of the IPB Enterprise was increased when, following the State aid clearance of the ASG, it became clear that the Respondent would be able to fulfill its obligations under the ASG and that this increase in value is attributable to Respondent and which Respondent should be able to recover. According to Respondent, permitting Claimant to keep this increased value would constitute a breach of contract, or alternatively unjust enrichment and would violate State aid rules.

C. Arbitration Clause

- 12 Article 6.6 of the Agreement and State Guarantee contains the following arbitration clause:

"Any disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said rules. No appeal shall be permissible against a duly rendered award. A duly rendered award shall be enforceable in any court of competent jurisdiction. The arbitration shall take place in Vienna. The language of the arbitration shall be Czech. The arbitrators shall interpret this Agreement on the basis of Czech law. The arbitrators shall have the authority, without limitation, to resolve any dispute related to (i) the validity and effectiveness of this Agreement, (ii) the validity and effectiveness of this Article 6.6 and (iii) payment of any default interest, contractual penalty or damages (excluding lost profits) in connection with this Agreement. The legal fees and expenses of the prevailing Party with respect to such award shall be paid in accordance with any award rendered by the arbitration tribunal."

- 13 The validity and applicability of this arbitration clause to the present dispute is not disputed.

II. Arbitral Proceedings

A. Initiation of Arbitration and Constitution of the Arbitral Tribunal

- 14 This arbitration was initiated by CSOB's Request for Arbitration dated June 13, 2007 filed with the International Chamber of Commerce (ICC) pursuant to its Rules of Arbitration in force as of January 1, 1998 (the **ICC Rules**).

- 15 On July 22, 2007, the MoF filed its Answer to the Request for Arbitration and Counterclaim.

- 16 On October 1, 2007, CSOB filed its Reply to the Counterclaim.

- 17 The Arbitral Tribunal was subsequently constituted as follows:

- Prof. Dr. Karl-Heinz Böckstiegel, Parkstrasse 38, 51427 Bergisch-Gladbach, Germany, was nominated by Claimant and confirmed by the Secretary General of the ICC International Court of Arbitration (the **ICC Court**) on February 13, 2008, in accordance with Art. 9(2) of the ICC Rules;

- Dr. Marc Blessing, Bär & Karrer AG, Brandschenkestr. 90, 8027 Zurich, Switzerland, was nominated by Respondent and confirmed by the Secretary General of the ICC Court on February 13, 2008, in accordance with Art. 9(2) of the ICC Rules;
- Dr. Markus Wirth, Homburger AG, Weinbergstrasse 56|58, 8006 Zurich, Switzerland, was confirmed by the Secretary General of the ICC Court on March 20, 2008, in accordance with Art. 9(2) of the Rules, upon proposal of the co-arbitrators in this arbitration.

18 On March 20, 2008, the ICC transferred the case file to the arbitrators.

B. Terms of Reference

19 The Terms of Reference were agreed upon by the Parties and the arbitrators on May 14, 2008 and signed during the organizational conference held in Vienna, Austria on the same date.

C. Organizational Conferences, Procedural Orders, and Principal Submissions

20 On May 14, 2008, an organizational conference was held in Vienna, Austria for the purpose of structuring the arbitral proceedings. During this conference, the Parties approved the draft Terms of Reference and draft Procedural Order No. 1 previously circulated by the Arbitral Tribunal. Agreement was also reached on a Procedural Timetable for pre- and post-hearing submissions, document production requests, as well as regarding the details of the Evidentiary Hearing, including a pre-hearing conference, Hearing dates, location and record. Summary Minutes of the organizational conference were circulated to the Parties on the same date.

21 During the organizational conference, the Parties further agreed on a bifurcation of the arbitral proceedings. In the first stage, the Parties agreed that the Arbitral Tribunal would decide on all issues relating to the Claimant's Claim (including liability and quantum), as well as all issues necessary to determine Claimant's liability with respect to Respondent's Counterclaim. Respondent was granted the possibility of briefly summarizing how it intended to calculate the quantum and to provide its best estimate of such quantum during the first stage. Should the Arbitral Tribunal affirm Claimant's liability as regards to Respondent's Counterclaim, the Parties agreed that a second stage of the arbitration would be conducted for the determination of the quantum of Respondent's Counterclaim.

- 22 On the same date, pursuant to the Parties' agreement during the organizational conference, the Arbitral Tribunal issued its Order No. 1 regarding Procedural Rules governing written submissions, documents, requests for document production, witnesses, experts, the further taking of evidence, time limits and notifications.
- 23 On August 29, 2008, CSOB submitted its Statement of Claim, together with supporting evidence in the form of exhibits, and expert and factual witness statements (**SoC**).
- 24 Pursuant to the revised Procedural Timetable, on December 1, 2008, the MoF filed its Statement of Defense and Counterclaim, together with supporting evidence in the form of exhibits, and expert and factual witness statements (**SoDC**).
- 25 On December 18, 2008, the Parties simultaneously exchanged their respective document production requests, with copies to the Arbitral Tribunal.
- 26 On January 23, 2009, the Parties submitted their reasoned objections to the production requests submitted by the other party and produced those documents as to which they had no objections.
- 27 On February 2, 2009, the MoF filed an unsolicited request including a rebuttal to CSOB's objections. By letter of the same date, CSOB replied to the MoF's rebuttal.
- 28 On February 6, 2009, the Arbitral Tribunal issued Order No. 2 regarding Document Production.
- 29 On June 18, 2009, CSOB submitted its Statement of Reply (to the Defense to the Claim) and Defense to Counterclaim (**Reply**), together with supporting evidence in the form of exhibits, and factual and expert rebuttal witness statements.
- 30 On September 30, 2009, the MoF submitted its Statement of Rejoinder (to the Reply to the Defense to the Claim) and Reply (to the Defense to the Counterclaim) (**Rejoinder**), together with supporting evidence in the form of exhibits, and factual and expert rebuttal witness statements.
- 31 On November 30, 2009, CSOB submitted its Statement of Rejoinder (to the Reply to the Defense to the Counterclaim) (**Rejoinder to Counterclaim**), together with supporting evidence in the form of exhibits, and factual and expert rebuttal witness statements.

- 32 On the same date, CSOB filed an application to the Tribunal for leave to introduce additional evidence in the arbitral proceedings and to amend the Procedural Timetable. CSOB filed the evidence it sought to introduce together with the application.
- 33 The MoF was given an opportunity to comment on Claimant's application, which it did by letter to the Arbitral Tribunal dated December 15, 2009, by objecting to CSOB's application to the Tribunal.
- 34 On December 18, 2009, the Arbitral Tribunal issued Order No. 3 regarding Claimant's Application for Leave to Introduce Additional Evidence and to Amend the Procedural Timetable. The Tribunal (1) admitted in evidence the additional evidence CSOB sought to introduce, namely CWS-10 (with Exhibits C-171 to C-179) and CWS-11 (with Exhibit C-180); (2) granted the MoF until January 11, 2010 to submit its Reply to the new evidence introduced by CSOB together with all rebuttal evidence upon which the MoF would wish to rely, including a potential Request for the Production of Documents to be limited to documents *"directly related to the new evidence submitted by Claimant"*; and (3) attached a revised Procedural Timetable taking into account the delays caused by CSOB's application for leave.
- 35 On January 11, 2010, the MoF submitted its Reply to the new evidence introduced by Claimant, together with supporting evidence in the form of exhibits rebuttal witness statements (**Reply to New Evidence**). Consequently, rebuttal witness statements RWS-11 and RWS-12 (together with Exhibits R-258 and R-262) were submitted. With this submission and as authorized by Order No. 3, the MoF submitted to the Tribunal a Request for Production of Documents.
- 36 On January 18, 2010, the Parties notified the Arbitral Tribunal as to which of the opposing party's witnesses they wished to cross-examine.
- 37 On January 22, 2010 and following the Arbitral Tribunal's invitation to comment, CSOB submitted a letter stating its first reaction to the MoF's Request for Production of Documents.
- 38 On January 27, 2010, a Pre-Hearing Telephone Conference was held to discuss the upcoming Hearing and issues associated therewith, as set forth in the draft agenda circulated by the Chairman on January 21, 2010. Summary Minutes of the Telephone Conference were subsequently circulated to the Parties on February 4, 2010.
- 39 On February 5, CSOB submitted its formal objection to the MoF's Request for the production of documents.

- 40 On February 16, 2010, the Arbitral Tribunal issued Order No. 4 regarding Respondent's Request for Document Production. The Tribunal denied the MoF's request for document production as it was in particular not "*directly related to the new evidence submitted by Claimant*" and thus did not comply with the Tribunal's directions set forth in Order No. 3.
- 41 On March 1, 2010, the Parties submitted a joint proposal regarding the schedule of the Evidentiary Hearing, as agreed during the Pre-Hearing Organizational Conference.
- 42 After various exchanges of correspondence relating to adjustments of the structure of the Hearing and of the list of witnesses appearing to testify, the Arbitral Tribunal finally circulated to the Parties the Final Schedule of the Evidentiary Hearing by letter dated April 22, 2010.
- 43 On April 26, 2010 and in compliance with the Tribunal's directions set forth in the Summary Minutes of the Pre-Hearing Organizational Conference, the Parties filed their Joint Vertical Timeline of the case.

D. Evidentiary Hearing

- 44 An Evidentiary Hearing was held at the Corinthia Hotel in Prague, Czech Republic, on May 3-8, 2010 (the **Hearing**).
- 45 A verbatim transcript of the Hearing was delivered to the Parties and the Arbitral Tribunal by email and in hard copies at the end of each day.
- 46 The following witnesses appeared to testify:

Date:	Name of Witness:	Party on whose behalf testimony was given:
May 3, 2010	Mr. Alexandr César	Claimant
	Mr. Jan Lamser	Claimant
	Mr. Eduard Janota	Respondent
May 4, 2010	Mr. Alexandr César	Claimant
	Mr. Jan Lamser	Claimant
	Mr. Eduard Janota	Respondent
	Mrs. Zlata Gröningerová	Respondent
May 5, 2010	Mr. Premysl Štenc	Claimant
	Mr. Boris Tregler	Respondent

	Mr. Jan Höfer	Claimant
	Mr. František Hamáček	Respondent
	Mr. Petr Knapp	Claimant
<i>May 6, 2010</i>	Mr. Premysl Štenc	Claimant
	Mrs. Zlata Gröningerová	Respondent
	Mr. František Hamáček	Respondent
	Mr. Premysl Štenc	Claimant
	Mr. Radim Homolka	Claimant
	Mrs. Renáta Snopková	Respondent
<i>May 7, 2010</i>	Mrs. Andrea Bednariková	Claimant
	Mr. Boris Tregler	Respondent
	Mr. David Urbanec	Claimant
	Dr. Jindřich Vítek	Respondent
<i>May 8, 2010</i>	Mr. Luděk Vrána	Claimant
	Prof. Dr. Aleš Gerloch	Respondent
	Sir Francis Jacobs KCMG QC	Claimant
	Dr. José Luis da Cruz Vilaça	Respondent

E. Events and Submissions Subsequent to the Hearing

- 47 On May 17, 2010, taking into account the respective discussion with the Parties during the Hearing, the Arbitral Tribunal issued Order No. 5 regarding the Procedural Timetable setting forth the deadlines for the submission of the Parties' respective Post-Hearing Briefs and Statements of Costs.
- 48 On July 15, 2010, the Parties simultaneously submitted their Post-Hearing Briefs.
- 49 On August 16, 2010, the Parties simultaneously submitted their respective Statement of Costs.
- 50 On August 18, 2010, the Arbitral Tribunal invited the Parties to comment on the Statement of Costs submitted by the other side, which both Parties did on August 30, 2010.
- 51 On September 10, 2010, the Arbitral Tribunal ordered the Parties to provide further information for the purpose of clarifying their Statements of Costs which both Parties did on September 20, 2010. In these submissions, the Parties set forth their net costs (*i.e.* excluding VAT where VAT recovery was possible) incurred during this Arbitration. On September 21, CSOB sent a letter to the

Arbitral Tribunal correcting a computational mistake in its submission of September 20, 2010.

52 On September 27, 2010, the Arbitral Tribunal declared the proceedings closed pursuant to Art. 22(1) of the ICC Rules.

53 At its session of October 7, 2010 and pursuant to Art. 24(2) of the ICC Rules, the ICC Court extended the time limit for rendering the Final Award until December 30, 2010.

F. The Parties' Prayers for Relief on the Merits

1. Claimant

54 In its Reply of June 18, 2009, CSOB requested the Arbitral Tribunal to issue an award whereby:

"a. The Czech Republic - Ministry of Finance, with its registered office at Letenska 15, 118 10 Prague 1, is ordered to pay to Ceskoslovenska obchodni banka a.s., Identification No.: 0001350, with its registered office at Praha 5, Radlicka 333/150, PSC 150 57, the amount of CZK 1,655,588,264.95 plus interest 3M PRIBOR increased by 0.27 percent per annum and accruing on CZK 1,655,588,264.95 from 11 April 2005 until payment, plus default interest of 2 percent accruing on CZK 1,655,588,264.95 from 13 April 2005 until payment, all within 15 days from the delivery of the arbitration award.

b. The Counterclaim raised by the Czech Republic - Ministry of Finance, with its registered office at Letenska 15, 118 10 Prague 1, in these arbitration proceedings is dismissed in full.

c. The Czech Republic - Ministry of Finance, with its registered office at Letenska 15, 118 10 Prague 1, is ordered to bear the costs of this arbitration and to reimburse Ceskoslovenska obchodni banka a.s., Identification No: 0001350, with its seat at Praha 5, Radlicka 333/150, PSC 150 57, for all its legal and other costs of this arbitration."

55 CSOB did not amend its prayers for relief in its Post-Hearing Brief.

2. Respondent

56 In its Rejoinder of September 30, 2009, the MoF requested the Arbitral Tribunal to issue an award whereby:

"(i) the claim raised by Ceskoslovenska obchodni banka, a.s., seated at Radlicka 333/150, Praha 5, Post Code 150 57, the Czech Republic shall be dismissed in full;

(ii) Ceskoslovenska obchodni banka, a.s., seated at Radlicka 333/150, Praha 5, Post Code 150 57, the Czech Republic shall be ordered to pay to the Czech Republic - Ministry of Finance, seated at Letenska 15, Praha 1, Post Code 118 10, Czech Republic an amount in damages or as an unjust enrichment, as per the counterclaim, such amount to be determined by the Tribunal based on further submissions, plus interest to be determined by the Tribunal based on further submissions;

(iii) Ceskoslovenska obchodni banka, a.s., seated at Radlicka 333/150, Praha 5, Post Code 150 57, the Czech Republic shall be ordered to pay to the Czech Republic - Ministry of Finance, seated at Letenska 15, Praha 1, Post Code 118 10, Czech Republic the costs of these arbitration proceedings, including the costs of the Tribunal and the legal and other costs incurred by the Czech Republic in connection with this arbitration on a full indemnity basis, the amount of such costs to be determined by the Tribunal based on further submissions."

57 In its Post-Hearing Brief, the MoF did not amend its prayers for relief.

G. Scope of the Present Award

58 As decided by the Parties and set forth in the Summary Minutes of the Organizational Conference of May 14, 2008, the present award is limited to (1) a determination of the MoF's liability for the claim alleged by CSOB; (2) a determination of the quantum of the MoF's liability for the claim alleged by CSOB, and (3) a determination of CSOB's liability for the counterclaim raised by the MoF.

59 Since the MoF's Counterclaim is to be dismissed in full, as explained in this Award, the Award becomes a Final Award.

III. Jurisdiction of the Arbitral Tribunal

60 The Arbitral Tribunal's jurisdiction over CSOB's claim submitted in this arbitration, which is based on the arbitration clause set forth in Section I.C above, is not in dispute.

61 With respect to the MoF's counterclaim, however, CSOB has alleged that the Tribunal would not be competent to decide on the counterclaim to the extent that adjudication of the counterclaim would require the Arbitral Tribunal to rule on the

compatibility of the rights and obligations of the Parties with (i) Czech State aid law, and (ii) State aid law of the European Community, to the extent such law applied in the Czech Republic at the relevant period of time (Reply, para. 263-267; CPHB, para. 136 *et seq.*). On the contrary, the MoF maintains that the Tribunal has jurisdiction to hear all issues related to its counterclaim (Rejoinder, para. 231-261; RPHB, para. 163 *et seq.*).

- 62 With respect to the MoF's counterclaim, the Arbitral Tribunal rules on the issue of its jurisdiction as set forth below in Section VII.C.

IV. Applicable Substantive Law

- 63 Article 6.6 of the ASG, quoted above, states in its relevant part that:

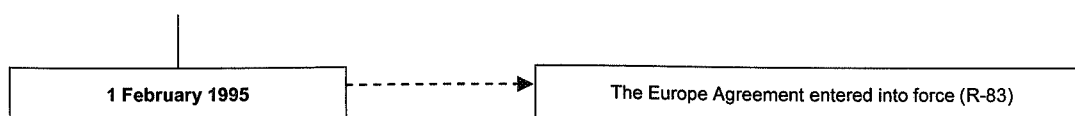
"The arbitrators shall interpret this Agreement on the basis of Czech law."

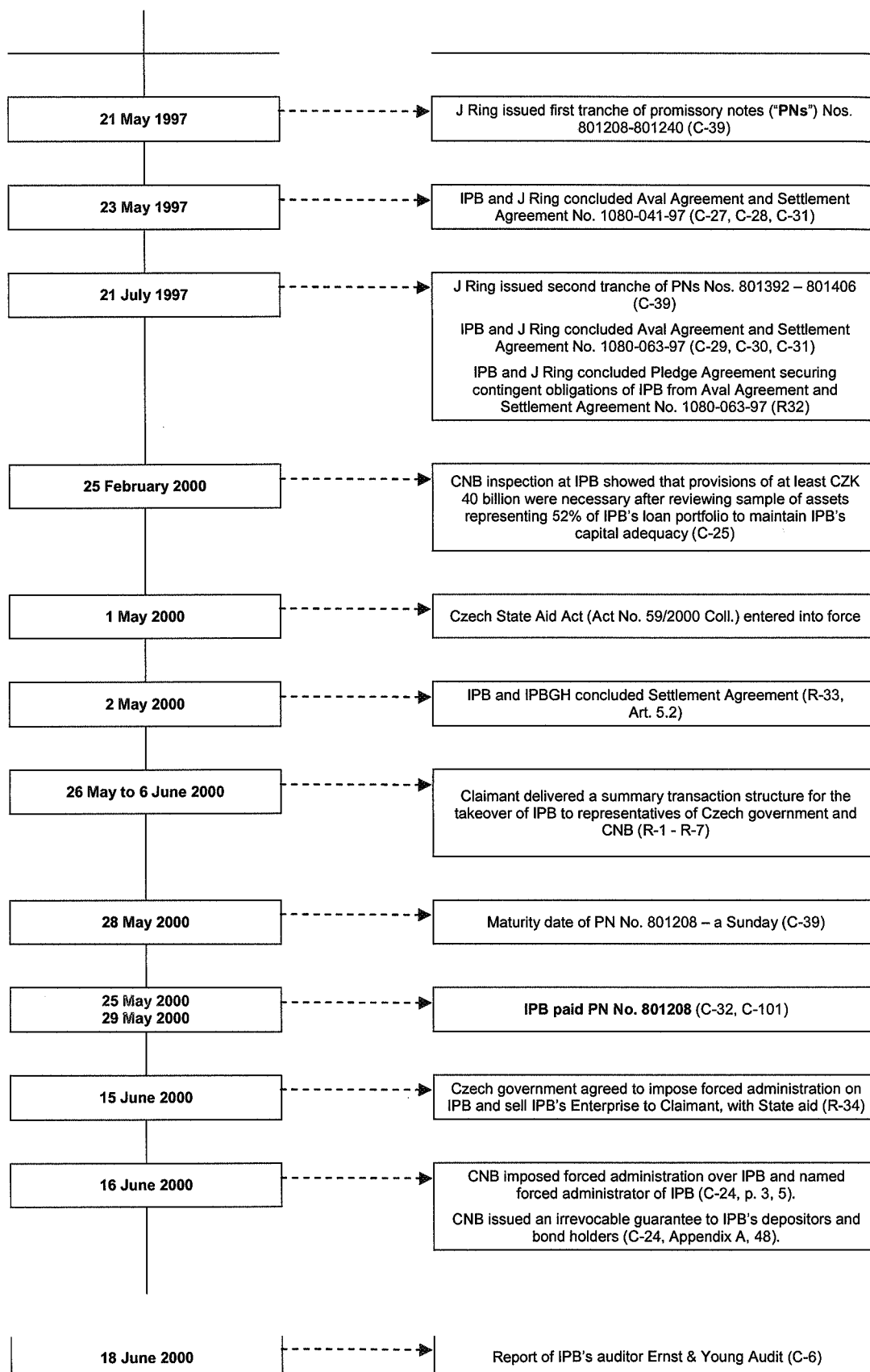
- 64 The Parties are in agreement that Czech law applies to the substantive issues in this arbitration.

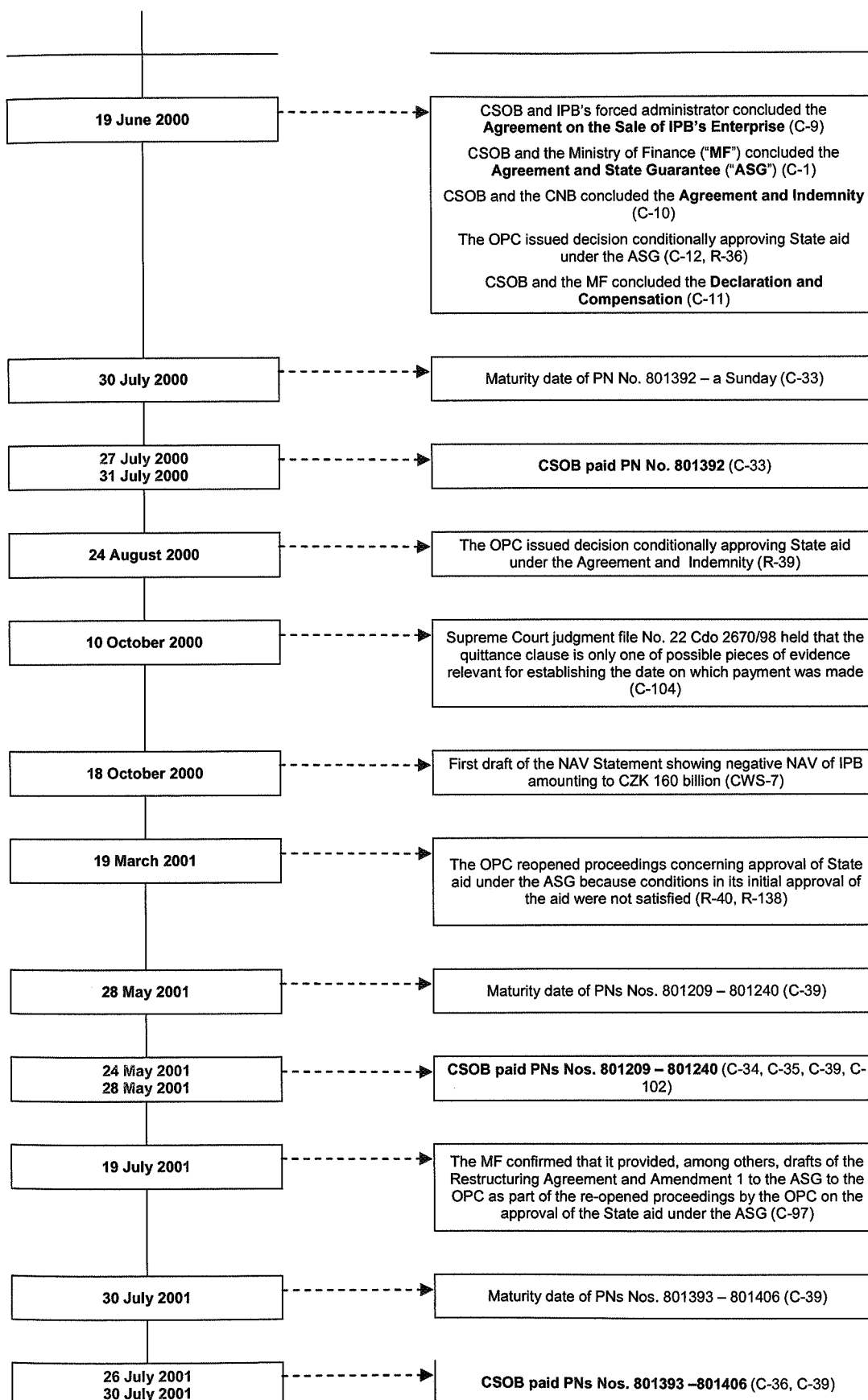
- 65 However, the Parties are in dispute as the exact content and interpretation of Czech law in the relevant time period, and more precisely as to the extent at which State aid law of the European Community would have been integrated into the Czech legal order in the relevant period of time. The Parties' position in this respect, as well as the findings of the Arbitral Tribunal, are set forth in detail in this Award in Section VI.D. below.

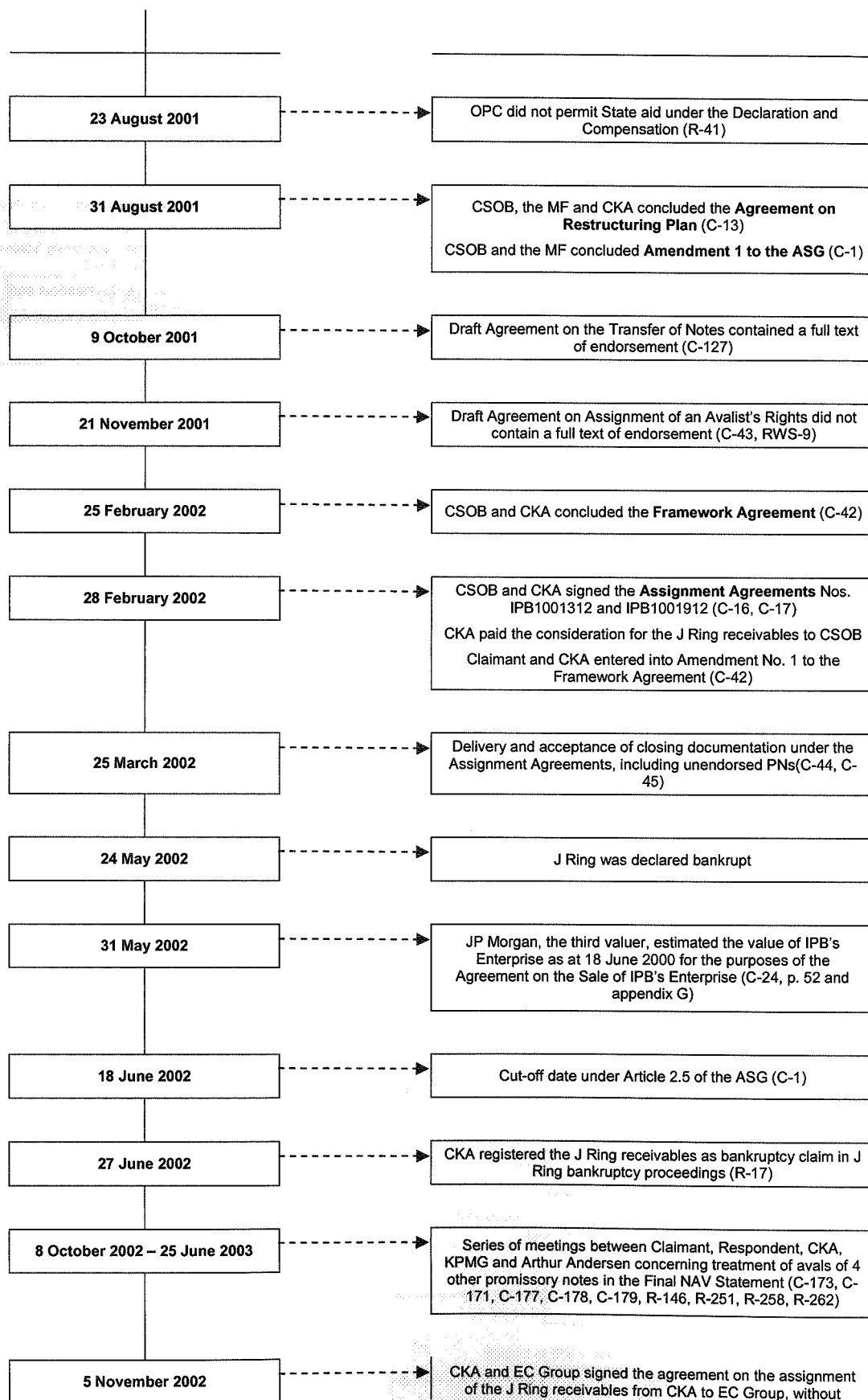
V. The Facts

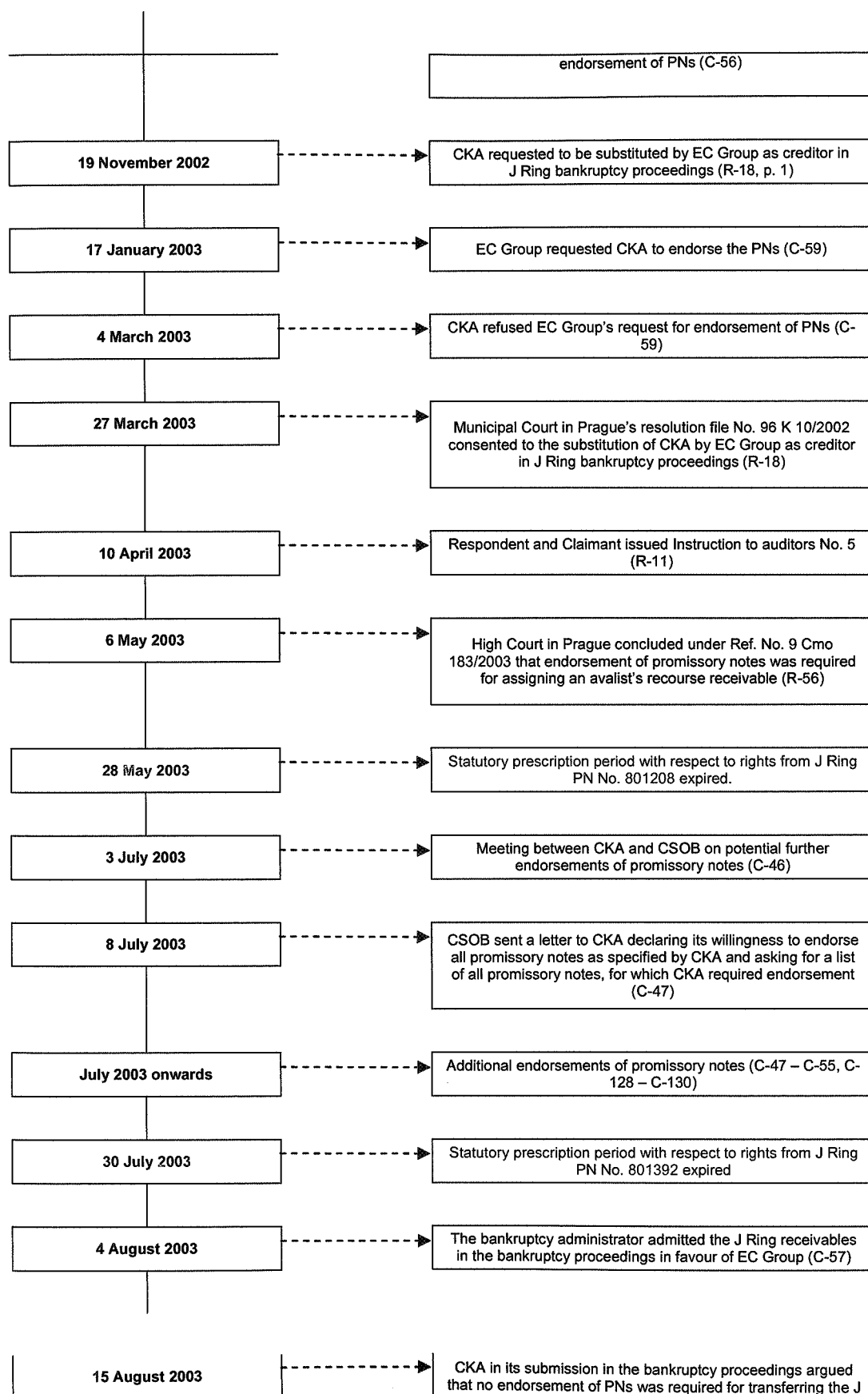
- 66 This section reproduces the Parties' Joint Vertical Timeline as submitted to the Arbitral Tribunal on April 26, 2010 (see, *supra* N 43). The Tribunal notes that as indicated in the Timeline, *"the parties have agreed that the summaries of the content and effect of the documents contained in the Timeline are of a descriptive nature only, do not comprise any admissions and are without prejudice to the respective submissions of the parties in this arbitration"*. The following Timeline thus sets forth the undisputed facts to which CSOB and the MoF both agree. Where the Parties disagree on a particular date and/or event, their respective positions are reflected in two different colors, *i.e.* in blue for Claimant and in red for Respondent.

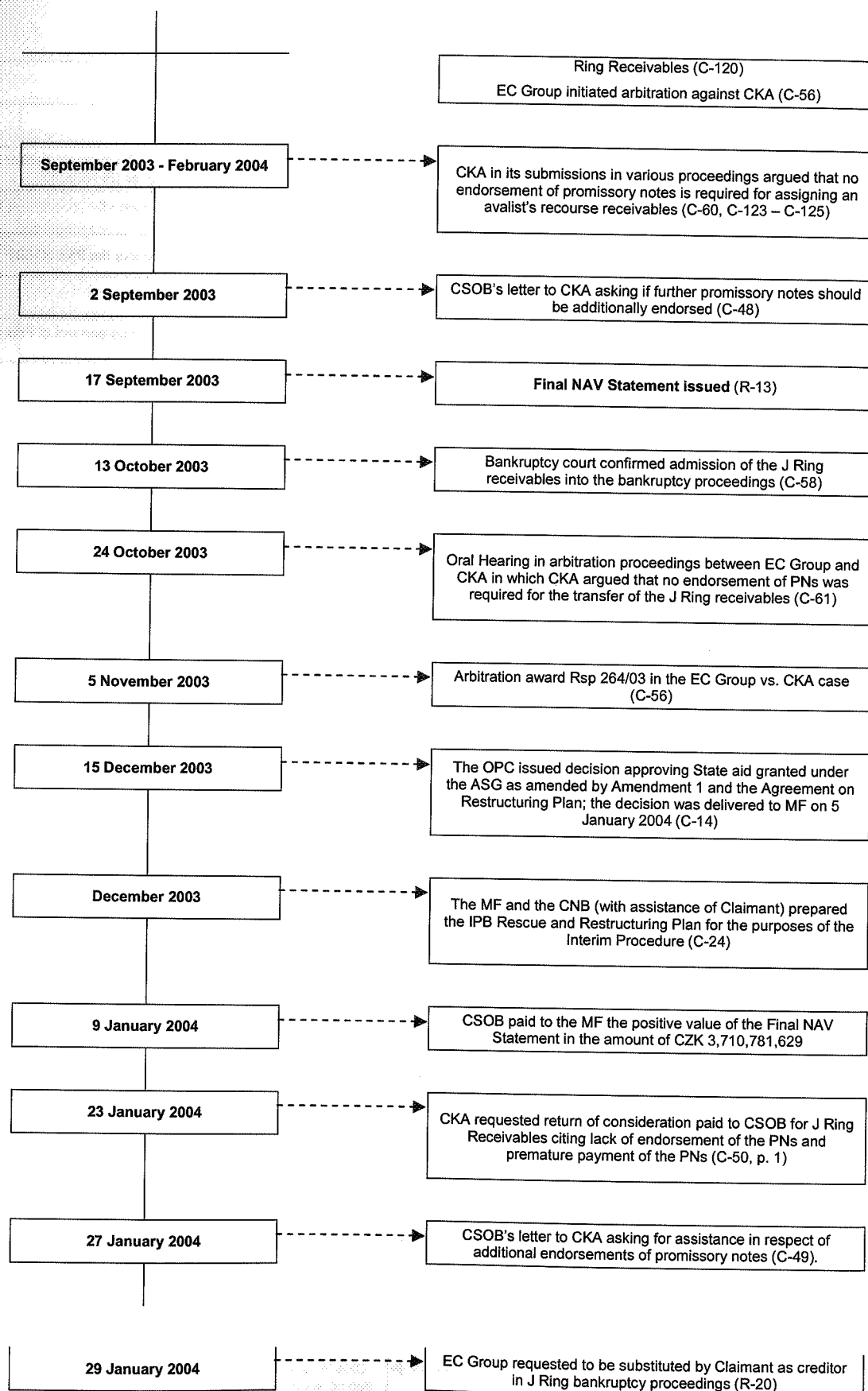


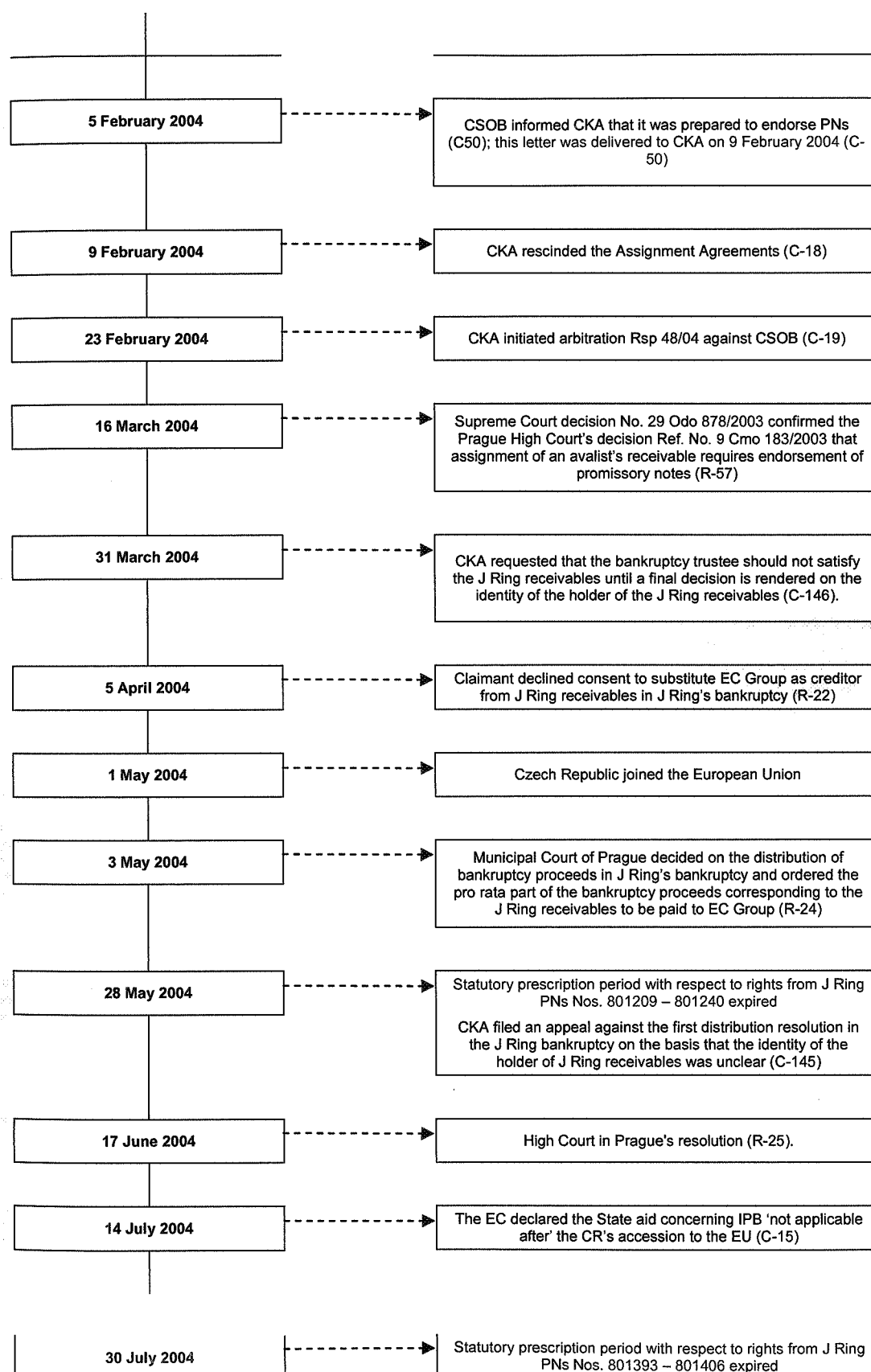


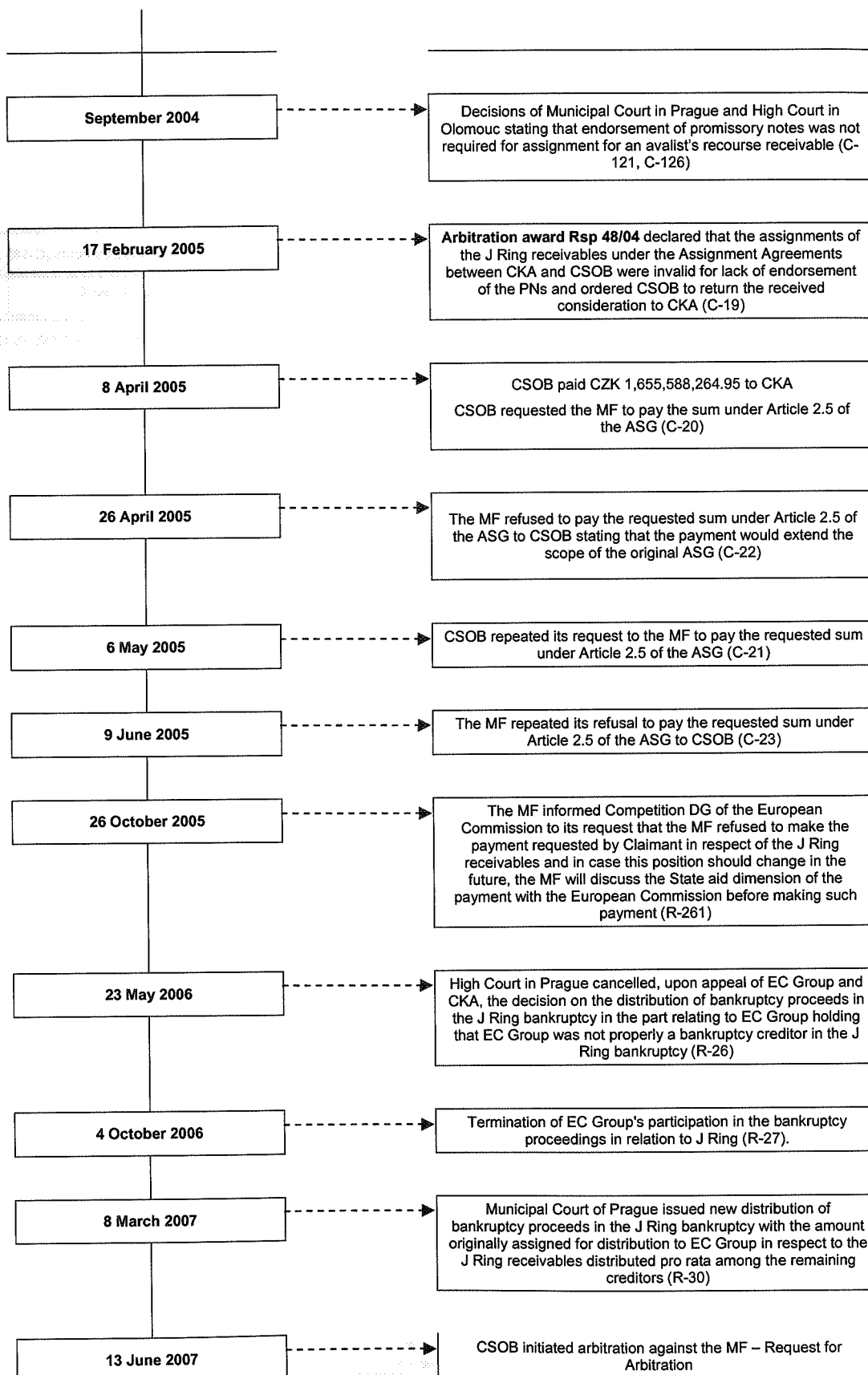


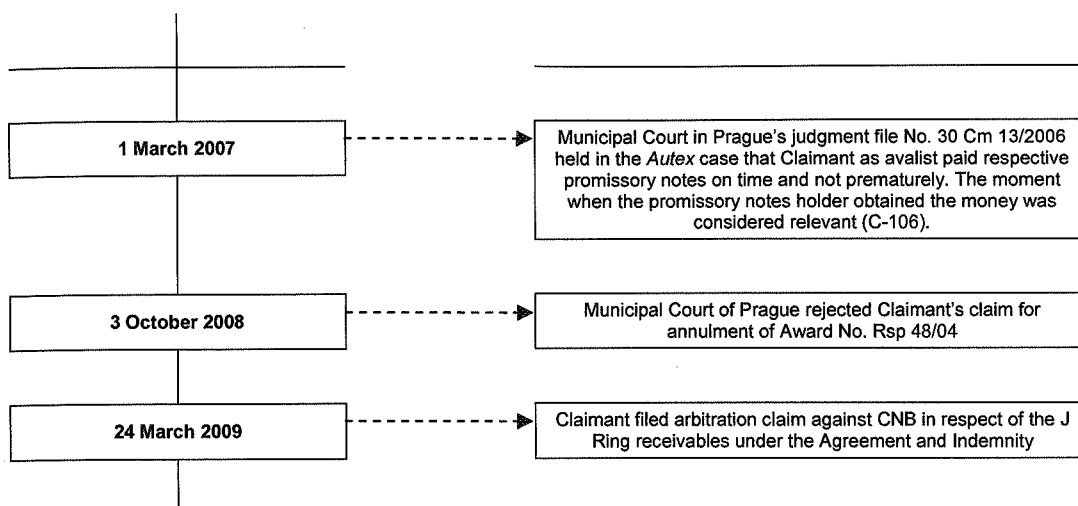












- 67 Where specific facts are relevant to a particular claim or aspect of the present decision and have not been reflected in the above Timeline, they will be addressed in the corresponding section of this Award.

VI. Claimant's Claim

- 68 The Arbitral Tribunal has given consideration to the extensive factual and legal arguments presented by the Parties in their written and oral submissions, all of which the Tribunal has found helpful. In this Award, the Tribunal summarizes and discusses the arguments of the Parties most relevant for its decisions. The Tribunal's reasons, without repeating all the arguments advanced by the Parties, address what the Tribunal itself considers to be the determinative factors required to decide the issues arising in this case. Furthermore, the Tribunal considers the short repetition of certain of its conclusions in the context of particular issues helpful.

- 69 The above preliminary remarks apply to the Arbitral Tribunal's considerations regarding CSOB's claim as well as to the Tribunal's considerations regarding the MoF's counterclaim.

A. Does the ASG including its Amendment 1 and the Zero Net Asset Value principle envisaged therein extend to off-balance sheet liabilities?

- 70 CSOB asserts that the MoF has an obligation under Article 2.5 of the ASG as amended by Amendment 1 to reimburse the amount of CZK 1,448,065,053 that CSOB was initially paid by CKA in consideration for the assignment of the J. Ring Receivables under the Assignment Agreements but which CSOB was ordered by an arbitral award to repay to CKA, plus interest.

1. Claimant's Position

- 71 CSOB asserts that the MoF's guarantee under the ASG, as amended by Amendment 1 and implemented through the Restructuring Agreement, extends to off-balance sheet items of IPB's Enterprise as at June 19, 2000.
- 72 First, CSOB relies on the key principle guiding the agreements reached and signed on June 19, 2000, whereby the MoF and the CNB undertook to ensure that the net asset value of IPB's Enterprise was equal to zero, or in other words that the real value of IPB's recorded and unrecorded assets equaled the real value of its liabilities – including off-balance sheet items – at the point in time of their transfer to CSOB (*i.e.* on June 19, 2000 at 7:00 AM) (the **Zero NAV Principle**).
- 73 CSOB recalls that the Parties' agreement on the Zero NAV Principle is laid down in the original wording of the ASG, and more precisely in Article 1 ASG (Exhibit C-1). In order to implement the Zero NAV Principle, the Parties agreed to determine the value of assets and liabilities in a manner consistent with CSOB's accounting policies used in the preparation of CSOB's audited consolidated financial Statements prepared under International Accounting Standards (**IAS**) as of December 31, 1999 (**IAS value**). The total amount of assets and liabilities (both balance and off-balance ones according to CSOB) was to be verified by two auditors respectively appointed by CSOB and the MoF, who were to confirm a statement showing the final net value of IPB's assets and liabilities as of June 19, 2000 (the **Final NAV** and the **Final NAV Statement**). The essential part of the ASG was the MoF's undertaking set forth in Article 2.1 ASG that if the Final NAV was negative, it would pay to Claimant, in three installments, an amount equal to the absolute value of the negative Final NAV (SoC, para. 33).
- 74 CSOB stresses that as off-balance sheet items from an integral part of a bank business, it was therefore clear that, from a commercial perspective, off-balance sheet items would necessarily have to be included in the Final NAV Statement, in order to implement the Zero NAV Principle. Carving-out off-balance sheet liabilities would have made no commercial sense for CSOB (CPHB, para. 7).
- 75 As a consequence, CSOB alleges that from the very beginning, *i.e.* in the original wording of the ASG as signed on June 19, 2000, the Parties expressly and unequivocally provided in Article 1.2 ASG that off-balance sheet items would form part of the NAV Statement of IPB's Enterprise (CPHB, para. 8).
- 76 To support its interpretation of Article 1.2 ASG, CSOB notes that the First draft NAV Statement, which was dated October 18, 2000 (**First draft NAV Statement**), included off-balance sheet items and, in particular, the J. Ring off-

balance sheet liabilities.¹ The J. Ring off-balance sheet liabilities were valued at their IAS value with the effect that reserves for the full face value of the unpaid Promissory Notes were created in respect of them. CSOB recalls that this first valuation resulted in an overall negative Net Asset Value of IPB's Enterprise of CZK 160 billion (CPHB, para. 9).

- 77 Second, CSOB asserts that off-balance sheet items remained fully covered when the Parties modified the original ASG by signing Amendment 1 and the Restructuring Agreement on August 31, 2001, and that this modification did not extend the scope of the original ASG founded on the Zero NAV Principle.
- 78 Neither was it the Parties' intention that the amended ASG and the Restructuring Agreement extend the scope of the MoF's guarantee under the ASG. CSOB explains that the Parties entered into Amendment 1 and the Restructuring Agreement because in October 2000, the preparation of the Final NAV Statement proved to be a more complex process than envisaged in the June 2000 negotiations. As the valuation of certain categories of items such as credit exposures and offshore structures appeared nearly impossible, the Parties agreed on a mechanism for the transfer of these items to CKA, which then did not have to be valued and could easily be reflected in the Final NAV Statement at their book value (SoC, para. 36; CPHB, para. 12).
- 79 This mechanism was embodied in Amendment 1 to the ASG and in the Restructuring Agreement, whereby "items" (**Items**)² were divided into: (i) items to be retained by CSOB at their adjusted IAS values as at June 19, 2000, 7:00 AM (**White Items**); (ii) items to be transferred to CKA by February 28, 2002 without revaluation, *i.e.* these items were transferred to CKA against payment of the net book value at which they were recorded in the accounts of IPB as at June 19, 2000, 7:00 AM (**Black Items**); and (iii) other items for which the legal regime could not yet be determined on August 31, 2001 (**Other Items**) (Exhibit C-13; SoC, para. 37).
- 80 CSOB relies on the express references to "off-balance sheet items" in the amended version of Article 1.2 ASG (Article 2.1 of Amendment 1), in Articles 1.2, 1.4 and 8 of the Restructuring Agreement, as well as on the Exhibits to the

¹ As set forth in the Summary of Facts, IPB paid one Promissory Note (N. 801208) in May 2000, *i.e.* prior to CSOB's acquisition of IPB's Enterprise. The remaining 47 Promissory Notes were still unpaid when CSOB succeeded to IPB's obligations on June 19, 2000 and hence constituted liabilities of IPB's Enterprise (*supra* Section V).

² See Article 1.1 Restructuring Agreement defining the term "Item" as "*any thing, receivable or other right or financially assessable property value or obligation pertaining to IPB's enterprise as of June 19, 2000, 7:00 AM.*"

Restructuring Agreement which included off-balance sheet items (Exhibits C1 and C13).

- 81 CSOB argues that as a consequence of this express wording, (i) White Items which were revalued at their IAS value and included in the Final NAV Statement included many off-balance sheet items, and (ii) hundreds of off-balance sheet items were transferred to CKA when implementing the amended ASG and the Restructuring Agreement. The J. Ring Items were part of the Other Items which were ultimately transferred to CKA (Exhibit C-13, Annex 1.3).
- 82 Hence, off-balance sheet items, and thus the J. Ring Items in particular, are covered by Article 2.5 ASG as amended which deals with invalid transfers (**Non-Transferred Items**) and sets forth two different mechanisms to reconcile the consequences of an invalid transfer to CKA with the MoF's Zero NAV Guarantee. If the invalidity arose before June 18, 2002, the Non-Transferred Item would be kept by CSOB, revalued at IAS value and included in the Final NAV Statement. If the invalidity occurred after June 18, 2002, the Parties agreed to not "reopen" the Final NAV Statement and to reconcile the effect by the MoF making a direct payment to CSOB "outside" the Final NAV Statement (Exhibit C-1; CPHB, para. 23). Both mechanisms were intended to maintain the economic effect of the Zero NAV Principle.
- 83 Consequently, as the invalidity of the transfer of the J. Ring Items arose on February 9, 2004 when CKA rescinded the Assignment Agreements, *i.e.* after June 18, 2002, CSOB asserts that it is entitled to a direct payment by the MoF for the CZK 1,655,588,264.95 consideration it had to return to CKA (*supra* Section V).

2. Respondent's Position

- 84 The MoF objects to CSOB's position and to the interpretation of Article 2.5 ASG as amended upon which it is based.
- 85 The MoF asserts a restrictive interpretation of the ASG. The MoF acknowledges that the ASG including Amendment 1 and the Zero Net Asset Value envisaged therein also encompass off-balance sheet items, *but only to the extent those items are included in the Final NAV Statement* (RPHB, para. 15).
- 86 The MoF however submits that the Zero NAV Principle was implemented through the combination of two contractual agreements taken together, namely (i) the Final NAV guarantee provided by the MoF in the ASG, and (ii) the Indemnity Agreement whereby the CNB guaranteed that off-balance sheet assets, liabilities and specified other risks would not economically undermine the Final NAV

guarantee, once the Final NAV Statement was agreed upon between the Parties (Exhibit C-10; Exhibit C-5, p. 28; Exhibit C-24, p. 6). Hence, the MoF asserts in essence that CSOB cannot solely rely on the ASG for a claim related to off-balance sheet liabilities (RPHB, paras. 17-19).

- 87 The MoF defines the Final NAV guaranteed by the MoF as the NAV of IPB's Enterprise, as at June 19, 2000, 7:00 AM, determined by the Final NAV Statement. The MoF argues, in sum, that it cannot be liable for more than what it guaranteed as part of the Final NAV Statement, by virtue of Article 2.5 ASG as amended.
- 88 Conversely, the MoF objects to CSOB's argument that it provided other guarantees over and above the Final NAV guarantee (RPHB, paras. 35, 40-47).
- 89 In support of its interpretation of Article 2.5 ASG, the MoF asserts that the scope of its guarantee is defined in Article 2.1 ASG whereby it has guaranteed to pay to CSOB an amount in cash determined in the Final NAV Statement. At the heart of the MoF's defense lies the argument that the full amount of CSOB's claim in this arbitration does not appear in the Final NAV Statement as agreed by the Parties on September 17, 2003 (RPHB, para. 48).
- 90 In this respect, the MoF stresses that the J. Ring Items are only *partially* included in the Final NAV Statement (Exhibit R-13):³
- in the positive amount of CZK 34,479,727, representing the net book value of the receivable that originated from the one Promissory Note paid prior to CSOB's acquisition of IPB's Enterprise;
 - in the negative amount of CZK 13,078,964.85, representing the amount of the reserves attributed to the remaining unpaid Promissory Notes;
 - and thus not in the amount of CZK 1,655,588,264.95 sought by CSOB in this arbitration (RPHB, para. 27).

³

It is noted that the following figures do not appear as such in the Final NAV Statement (Exhibit R-13). For these figures and the explanation of how these amounts are included in the amounts stated in Line 15 of the Final NAV Statement, see Exhibit CWS-7, WS Höfer, paras. 18-19, and Exhibit R-15.

91 Consequently, the MoF argues that the full value of the J. Ring Receivables claimed by the CSOB in this arbitration cannot be properly claimed under Article 2.5 of Amendment 1, absent an increase in the liability side of the Final NAV Statement and a corresponding reduction of the positive value of the Final NAV, *i.e.* absent an increase of the MoF's liability over and above the Final NAV Statement (Rejoinder, para. 39).

92 The MoF asserts that the very purpose of the Final NAV Statement was to provide finality to the MoF's payment under the ASG. In order to succeed with its claim, CSOB would need to prove that it does not exceed the limits of the MoF's guarantee set forth in Article 1.1 of Amendment 1 to the ASG. Because no valuation of the J. Ring off-balance sheet liabilities was ever agreed upon by the Parties, as would have been required under the provisions of the ASG, CSOB fails to prove that its claim advanced in this arbitration does not fall beyond the limitation imposed by Article 1.1 Amendment 1, on any recovery under Article 2.5 ASG as amended.

3. Decision of the Arbitral Tribunal

93 CSOB, in this arbitration, seeks compensation under Article 2.5 ASG in relation to the J. Ring Promissory Notes.

94 The Tribunal recalls that IPB paid one Promissory Note (N. 801208) in May 2000, *i.e.* prior to CSOB's acquisition of IPB's Enterprise. Hence, on June 19, 2000, the recourse receivable arising out of that paid Promissory Note appeared as an asset in IPB's books. The remaining 47 Promissory Notes were still unpaid when CSOB succeeded to IPB's obligations and on June 19, 2000 they qualified as off-balance liabilities of IPB.

95 The Parties' dispute centers on the scope of the MoF's guarantee under Article 2.5 ASG in relation to off-balance liabilities of IPB existing on June, 19, 2000. In order for CSOB to prevail, the Arbitral Tribunal must find, in the first place, that its claim falls within the scope of Article 2.5 ASG.

96 The first issue the Tribunal is thus faced with is (i) whether, and (ii) to what extent, the ASG as amended by Amendment 1 covers off-balance sheet liabilities of IPB's Enterprise as at June 19, 2000.

a) The ASG including Amendment covers off-balance sheet liabilities

97 The Arbitral Tribunal has considered the Parties' submissions, witness testimony and the evidence on record in relation to the negotiation of the ASG and of the Zero NAV Principle it implemented and concludes that off-balance sheet liabilities

of IPB existing on June 19, 2000 were covered by the ASG in its original wording, and have remained covered by the ASG following the signature of Amendment 1.

98 In the first place, the Arbitral Tribunal is guided in this respect – and because CSOB's claim raises in its essence an issue of contractual interpretation of the ASG – by the wording of the provisions of the ASG. The ASG contains numerous express references to off-balance sheet liabilities.

99 The ASG – as originally agreed to between the Parties on June 19, 2000 – contains explicit references to IPB's "*off-balance sheet items*". Article 1 ASG, which sets forth the auditing procedure agreed to be the Parties in order to determine the net asset value of IPB's Enterprise as at June 19, 2000, 7:00 AM, contains two express references to these items.

100 Article 1.2 ASG indeed reads as follows:

*"The Bank shall in good faith attempt to prepare within two months of the effective date of the Agreement on Sale of Enterprise a statement listing all of the Enterprise's assets, liabilities and **off-balance sheet items** as of 7 a.m. on the effective date of the Agreement on Sale of Enterprise (provided that in preparing such statement the content of this Agreement or the CNB Agreement shall not be taken into account with the exception of provisions in this Agreement regulating the procedure for preparing such statement) (Preliminary NAV Statement). Such Preliminary NAV Statement shall be prepared on the basis of the Bank's accounting policies as used in the preparation of the Banks audited consolidated financial statements prepared under International Accounting Standards as of 31 December 1999 (except where complete consolidation is used), except that with respect to individual assets, liabilities and **off-balance sheet items**, the Bank shall have discretion to utilize fair value rather than book value [...]" (Exhibit C1, Emphasis added)*

101 Hence, as explicitly set forth by Article 1.2 ASG, it was the Parties' agreement that IPB's off-balance liabilities were to be expressly taken into account for the purpose of preparing the various draft NAV Statements which ultimately led to the conclusion of the Final NAV Statement.

102 According to Claimant's witness Mr. Höfer, the First draft NAV Statement dated October 18, 2000 included off-balance sheet items and in particular the J. Ring off-balance liabilities. Mr. Höfer indicated in his witness statement and maintained during the Hearing that the J. Ring off balance sheet liabilities had been assessed. Since J. Ring was heavily indebted and was presumed not to be able to fulfill its obligations under the Promissory Notes, Mr. Höfer asserts that the unpaid J. Ring Promissory Notes were classified as "*loss*", and "*100% provisions were created*" (WS Höfer, CWS-7, para. 8), *i.e.* that reserves for the *full face value* of the unpaid Promissory Notes were created in respect of them in the First draft NAV Statement (CPHB, para. 9). Consequently, the Parties' performance of

the ASG – as originally signed – is to be construed as the confirmation that off-balance liabilities and the J. Ring off-balance liabilities in particular, were expressly discussed for the purpose of preparing the First draft NAV Statement. The Tribunal however notes in this respect that the MoF has put forth that the Parties were in disagreement regarding the value of the individual items contained in the First draft NAV Statement (RPHB, para. 22 and footnote 16).

103 Further and yet again relying on the wording of the relevant provisions which it determines to be decisive in the case at hand, the Tribunal finds that off-balance sheet liabilities of IPB, existing at June 19, 2000 remained covered under the provisions of the ASG when the Parties entered into Amendment 1 to the ASG, on August 31, 2001.

104 The Tribunal refers to Article 1.2 ASG, as introduced by Article 2.1 Amendment 1, which again contains three explicit references to off-balance liabilities:

"[...] The Preliminary NAV Statement shall be prepared either:

*(a) on the basis of accounting standards of the Bank which were used in preparation of the audited consolidated accounting statements of the Bank [...] and the Bank, may, at its discretion, when evaluating the selected assets, liabilities and **off-balance items** apply fair value rather than book value; or*

*(b) assets, liabilities and **off-balance items** of the Enterprise shall be evaluated as per agreement of the Parties at net book value, should such assets, liabilities and **off-balance items** of the Enterprise (i) be transferred under Specific Option Right, Specific Call Option or RP Agreement to Konsolidacni banka praha, s.p.u [...]" (Exhibit C1, Emphasis added)*

105 As recalled above (*supra* N 91), the MoF argues that CSOB's claim under Article 2.5 ASG as introduced by Amendment 1 would amount to extending the scope of the MoF' Zero NAV Guarantee as originally granted under Article 2.1 ASG. However, as stated in the express wording of Amendment 1, the Tribunal notes that it was the common understanding of both Parties that Amendment 1 did not and could not extend the scope of the MoF's liability with respect to the Zero NAV guarantee. The precaution shown by the Parties in Article 1.1 Amendment 1 is in this respect unambiguous:

*"Amendments to the Agreement as set forth herein **shall not, and the Parties do not intend to, extend the scope of MF's state guarantee for IPB Enterprise**. Both Parties acknowledge that should the scope of the original guarantee be extended such extension will be invalid. Both Parties conclude this **Amendment to the Agreement in good faith that it does not extend the scope of the original state guarantee**. In addition, both Parties declare that they concluded the **RP Agreement accordingly in good faith that it does not extent the scope of the original state guarantee**." (Exhibit C-1, Emphasis added)*

- 106 Moreover, the Tribunal is guided by the Parties' explanations regarding the negotiations of Amendment 1 and the Restructuring Agreement. While the Parties differ as to the *precise reasons* why difficulties in valuation arose in October 2000, the Tribunal notes that the MOF and CSOB agree that their respective auditors' inability to agree on the valuation of a large number of former IPB items in the drafts of the NAV Statement, led them to amend the ASG as originally conceived (WS Štenc, CWS-1, para. 9; RPHB, para. 22).
- 107 This difficulty was solved through what the MoF describes itself as a mere "**change in the agreed mechanism of the Final NAV guarantee**" (RPHB, para. 23, Emphasis added). Such change was introduced by the Restructuring Agreement entered into on August 31, 2001, whereby the items of IPB's balance sheet considered as at June 19, 2000, 7:00 AM were divided into the so-called White, Black and Other Items.
- 108 In this respect, the Tribunal notes that the Restructuring Agreement also expressly listed the "*receivables arising out of the fulfillment of the Bank's off-balance obligations which existed within the Enterprise's property as of 19 June 2000, 7:00 a.m.*" for the purpose of defining the Black Items to be transferred by CSOB to CKA (Exhibit C-13, Article 1.4(i)(b) Restructuring Agreement). Moreover, the J. Ring Items were expressly listed in Annex 1.3 to the Restructuring Agreement which in itself confirms that both Parties were aware that the J. Ring Items were being taken into consideration when implementing the ASG (Exhibit C-13, Annex 1.3). Ms Gröningerová acknowledged in this respect that CKA checked the Items' eligibility to be classified as Black Items and their eligibility to be transferred under the Restructuring Agreement (WT Gröningerová, Tr. Day 2, p. 327, lines 11-19).
- 109 It was in order to implement this change in the agreed mechanism of the Final NAV guarantee that Amendment 1 to the ASG was entered into on the same date as the Restructuring Agreement, and that Article 2.5 ASG was thus introduced.
- 110 As explained above (*supra*, N 79) the change in the agreed mechanism of the ASG led to a division of Items into White, Black and Other Items. White Items were to remain with CSOB and for that purpose were revalued at their IAS value and included in the Final NAV Statement. As explained by CSOB, those White Items included many off-balance sheet liabilities. The remaining Items were transferred to CKA without revaluation. Among those transferred Items were numerous off-balance liabilities, including the J. Ring Items (CPHB, para. 12). Thus it is clear that the Parties' implementation of the Restructuring Agreement and of the amended ASG also leads to the conclusion that off-balance liabilities were taken into consideration for the purpose of the Final NAV Statement.

111 Based on the foregoing, the Tribunal finds that the various relevant provisions themselves make it clear that (i) off-balance sheet items fell within the scope of the ASG as originally drafted, (ii) that the off-balance sheet items remained covered by the mechanism introduced by Amendment 1, and (iii) that Amendment 1 to the ASG did not in any way extend the scope of the MoF's obligations under the ASG.

b) The fact that the J. Ring items are only partially included in the Final NAV Statement does not preclude CSOB from recovery under Article 2.5 ASG

112 The Tribunal has noted that the MoF does not dispute in itself that IPB's off-balance sheet items fell within the scope of its Zero NAV guarantee under the ASG. In its various submissions and in its Post-Hearing Brief, the MoF made it clear that its position was that the J. Ring Items are not fully guaranteed because they were only *partially* included in the Final NAV Statement.

113 What the MoF argues in essence is that its liability – as well as CKA's – under the ASG was fixed once for all by the signing of the Final NAV Statement, and that the payment sought by CSOB in this arbitration goes beyond that amount.

114 The issue the Tribunal thus has to assess is whether the fact that the J. Ring Items were only partially included in the Final NAV Statement should preclude CSOB from bringing a claim under Article 2.5 ASG for the entire amount of the J. Ring Items.

115 The Arbitral Tribunal refers to the witness testimony of Jan Höfer which provides the most details on IPB's exposure to J. Ring as of June 19, 2000 (WS Höfer, CWS-7, paras. 15, 18-19; WT Höfer, Tr., Day 3, pp. 483 *et seq.*), as well as to the letter dated June 6, 2005 of KPMG to Mr. Hamáček – the MoF's witnesses which was at that time Manager of the Off-Shore Assets Division at CKA (Exhibit R-15). This letter sets forth in detail the status of IPB's balance and off-balance engagement with respect to the J. Ring Items, and how such Items were included in the Final NAV.

116 The J. Ring Items were first classified as Other Items and then transferred to CKA under the Assignment Agreements. For the purpose of establishing the Final NAV Statement, the J. Ring Items were thus classified as Black Items. With respect to Black Items, the Parties agreed not to re-value them but instead to present them in the NAV Statement at IPB's originally recorded net book value as of June 19, 2000. This was because CKA has paid a transfer price for these Items corresponding to their net book value. Accordingly the Tribunal has noted that the NAV Statement does not reflect the true value of the Black Items, but rather IPB's accounting for such Items (WS Höfer, CWS-7, para. 12).

- 117 On June 19, 2000, IPB's exposure to J. Ring consisted of two parts, one being a balance sheet receivable due to the one Promissory Note paid before June 19, 2000, and the other being off-balance sheet liabilities for the remaining 47 Promissory Notes.
- 118 The J. Ring balance sheet receivable was present in IPB's book as an asset (due from customers) in the amount of CZK 34,479,727, *i.e.* at the nominal value of the paid Note. This same amount was included in the Final NAV Statement as an asset in Column VII, line 4. The Tribunal has noted that, as Mr. Höfer explains, this reflection as an asset was improper, given that J. Ring was indebted. Its true value was nil (WS Höfer, para. 15).
- 119 IPB's off-balance liability in respect to J. Ring in an amount of CZK 653,948,242.20 is evidenced in Account No. 127520038 in Exhibit R-15. On June 19, 2000, IPB's books showed in relation to that liability a provision of merely CZK 13,078,964.85, which was ultimately included in the Final NAV Statement Column VII, line 15 (WS Höfer, para. 18). As this account was transferred to CKA before the conclusion of the Final NAV Statement, the Parties agreed to leave this provision in the Final NAV Statement but to deduct it from the sum paid by CKA to CSOB for the assignment of this account.
- 120 IPB's further off-balance liability in respect to J. Ring in an amount of CZK 731,045,105.72 is evidenced in Account No. 127520716 in Exhibit R-15, to which a provision in IPB's books was created in the mere amount of CZK 14,620,902.72. This provision is reflected in the Final NAV Statement Column VII, line 15 in the amount of CZK 0. Mr. Höfer explained that this was the case because the provision had to be dissolved, as it had not been deducted from the consideration paid by CKA to CSOB for the assignment of the account – contrary to the previous account.
- 121 Based on the foregoing, the MoF has consequently argued that the J. Ring Items were only partially "reflected" in the Final NAV Statement in the positive amount of CZK 34,479,727 and in the negative amount of CZK 13,078,964.85, and that its liability should thus be tied to these amounts.
- 122 The Tribunal notes in this respect that it follows from Mr. Höfer's testimony that the provision created in IPB's books as at June 19, 2000, was highly inadequate given the amount of off-balance liabilities recalled above. Respondent's witness Mr. Janota, while insisting throughout his witness testimony that the ASG covered only the reserves relating to off-balance sheet items as recorded in IPB's balance sheet, has recognized that such reserves represented "*quite negligible*" amounts taking into account the amounts now claimed by CSOB (WT Janota, Day 1, p. 178, lines 4-10). The MoF has further indicated that IPB's aggregate reserve in its

balance sheet represented only 2% of the face value of the J. Ring Promissory Notes. The Tribunal thus does not deny that the J. Ring Items were only "*partially*" included in the Final NAV Statement, and *in fine* in a very small amount.

- 123 The issue at stake before the Tribunal is however to determine whether an inadequate reserve of CZK 13 million with respect to the J. Ring Items in IPB's books and consequently in the Final NAV Statement, should preclude CSOB from claiming that it be guaranteed for what IPB's true exposure was on June 19, 2000, *i.e.* approximately CZK 1.4 billion.
- 124 The Tribunal stresses that if it were to find that the state guarantee under the ASG with respect to the J. Ring off-balance sheet items was limited to the unrealistically low reserve in IPB's books, this would lead to practically excluding the J. Ring off-balance sheet items from the state guarantee.
- 125 The Tribunal considers that this would not be an appropriate solution, and therefore rejects the MoF's defense based on the argument that the Final NAV Statement fixed CKA's and the MoF's obligation under the ASG.
- 126 First, the Tribunal considers that the consequences of the Final NAV Statement – and hence the MoF's guarantee under the ASG – can only be understood in its relation with the Restructuring Agreement. In this respect, it is undisputed that CSOB received state support "outside" the Final NAV Statement and that the Final NAV Statement does not reflect in itself the amount of state support actually provided to CSOB for off-balance sheet items, as expressly recognized by the MoF's counsel during the Hearing:

"CHAIRMAN WIRTH: [...] It seems to me, then, that from a layman's view, the NAV does not reflect properly what in terms of State aid had been granted up to the date of the NAV because it does not properly reflect the payment by CKA to CSOB because this payment is not fully reflected in the 153 billion. From a layman's point of view, just looking at the financial situation, is that a correct assessment of the situation? Ms. Horáková.

MS. HORÁKOVÁ: I would say that the Final NAV Statement does not reflect in full payments made for former off-balance-sheet liabilities."

(Tr. Day 4, p. 600, lines 13-23, Emphasis added).

- 127 The Final NAV Statement indeed lead to a *positive* net value of IPB's Enterprise, and CSOB ultimately paid to the MoF an amount of CZK 3,710,781,629 plus interest, on January 9, 2004 (Exhibit RX-13). This positive net asset value was due to the fact that an important part of IPB's "bad assets", *i.e.* the Black Items, had been transferred to CKA (CPHB, para. 15).

128 The Tribunal finds it decisive that, with respect to the J. Ring Items, it is clear that CSOB *did* receive state support *from* CKA, precisely as foreseen by Amendment 1 ASG and the Restructuring Agreement. CSOB in effect received payment from CKA for the *full* net asset value of the J. Ring Items, *regardless of the corresponding provisions in IPB's books*. CKA thus paid CZK 1,448,065,053 in consideration for the assignment of the J. Ring Items (Exhibits C16 and C17). As explained by Mr. Höfer, the transfer of the J. Ring Items to CKA amounted to transferring to CKA the risk of not being able to recover payment from J. Ring. As that risk has been transferred to CKA, it was the Parties' express agreement that the reserves already existing on IPB's balance sheet did not need to be revised (WS Höfer, CWS-7). As the Parties had agreed to this accounting method for transferred Items, the Tribunal considers that the MoF must have necessarily known or at least should have been aware – in respect of the J. Ring Items – that CKA was paying to CSOB a consideration which went beyond the corresponding reserve, and hence beyond the amounts stated in the Final NAV Statement.

129 Hence, when dealing with the assessment of state support to be provided under the ASG, the Tribunal considers that the Final NAV Statement cannot be taken in isolation, and cannot be exclusively relied upon by the MoF to define the final amount of the state guarantee under the ASG.

130 The state guarantee under the ASG that the net asset value of IPB's Enterprise would be equal to zero is based on a *combination* between the Final NAV Statement on the one hand, and transfers made to CKA on the other. This understanding of the state guarantee was expressly confirmed by Respondent's witness Ms. Gröningerová:

"And the State Guarantee does not give you an absolute figure at the beginning, but it says that it will only guarantee the Net Asset Value based on the difference between total assets and total liabilities of IPB as at June the 19th, 2000. And the State Guarantee, as provided by the Ministry of Finance, was a combination of performance by KoB and later on CKA, and the Ministry of Finance, and the exact figure was not known at the beginning. But there was a rough idea that it would be the difference between the total assets and total liabilities of IPB as at June the 19th, 2000, being the Net Asset Value as of at that date." (Tr. Day 2, p. 323, lines 2-13).

131 Based on the witness testimony of Ms. Gröningerová and Mr. Höfer, the Tribunal stresses that if the J. Ring Items had been kept by CSOB as White Items, they would have been valued at their IAS value and given the indebtedness of J. Ring it is fair to assume that a 100% reserve would have been created for their full face value. Hence, the J. Ring Items would have significantly increased the liability side of the Final NAV Statement – in the same amount as the consideration paid by CKA –, and consequently the potential payment to be made by the MoF under NAV Statement.

- 132 Given that CSOB has explained that the net economic effect of treating an Item as White or Black was the same for the purpose of the state guarantee, and the only difference was whether the payment to CSOB was made by the MoF or CKA, the Tribunal finds the MoF's argument that the payment sought by CSOB would lead to an increase of the state guarantee to be without merits. It is because CSOB has already received state support with respect to the J. Ring Receivables from CKA, and because it had to repay that consideration following their failed transfer, that the MoF's payment under Article 2.5 ASG sought by CSOB would amount to a *replacement payment* and not to an *additional payment* as alleged by the MoF. It is undisputed that the transfers of Items to CKA, in accordance with the provisions of the Restructuring Agreement, were a means of implementing the ASG. Consequently, the Tribunal considers that if the transfers were covered by the ASG in the first place, a payment which replaces the consideration for the transfer which was returned by CSOB back to CKA must also be covered.
- 133 Second, the Tribunal considers that the MoF cannot from hindsight claim that its guarantee under the ASG with respect to the J. Ring off-balance sheet liabilities was limited to the negligible amount of the corresponding provision in the Final NAV Statement. As stressed above (*supra*, N 124), the MoF's defense is tantamount to completely excluding the J. Ring off-balance sheet liabilities from the ASG.
- 134 Such a defense fails on the basis of the numerous references to off-balance sheet liabilities in the ASG as originally drafted and in Amendment 1 (*supra*, N 99 *et seq.*). Had the MoF truly construed its liability with respect to off-balance sheet items to be limited in such a way under the ASG, the wording of the ASG itself should have been changed, or as Mr. Janota puts it "*the formulation in 1.2 [ASG] should have been written in a clearer way, should have been much clearer as I see it now*" (WT Janota, Tr. Day 1, p. 192, line 24).
- 135 More importantly, the Tribunal considers – based on a teleological argument – that the Parties could not *reasonably* have understood the ASG to exclude the J. Ring off-balance sheet liabilities. Such interpretation would contradict the most basic commercial sense.
- 136 It is common for all banks to have off-balance sheet liabilities. As Mr. Knapp, current member of the board of CSOB has explained in his oral testimony "*off-balance sheet items are standard, integral part of each bank's business*" (WT Knapp, Tr. Day 3, p. 569, lines 21-22).

- 137 Based on the evidence on record, it is clear that in the IPB transaction the issue of IPB's off-balance sheet liabilities was even the more so at the center of the Parties' negotiations.
- 138 When the Parties entered into the ASG on June 19, 2000, they had anticipated that the Net Asset Value of IPB's Enterprise would be deeply negative. Messrs. Janota and Štenc, and Ms. Gröningerová confirmed their understanding that it was expected that the Czech State intervene to cover the liabilities of IPB as they exceeded IPB's assets (WT Janota, Tr. Day 1, p.173, lines 7-11; WT Štenc, Tr. Day 3, p. 375; WT Gröningerová, Tr. Day 2, p. 306, lines 12-25). This was due to the fact that in June 2000, IPB was on the verge of bankruptcy.
- 139 It was thus against this background that the MoF consented to grant state support in the form of the Zero NAV Guarantee – and not in the form of an exact amount that could not in any event be quantified at the time given the situation of emergency – under Article 2.1 ASG as originally drafted. As explained above, the Restructuring Agreement and Amendment 1 to the ASG did not alter the scope of the MoF's guarantee in any way. The result of the Restructuring Agreement and Amendment 1 was simply to adapt the mechanism of the MoF's guarantee. The Tribunal notes in this respect that Article 2.1 as amended by Amendment 1, uses the exact same wording as the Article 2.1 in its original version.
- 140 Mr. Lamser, member of CSOB's board of directors in June 2000 who had responsibility for coordinating the negotiations with the MoF and the CNB for the acquisition of IPB, explained that it was unthinkable for CSOB to enter the transaction without guarantees from the Czech State (WS Lamser, CWS-4). As stated by CSOB in its Post-Hearing Brief, carving out off-balance sheet items from the scope of the Czech State's guarantee would have meant disregarding an important and significant part of IPB's Enterprise, and was therefore never considered by CSOB (CPHB, para. 7).
- 141 In light of the context of the acquisition of IPB's Enterprise by CSOB, and based on the Parties' common understanding that CSOB was to acquire a bank for which the liabilities equaled the assets, the Tribunal finds that the MoF cannot exclude the J. Ring off-balance liabilities from the scope of its guarantee under the ASG.
- 142 Such exclusion would amount to a violation of the Zero NAV Principle.
- 143 Based on the foregoing analysis of the contractual provisions underlying the IPB transaction, the Tribunal finds that the fact that the J. Ring Items were only partially included in the Final NAV Statement does not preclude CSOB from bringing a claim under Article 2.5 ASG for the entire amount of the J. Ring Items.

144 The MoF's defense is rejected.

B. Did the Parties enter into an agreement providing that off-balance sheet liabilities would be exclusively governed by the Indemnity Agreement?

1. Claimant's Position

145 CSOB denies that the Parties ever entered into an agreement providing that off-balance sheet items of the type of the J. Ring Items should be *exclusively* covered by the Indemnity Agreement.

146 CSOB's stresses that there can be no doubt that off-balance sheet items fall within the scope of the ASG as implemented through the Final NAV Statement, the Restructuring Agreement and Amendment 1 to the ASG.

147 To overcome that fact, the MoF has asserted at a very late stage of the proceedings that the Parties had agreed during meetings held between October 2002 and June 2003 (the **2002|2003 Meetings**) that the J. Ring Receivables were to be dealt with exclusively under the Indemnity Agreement between CNB and CSOB. However, the witnesses the MoF relied upon in this respect were unable to confirm, upon oral examination during the Hearing, the existence of the alleged agreement (CPHB, para. 37).

148 CSOB relies on the witness testimony of Mr. Štenc and Mr. Knapp, to assert that the only subject of the 2002|2003 Meetings was certain *specific* receivables, namely the receivables relating to the debtors Pivovar Klaster, a.s., ABA-AIR, a.s., CARent, a.s., and Millenium, which were different from other receivables arising from aval in that, as at June 19, 2000, CSOB itself owned the promissory notes drawn by those debtors and avalized by IPB. Accordingly, CSOB became both a creditor and a debtor under the still undue promissory notes (CPHB, para. 38; WS Štenc, Exhibit CWS-10, paras. 3 and 5). It was in respect of these four particular receivables that the MoF assured CSOB during the 2002|2003 Meetings that it had agreed with the CNB that these specific Items would be dealt with under the Indemnity Agreement.

149 In sum, with respect to the 2002|2003 Meetings CSOB alleges (i) that they were limited in scope to four specific Items, different from the type of J. Ring; (ii) that the treatment of the J. Ring Items was never discussed during the 2002|2003 Meetings; and (iii) even if the MoF assured that certain specific Items would be dealt with under the Indemnity Agreement, CSOB never waived its right to seek compensation from the MoF under Article 2.5 ASG.

150 Moreover, CSOB denies that the Parties ever entered into an agreement to the effect that the conclusion of the Final NAV Statement prevents the reimbursement under Article 2.5 ASG of moneys returned following invalid transfers after June 18, 2002.

151 Article 2.5 ASG clearly allows CSOB to recover amounts it has had to repay CKA without having to re-open the Final NAV calculation. CSOB maintains that the Parties never entered subsequently, *i.e.* after the signature of Amendment 1 ASG, into an agreement which would limit Claimant's right to bring a claim under Article 2.5 ASG (CPHB, paras. 44-45).

2. Respondent's Position

152 The MoF seeks dismissal of CSOB's claim for payment under Article 2.5 ASG.

153 The heart of the MoF's defense in this respect lies within the assertion that the Parties entered into an agreement providing that off-balance sheet items of the type represented by the J. Ring Items would be *exclusively* covered by the Indemnity Agreement. According to the MoF, the Final NAV Statement, as signed on September 17, 2003, represents such an agreement, to the extent such Items were not reflected in the Final NAV Statement.

154 The guarantee granted by the MoF on June 19, 2000 under the ASG was originally flexible and as a result, at that point in time, an uncertainty existed as to the exact value of the state support that was to be provided to CSOB under the ASG. This original uncertainty was justified by the circumstances of crisis that led to the IPB transaction.

155 However, the flexibility as to the amount of State aid granted under the ASG was to be limited in time, in order to comply with applicable State aid rules. The Czech Office for the Protection of Competition (the **OPC**) in its Decision VP[S 9]00-160 of June 19, 2000, thus imposed the subsequent quantification of State aid provided under the ASG as a specific condition for the validity of the State aid exemption (Exhibit R-36).

156 The MoF submits that the Final NAV Statement's purpose was to set forth the exact and final amount of State support to be granted to CSOB under the ASG (RPHB, para. 56).

157 Thus, in determining the Final NAV, the MoF argues that the Final NAV Statement fixed the obligations of both the MoF and CKA under the ASG to the amount of CZK 153.3 billion, plus agreed accrued interest. The MoF allegedly insisted on the finalization of the Final NAV Statement precisely to fix its liability

under the ASG and "*to achieve a closing of the transaction*" (RPHB, para. 58, footnote 43). The MoF relies in this respect on the Final ASG exemption decision of the European Commission (Exhibit C-14, para. 62 and p. 8), as well as on the witness testimony of Zlata Gröningerová (WT Gröningerová, Tr. Day 2, p. 323, lines 23-25 *et seq.*).

- 158 Thus, regardless of whether an overlap originally existed between the ASG and the Indemnity Agreement in addressing the treatment of IPB's former off-balance sheet liabilities, it is the MoF's case that such overlap ceased to exist following September 17, 2003, *i.e.* following the signature of the Final NAV Statement which fixed the MoF's liability under the ASG.
- 159 Accordingly the consequences are two-fold: following September 17, 2003 (i) IPB's former off-balance sheet liabilities may only be claimed under the ASG in the amount in which they were, in each individual case, included in the Final NAV Statement; and (i) to the extent there is any excess, such excess can be claimed only under the Indemnity Agreement (RPHB, paras. 60 and 63).
- 160 To support the fact that these consequences – and in particular the exclusive application of the Indemnity Agreement – were equally understood by CSOB, the MoF relies in particular on the List of Claims submitted by CSOB to the European Commission for the purpose of the assessment of the IPB transaction by the Commission. In this List of Claims, the J. Ring Items are listed as potential claims against the CNB under *the Indemnity Agreement* (Exhibit R-16, together with the cross-examination of Alexandr César by Respondent's counsel regarding this exhibit at Tr., Day 1, p. 113, lines 1-3, p. 118, lines 19-21). Moreover, the MoF stresses that CSOB with respect to the J. Ring Items has initiated parallel arbitration proceedings against the CNB under the Indemnity Agreement.
- 161 The MoF refers to the 2002|2003 Meetings to support its position. The fact that there was a difference between the purchase price for which former off-balance sheet liabilities were transferred to CKA and the amount in which such items were included in the Final NAV Statement was allegedly discussed during those meetings. In connection with a return of such former off-balance sheet liabilities by CKA, the MoF asserts that two solutions were considered by the Parties: (i) either CSOB would retain the former off-balance sheet liabilities under discussion and the entries corresponding to them in the NAV Statement – which had not yet been agreed upon at the time of the 2002|2003 Meetings took place – would be changed to include them in the amount of performance made by CSOB for these liabilities after June 19, 2000 (WS Janota, RWS-11, para. 7); (ii) or the NAV Statement would be left unchanged, in which case CSOB could claim recovery for the amounts in excess of those stated in the Final NAV Statement, however exclusively under the terms of the Indemnity Agreement. In this respect, the MoF

relies on a letter dated February 7, 2003 sent by Zlata Gröningerová and František Hamáček to Jan Lamser (Exhibit 251), and to the understanding of its auditor, KPMG (Exhibits R140 and R141).

- 162 Finally, the MoF concludes that the exclusive application of the Indemnity Agreement would not be "unfair" and does not by any means undermine the Zero NAV Principle. The fact that the J. Ring Items should be dealt with under the terms of the Indemnity leads to the same economic outcome for CSOB.

3. Decision of the Arbitral Tribunal

- 163 The MoF has asserted, as a further defense to CSOB's claim under Article 2.5 ASG, that the Parties entered into an agreement whereby off-balance sheet Items of the type of J. Ring were to be exclusively dealt with under the Indemnity Agreement.

- 164 The MoF bears the burden of proving the existence of this agreement in order to prevail in its defense. Given the numerous references to off-balance sheet items in the ASG, Amendment 1 and the Restructuring Agreement, the Tribunal stresses that the burden of proof to be met by the MoF in the case at hand, is very high.

- 165 The Tribunal finds that it is not met.

- 166 The Indemnity Agreement was entered into between CSOB and the CNB on June 19, 2000 simultaneously to the Sale Agreement and the ASG (Exhibit C-10). This contract was thus one of the three key contracts underlying CSOB's acquisition of IPB's Enterprise.

- 167 The MoF has described the Indemnity Agreement as having been designed to prevent the Zero NAV Principle, as defined in the ASG, from being economically affected by off-balance sheet liabilities, unrecorded liabilities and recorded but missing assets (SoDC, para. 16). Pursuant to Articles 1.2 to 1.4 of the Indemnity, the CNB undertook to compensate CSOB in cash for such off-balance sheet liabilities, unrecorded liabilities and recorded but missing assets which existed at the time of the transfer of IPB's Enterprise. Article 1.4 Indemnity Agreement reads as follows:

"The CNB hereby irrevocably and unconditionally agrees and guarantees to indemnify the Bank for any payments or other performance of any nature actually realized by the Bank in connection with any off-balance-sheet liabilities of the Enterprise, irrespective of whether such liabilities were recorded in books or not,

providing that such liabilities existed as of the effective date of the Agreement on Sale of Enterprise." (Exhibit C-10).

- 168 Based on its express wording, there is no doubt that the Indemnity Agreement applied to off-balance sheet liabilities. Given the Arbitral Tribunal's conclusion in Section VI.A.3.1 and finding that the ASG, including Amendment 1, applied to off-balance sheet liabilities, it is clear that there is an "overlap" of contracts with respect to off-balance liabilities. The existence of this overlap is uncontested by the MoF (see in particular, RPHB, para. 61).
- 169 The overlap between the ASG and the Indemnity Agreement was not a mistake, but rather a clear choice of the Parties justified by the context surrounding the June 19, 2000 transaction. In order to make sure that CSOB would not be compensated twice for the same off-balance sheet liabilities, the Parties expressly agreed that CSOB would return funds it had received from the CNB if it had received the relevant performance otherwise. This safeguard was provided for by Article 1.6 of the Indemnity Agreement. Questioned on this issue by the Arbitral Tribunal, Mr. Knapp explained that the existence of this overlap was important for CSOB:

"So--and this Indemnity Agreement which was signed with Czech National Bank, this Agreement was more related to these unrecorded liabilities, off-balance-sheet liabilities. On the other hand, there was sometimes very difficult and reliability also of many recording booked entries was really questioned, so, therefore, it was important to have there certain overlap, which was also explained, I think the first day by Mr. Lamser, but there was also this clause 1.6 in the Indemnity Agreement which was also discussed already here which broad clear mechanism that CSOB couldn't be compensated twice for the same--for the same item. So, there was an overlap. It's clear, but there was normal standard that because this is part of standard part of banking business that firstly we wanted to have it, value it as a part of enterprise, IPB Enterprise." (Tr. Day 3, p. 570, lines 6-19, emphasis added).

- 170 Consequently, based on the wording of the relevant contracts, CSOB could theoretically claim for compensation for the J. Ring off-balance liabilities either under the ASG, or under the Indemnity Agreement. As the claim in this arbitration is brought under the ASG, the MoF bears the burden of proving that such overlap no longer exists or that CSOB subsequently waived its right to claim compensation under the terms of ASG.
- 171 The Arbitral Tribunal has considered the witness testimony of Mr. Janota and Ms. Gröningerová relied upon by the MoF to claim that it follows from the 2002|2003

Meetings that the J. Ring off-balance liabilities were to be exclusively covered by the Indemnity Agreement (WS Janota, RWS-11, WS Gröningerová, RWS-12).

- 172 The MoF has explained that the 2002|2003 Meetings took place because CKA exercised its right to return four receivables which, like the J. Ring Items, arose after June 19, 2000 from former off-balance sheet promissory note guarantees of IPB. Ms. Gröningerová asserts that the problem solved in these meetings was a general one while conceding that the case of the J. Ring Items was not expressly discussed simply because CKA withdrew from the Assignment Agreements well after those meetings took place, *i.e.* on February 9, 2004 (WS Gröningerová, RWS-12, paras. 5-7). To prove that CSOB however equally understood that the solution discussed during the 2002|2003 for four specific receivables was to be a general one, the MoF has submitted into the record an e-mail by Ms. Netusilova to CKA dated February 21, 2003 which reads as follows:

"Enclosed please find a proposed solution of the impact of return of assigned receivables from performance rendered under aval (Charouz, Pivovar Klaster). It can be generally applied to all cases of this type, as well as the draft Settlement Agreement sent to you yesterday." (Exhibit R-262).

- 173 The MoF claims that during the six-month negotiation which took place in late 2002 and the first half of 2003, the Parties agreed that following the closing of the Final NAV Statement, assets which originated from former off-balance sheet liabilities of IPB, in the amount not reflected in the Agreed NAV Statement, were to be dealt with under the terms of the Indemnity.
- 174 The Tribunal notes that the MoF's interpretation of the 2002|2003 Meetings has a significant impact on the scope of the guarantees granted by the State to CSOB with respect to off-balance sheet liabilities, as under the Indemnity Agreement CSOB can only seek compensation from the CNB and at different conditions than those set forth in the ASG, whereas CSOB originally benefited from a conscious overlap of guarantees. Questioned by the Tribunal, counsel for Respondent indeed expressly acknowledged – and the Tribunal agrees – that the *"the two agreements, the ASG and the Indemnity are not identical in their terms and conditions; and therefore, the payments may be different under each of them"* (Tr. Day 4, p. 609, lines 12-18).
- 175 Hence, had CSOB truly waived its right to seek compensation under Article 2.5 ASG for *all* cases of failed transfers of receivables under aval, said waiver would have had to be explicitly expressed in such general terms.
- 176 The Tribunal has considered the Minutes of the 2002|2003 Meetings, and in particular the Minutes of the meeting which took place on June 25, 2003 relied

upon by Mr. Janota and Ms. Gröningerová, which read in their relevant part as follows:

*"In addition to the above areas which basically characterize all of the remaining matters necessary to compile the Agreed NAV Statement, auditor KPMG pointed out one more matter which needed to be resolved, specifically **certain note avals (Pivovar Klaster, Charouz)**, where CSOB envisaged a solution with the CNB outside the agreed NAV Statement."* (Exhibit R-146, Emphasis added).

- 177 Moreover, the Tribunal has reviewed the contemporaneous correspondence relating to the said meetings, and in particular the letter sent by Ms. Gröningerová and Mr. Hamáček to Mr. Lamser on February 7, 2003, indicating that the disputed receivables discussed during the meetings were *"Pivovar Klaster, a.s., ABA – Air, a.s., and Millenium, a.s."*
- 178 Based on these minutes and correspondence, the Tribunal understands that the scope of the 2002|2003 Meetings was expressly limited to *"certain"* avals. This seems to be in line with the fact that the Parties dealt on a case-by-case basis to address certain difficulties in the preparation of the Final NAV Statement (see in particular, WT Gröningerová, Tr. Day 4, pp. 640 *et seq.*). The issue of whether or not the case of the J. Ring Items was expressly discussed during the 2002|2003 Meetings is of little relevance: since the transfer of the J. Ring Items was only invalidated in February 2004, the Parties could not reasonably have been expected to discuss this particular case. The true decisive factor lies in two consequences the Tribunal draws from the evidence on record.
- 179 First, the Tribunal has found no evidence in the meeting minutes and correspondence of a waiver of CSOB expressed in *general terms*, whereby it would have expressly agreed to limit the scope of its rights regarding off-balance liabilities to the Indemnity Agreement.
- 180 Second, the Tribunal has found no evidence of an express agreement of the Parties to treat the J. Ring Receivables in particular under the terms of the Indemnity Agreement. The MoF has indeed failed to produce meeting minutes or correspondence expressly addressing the J. Ring case, whereas such express correspondence existed for other cases of receivables under aval. Absent any such evidence relating to the J. Ring Receivables, the Tribunal is bound to conclude that no such agreement exists.
- 181 In an attempt to prove that CSOB also understood the particular case of the J. Ring Items to fall exclusively under the terms of the Indemnity Agreement, the MoF has relied to a great extent on the List of Claims submitted to the European Commission for the purposes of the EC Decision, whereby the Commission

assessed the State aid measures delivery under the Indemnity Agreement, and concluded on the basis of this List that they were not applicable after accession (Exhibit R-16; Tr. Day 1, pp. 118-119, lines 23-25 and 1-7). The Tribunal has reviewed this List of Claims and has noted that the J. Ring Items are indeed listed as claims under Article 1.4 of the Indemnity Agreement on page 288. However, Mr. César explained that this List merely related to the Indemnity Agreement and did not address at all the ASG. When assessing the Indemnity Agreement – and unlike for the ASG – the Commission specifically required CSOB to list all *potential* claims which could be brought against the CNB under the Indemnity Agreement (WT César, Tr, Day 1, p. 126, lines 2-13). Hence, the Tribunal finds that the mere indication of the J. Ring Items on a list of potential claims to be brought under the Indemnity cannot amount to an explicit waiver to introduce such claim under the terms of the ASG, given the original existence of an overlap between the ASG and the Indemnity Agreement.

- 182 Likewise, the MoF's defense based on the commencement of arbitral proceedings by CSOB against the CNB for recovery under the Indemnity Agreement cannot be construed as a waiver to assert its rights under the ASG. As explained by counsel for CSOB during the Hearing, these arbitral proceedings were commenced *after* the present proceedings, and were initiated as an *"alternative claim for the purpose of stopping the claim becoming time-barred"* (Tr. Day 1, p. 38, lines 13-15). The Tribunal considers this a plausible explanation and therefore considers it cannot draw any adverse inference against CSOB from what amounts to a prudent contingency plan.
- 183 Finally, the Tribunal considers that the MoF's argument claiming that conclusion of the Final NAV Statement brought an end to the original overlap existing between the ASG and the Indemnity with respect to moneys returned following invalid transfers after June 18, 2002 and leads to the exclusive application of the Indemnity Agreement, must be rejected on the basis of the relevant contractual provisions.
- 184 As explained above (Section VI.A.3), the Arbitral Tribunal has found that the MoF's guarantee under the ASG cannot be construed to be limited to the amounts expressed in the Final NAV Statement, simply because CSOB has already received payments over and beyond those amounts. Further, the Tribunal finds it decisive that Article 2.5 ASG itself provides a mechanism which, by its very nature, permits CSOB to recover amounts it has had to repay to CKA *without having to re-open the Final NAV calculation*. Hence, the consequences of transfers invalidated after June 18, 2002 were expressly foreseen and dealt with by Article 2.5 ASG, which reads as follows with respect to transfers invalidated after that date:

"If any circumstances set forth under (i) and (ii) above occurs **after 18 June 2002** and the Bank returns the amount received for such Item (including interest, if any) or a part thereof to KoB or another person to which the respective Item had been transferred (assigned), **the MF shall reimburse the Bank for an amount equaling the sum returned or paid in consequence of such circumstances to KoB by the Bank.** The amount paid by the MF to the Bank under this provision shall hereinafter be referred to as "Payment". From the day of the Bank returning the amount of the price (consideration) for an Item to KoB until the payment by MF, the Payment shall be subject to interest at the rate of 3M PRIBOR increased by 27 basis points. For the avoidance of doubt, the provisions of this paragraph shall also apply if it is impossible to transfer the relevant Item from KoB back to the Bank." (Exhibit C-1, emphasis added).

185 Based on the foregoing and absent any evidence to the contrary, the Arbitral Tribunal finds that CSOB did not waive its right to claim payment under Article 2.5 ASG for the failed transfer of the J. Ring Items.

186 The MoF's defense based on the exclusive application of the Indemnity Agreement is rejected.

C. Do the rescission of the Assignments Agreements signed between CSOB and CKA, and the reasons for such rescission, legally prevent CSOB from asserting rights against the Ministry of Finance under Article 2.5 ASG as amended by Amendment 1?

1. Claimant's Position

187 CSOB maintains, in response to the MoF's defense in this respect, that the reasons which led to the rescission of the Assignment Agreement by CKA do not legally prevent CSOB from asserting its right to reimbursement under Article 2.5 ASG.

188 CSOB's argument is two-fold.

189 First, CSOB stresses that Article 2.5 ASG is "*unconditional*". The rescission – or invalidation – of an Item's assignment to CKA is not an obstacle to CSOB's right to bring a claim under Article 2.5 ASG, but rather precisely the condition precedent which gives rise to such a claim.

190 Moreover, CSOB refers to the wording of Article 2.5 ASG and notes that nothing in this provision limits its right to payment on the basis of the reason why a transfer to CKA is invalidated or rescinded (CPHB, paras. 45-48).

- 191 On the contrary, KoB (later CKA) insisted on having a right to return Items to CSOB if the transfer was invalidated. Unless the returned Items were duly reflected in the Final NAV Statement at their IAS value, the return of the Items to CSOB would undermine the Zero NAV Principle and upset the balance of the transaction. It is precisely for that reason that the Parties included two processes, depending on whether the transfer was invalidated before or after June 18, 2002 (*i.e.* the date for finalizing the division of IPB's Items into White and Black Items), under Article 2.5 ASG. It is precisely because CSOB asserts that the Zero NAV Principle has been breached by the MoF's refusal to perform under Article 2.5 ASG that CSOB claims to have initiated the present arbitration proceedings. CSOB relies, to support its case, on the witness testimony in this respect of Premysl Štenc, Alexandr César and Jan Höfer.
- 192 Second, CSOB objects to the MoF's further defense that the J. Ring ceased to qualify as Items for the purpose of Article 2.5 ASG because of its alleged failure to endorse the J. Ring Promissory Notes when assigning the J. Ring Items to CKA, or because CSOB has allegedly paid the said Promissory Notes prematurely.
- 193 With respect to the issue of lack of endorsement, CSOB argues that at the time of the transfer of the J. Ring Receivables to CKA in 2002 (*i.e.* at the time of signature of the Assignment Agreements), there was no case law requiring to endorse underlying promissory notes for the purpose of assigning *recourse rights* of an avalist. CSOB refers to the witness testimony of its expert, David Urbanec (WS Urbanec, Exhibit CEX-4, p. 8; WT Urbanec, Tr. Day 5, pp. 822-825).
- 194 Moreover, CSOB asserts that it was a joint decision of CSOB and CKA not to endorse the Promissory Notes, or rather that CSOB and CKA – contrary to other transactions – did not agree on the need to endorse promissory notes paid by an avalist, for the purpose of assigning the recourse receivables resulting from the payment of those notes (CPHB, paras. 55-61). CSOB refers in this respect to the negotiations relating to the standard agreement on transfer of avalist's rights (the **Standard Agreement**) and to the fact that the Standard Agreement did not contain an explicit obligation to endorse such promissory notes (CPHB, para. 59).
- 195 CSOB stresses that hundreds of avalist recourse receivables were transferred to CKA without endorsement of the underlying promissory notes. There was not a single case where CKA objected or sought endorsement before the decision of the High Court of Prague of May 6, 2003 (Exhibit R-56), which clearly proves that before this decision it was the common understanding of CSOB and CKA that no endorsement of the J. Ring Promissory Notes was required.

- 196 Further, after the High Court of Prague issued its decision on May 6, 2003, CSOB expressly wrote to CKA offering to endorse the promissory notes concerning recourse receivables (Exhibits C48 and C49). CSOB alleges that CKA accepted subsequent endorsements in many cases, but refused such endorsement with respect to the J. Ring Promissory Notes (CPHB, para. 62). In so doing, CKA hindered the elimination of a legal obstacle to a valid transfer, in breach of its obligations under Article 11 of the Framework Agreement, and Article 17 of the Assignment Agreements.
- 197 CSOB equally objects to the MoF's argument that CSOB allegedly paid the J. Ring Promissory Notes before their maturity date, and hence, has lost its rights under Article 2.5 ASG.
- 198 First, CSOB stresses that the Assignment Agreements were not invalidated because of the alleged premature payment but only because of a lack of endorsement of the underlying Promissory Notes. Moreover, CSOB denies to have prematurely paid the Promissory Notes to their holders. CSOB relies on the witness testimony of Radim Homolka to assert that the dates mentioned in the quittance clauses on the Promissory Notes are merely the dates on which the moneys were transferred to CSOB's "nostro" accounts in CSOB's correspondent banks abroad (*i.e.* UBS, Credit Suisse, and ZKB), and not the actual dates of payment to the holder of the Promissory Notes which only occurred subsequently. The payments of the Promissory Notes were credited on the holders' accounts on the respective maturity date of the relevant Promissory Notes, *i.e.*, on July 31, 2000, May 28, 2001 and July 30, 2001 (SoC, para. 55; CPHB, paras. 63-66), as evidenced by the SWIFT confirmations submitted by CSOB (Exhibits C32 to C36, C101, and C102).
- 199 Hence, CSOB concludes to the dismissal of the MoF's defense based on the alleged lack of endorsement and premature payment of the J. Ring Promissory Notes.

2. Respondent's Position

- 200 In addition to arguing that the J. Ring off-balance liabilities do not fall within the scope of Article 2.5 ASG because they were not fully included in the Final NAV Statement, the MoF alleges that the specific conditions for recovery pursuant to Article 2.5 ASG are not met in the case at hand.
- 201 The MoF argues in essence that CSOB may only assert rights under Article 2.5 ASG if an "Item", as defined in Article 1.1 of the Restructuring Agreement, has been invalidly transferred to CKA.

- 202 It is the MoF's case that the J. Ring Receivables do not qualify as an "Item" in the sense of Article 1.1 Restructuring Agreement because of (i) CSOB's alleged failure to preserve the rights under the Promissory Notes upon payment to the holders of the Promissory Notes, and (ii) CSOB's alleged failure to validly transfer the J. Ring Receivables to CKA, in breach of its obligations under the Restructuring Agreement.
- 203 First, the MoF submits that CSOB in reality never acquired the rights, *i.e.* the J. Ring Receivables, it purported to transfer to CKA under the Assignment Agreements (SoDC, para. 101).
- 204 In order to validly acquire recourse rights under the J. Ring Promissory Notes, CSOB would have had to (i) present the Notes for payment to J. Ring as the primary obligor for payment on the Notes' maturity dates, and (ii) failing such payment by J. Ring on the due dates, honor the payment obligation under the Notes itself as avalist.
- 205 However, the MoF claims that none of the above occurred (SoDC, para. 97).
- 206 CSOB never presented any of the Notes for payment to J. Ring. Instead CSOB claims to have sent a letter to J. Ring on May 17, 2001 advising it of the approaching maturity date of one of the Notes and asking it to transfer funds sufficient for the discharge of that Note ahead of the maturity date. J. Ring did not reply to that letter, and the MoF alleges that CSOB did not adduce any evidence that J. Ring in fact received that letter (SoDC, para. 98).
- 207 Moreover, the MoF has argued throughout its submissions, that CSOB had paid the Promissory Notes to their respective holders *before their stated maturity* (SoDC, paras. 99-100; Rejoinder, para. 126-144). In this respect, the MoF relies on the "quittance clause" on the back of the Promissory Notes which mention in all cases a date anterior to the maturity date of the Notes (Exhibit C-39).
- 208 According to the MoF's expert, Jindřich Vitek, an avalist is a secondary obligor of the payment obligation incorporated in a promissory note. Hence, the avalist's payment obligation does not arise – or "crystallize" as the MoF puts it – until the maturity of the note. Consequently, if an avalist pays prematurely, the payment does not discharge him of his payment obligation and the avalist thus does not acquire any recourse rights, because the obligation never came to exist in the first place (WS Vitek, Exhibit REX-1). Hence, the MoF alleges that CSOB never truly acquired the J. Ring Receivables.
- 209 As a result, CKA entered into the Assignment Agreements based on the mistaken belief that CSOB's representation as to the existence of the J. Ring Receivables

was true and accurate (SoDC, para. 104). CSOB's defense based on the lack of objection of CKA must be rejected: CKA was not in a position to object to the premature payment of each of the Promissory Notes immediately upon their delivery and receipt because hundreds of items were being transferred to CKA under assignments agreements implementing the Restructuring Agreement. It was thus humanly impossible for CKA to check immediately upon transfer the accuracy of CSOB's representations in respect of each individual asset which was received by CKA.

- 210 Second, the MoF asserts that CSOB failed to transfer to CKA the purported rights arising under the J. Ring Promissory Notes because CSOB *never endorsed* the underlying Notes. Such an endorsement was required as a matter of contract and as a matter of law (SoDC, para. 107).
- 211 The MoF maintains that, pursuant to Section 18(1) of Act No. 591/1992 Coll., as amended (the **Securities Act**), a transfer of rights incorporated in a promissory note requires the endorsement of the underlying note (Exhibit R-77). This requirement of Czech law exists since 1992, and was explicitly confirmed by the High Court of Prague in its judgment of May 6, 2003 (Exhibit R-56).
- 212 This principle of endorsement has already been confirmed by three judicial and arbitral decisions in the Czech Republic, precisely with respect to the J. Ring Receivables.
- 213 The November 5, 2003 decision of the arbitral tribunal in the arbitration opposing EC Group to CKA held – in the case of the J. Ring Receivables – that in the absence of the endorsement of the Promissory Notes, CKA never validly assigned them to EC Group (Exhibit C-56).
- 214 On March 16, 2004, the Czech Supreme Court equally found that because of the lack of endorsement of the Promissory Notes, neither the rights under the Notes, nor the procedural rights derived from the Notes in the J. Ring bankruptcy proceedings, had been validly transferred from CSOB to CKA (Exhibit R-57).
- 215 On February 17, 2005, the arbitral tribunal issued its decision in the case brought by CKA against CSOB under the Assignment Agreements. The disputed issue was thus identical to the case at hand. The arbitral tribunal confirmed that the endorsement of the underlying notes was indispensable and, based on CSOB's breach of its obligation to endorse the Promissory Notes, declared that the transfer of the J. Ring Receivables to CKA was void (Exhibit C-19).
- 216 According to this award and the Judgment of the High Court of Prague of May 13, 2009 (Exhibit R-153) and given that the MoF is – since December 31, 2007 – the

legal successor of CKA, the MoF raises in the present proceedings the defense of *res judicata* with respect to the issue of lack of endorsement (see in particular Rejoinder, para. 161).

- 217 Finally, the MoF has further argued that the J. Ring Receivables do not qualify as an "Item" in the sense of Article 1.1 Restructuring Agreement because of CSOB's failure to treat the J. Ring Receivables with due care, as prescribed under Article 3.5 ASG, which ultimately led to a deterioration of the value of the J. Ring Receivables. The MoF's defense in this respect is based on (i) CSOB's purported failure to enforce the security and put option rights attached to the J. Ring Receivables, (ii) CSOB's failure to enter the J. Ring Bankruptcy proceedings, and (iii) the fact that CSOB allegedly caused the J. Ring Receivables to prescribe. These three arguments are fully restated and assessed by the Arbitral Tribunal in Section VI.E of this Award.

3. Decision of the Arbitral Tribunal

- 218 The MoF's defense is based in essence on an alleged breach by CSOB of the Assignment Agreements it had concluded with CKA. The MoF asserts that CSOB was under an obligation to transfer the J. Ring Receivables to CKA by endorsement, and that as CSOB has violated this obligation, it must now be precluded from asserting rights against the MoF under Article 2.5 ASG. The Arbitral Tribunal has determined that this defense must be rejected.
- 219 The Assignment Agreements were entered into between CSOB and CKA on February 28, 2002. CKA – the Czech consolidation agency – was the legal successor of KoB, a special state-owned bank established in 1992 which was to support the transformation, restructuring and development of the Czech economy. At that time, CKA and the MoF were two distinct legal entities. CKA was created for the purpose of restructuring corporations and other legal entities as determined by governmental resolutions, by taking over non-performing loans and receivables in order to administer them and ensure their enforcement (Exhibit C-4; SoC, para. 3). CKA was ultimately dissolved and as of December 31, 2007, the MoF became its legal successor.
- 220 Since the MoF became CKA's legal successor as of December 31, 2007, it relies – as a basis to its defense under the ASG – on an alleged breach of the Assignment Agreements, *i.e.* two agreements to which it is not originally a party but subsequently became one by way of legal succession. Hence, arguably, the MoF could rely on the alleged breach by CSOB. However, the question of whether it may rely on CSOB's alleged breach of the Assignment Agreements originally entered into by CKA can be left open because the Arbitral Tribunal finds

that the MoF cannot, on principal, rely on a breach by CSOB of the Assignment Agreements in order to refuse performance under the ASG.

- 221 The Arbitral Tribunal is guided by the wording of Article 2.5 ASG which defines the scope of the MoF's liability with respect to failed transfers to CKA. This provision does not stipulate that the MoF's payment obligation for invalidated transfers should cease to exist in certain cases of invalidity, or in case of a breach by CSOB of an assignment agreement. Quite to the contrary, the Arbitral Tribunal stresses that the wording of Article 2.5 is broad and does not distinguish among the reasons that led to rescission of an assignment. It provides for the MoF's obligation to reimburse CSOB for the consideration it had to pay back to CKA, irrespective of the reason that led to such rescission:

*"(ii) [a]n Item is transferred (assigned) back to the Bank and again becomes a part of its assets, or if **any circumstances** of fact having similar effects occurs, **due to KoB or another person** to which the respective Item had been transferred (assigned) rescinding an Individual or Framework Agreement **for any reason**" (Exhibit C-1, emphasis added).*

- 222 As explained in the Parties' submissions and during the Hearing, it had been anticipated during the negotiations of the Restructuring Agreement that certain transfers to CKA might be subsequently invalidated. That was indeed the reason why the mechanism of Article 2.5 ASG was ultimately agreed to in order to prevent CSOB from bearing the risk of invalidated transfers of Items, which would have seriously undermined the Zero NAV Principle.

- 223 The Arbitral Tribunal refers – in particular – to the witness testimony of Mrs. Gröningerová who summarized the mechanism of Article 2.5 ASG without any indication that CSOB's recovery from the MoF under Article 2.5 ASG should be limited to certain cases of rescission. Rather, the only condition for the MoF to perform under Article 2.5 ASG appears to be the fact that the rescission of the Item's transfer took place after June 18, 2002. The mechanism of Article 2.5 ASG thus appears to have been deliberately drafted in a broad manner:

"Q. So, the rationale was that CKA reserved a right to rescind a transfer, and CSOB in that event could turn to the Ministry of Finance under Article 2.5 of Amendment 1; is that a fair summary?"

A. Yes. CKA--or rather this mechanism said from the point--viewpoint of CKA that if the Item of transfer is invalid, then it can be handled in whatever manner. It would not be at the CKA's disposal. And if this comes out after the transfer only, there was this possibility to rectify things by returning that particular Item to CSOB either prior to the 18th of June 2002 or after that date. If it's after that date, then CSOB in which--which in both cases returns the consideration, then if it's after the 18th of June, then it is the Ministry of Finance that should make that payment to CSOB." (WT Gröningerová, Tr. Day 2, p. 319, lines 1-14).

- 224 Consequently, the Arbitral Tribunal finds that the MoF's overly restrictive interpretation of Article 2.5 ASG contradicts the express and broad wording of the provision: the wording of Article 2.5 ASG, reflecting the agreement of the Parties when they entered into Amendment 1, must prevail over the MoF's attempt to restrict – from hindsight – the scope of its obligations under the ASG.
- 225 The wording of Article 2.5 ASG prohibits the MoF – *from the outset* – from relying on a breach of the Assignment Agreements to refuse performance under the ASG.
- 226 The Arbitral Tribunal has noted that the MoF's defense goes a step further in contending that, as a result of CSOB's alleged failure to transfer the J. Ring Receivables to CKA, the J. Ring Receivables no longer qualify as "Items" for the purpose of Article 2.5 ASG. The MoF asserts in essence that the condition precedent for Article 2.5 ASG to apply is not fulfilled. Notwithstanding its foregoing conclusion (*supra* N 225) and for the sake of completeness, the Arbitral Tribunal turns to the assessment of CSOB's alleged failure to transfer the J. Ring Receivables to CKA.
- 227 The MoF asserts that the J. Ring Receivables never came to exist because of CSOB's (i) alleged non-presentation of the Promissory Notes to the principal debtor under the Notes, and (ii) alleged premature payment of the Promissory Notes to their holders.
- 228 The Arbitral Tribunal first turns to the MoF's contention that CSOB did not properly discharge its obligations under the Promissory Notes as it did not present them for payment to J. Ring in the first place. The Tribunal is guided by the expert witness conferencing which took place during the Hearing between Claimant's Czech law expert Mr. Urbanec, and Respondent's Czech law expert Mr. Vitek. The Arbitral Tribunal has understood from the party experts that Section 4 of Act No. 191/1950 Coll. on Bills and Cheques (**Bills and Cheques Act**) allows for making a promissory note payable at a "domicile", *i.e.* a third party. A domicile is not a person obliged under the note and only serves as an intermediary. It follows that a note must be submitted for payment solely at the domicile (WS Urbanec, CEX10, paras. 8-11). The foregoing was confirmed in oral testimony: at the end of the witness conferencing, both experts came to the conclusion that, despite their diverging interpretations of certain issues, they could agree to the fact that pursuant to the Bills and Cheques Act a domiciled promissory note must be presented to the domicile for the debtor to validly discharge its obligations under the note (Tr. Day 5, p. 839, lines 1-3 and 8-11). Given that CSOB was acting in the case at hand as avalist and domicile of the Promissory Notes, the Arbitral Tribunal is inclined to determine that CSOB properly discharged its obligations under the Promissory Notes.

- 229 However, what is more determining in the Arbitral Tribunal's view is that – as far as it can determine from the evidence on record – J. Ring never objected or raised the argument that CSOB had not properly discharged its obligations under the Promissory Notes. Moreover, it also appears clear from the evidence on record that, due to its financial situation, J. Ring could not have paid the Promissory Notes to their holders itself. Hence, even if CSOB had presented the Promissory Notes to J. Ring in the first place, this would not have altered the conclusion that CSOB would have, ultimately, paid the Promissory Notes in lieu of J. Ring. Further, CKA itself did not raise the issue of non-presentation at the time of the transfer of the J. Ring Receivables. Likewise, the invalidity of the Assignment Agreements determined by the arbitral award Rsp 48/04 of February 17, 2005 was not based on the non-presentation of the Promissory Notes, but solely due to the lack of endorsement of the underlying Promissory Notes (Exhibit C-19).
- 230 The MoF's defense amounts yet again to questioning from hindsight the validity of a transaction of which it was not originally a party to.. Most importantly, such a defense is incompatible with the wording of Article 2.5 ASG which does not allow the MoF to rely on the purported invalidity of the transaction which caused IPB's "Items" to come into existence in order to be excused from performance. Finally, the Tribunal does not find any element to support the defense in the definition of "Items" set forth in Article 1.1 Restructuring Agreement. The MoF's defense based on the non-presentation of the Promissory Notes is rejected.
- 231 Regarding the alleged premature payment by CSOB of the Promissory Notes, the Tribunal is guided by the same findings as the foregoing. The Parties – by relying on the expert testimony of Mr. Urbanec and Mr. Vitek – are in disagreement on the effective date of payment of the J. Ring Promissory Notes to their holders. Addressing the consequences of a premature payment, both experts have explained that if an avalist pays prior to the due date, it bears the risk that the debtor also might pay on the maturity date of the note, in which case the avalist would not obtain a recourse receivable against the debtor. Given the financial situation of J. Ring at the moment of the payment of the Promissory Notes, such risk was highly unlikely to arise.
- 232 Moreover, the Arbitral Tribunal relies on the expert testimony of Mr. Urbanec which convincingly explained that if the principal debtor does not pay the promissory note to its holder, the avalist's payment – although premature – satisfies the debt and results in a recourse receivable against the debtor (WS Urbanec, CWS-10, paras. 35-36). In such a case, it appears to the Arbitral Tribunal – based on the Respondent's expert explanations during the witness conferencing - that under Czech law, the premature payment of a note by an avalist does not put the debtor in a fundamentally different economical situation

than if he had paid the note himself from the outset. Further and most importantly, the premature payment does not have a significant economical impact on the avalist's rights: the premature payment gives rise to the only consequence that the avalist might not be entitled to ask for the statutory 6% interest rate on the amount paid to the holder prior to the due date (WT Vitek, Tr. Day 5, pp. 846-850).

- 233 Given this consequence which appears rather minor, the Arbitral Tribunal finds that the MoF has failed to demonstrate that the premature payment by CSOB – if that was indeed the case – had any impact on CSOB's rights.
- 234 In any case, the Arbitral Tribunal again stresses that J. Ring never argued that the Promissory Notes had been paid prematurely. CKA itself did not raise the issue of premature payment at the time of the transfer of the J. Ring Receivables and signed the Assignment Agreements, even though the Arbitral Tribunal has noted that the voluminous transfers of Items to CKA might have impaired CKA to object to the assignments at the time of the signature of the Assignment Agreements. However, likewise, the invalidity of the Assignment Agreements determined by the arbitral award Rsp 48|04 of February 17, 2005 was not based on the premature payment of the Promissory Notes, but solely due to the lack of endorsement of the underlying Promissory Notes. As set forth above, the Arbitral Tribunal does not find any element to support the MoF's defense of premature payment neither in Article 2.5 ASG, nor in Article 1.1 Restructuring Agreement. Consequently, the MoF's defense based on an alleged premature payment of the J. Ring Promissory Notes to their holders is dismissed.
- 235 The Arbitral Tribunal thus turns to the issue of the alleged lack of endorsement of the J. Ring Promissory Notes. As set out above in Section IV.C.2, the MoF asserts that when the Assignment Agreements were entered into in 2002, Czech law required an endorsement of the underlying promissory note for an assignor to validly transfer the recourse receivable arising from the payment of the note. CSOB disagrees and submits that Czech law did not require the endorsement of the underlying promissory note.
- 236 The Arbitral Tribunal relies on the expert witness statements of Mr. Urbanec and Mr. Vitek, and on their oral testimony during the expert witness conferencing on Czech law issues. It is common ground that since the decision of the Czech Supreme Court of March 16, 2004, the endorsement of the underlying promissory note is required to transfer avalist recourse rights (Exhibit R-57).
- 237 Overall, the Arbitral Tribunal finds that the expert witness conferencing has evidenced that it is unclear whether or not such endorsement was required prior

to the Czech Supreme Court decision, and in particular at the time the Assignment Agreements were entered into.

- 238 In any event, in view of this uncertainty, and given that conflicting opinions on the issue existed in 2002, it is reasonable to assume that CKA – had it truly believed that an endorsement was necessary – should have, as a measure of precaution at least, expressly stated this requirement in the Assignment Agreements or in the Framework Agreement. In this respect, the Tribunal is guided by the witness testimony of Mrs. Bednariková which confirmed that other agreements signed between the Parties, such as the standard agreements relating to the assignment of discounted loan notes or causal promissory notes, contained an explicit obligation to endorse those notes (WS Bednariková, CWS-9, paras. 19-20; WT Bednariková, Day 5, p. 792, lines 5-21).
- 239 The Tribunal has reviewed the Framework Agreement and the Assignment Agreements. As explained by Mrs. Bednariková, those agreements were the result of substantial negotiations between CKA and CSOB and considerable time was spent on the drafting of their clauses (WT Bednariková, Tr. Day 5, pp. 791-792, lines 24-25 and 1-15). This was particularly true of standard agreements: Mrs. Bednariková explained that the actual Assignment Agreements were not filled out in the headquarters of CSOB but rather by CSOB's branch offices, which received electronic versions of the various standard agreements for the assignments and then filled out the "blanks" which were very limited. The standard agreements were thus intensely discussed in order to be "*technically locked*" as put by the witness, *i.e.* as complete as possible, to leave only limited space to the branch offices. This procedure was also implemented in the case of the Assignment Agreements at the center of this Arbitration (WT Bednariková, Tr. Day 5, pp. 792-794).
- 240 The Arbitral Tribunal concludes that neither the Framework Agreement nor the Assignment Agreements contain a provision requiring the endorsement of the Promissory Notes. Given the context of their negotiations, the Arbitral Tribunal finds that CSOB was under no contractual obligation to endorse the underlying Promissory Notes.
- 241 After having been assigned the J. Ring Receivables, CKA assigned them in turn to EC Group, on November 5, 2002. It is undisputed that CKA did not itself endorse the underlying Promissory Notes. The issue of the lack of endorsement thus only arose when EC Group required CKA to endorse the Promissory Notes.
- 242 The fact that the Assignment Agreements were ultimately voided by the arbitral award RSP 48|04 because of the lack of endorsement of the J. Ring Promissory Notes is undisputable. The J. Ring Receivables were returned to CSOB and

CSOB was ordered to reimburse CKA for the consideration it had received. This is precisely why CSOB now has standing to seek payment from the MoF under Article 2.5 ASG in this Arbitration.

- 243 The Arbitral Tribunal does not intend to – nor is it empowered to – question the findings of other arbitral tribunals or of the Czech Supreme Court in this respect. The issue of the lack of endorsement of the J. Ring Promissory Notes – although pleaded at length by the Parties – is ultimately not the issue that lies at the core of this Arbitration. Rather, the issue that now lies before the Arbitral Tribunal is whether CSOB behaved in such a negligent way in assigning the J. Ring Receivables to CKA that it should now be precluded from asserting its rights under Article 2.5 ASG.
- 244 The Arbitral Tribunal finds that there is no reason why CSOB should be precluded from asserting rights against the MoF under Article 2.5 ASG. The Arbitral Tribunal finds rather that CKA – who was moreover just as CSOB under an obligation to *"reasonably cooperate when performing"* the agreements pursuant to Article 11 of the Framework Agreement and to Article 17 of the Assignment Agreements – is concurrently responsible for the lack of endorsement. As explained above and evidenced in the witness testimony of Mrs. Bednariková, those documents were the result of substantial negotiations and time spent on the drafting of their provisions. At no time did CKA precise that an endorsement was necessary to their validity. Hence, CSOB cannot alone be held responsible for the lack of endorsement of the Promissory Notes.
- 245 Further, the Hearing has evidenced that CKA's conduct in this respect was highly contradictory. The evidence produced by CSOB – and namely Exhibits C48 and C49 – proves that after the High Court of Prague issued its decision in 2003, CSOB declared that it was prepared to endorse promissory notes concerning recourse receivables if expressly required by CKA. The MoF has not put forth any sufficient explanation to rebut such evidence. Quite to the contrary, CKA's attitude in respect of the issue of endorsement appears particularly contradictory in light of the fact that, in many cases, CKA did accept the subsequent endorsement by CSOB and communicated to CSOB lists of promissory notes for which it required a subsequent endorsement. The J. Ring Promissory Notes were not listed by CKA for the purpose of a subsequent endorsement (see in particular Exhibit C-53). The Arbitral Tribunal refers in this respect to the oral testimony of Mrs. Snopková (WT Snopková, Tr. Day 4, pp. 750 *et seq.*).
- 246 The Tribunal has noted that the MoF has put forth several times in this Arbitration that the volume of transfers of receivables prohibited CKA from checking simultaneously the hundreds of receivables transferred in every tranche (see e.g., WT Snopková, Tr. Day 4, p. 753, lines 8-14). In light of the circumstances of

the transfers, the Arbitral Tribunal agrees that such task might well have been impossible for CKA's employees.

- 247 However, the evidence on file shows that four of CKA's employees reviewed in particular the Assignment Agreement No. IPB 1001912 (Exhibit C-17) in order to check whether the documentation relating to the Assignment Agreement was complete and for the purpose of accepting the handing over of such documentation from CSOB to CKA. The result of this verification is set forth in the "Report of Defects No. 25068741" (Exhibit C-44, p. 7). The Report of Defects is part of the "Record of Handover and Acceptance of Documents based on the Agreement on Assignment of a Receivable No. IPB1001912", and lists two omissions, *i.e.* missing documentation or information that CSOB was to provide. The Report of Defects defined an additional period of time – *i.e.*, until April 30, 2002 – for CSOB to remedy those defects and provide the missing documents. The Report of Defects mentions nowhere that the endorsement of the Promissory Notes was missing. The Arbitral Tribunal has considered the explanations given by Mrs. Snopková during her cross-examination (WT Snopková, Tr. Day 4, pp. 754-756). The Arbitral Tribunal finds them to be unconvincing. The Report of Defects evidences that four employees of CKA – including a Team Manager and a Team Lawyer – reviewed the documentation relating to the Assignment Agreements with care and even identified omissions. Given the position and knowledge of the signatories to the Report, the Arbitral Tribunal finds that at the time of the drafting of the Report, CKA was in a position to object to a missing endorsement of the Promissory Notes. It did not.
- 248 The Arbitral Tribunal joins the observation made by CSOB in its Post-Hearing Brief whereby it stressed that CKA's attitude was particularly striking since CKA itself committed to liaise with CSOB in respect of the endorsement of the J. Ring Promissory Notes when EC Group required their endorsement (CPHB, para. 62). This issue was indeed expressly discussed during the Hearing and left insufficiently rebutted by the MoF (WT Snopková, Tr. Day 4, pp. 758-760). The evidence on record shows that CSOB sent a letter on September 2, 2003 indicating its willingness to endorse promissory notes as required by CKA, whereas the Evidentiary Hearing in the EC Group arbitration took place on October 24, 2003 (see Exhibits C48 and C61). Based on this evidence, the Arbitral Tribunal finds that it may reasonably be assumed that if CKA and CSOB had liaised efficiently, the outcome of the EC Group arbitration could have been different in the first place and the dispute between the Parties in this Arbitration would not have arisen.
- 249 One can only speculate on the reasons for which CKA did not or could not insist on having the J. Ring Promissory Notes endorsed by CSOB. The Arbitral Tribunal however finds, in light of the circumstances recalled above, that CSOB did not

behave in a negligent manner that would have been the cause of the ultimate rescission of the Assignment Agreements as the MoF has alleged.

- 250 Consequently, given (i) the express and broad wording of Article 2.5 ASG which does not allow the MoF to assert that it incurs no payment obligation in certain cases of rescission, (ii) the absence of any element to support the MoF's defense that the J. Ring Receivables no longer qualify as "Items", and (iii) the absence of any misbehavior or negligence from CSOB that would have been the cause of the rescission of the Assignment Agreements and that would preclude it from asserting rights against the MoF under Article 2.5 ASG, the Arbitral Tribunal finds that the MoF's defense is to be rejected in full.

D. Is the payment requested by CSOB from the Ministry of Finance prohibited by State Aid law, whether EC law or Czech law?

1. Claimant's Position

- 251 CSOB objects to the MoF's defense based on State aid, whereby the MoF has alleged that the payment sought by CSOB in this Arbitration is prohibited by State aid law.
- 252 CSOB denies that the payment sought under Article 2.5 ASG would increase the liability of the MoF beyond what was included in the original ASG.
- 253 Hence, CSOB maintains that the MoF's payment CSOB seeks in this arbitration is *not* prohibited by any State aid regulation (SoC, para. 100 *et seq.*; Reply, para. 60 *et seq.*; CPHB, para. 68 *et seq.*).
- 254 CSOB argues in essence that it has already received State aid under the ASG for the J. Ring Items in the form of CKA's payments for the J. Ring Receivables under the Assignment Agreements. The MoF's obligation under Article 2.5 ASG is therefore no more than to pay an amount corresponding to the sum of State aid that CSOB had to return to CKA in 2005 when the transfers of the J. Ring Receivables were declared invalidated (CPHB, para. 69).
- 255 Accordingly, a payment from the MoF with respect to the J. Ring Receivables would not create additional liability of the MoF requiring further authorization by competition authorities. The decisions of the OPC and the European Commission regarding the State aid involved in the IPB transaction have already authorized and assessed such payment.
- 256 On February 1, 1995, the Europe Agreement establishing an association between the European Communities and their Members States, on one part, and

the Czech Republic on the other entered into effect (the **Europe Agreement**; Exhibit R-83). Pursuant to Article 64(3) of the Europe Agreement, the Association Council was required to adopt within three years of the entry into force of the Europe Agreement, the necessary rules for the implementation of State aid rules, in view of the Czech Republic's subsequent accession to the European Union.

- 257 Accordingly, on June 24, 1998, the Council adopted Decision No. 1|98 which required the Czech Republic to appoint a national institution or administration which was to become the competition authority in charge of monitoring and authorizing State aid measures in the Czech Republic (Exhibit R-100). The OPC was appointed as the Czech monitoring authority.
- 258 Pursuant to the Annex to Decision No. 1|98 and yet again in view of the Czech Republic's accession to the European Union, the State aid rules to be applied by the monitoring authority were to reflect the criteria arising from the application of the rules of Article 87 of the Treaty Establishing the European Community (**the ECT**) "including the present and future secondary legislation, framework, guidelines and other relevant administrative acts in force in the Community, as well as the case law of the Court of First Instance and the Court of Justice of the European Communities and further special guidance" - *i.e.*, the so-called *acquis communautaire* (Reply, para. 70).
- 259 In order to implement Decision 1|98 and to comply with its obligations under the Europe Agreement, the Czech Republic adopted Act No. 59|2000 Coll. on State aid which became effective on May 1, 2000 (the **State Aid Act**; Exhibit R-78). The State Aid Act was adopted to create a legal framework for the review and approval of State aid measures put into effect by the Czech Republic *prior to the date of accession to the European Union*.
- 260 Consequently, CSOB asserts that as of May 1, 2000, any State aid granted in the Czech Republic had to be assessed by the OPC under the State Aid Act, and *only* under that act. According to CSOB's experts, neither Article 87 of the ECT nor Article 64 of the Europe Agreement, which define incompatible State aid, were directly applicable in the Czech Republic before the Czech Republic formally joined the European Union on May 1, 2004 (see *e.g.*, Exhibit CEX-9, Eilmansberger).
- 261 Further, under the State Aid Act, the OPC had the *exclusive* competence to assess the compatibility of State aid with the State Aid Act. The European Commission had no basis to do so since Article 87 ECT was not applicable in the Czech Republic prior to accession (Reply, para. 71).

- 262 Hence, with regard to State aid measures granted prior to the Czech Republic's accession, any competence of the European Commission could only follow from the application of the rules set out in the Interim Mechanism defined in Annex IV.3 of the Act of Accession (Exhibit C-72; SoC, para. 106 *et seq.*). Under those rules, if a new Member State wants to seek additional certainty after an approval by its own monitoring authority, it can notify the State aid granted and approved by the national monitoring authority to the European Commission. The European Commission then reviews whether or not the State aid is "past aid", *i.e.* State aid which is "not applicable after" the accession of the new Member State to the European Union. It is only if the Commission comes to the conclusion that the aid is "still applicable after accession" that it will subsequently rule on its compatibility with the Common Market (Reply, para. 73).
- 263 In the case at hand, CSOB asserts that the State aid granted under the June 19, 2000 transaction, was to be reviewed and approved exclusively by the OPC, and exclusively under the State Aid Act, as the State aid measures were granted prior to the Czech Republic's accession to the European Union.
- 264 CSOB first relies on the OPC decision of June 19, 2000 whereby the OPC approved the Zero NAV Principle underlying the acquisition of IPB's Enterprise by CSOB (Exhibit C12), and stresses that this decision expressly refers to off-balance sheet items (CPHB, para. 71).
- 265 CSOB further refers to the Final Decision of the OPC dated December 15, 2003, and asserts that the OPC exempted the State aid granted under the original ASG, but also under the ASG as amended by Amendment 1, the Restructuring Agreement and the various implementing agreements (Exhibit C-16).
- 266 According to CSOB's interpretation of the operative part of the Decision, the OPC's exemption covered all transfers that were carried out by December 15, 2003 relating to those Items which on June 19, 2000 had been reflected in IPB's books with a total value of CZK 153 billion (Reply, para. 76).
- 267 Hence, CSOB asserts that the OPC's approval of State aid covered the J. Ring Receivables. Consequently, there can be no doubt that the payment sought with the respect to the J. Ring Receivables under Article 2.5 ASG, which by definition would only be the replacement on an earlier payment by CKA, is already covered by the OPC Decision (CPHB, para. 72).
- 268 In the case at hand, the State aid granted in the context of the acquisition of IPB's Enterprise by CSOB was also notified to the European Commission under the Interim Mechanism by letter dated December 17, 2003 (Exhibit R-71). Having reviewed the State aid granted, the European Commission issued its Decision CZ

46|2003 on July 14, 2004 (the **EC Decision**) whereby it declared that all the measures notified by the Czech authorities with regard to the IPB|CSOB transaction were to be considered not to be "applicable after accession" (Exhibit C-15). Therefore the European Commission did not have to rule on the issue of their compatibility with the Common Market.

- 269 Contrary to Respondent's line of argument, CSOB argues that the EC Decision that all State aid granted under the ASG is "not applicable after" also covers any State aid granted under the ASG as amended by Amendment 1 and hence covers the mechanism of Article 2.5 ASG (CPHB, para. 74). CSOB relies in this respect on the expert testimony of Sir Francis Jacobs (WS Jacobs, CEX6, para. 6-12).
- 270 Based on its assessment of the above decisions, CSOB disputes in its entirety the MoF's defense that the State aid already approved by the OPC and assessed by the European Commission was limited to the amount of CZK 153 billion, and that the payment sought under Article 2.5 ASG would constitute "additional" or "new" State aid, which would require further exemption decisions of these competition authorities.
- 271 CSOB refers in this respect to Mr. Janota's own Report to the Czech Government of November 5, 2003, and to Mr. Janota's cross-examination during the Hearing (Exhibit C-89): the MoF cannot argue, as a defense to CSOB's claim, that the Czech State's aid was limited to a total sum of CZK 153.3 billion, simply because the report makes it clear that CKA paid a total sum of CZK 171 billion (CZK 171,092,400,000) for Items having a total net book value in IPB's books as of June 19, 2000 of CZK 153.3 billion (CZK 153,304,700,000) (CPHB, para. 79).
- 272 The MoF was thus fully aware that the payments made under the Zero NAV Principle were not limited to any reserves "reflected" or included for the J. Ring Items in the Final NAV Statement. Rather, CSOB relies on the MoF's Report to the Czech government, to claim that it is well aware that its Zero NAV guarantee covers the full amount sought in this arbitration (CPHB, para. 81).
- 273 Consequently, it has been CSOB's position throughout this Arbitration that the payment sought under Article 2.5 ASG would not increase the Czech State's liability with respect to the IPB transaction and that such payment would not violate the applicable State aid rules as this payment would only intervene as a *replacement* of a payment already approved by the OPC and assessed by the European Commission.

2. Respondent's Position

- 274 The MoF has based its defense on the argument that the payment sought by CSOB under Article 2.5 ASG is barred by the applicable regime of State aid.
- 275 According to the MoF, the payment sought by CSOB represents exempted State aid *only* in the amounts in which the J. Ring Receivables appear in the Final NAV Statement. The claim in excess of that amount would represent prohibited State aid (RPHB, para. 90 *et seq.*).
- 276 Regarding the issue of the applicable regime of State aid, the MoF agrees that prior to the entry of the Czech Republic in the European Union on May 1, 2004, the State Aid Act applied to all aid measures granted by the Czech State (RPHB, para. 92).
- 277 In its Post-Hearing Brief, the MoF further states that in conjunction with the State Aid Act, the relevant rules arising under EC law were "substantively binding" upon the Czech authorities, and upon the OPC in particular, when ruling on the admissibility of a measure of State aid. Consequently, the OPC was to apply State aid rules arising not only under the Czech State Aid Act but also "in the light of EC law" and "in fact, applied both" (RPHB, para. 92).
- 278 The true difference between the Parties and their experts regarding the issue of the applicable State aid regime remains in respect of the issue of whether or not Article 64(1)(iii) of the Europe Agreement⁴ was a self-executing provision, *i.e.* a provision directly applicable in the Czech Republic prior to its accession to the European Union.
- 279 However, the MoF has conceded in its Post-Hearing Brief that, insofar that the Parties have agreed⁵ that EC law State aid rules were in any event substantively binding upon the OPC and consequently applied, the issue of Article 64(1)(iii)'s self-executing character is not determinative for the MoF's defense or counterclaim in this arbitration (RPHB, para. 94).

⁴ Article 64(1)(iii) of the Europe Agreement classifies "*any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods*" as "*incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and the Czech Republic*" (Exhibit R-83).

⁵ Respondent bases the purported "agreement" of the Parties on this issue on the expert witness conferencing which took place between Aleš Gerloch and Luděk Vrána, Respondent and Claimant's respective experts in Czech state aid law (see RPHB, para. 92 referring to Tr, Day 6, pp. 880-891).

- 280 The MoF's true objection to CSOB's arguments thus lies within the interpretation of the relevant decisions of the OPC and the European Commission.
- 281 First, the MoF asserts that the payment sought by CSOB does not fall within the scope of State aid approved by the OPC (Rejoinder, para. 76 *et seq.*).
- 282 The MoF recalls that the OPC's Decision of December 15, 2003 was issued three months *after* the Final NAV Statement was agreed to. The operative part of the Decision clearly details which State aid measures were exempted. The MoF relies on the figure cited in the operative part of the Decision to maintain that, with respect to payments already made by CKA, the OPC authorized State aid in the total amount of CZK 153,901,000,000.
- 283 The OPC did not assess, and thus did not exempt, any part of the purchase price paid by CKA to CSOB for former IPB assets transferred to CKA over and above the one reflected in the Final NAV Statement (RPHB, paras. 112-113). With respect to the MoF's Report to the government relied upon by CSOB and which shows that the payments made by CKA for former IPB Items amounted to approximately CZK 171 billion (Exhibit C-89), the MoF stresses that it was never communicated to the OPC. Moreover, the Report does not explain whether or not the difference between the purchase price of those Items and their net book value could be due to accrued interest, or any other reason.
- 284 Moreover, the fact that the OPC was provided with Amendment 1 could not mean that the OPC approved any and all imaginable payments on the basis of the ASG, as amended (Rejoinder, paras. 13-27; and 77-79).
- 285 To the contrary, the OPC subsequently confirmed to the MoF that it had the same understanding as outlined above. In order to sustain its allegation, the MoF refers to its correspondence with the OPC on this issue, and namely to two letters from the Vice-Chairman of the OPC, Mr. Rudolecky, to the MoF dated September 5, 2005, and October 4, 2007 (Exhibits R50 and R53). In its Rejoinder, the MoF particularly insisted on the following quotes (Rejoinder, para. 84, quoting from Exhibit R-53):

"It is obvious ... that, under its Decision ref. no. VP/S 61/01-160, the Office authorized no other payments than those already effected and future payments whose maximum amount was limited to CZK 594 million. Consequently, the Office's decision covered payments effected prior to its issuance and prospective payments about which it was known at the time of the Office's deliberations that they will occur in the future in a specific amount and in respect of specific items. The total amount of such payments as well as the reason for them was, accordingly, clearly specified. The proper identification of state aid amount constituted one of the conditions for assessing the compatibility of the aid. No other future payments by MoF in favour of CSOB were authorized, which applies also to future payments

under Art. 2.5 of the ASG. ... it is necessary to realize that the Office is not an authority interpreting contractual documentation, including Art. 2.5 of the ASG. By its decision to grant an exemption from the prohibition of state aid, the Office does not approve contractual documentation as such, but measures establishing state aid. In other words, it was the specific amount stated in the decision which was specifically identified and expressed in financial terms that was approved. The Office did not approve in its decision the contractual documentation as such but only the state aid, payments of which were exactly identified in the operative part and reasoning of the Office's decision. Furthermore, not only the aggregate maximum amount of aid, but also time and manner of granting state aid and other circumstances are to be considered. Modifications of these characteristics would thus have to be considered as a new state aid subject to approval by the EC since their impact on economic competition may be different."

- 286 The OPC is the only authority entitled to monitor the effective application of its decisions issued before the Czech Republic's accession to the European Union. There is hence nothing objectionable in the MoF having requested an opinion from this authority before considering making the payment sought by CSOB. The OPC's stance in this respect is clearly stated in its letter of September 5, 2005 whereby it declared that *"[i]f, despite the foregoing information, the MF still considers making the J. Ring payment in favor of CSOB, it is the view of the Office that it would be essential and necessary to notify the European Commission and discuss the proposed procedure with it."* (Exhibit R-50, p. 2).
- 287 Thus, based on the above and in addition to claiming that the payment sought does not fall within the scope of the OPC's exemption, the MoF asserts that Claimant's present claim is not among the measures assessed as "non applicable after accession" by the EC Decision (Rejoinder, para. 89 *et seq.*).
- 288 Indeed, if the OPC did not exempt the payment sought by CSOB from the State aid prohibition, such payment could not possibly have been assessed by the European Commission under the Interim Mechanism (RPHB, para. 126).
- 289 Moreover, the MoF argues that the EC Decision itself stresses that no further consideration was to be paid to CSOB on the basis of the ASG because a final settlement of such consideration has been made. In support of this interpretation, the MoF has referred to the following excerpts of the EC's Decision:

*"The final NAV statement verified by Arthur Andersen and KPMG (the auditors) was established in September 2003. Given that all "black items" were transferred to KoB by 20 February, 2002 and that the call option on "other items" was exercised on 6 March, 2002, the September 2003 NAV would comprise only "white items" and dues from KoB|CKA. The Complainants have raised the point that for certain items the transfer of the legal title to CKA has yet to be completed. **The Commission understands that, irrespective of the completion of the legal transfer of the title, no further consideration will be payable by the Czech State to CSOB in relation to the NAV Statement.**"* (Exhibit C-15, para. 59, emphasis added);

*"The Commission understands from the Complainant that although the transfers to CKA of items have been made in exchange of consideration, the legal transfer of title of these items may still not have been completed. The Commission understands, however, that irrespective of the eventual transfer of legal title, **no additional consideration may be paid** by the CKA to CSOB for that transfer." (Exhibit C-15, para. 65, emphasis added);*

*"In view of the fact that all "transfers" and "retentions" have been carried out before accession, that a final settlement of CZK 4.4 billion was effected on 9 January 2004 and **that no further consideration can be paid by the Czech State after accession** of, in any case, that this measure does not give rise to further liabilities for the State, the Commission considers the NAV guarantee to not be "applicable after accession"." (Exhibit C-15, para. 94, emphasis added).*

- 290 The MoF has further claimed that the mechanism of Article 2.5 introduced by Amendment 1 as interpreted by CSOB was not taken into consideration by the European Commission: Amendment 1 was not notified to the Commission and was thus not included in the Czech authorities' request for assessment within the Interim Mechanism. Prof. José Luis da Cruz Vilaça's expert testimony makes it clear that Amendment 1 was not formally "notified" to the Commission (see in particular, WS Vilaça, Exhibit REX-6, paras. 1-21).
- 291 The foregoing analysis of the EC Decision is confirmed by contemporaneous correspondence preceding the commencement of this Arbitration. In its letter of November 15, 2005, the Ambassador of the Czech Republic to the European Union, Mr. Kohout at the time, wrote to the MoF:

"... the Czech side cannot under any circumstances provide anything above and beyond the framework of what was set forth in the European Commission decision of 14 July 2004; Amendment No. 1, specifically the possibility of rendering performance to CSOB for a receivable with a legal defect, was not evaluated by the European Commission within the framework of interim procedure and is not there." (Exhibit R-51).

- 292 Hence, it is the MoF's stance that the Commission did not assess under the Interim Mechanism, anything further than those payments that had been already made and included in the Final NAV Statement at the time of its EC Decision. The EC Decision did not approve an "open envelope" which may provide money to CSOB that was simultaneously being claimed under the Indemnity Agreement. Indeed, the MoF recalls that in assessing the Indemnity Agreement, in contrast to the ASG, the Commission required that CSOB provide a detailed list of the individual items which could become the subject of future payment from the CNB, and that this list included the J. Ring Items (Exhibit R-16; RPHB, paras. 60 and 142). There is no reason to believe that the Commission would have failed to identify and address the alleged overlap between the Article 2.5 ASG as construed by Claimant and the Indemnity Agreement.

- 293 Given the foregoing, the MoF claims that (i) the Commission has not assessed the payment sought by CSOB as "not applicable after" and, (ii) such payment would represent new aid "applicable after accession" which cannot be granted without prior approval of the European Commission (RPHB, para. 146; Exhibit R-126, Chapter 3, para. 1).

3. Decision of the Arbitral Tribunal

- 294 In order to assess the merits of the MoF's defense based on State aid, and in view of the arguments developed by both Parties in the course of the arbitral proceedings, three issues lie before the Arbitral Tribunal:

(i) the determination of the applicable State aid regime and the relevance of such determination for the assessment of the MoF's defense by the Arbitral Tribunal;

(ii) whether the payment sought by CSOB in this Arbitration falls within the scope of the OPC's approval of State aid granted in the context of the IPB transaction; and

(iii) whether the payment sought by CSOB in this Arbitration falls within the scope of the European Commission's decision to assess the State aid granted in the context of the IPB transaction as "non applicable" after the Czech Republic's accession to the European Union.

- 295 The Arbitral Tribunal turns to the first of these issues.

a) Applicable State aid regime

- 296 The debate on the applicable State aid regime stems from the fact that the transaction at the center of this Arbitration took place in a period of time during which the Czech Republic was preparing its accession to the European Union. The Czech Republic ultimately became a member of the European Union as of May 1, 2004. The Parties' dispute raises the issue of the applicability of provisions of Community law in the Czech legal system during this transitory period.

- 297 While the Parties had pleaded this issue at length in their written submissions prior to the Hearing, the Hearing has evidenced that the Parties' dispute on the issue of applicable State aid regime is rather limited in scope.

- 298 The Arbitral Tribunal has noted that CSOB did not further mention this issue in its Post-Hearing Brief. This would of course not amount to a waiver of its arguments

– which the Arbitral Tribunal has considered – but sheds light on the true importance to be given to this issue.

299 In its Post-Hearing Brief, the MoF has indicated that the difference between the Parties as regards to the applicable State aid regime only focuses on whether Article 64(1)(iii) of the Europe Agreement was a self-executing provision and conceded that it did not consider the resolution of this particular issue to be determinative for its defense (RPHB, N 94, the full position of the MoF having been recalled in greater detail above at N 279).

300 Most importantly and based on the expert testimony developed during the Hearing, the Arbitral Tribunal does not consider the issue of applicable State aid regime to be truly relevant in order to assess the MoF's defense, for the reason set forth below. The Arbitral Tribunal is guided by the expert witness conferencing which took place between Mr. Vrána and Prof. Gerloch (Tr. Day 6, p. 878 *et seq.*).

301 The experts agreed that in order to determine the governing State aid regime in the timeframe of the dispute, three different regimes were theoretically conceivable:

(i) The Czech State Aid Act, and in particular Article 2 of the State Aid Act which defines impermissible State aid as follows (Exhibit R-78, emphasis added):

(1) *Any state aid, including their programmes, granted by the state or through state resources **in any form whatsoever which distorts or threatens to distort competition by favouring certain undertaking or the production of certain goods** shall, insofar as it affects trade between the Czech Republic and member states of the European union, be incompatible with the obligations of the Czech Republic towards the European union and its member states and **shall be forbidden**.*

(2) *The prohibition of the state aid according to subparagraph (1) shall be applicable if not otherwise stated by this or if the Office for Protection of Competition (hereinafter referred to as "the Office") has not authorize [sic] an exemption.*

(ii) Article 64 of the Europe Agreement which reads as follows in its relevant part (Exhibit R-83, emphasis added):

"1. *The following **are incompatible** with the proper functioning of the Agreement, in so far as they may affect trade between the Community and the Czech Republic:*

(i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of the Czech Republic as a whole or in a substantial part thereof;

(iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Economic Community"

(iii) Article 87 ECT⁶ which reads as follows in its relevant part (Exhibit R-82, emphasis added):

"1 Save as otherwise provided in this Treaty, **any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.**"

302 During the witness conferencing, Mr. Vrána explained, in sum, that in his opinion the Czech State Aid Act was the only regime applicable prior to the Czech Republic's accession to the European Union (WT Vrána, Tr. Day 6, p. 886, lines 14-17).

303 On the contrary, Prof. Gerloch explained that, in his view, Article 64 of the Europe Agreement applied directly in the Czech Republic, as it was a self-execution provision, *i.e.* a provision which did not need an incorporating norm to be applicable in the Czech Republic (WT Gerloch, Tr. Day 6, p. 883, lines 7-16). Prof. Gerloch further stated that Article 87 ECT also became applicable – despite the fact that the Czech Republic had not yet entered the European Union – by means of the reference to the ECT rules on impermissible State aid contained in Article 64 of the Europe Agreement. Prof. Gerloch also agreed that the Czech State Aid Act was applicable at the time, and defined it as an incorporating norm.

As of January 1, 2010, the provisions of Article 87 ECT are reflected in Article 107 of the Treaty on the Functioning of the European Union. However, for ease of consistency, the Arbitral Tribunal will continue to refer to Article 87 ECT, as this was the provision in force in the timeframe of the dispute.

In sum, Prof. Gerloch explained that the State Aid Act "*governs the procedure for assessing the compatibility of the State aid with the application undertaken after the Europe Agreement*" (WT Gerloch, Tr. Day 6, p. 885, lines 6-17).

304 However, the Arbitral Tribunal notes that the relevant provisions quoted above at N 301 *all* define impermissible State aid in practically the *same words*. This is unsurprising since the Czech State Aid Act was amended in 2000 to mirror the provisions of Community law and to implement the *acquis communautaire* in the Czech Republic. Hence, the Tribunal stresses that no matter what substantive provision would apply, the end result would be strictly identical. When having to determine if a particular measure amounts to impermissible aid, the result of the application of either Article 87 ECT or of the State Aid Act would be the same (as indicated several times by the Chairman during the witness conferencing, see Tr. Day 6, p. 888, lines 1-14, and p. 890, lines 18-22).

305 Based on the above, the Arbitral Tribunal need not rule in further detail on the self-executory character of Article 64 Europe Agreement.

b) Scope of the OPC's Decision of December 15, 2003

306 The question that lies before the Arbitral Tribunal is to determine whether the payment sought by CSOB under Article 2.5 ASG was *already* envisaged and hence approved by the OPC Decision of December 15, 2003, and assessed by the EC Decision of July 14, 2004. For the MoF's defense to prevail, the Arbitral Tribunal must find that it does not fall within the scope of those decisions.

307 The Arbitral Tribunal finds that the payment sought by CSOB in this Arbitration was included in the exemption by the OPC's Decision of December 15, 2003 of all State aid granted to CSOB in the context of the acquisition of IPB's Enterprise.

308 First, the Arbitral Tribunal refers to the context which led to the OPC Decision. From the very beginning of the negotiations which ultimately led to the granting of State aid, the OPC was closely involved in the transaction entered into between CSOB, the MoF, CKA and the CNB. As evidenced during the Hearing the entire contractual framework of the acquisition was negotiated, drafted and agreed to during the week-end of June 17-18, 2000. A representative of the OPC was present in the meetings which took place during that week end, as stated by Mr. Janota (WT Janota, Tr. Day 1, p. 165, lines 8-21, Emphasis added):

"Q. [...] So, wouldn't you agree that that at that time you confirmed that the OPC was familiar with what was going on and did not object?

A. What I wanted to say once again that I was not the leading negotiator, a representative from the Anti-Monopoly Office was invited in that evening, and that person was briefed on what was going on and what

*had been prepared. That's what I meant when I responded to the question as in the document. **The Anti-Monopoly Office was present at the meeting, and I wanted to say that the representative from the Anti-Monopoly Office negotiated with Minister Mertlik and also the representatives from CSOB, but I cannot say that they have agreed with all the details of all the contractual documents. That's a question that should be addressed to them.***"

- 309 It follows from Mr. Janota's testimony that the OPC was familiar with the details of the IPB transaction, and even negotiated directly with the MoF and CSOB. This situation continued until the OPC issued its Decision of December 15, 2003.
- 310 Second, the Arbitral Tribunal has reviewed the OPC's Decision of December 15, 2003, in light of the MoF's main argument based on the operative part of the Decision (Exhibit C-14).
- 311 The MoF has persistently relied on this operative part of the Decision (see Exhibit C-14, p. 1) as well as on other parts of the Decision (Exhibit C-14, p. 5, para. 3, and p. 8, para. 4), to assert that the OPC only assessed as exempted State aid the payments already made (and the CZK 594 million in payments potentially yet to be made) by CKA under the Restructuring Agreement in the *total maximum amount* of CZK 153,901,000,000. The MoF, as recalled above, has stressed that the OPC did not exempt any part of the purchase price paid by CKA over and above the amount reflected in the Final NAV Statement. In sum, the MoF relies on this figure as a maximum limit to the Czech State's exposure under the ASG and contends that the payment sought by CSOB would exceed the maximum limit.
- 312 The Arbitral Tribunal is not convinced and thus does not uphold the MoF's interpretation of the OPC Decision.
- 313 First, the Tribunal is of the opinion that the wording of the OPC Decision is not as clear and restrictive as the MoF purports it to be. Rather, the Tribunal finds that other excerpts could well support the argument that the OPC Decision did not base its exemption on an actual amount quantified as at the date on which it took its Decision, and to the contrary, foresaw possible future developments. For instance, the OPC also indicated the following:

*"When judging whether or not the condition of securing the viability has been met, the Office takes into account the development of the IPB from the its sale up to the date of issuing of this Decision, **including its anticipated development in the future.**" (Exhibit C-12, p. 12, para. 2, Emphasis added)*

- 314 The Arbitral Tribunal is of the opinion that the OPC exempted, in sum, all State aid necessary to achieve the underlying principle of the ASG, *i.e.* the Zero NAV Principle. Such interpretation is supported by the fact that the OPC was well

aware that the Zero NAV Principle was the cardinal principle of the State aid granted. As recalled above at N 308, the OPC was represented and actively took place in the negotiations during which such principle was agreed to.

- 315 Further and most importantly, the Arbitral Tribunal finds that it is decisive that CKA in fact paid to CSOB *more* than CZK 153 billion for the transferred Items. Hence, the Arbitral Tribunal cannot uphold the MoF's argument that the Final NAV Statement and the OPC's Decision supposedly relying on the Final NAV Statement, set the MoF's CKA's liability for transferred Items to a maximum amount of CZK 153 billion.
- 316 The Arbitral Tribunal has confronted counsel's explanations of the MoF's Report to the Czech Government dated November 5, 2003 (Exhibit C-89) developed during the Hearing and fully presented in their Post-Hearing Briefs (CPHB, paras. 77 *et seq.*; RPHB, footnote 108), and finds CSOB's to be entirely convincing.
- 317 The MoF's Report was sent to the Czech government more than one month before the OPC issued its Decision. The MoF contends that the OPC never received such document and thus could not have taken it into account when it issued its exemption. Whether this is true or not does not alter the conclusion that the document evidences that (i) CKA paid more than CZK 153 billion for the transferred Items and that (ii) the MoF was well aware of this fact.
- 318 Table 1 on page 6 of the Report includes a summary of transfers of IPB's former assets to CKA which took place between 2000 and 2003. It is undisputed between the Parties that the J. Ring Receivables were transferred to CKA as part of Tranche 12 – which also included Other Items. A second chart on page 7 of the Report evidences that those Items listed on p. 6 had a total net book value in IPB's books as of June 19, 2000 of CZK 153,304,700,000 (see column "NBV as of 19/6/2000), *i.e.* the amount which appears in the Final NAV Statement and in the OPC Decision. The column "Purchase Price" of the same chart evidences that for those Items of a net book value of CZK 153,304,700,000, CKA paid in fact a purchase price of CZK 171,094,000,000.
- 319 The MoF has alleged that the reason for the discrepancy between the net book value and the purchase price of the transferred Items is not explained in the Report, except for the indication in the last paragraph on page 5 that the purchase price included an agreed accrued interest (RPHB, footnote 108). Hence, the MoF alleges in sum that the CZK 18 billion discrepancy is solely due to interest and that its arguments based on a quantified maximum exposure remains valid.

- 320 CSOB objects to this interpretation, and has proved to the Tribunal in a detailed explanation led in its Post-Hearing Brief that the discrepancy is not merely explained by interest (see CPHB, paras. 82-1 to 82-8). In its explanations, CSOB has relied on the Framework Agreement signed between CSOB and CKA for the subsequent assignment of receivables transferred under Tranche 12 (Exhibit C-42). The Framework Agreement explains in detail how the purchase price for Tranche 12 was calculated.
- 321 Having reviewed Claimant's explanation, the Arbitral Tribunal finds that it is convinced that this difference was due to the Parties' agreement that CKA should pay consideration based on the face value of the transferred receivables.
- 322 It follows that because CKA paid to CSOB more than the amount of CZK 153 billion, *i.e.* more than the net book value of the transferred Items as stated in the books of IPB as at June 19, 2000, the MoF must in this Arbitration face the consequence that the State aid granted under the Zero NAV Principle was not limited to any reserves included for the J. Ring Items in the Final NAV Statement.
- 323 The Arbitral Tribunal has well noted that the MoF submitted and relied upon correspondence exchanged between the MoF and the OPC. The relevant provisions of such correspondence were recalled above at N 285. The Arbitral Tribunal does not intend to question the assessment of the Czech competition authority. Rather, it considers the actual purchase price paid by CKA to CSOB – and which was *already* paid by CKA to CSOB at the point in time in which the OPC issued its Decision of exemption – to be the key element in this dispute.
- 324 Based on the above, the Arbitral Tribunal finds that the MoF's defense based on a maximum exposure of CZK 153 billion is without merits and that the OPC's Decision did not rely on such maximum exposure to exempt the State aid granted in the IPB transaction.
- 325 The Arbitral Tribunal concludes that the consideration paid in the first place by CKA for the J. Ring Receivables was exempted by the OPC Decision of December 15, 2000. Hence, as affirmed by CSOB, the payment sought in this Arbitration does not constitute an *additional payment*. It rather constitutes a *replacement* of the payment originally received by CSOB but that it had to reimburse to CKA.
- 326 The MoF's defense based on the OPC Decision of December 15, 2003 is denied.

c) Scope of the EC's Decision dated July 14, 2004

- 327 As alleged for the OPC Decision, the MoF asserts that the payment sought by CSOB was not part of the State aid assessed by the European Commission in its Decision of July 14, 2004. According to the MoF, the European Commission did not assess any other part of the purchase price paid for the Items transferred to CKA than the part corresponding to their net book value as recorded in IPB's books as at June 19, 2000, *i.e.* CZK 153 billion, and the corresponding interest.
- 328 The Arbitral Tribunal finds that such interpretation of the EC Decision of July 14, 2004 must be rejected.
- 329 The Arbitral Tribunal has relied on the expert witness statements of Sir Francis Jacobs for Claimant (WS Jacobs, CEX-6 and CEX-8) and of Prof. da Cruz Vilaça for Respondent (WS Vilaça, REX-3 and REX-6), as well as on the conclusions drawn from the expert witness conferencing on European law issues which took place during the Hearing (Tr. Day 6, p. 939 *et seq.*).
- 330 In reaching its decision, the Arbitral Tribunal reviewed various Council Regulations and European Guidelines on State aid law submitted by the Parties in this Arbitration and referred to by the Arbitral Tribunal during the expert witness conferencing of Sir Francis Jacobs and Prof. da Cruz Vilaça.⁷ All of these materials provide an important insight into the practice, the depth of scrutiny and the yardsticks applied by the European Commission when reaching its decisions in matters of State aid.⁸
- 331 The Arbitral Tribunal finds that the payment sought by CSOB in this Arbitration was assessed by the European Commission as part of the State aid declared "non applicable after" the accession of the Czech Republic to the European Union. It does so for the following reasons.
- 332 The MoF's first line of defense amounted in essence to claim that the European Commission could not have assessed the payment sought by CSOB in this Arbitration since it was not within the scope of the OPC Decision in the first place. Since the Arbitral Tribunal has decided the contrary (*supra*, N 325), it follows that the MoF's first line of defense is rejected.

⁷ See Tr. Day 6, p. 945 *et seq.*

⁸ The expert Professor da Cruz Vilaça agreed to this remark, see Tr. Day 6, p. 947.

333 Second, the MoF relies on the *wording* of the EC Decision to claim that it does not encompass the payment sought by CSOB under Article 2.5 ASG but fails to convince the Arbitral Tribunal. The Arbitral Tribunal finds that, on the contrary, Amendment 1 was assessed by the European Commission.

334 It is undisputed that Amendment 1 was part of the documents sent to the European Commission. Thus, the Arbitral Tribunal is unconvinced by Prof. da Cruz Vilaça's argument based on the fact that Amendment 1 was not formally "notified" to the European Commission.

335 Amendment 1 to the ASG was entered into on August 31, 2001, *i.e.* three years before the European Commission issued its Decision. Further, Amendment 1 is implicitly referred to in the text of the Decision through the various references to the Restructuring Agreement which was (i) simultaneously concluded on the same day as Amendment 1 and (ii) is intrinsically linked to Amendment 1. The Arbitral Tribunal refers in this respect to Paragraphs 52-58 and 94 of the Decision which explicitly present the mechanism of assignment of doubtful assets to CKA agreed to in the Restructuring Agreement. Hence, the MoF cannot convincingly claim that Amendment 1 was not taken into account by the European Commission when assessing the State aid granted in the context of the IPB transaction. It follows, that this line of defense of the MoF must be equally rejected.

336 As it had claimed for the OPC Decision, the MoF's main line of defense with respect to the EC Decision is to argue that the European Commission assessed the State aid as "non applicable after" and limited such assessment to the maximum amount of CZK 153 billion.

337 The Arbitral Tribunal first notes that the operative part of the EC Decision does not contain any reference to a specific figure (see Exhibit C-15, p. 19). Most importantly, the Arbitral Tribunal refers to its findings above where it decided that the amount of CZK 153 billion could not be relied upon by the MoF as a maximum amount of State aid to be granted in the context of the IPB transaction since CKA actually paid more than that amount for the transferred items.

338 Further, the Arbitral Tribunal finds that the decisive argument has been presented by Sir Francis Jacobs during the witness conferencing which took place during the Hearing. In response to the Arbitral Tribunal's questions, Sir Francis Jacobs relied on Paragraph 23 of the EC Decision to explain that the European Commission would under State aid law be concerned "*not with a specific sum of money but with the measure*" (WT Jacobs, Tr. Day 6, p. 978, lines 14-17). Paragraph 23 of the EC Decision indeed reads as follows in its relevant part and even refers explicitly to the possibility of future payments:

"[...] It is the legal commitment of the state that is synonymous with the granting of aid and not the mere payment thereof. Any payment, current or future, under a legal commitment is an act of simple implementation and cannot be construed to be new or additional aid." (Exhibit C-15)

339 Based on the above, the Arbitral Tribunal finds in the case at hand that the European Commission reviewed the measures – and not any specific figure or amount – represented by the ASG, Amendment 1 and the Restructuring Agreement and found them to be in their entirety "not applicable after" the Czech Republic's accession to the European Union. The Arbitral Tribunal is not bound by any opinion to the contrary expressed by Mr. Rudolecky of the OPC or Mr. Kohout as the Ambassador of the Czech Republic to the European Union.

340 Within this context and to fully ascertain the scope of the EC Decision in this Arbitration, the Tribunal has noted from the European Commission's decision in the matter of Agrobanka Praha a.s./GE Capital (Exhibits R-113 and R-151), which described the overall context and the situation of Czech banks prior to the accession date, that in fact 16 Czech banks, *i.e.* all of the major Czech banks, were on the verge of bankruptcy and had to be supported by State aid provided by the Czech Government which also had to be cleared by the EC Commission:

"(122) It should be stressed in that regard that the present case cannot be seen in isolation. In fact, when the aid was granted, the Czech banking sector as a whole was facing huge difficulties and most of the banks were close to bankruptcy. The case at hand is indeed one of the sixteen cases, all notified under the interim mechanism procedure, in which the Czech State had to intervene in order to avoid a complete failure of the whole banking sector in the Czech Republic. They cover all the major Czech banks."⁹

341 The Tribunal was not made aware of any other State aid scheme of the Czech Government in support of the Czech banks which raised serious concerns such that a Phase II investigation had to be opened by the Commission, except for the case of Agrobanka Praha a.s./GE Capital. Hence, all other State aid cases involving the Czech banks were at the time cleared by the European Commission without a detailed Phase II investigation.

342 Considering this overall context, and in particular the situation as it had presented itself to the European Commission in the sense that all of the major Czech banks, prior to the accession of the Czech Republic to the European Union, were in serious difficulty and had to be supported by State aid, the Tribunal finds its conclusions reached above - in the sense that the European Commission indeed

⁹ This passage was expressly mentioned by the Arbitral Tribunal during the expert witness conferencing: see Tr. Day 6, p. 949.

approved the measure as such (rather than being concerned with a particular amount)¹⁰ - reinforced.

343 In fact, it might have well been - under these perspectives - almost impossible for the European Commission to disapprove the State aid and thereby trigger a collapse of the entire Czech banking system, and this notably at the detriment of probably millions of Czech small or large account holders. Hence, as always in State aid matters, the extent of public interest at stake is an important aspect which is considered by the Commission.¹¹

344 Recent materials emanating from the Commission on State aid which explain the consistently applied practice of the Commission in State aid matters (including the Consultation Paper of June 2005, the best Practice Code on the Conduct of State aid Control of June 16, 2009, the Recovery Notice of November 15, 2007, the General Block Exemption Regulation No 800/2008 and the State aid Scoreboard published December 7, 2009 and a number of temporary rules which had been promulgated by the Commission in a very swift response to the economic and financial crisis adopted since December 2008) all corroborate the conclusion that the European Commission rendered its Decision declaring the State aid measure "*not applicable after accession*" in full harmony of its general and consistent practice at the time, and consistently built up since then.

345 One of the criteria consistently applied by the European Commission is the principle of "One Time, Last Time" (mentioned by the Tribunal at the examination of the experts),¹² which basically means that rescue aid is a "*one-off operation*" in the sense that an applicant can come only once. For this reason the Commission always requires a Restructuring Plan which will sufficiently remove the failing aspect of the company, so as to allow it to be-come again a viable competitor on the market.¹³

346 Hence, this important notion also suggests that the European Commission did not have the intention to pin down its approval on a particularly limited amount, but indeed – as repeatedly stressed herein – approved the measure in the sense of allowing the acquisition of OPC's enterprise by CSOB on the basis of the Zero NAV Principle.

¹⁰ See also Tr., Day 6, at page 978, where the expert Vilaça explained that often times the amount of aid is not determined at the time when the aid is considered by the Commissionary state aid measures.

¹¹ See comments of Arbitrator Blessing at Tr. Day 6, at p. 983.

¹² Tr. Day 6, at p. 971-979.

¹³ The principle is for instance referred to in the Community Guidelines on State aid for Rescuing and Restructuring Firms in difficulty (2004/C 244/02, Section 3.3 paras. 72-77).

347 For the sake of completeness, the Arbitral Tribunal notes that the MoF has yet again alleged that the J. Ring Items were listed as potential claims that could arise under the Indemnity Agreement in the List of Claims transmitted to the European Commission. However, as the Arbitral Tribunal explained previously (*supra*, N 181), this List cannot be construed to amount to a waiver by CSOB to seek the compensation it is entitled to under Article 2.5 ASG.

348 Based on the foregoing, the Arbitral Tribunal concludes that awarding CSOB the payment it seeks in this Arbitration would not amount to an additional post-accession payment which would create additional liability for the Czech State. Since the measure of State aid was committed prior to Czech Republic's accession to the European Union, the payment sought by CSOB does not amount to an *additional* payment, but rather to a *replacement* of what was already assessed as "non applicable" after accession.

d) Conclusion

349 Based on the above, the Arbitral Tribunal finds that the payment sought by CSOB under Article 2.5 ASG in this Arbitration falls within the scope of the OPC's Decision as well as the EC Decision.

350 Hence, awarding such monetary compensation to CSOB in this Arbitration would not amount to an additional payment of State aid. Rather it would constitute the *replacement* of a payment already approved the competent authorities.

351 The payment sought by CSOB is not prohibited by the applicable State aid regime.

352 The MoF's defense is rejected.

E. Did CSOB, in violation of its professional duty of care, fail to assert rights it has as an avalist in the J. Ring bankruptcy estate? If so, what losses resulted from such failure?

1. Claimant's Position

353 CSOB objects to the MoF's defense based on the purported violation of its professional duty of care with respect to the J. Ring Receivables.

354 CSOB recall, as it has previously explained, that its rights under Article 2.5 of the ASG are unconditional, which in itself precludes the MoF from bringing this defense (CPHB, para. 87). Nor did the MoF put forward any statutory provisions which would expressly require CSOB to have acted with such due care.

- 355 For the sake of completeness, CSOB however addresses the MoF's allegation that CSOB had refused to enter the J. Ring bankruptcy proceedings (Reply, paras. 198-204; CPHB, paras. 90-93).
- 356 CSOB argues that at the time J. Ring, a.s. was declared bankrupt (*i.e.*, in May 2002), both CSOB and CKA were convinced that the title to the J. Ring Receivables had validly passed to CKA. CKA itself registered the J. Ring Receivables in the J. Ring bankruptcy on June 27, 2002 (Exhibit R-17), and subsequently assigned them to EC Group. It was not until EC Group obtained an arbitration award against CKA that the issue of ownership arose. Given this context, CSOB argues that it was not surprising that CSOB refused to enter the J. Ring bankruptcy proceedings.
- 357 More fundamentally, CSOB asserts that under Czech law, the subsequent invalidity of an assignment agreement does not constitute a sufficient legal ground for substituting a creditor in bankruptcy proceedings (CPHB, para. 92). Thus, even if CSOB had requested to enter the J. Ring bankruptcy proceedings, the court would not have accepted this as CSOB was not entitled to join them.
- 358 Consequently, CSOB did not fail to assert any rights against the J. Ring bankruptcy estate.
- 359 CSOB then turns to the MoF's second line of defense, whereby it asserted that CSOB failed to properly administer the J. Ring Receivables because the value of the security available in respect of the J. Ring off-balance sheet liabilities allegedly deteriorated following June 19, 2000. The MoF indeed blames CSOB for (i) not having exercised the pledge over the Vojenské Stavby shares, and for (ii) not having exercised its put option against the entity IPB Group Holding, a.s. (IPBGH) (see in particular, Rejoinder, para. 160 *et seq.*).
- 360 When CSOB took over IPB's Enterprise, CSOB's exposure with regard to the J. Ring Promissory Notes was secured by a pledge over 30,59% of the shares of Vojenské Stavby, a.s., a company owned by J. Ring, a.s. The pledge made by J. Ring, a.s. in favor of IPB (and later CSOB) was established by a Pledge Agreement dated July 21, 1997 (the **Pledge Agreement**; Exhibit R-32). Under the Pledge Agreement, CSOB had the right to foreclose on this collateral through a direct sale of the shares via a security broker in the event J. Ring did not honor its obligations under the J. Ring Promissory Notes. The MoF has argued that CSOB made no attempt to sell the shares in order to reduce the loss from the J. Ring Receivables.
- 361 In response, CSOB argues that it did not exercise the pledge over the Vojenské Stavby shares, because those shares had no value, and that in those

circumstances seeking to exercise that pledge would have been meaningless and would only have resulted in additional costs. Moreover, CKA itself, although it had been assigned the J. Ring Receivables, never took steps to enforce this pledge (CPHB, para. 94.1).

- 362 CSOB further objects that it did not exercise its put option with respect to the J. Ring Receivables. CSOB explains that IPBGH was founded as a holding company. It was the intention of IPB's managers to indirectly provide financing to IPBGH which would enable IPBGH to purchase from IPB certain assets, such as non-performing loans. Under the Agreement on Settlement of May 2, 2000 entered into between IPB and IPBGH, IPB (and subsequently CSOB) had the right to assign prospective J. Ring Receivables to IPBGH against their full nominal value (Exhibit R-33). The MoF blames CSOB for having failed to exercise its put option under the Agreement on Settlement, and having ultimately caused to expire.
- 363 In response, CSOB argues that it did not exercise its put option against IPBGH because this put option also was of no value: in the relevant time period, IPBGH was heavily indebted and would have not been unable to make payments to CSOB had CSOB exercised its put option (CPHB, para. 94.2).
- 364 Finally, CSOB denies any implication in the fact that the J. Ring Receivables became prescribed (CPHB, para. 94.3).
- 365 Hence, CSOB objects in full to the MoF arguments based on a purported misadministration of the J. Ring Receivables.
- 366 Should the Arbitral Tribunal decide nonetheless that CSOB did breach the required duty of care in its administration of the J. Ring Receivables, CSOB asserts that the loss incurred by such a breach would have been minimal.
- 367 The value which could have been collected in the J. Ring bankruptcy proceedings merely amounted to CZK 187,273.13 (Exhibits R26-R28, WS Homolka, CWS-3, para. 8). According to CSOB, in this hypothetical scenario, the MoF could have a contractual or damage claim based on the last paragraph of Article 2.5 ASG under which CSOB must surrender to the MoF any moneys gained from an Item for which the MoF has made a payment under Article 2.5 ASG (CPHB, para. 97).
- 368 However, the MoF has not filed such a claim as a counterclaim, nor as a set-off claim in this arbitration. There is therefore no ground for deducting the amount of CZK 187,273.13 from the claim.

2. Respondent's Position

- 369 The MoF asserts that CSOB was under an obligation to treat the J. Ring Receivables with professional care and as it failed to comply with this obligation, it must be precluded from asserting rights under Article 2.5 ASG because the conditions of Article 2.5 ASG are not met.
- 370 The MoF stresses that Article 2.5 ASG applies only to "Items" as defined in Article 1.1 of the Restructuring Agreement for the purposes of Amendment 1. The Restructuring Agreement like the ASG foresaw that the value of "Items" could change over time. However, the MoF stresses that pursuant to Article 3.5 ASG, CSOB was under an obligation to treat IPB's former assets, *i.e.* the Items, with due care. This obligation to treat the assets with due care also necessarily extended to any security available at the time of the transfer of IPB.
- 371 With respect to the J. Ring Receivables, the MoF asserts that CSOB violated its professional duty of care by (i) failing to enforce the security and put option rights attached to the J. Ring Receivables in the first place; (ii) by failing to assert its rights in the J. Ring Bankruptcy proceedings; and ultimately (iii) by causing the prescription of the J. Ring Receivables.
- 372 First, with respect to the pledge on the Vojenske Stavby shares, the MoF puts forth that at the time of the purported transfer from CSOB to CKA, the J. Ring Receivables were still secured by the Pledge Agreement. The MoF blames CSOB for having made no attempt to exercise the security and sell the shares in order to reduce the loss from the J. Ring Receivables. The MoF argues that at the time of the transfer of IPB's Enterprise to CSOB, the value of the security was estimated in the books of IPB at CZK 320 million (SoDC, para. 146 and footnote 159 referring to Exhibit R-15). The MoF objects to CSOB's defense that the shares were worthless, as this argument is based on information posterior to the time when such collateral could have been realized by CSOB (Rejoinder, para. 162).
- 373 The MoF develops a similar argument with respect to the put option CSOB was entitled to under the Agreement on Settlement originally signed between IPB and IPBGH (Exhibit R-33). The MoF stresses that pursuant to Article 5.2 of the Agreement on Settlement, IPB (and subsequently CSOB) had the right to sell the J. Ring Receivables to IPBGH for 100% of their nominal value at any time in a time period starting from 30 days following CSOB's payment of the Promissory Notes to their respective holders and lasting until July 30, 2002 (SoDC, para. 148). The MoF puts forth that IPBGH was a liquid counterparty and not insolvent as CSOB has alleged (SoDC, para. 149; Rejoinder, paras. 164-172).

Consequently, CSOB again failed to reduce the loss resulting from the J. Ring Receivables.

- 374 Second, the MoF alleges that CSOB failed to enter the J. Ring Bankruptcy Proceedings as a creditor. The MoF argues that as a result of its failure to endorse the J. Ring Promissory Notes when assigning the J. Ring Receivables to CKA, CSOB – as a matter of law – never ceased to be the creditor of the J. Ring Receivables for the purpose of the J. Ring bankruptcy proceedings.
- 375 J. Ring, a.s. was declared bankrupt on May 24, 2002. The claims for the J. Ring Receivables were initially registered in the J. Ring bankruptcy proceedings by CKA on June 27, 2002 (Exhibit R-17). These claims were then assigned by CKA to EC Group as part of the purported further transfer of the J. Ring Receivables from CKA to EC Group, and CKA requested to be substituted by EC Group as the creditor in the J. Ring bankruptcy proceedings (Exhibit R-18). On August 4, 2003, the bankruptcy administrator admitted the J. Ring Receivables in the bankruptcy proceedings and declared EC Group to be their creditor (Exhibit C-57).
- 376 As a result of the arbitration proceedings between CKA and EC Group, in the arbitral award No. Rsp 264/03 rendered on November 5, 2003, the arbitration tribunal held on that no transfer of the J. Ring Receivables had occurred and that CSOB continued to be the creditor of the J. Ring Receivables.
- 377 Accordingly, on January 29, 2004, EC Group filed a motion before the Municipal Court of Prague asking the court to register CSOB as the creditor of the J. Ring Receivables in the bankruptcy (Exhibit R-20). The Municipal Court of Prague then invited CSOB to join the J. Ring bankruptcy proceedings as creditor by resolution dated March 26, 2004. The MoF thus stresses that CSOB refused to do so by letter dated April 5, 2004 (Exhibit R-22).
- 378 The MoF claims that as a result of CSOB's refusal, the claims arising from J. Ring Receivables were ultimately dismissed by the bankruptcy court, thus depriving CSOB – and any other creditor or potential transferee of those receivables - of any proceeds that would have been otherwise available to it in the J. Ring bankruptcy proceedings. CSOB's argument that those proceeds were negligible is irrelevant and does not excuse CSOB's refusal to take part in the proceedings (SoDC, paras. 151-155; Rejoinder, paras. 173-174).
- 379 Finally, the MoF has asserted in its Statement of Defense that the J. Ring Receivables are now "*prescribed*" as a result of CSOB's conduct because "*Claimant further never took any action directly against J. Ring to recover an amount under the J. Ring Receivables*" (SoDC, para. 156 *et seq.*).

- 380 According to Section 306(2) of the Czech Commercial Code (Exhibit R-75), the MoF explains that *"a guarantor is entitled to raise against the creditor of a guaranteed claim inter alia objections of the debtor of such claim, including in circumstances where such debtor did not raise such objection"* and that the objection of prescription of the claim is one of those objections available to the guarantor (SoDC, para. 158).
- 381 The ASG as amended is silent on the possibility of the MoF to reject a payment to the extent the asset in respect of which a payment of the MoF should be made no longer exists. However, the MoF submits that the principles of Section 306(2) of the Commercial Code should apply to the ASG by analogy, by effect Section 491(2) of the Czech Civil Code which provides that *"the provisions of the law which regulate the obligations closest to the obligations arising under agreements not regulated by the law shall apply, unless the agreement itself does not provide otherwise"* (Exhibit R-74; SoDC, para. 159). Accordingly, the MoF submits that it is entitled to reject the claims made by CSOB in respect of the J. Ring Receivables on the basis of Article 2.5 ASG, also on the basis of the prescription of the assigned claims. The MoF concludes that the objection of prescription is a separate and independent reason for CSOB's claim to be rejected.
- 382 During the Hearing, the Arbitral Tribunal directed the MoF to specify in its Post-Hearing Brief what losses have resulted from CSOB's alleged violation of professional duties of care, and what losses would have to be deducted from CSOB's claim. In its Post-Hearing Brief, the MoF responded that an amount of CZK 187,273.13 would have to be deducted from CSOB's claim, *i.e.*, the amount which could have been collected in the J. Ring Bankruptcy proceedings. However, the MoF indicated that such a deduction would fail to consider the consequences of CSOB's alleged failures. The core of the MoF's defense in this respect lies within the assertion that CSOB's omissions (i) caused the J. Ring Items to cease to qualify as *"Items"*, and (ii) led to the prescription of the J. Receivables and hence the MoF's obligation is itself prescribed (RPHB, paras. 152-153).

3. Decision of the Arbitral Tribunal

- 383 The MoF has raised four defenses in asserting that CSOB failed to comply with its duty of care with respect to the J. Ring Receivables. The MoF has put forward contractual and statutory provisions which in its view imposed a duty of care on CSOB.
- 384 CSOB has objected that the wording of Article 2.5 ASG is *"unconditional"* and that no such duty exists as a condition to CSOB's entitlement to seek compensation from the MoF under Article 2.5 ASG. The Arbitral Tribunal agrees

with CSOB that the wording of Article 2.5 ASG as such does not submit CSOB to a duty of professional care for being able to assert rights against the MoF.

385 However, the Arbitral Tribunal finds that – based on the structure of the IPB transaction and the mechanism of Article 2.5 ASG which cannot be read in isolation of other relevant contractual provisions – it would be improper to allow CSOB to seek payment from the MoF if the evidence on record proves that CSOB managed the J. Ring Receivables in a genuinely negligent manner. Given the economical importance of the IPB transaction for the Czech economy and CSOB's position as one of the leading Czech banks, the Arbitral Tribunal finds that CSOB was under a duty to act with professional care when administering IPB's former assets and liabilities, irrespective of the source of this duty, whether contractual or statutory. Thus, the issue that now lies before the Arbitral Tribunal is to determine whether CSOB managed the J. Ring Receivables in such a negligent manner that it should be precluded from seeking a payment from the MoF under Article 2.5 ASG, as this would amount to a violation of its professional duties. Having put forth this defense, the MoF bears the burden of proof.

386 The Arbitral Tribunal has considered all four defenses raised by the MoF in light of this question and finds that they must all four be rejected for the following reasons.

a) Claimant's alleged failure to foreclose on security

387 The MoF has argued that, at the time of the purported transfer from CSOB to CKA, the J. Ring Receivables were still secured by the Pledge Agreement and that CSOB must be held liable for having made no attempt to exercise the security and sell the Vosjenské Stavby shares in order to reduce the loss from the J. Ring Receivables.

388 The Parties' disagreement in this respect focuses on the value of the pledged shares. Whereas CSOB contends in sum that the shares were worthless because of Vojenské Stavby's financial situation which ever since 2002 had been in bankruptcy proceedings (CPHB, para. 94.1, WT Homolka, pp. 708-709, lines 22-25 and 1-2), the MoF asserts that they had a high value before Vojenské Stavby was ultimately declared bankrupt on June 17, 2002, *i.e.* nearly two years after CSOB succeeded to IPB's rights and could have first sold the pledged shares.

389 The Arbitral Tribunal has considered the MoF's indication that the pledged shares were valued at CZK 2,600,445 on July 31, 2000, *i.e.* when this collateral could have first been realized by CSOB (Rejoinder, footnote 188).

390 The Arbitral Tribunal finds the MoF's defense to be unconvincing.

391 First, the defense implicitly amounts to arguing that CSOB had two years to sell the pledged shares, *i.e.* from July 31, 2000 to Vojenské Stavby's declaration of bankruptcy on June 17, 2002. However, it was not until July 2001 that CSOB paid all Promissory Notes giving rise to the J. Ring Receivables, and the J. Ring Receivables were ultimately assigned to CKA on August 31, 2001. As of August 31, 2001, CSOB was thus legitimately entitled to believe that the J. Ring Receivables – and its rights under the Pledge Agreement – had been validly transferred to CKA. Hence, the timeframe of CSOB's inaction – if any – appears much more limited.

392 Second, the Arbitral Tribunal notes that counsel for Respondent has confirmed during the Hearing that CKA *itself* did not exercise its rights under the Pledge Agreement, arguing that it had almost immediately after the assignment of the J. ring Receivables assigned them in turn – together with the security – to EC Group to the effect that *"there was a very limited window of time during which that exercise would actually be possible by CKA"* (Tr. Day 1, p. 76, lines 15-24). This line of defense does not convince the Arbitral Tribunal and, in any event, may be understood implicitly as a confirmation that all parties were well conscious of the true value of the pledged shares.

393 Most importantly, the Arbitral Tribunal finds that in light of Vojenské Stavby's subsequent bankruptcy in June 2002, estimating CSOB's chances of indeed recovering proceeds from the sale of the pledged shares in the months preceding the bankruptcy of the construction company would be an exercise of speculation. Moreover, determining at what point in time the Vojenské Stavby shares should be valued in order to define an amount to be deducted from the quantum of CSOB's claim is – given the status of the evidence on file in this respect – equally a speculative exercise which the Tribunal deems inappropriate in the case at hand.

394 In light of the foregoing and given that the MoF bears the burden of proof, the Arbitral Tribunal finds that the MoF does not meet the threshold of proving that CSOB violated its professional duty of care by failing to sell the pledged shares.

395 In any event, the MoF has not asserted in its Post-Hearing Brief that the value of the security should be deducted from the quantum of CSOB's claim. Rather, the MoF argues that CSOB's purported inaction led to such a "deterioration" of the J. Ring Receivables that they no longer qualify as "Items" for the purpose of Article 2.5 ASG.

396 However, the MoF's defense is based on a too farfetched interpretation of the definition of an "Item" in the IPB transaction. The J. Ring Receivables were classified among the "Other Items" and this is the reason why they were ultimately transferred to CKA in the first place. The Arbitral Tribunal sees no support in Article 2.5, in Article 3.5 ASG, or in Article 1.5 ARP indicating that a receivable would cease to qualify as an "Item" if the collateral securing the receivable ceased to exist.

397 The MoF's defense is dismissed.

b) Claimant's alleged failure to exercise the Put Option

398 As for the Vojenské Stavby shares, the Parties' are in dispute on the financial situation of IPBGH and on CSOB's possibility of exercising or not the put option with respect to the J. Ring Receivables.

399 For similar reasons as above, the MoF's defense is rejected.

400 The Arbitral Tribunal stresses that, as of August 31, 2001, CSOB was no longer in a position to exercise the said put option given the assignment of the J. Ring Receivables to CKA. If CSOB failed to exercise the put option, its conduct must be assessed on a rather short period of time, i.e. from the acquisition of IPB's Enterprise in June 2000 to the assignement of the J. Ring Receivables to CKA in August 2001. The MoF has in essence put forth in its Post-Hearing Brief that CSOB *"destroyed the value of the put option"* by (i) acquiring the control of IPBGH on June 18, 2000 (Exhibit R-164), and (ii) subsequently transferring to itself IPBGH's principal assets, namely the options to purchase majority stakes in two valuable operational affiliates of IPB in the sectors of insurance and pension funds, for a fraction of their market value while leaving the property of the liabilities associated to *those assets to IPBGH (RPHB, para. 75)*.

401 One can only speculate on the reasons which led CSOB to such transactions. These reasons belong to the realm of CSOB's corporate and group strategy. In any event, determining retroactively IPBGH's true financial situation at the relevant point in time and thus the value of the put option for the purpose of this Arbitration, would amount to a highly speculative exercise which the Arbitral Tribunal does not consider justified.

402 Overall, the Arbitral Tribunal finds that CSOB has most convincingly argued – and that the MoF did not succeed in sufficiently rebutting CSOB's argumentation in this respect – that IPBGH would have in any event been unable, given its financial situation, to pay CSOB had CSOB put the J. Ring off balance sheet exposure to IPBGH in the time period June 2000-August 2001. As put forth by

CSOB and evidenced by Exhibit C-140, it appears that already on June 19, 2000 (i.e. before CSOB allegedly transferred IPBGH's assets to itself) IPBGH had insufficient cash on its accounts to pay the option price to CSOB (Reply, N 189 et seq.). Whether the deterioration of IPBGH's financial situation was ultimately caused by CSOB is – as stressed above at N 401 – a matter of speculation into which the Arbitral Tribunal does not consider justified to engage.

403 The Arbitral Tribunal has noted that the MoF argued during the Hearing and in its Post-Hearing Brief that CKA was unaware of the existence of the put option and alleged that CSOB had withheld information about of the existence of the put option. The MoF consequently argued that this behavior of CSOB amounted to a breach of the ASG and of Sections 39 and 415 of the Czech Civil Code which should trigger CSOB's liability for the damage it caused (see e.g., RPHB, paras. 74 and 77). Based on the same serious doubts as to IPBGH's ability to pay the option price to CSOB given its financial situation, the Arbitral Tribunal is unconvinced by the MoF's defense: CKA's awareness of the existence of the put option would not have overcome the fact that IPBGH would have been unable to pay the option price to CKA. Hence, the Arbitral Tribunal finds that the MoF did not meet the burden of sufficiently proving either the existence of the alleged damage or the causal link between CSOB's conduct and the alleged damage.

404 As recalled previously, the MoF bears the burden of proving CSOB's alleged violations of professional care and the damage resulting therefrom. It follows from the above considerations of the Arbitral Tribunal that the MoF has not done so with respect of the exercise of the put option.

405 Finally, the Arbitral Tribunal sees no support in Article 2.5, in Article 3.5 ASG, or in Article 1.5 ARP indicating that a receivable would cease to qualify as an "Item" if the put option securing such item was not exercised.

406 The MoF's defense is dismissed.

c) Claimant's alleged failure to enter the J. Ring bankruptcy proceedings

407 The MoF has relied insistently on CSOB's alleged failure to enter the J. Ring bankruptcy proceedings as a creditor.

408 The Arbitral Tribunal has considered the sequence of events relating to the J. Ring bankruptcy proceedings and finds as follows.

409 When the bankruptcy proceedings were opened, on May 24, 2002, it is undisputed that CSOB and CKA both believed CKA to be the creditor of the J. Ring Receivables.

- 410 Such a situation persisted during two years, until the Municipal Court of Prague invited CSOB, by resolution dated March 26, 2004, to join the bankruptcy proceedings as a creditor in light of the outcome of the EC Group arbitration. However, the Arbitral Tribunal notes that CSOB was not a party to the EC Group arbitration, and CSOB further stressed in its Post-Hearing Brief and previous submissions that CKA had simultaneously challenged the Arbitration award Rsp 264|03 before the Czech courts and rescinded the Assignment Agreements at the time CSOB was invited to join the bankruptcy proceedings (CPHB, para. 90).
- 411 It is against this background of events, and the consequent legal uncertainty as to the identity of the creditor of the J. Ring Receivables, that the Arbitral Tribunal must assess whether CSOB must be held liable for its refusal to substitute EC Group as a creditor of the J. Ring Receivables in the J. Ring bankruptcy.
- 412 CSOB communicated its refusal by letter dated April 5, 2004 (Exhibit R-22). CSOB justified its refusal by (i) its belief that it had validly assigned the J. Ring Receivables to CKA; (ii) the fact, in sum, that it was not a party to the EC Group arbitration opposing EC Group to CKA; and (iii) that based on publicly available information the outcome of the EC Group arbitration was challenged by CKA.
- 413 The Arbitral Tribunal considers all three defenses to be justified and reasonable.
- 414 Indeed, at that point in time CSOB had consistently objected to the rescission of the Assignment Agreements and the issue of whether it was to be considered to have always remained the legal owner of the J. Ring Receivables remained pending before an arbitral tribunal until February 17, 2005, when the Arbitration award Rsp 48|04 determined that the Assignment Agreements were invalid *ab initio* for lack of endorsement of the Promissory Notes.
- 415 On the basis of CSOB's refusal, the Municipal Court of Prague decided on May 3, 2004 in its Apportioning Resolution to distribute to EC Group the proceeds of J. Ring's bankruptcy attributable to the J. Ring Receivables (Exhibit R-24). The Arbitral Tribunal has noted that *CKA itself* appealed this decision on the basis that the identity of the holder of the J. Ring Receivables was still unclear (Exhibit C-145). Consequently, and given this uncertainty which was expressly acknowledged by CKA, the Arbitral Tribunal finds that CSOB was legitimately entitled to refrain from entering bankruptcy proceedings while the resolution of this issue was still pending.
- 416 Further, CSOB has objected that, in any event, it was legally impossible for CSOB to replace EC Group in the bankruptcy proceedings. The Arbitral Tribunal has considered the High Court of Prague's resolution dated June 17, 2004 relied upon by CSOB and understands from this judicial decision that the court

confirmed that the Arbitration award Rsp 264|03 and the invalidity for CKA's assignment to EC Group did not constitute a "transfer" of the J. Ring Receivables claimed in the proceedings from EC Group back to CSOB (Exhibit C-110, p. 5). The Arbitral Tribunal has noted that the MoF contended that CSOB's argument was irrelevant: according to the MoF, Arbitration award Rsp 264|03 did not transfer the J. Ring Receivables back to CSOB because CSOB was held in the first place to have never ceased to be the owner of the J. Ring Receivables (Rejoinder, para. 179).

417 However, whether it was legally possible or not for CSOB to join the J Ring bankruptcy as a creditor, does not alter the conclusion that until February 17, 2005, the identity of the owner of the J. Ring Receivables was disputed and hence, uncertain. In light of this conclusion, the Arbitral Tribunal finds that CSOB was in any event entitled to object to entering the proceedings since it could justifiably purport not to be the owner of the J. Ring Receivables.

418 Finally, the Arbitral Tribunal stresses that both Parties have acknowledged that the proceeds of the bankruptcy were negligible: the monies which could have been collected by CSOB had it joined the proceedings as a creditor amounted to CZK 187,273.13. The Arbitral Tribunal has calculated that this sum amounts to a mere 0.01% of the consideration originally received by CSOB from CKA for the assignment of the J. Ring Receivables.

419 In light of the foregoing, the Arbitral Tribunal finds that the MoF did not violate its professional duty of care in administering the J. Ring Receivables, and that the sum of CZK 187,273.13 – given its very negligible amount and the MoF's failure to meet its burden of proof – must not be deducted from the quantum of CSOB's claim in this Arbitration.

420 The MoF's defense is denied.

d) The MoF's defense relating to the "objection of prescription"

421 The MoF has put forth that the 3-year statutory period for asserting rights deriving from the J. Ring Receivables has lapsed and indicates – without more precision – that the J. Ring Receivables became prescribed on May 28, 2003, July 30, 2003 and July 30, 2004 (RPHB, para. 82). The MoF asserts that this is to be qualified as a "qualitative change" of the J. Ring Receivables that is, in turn, incompatible with Article 1.2 Amendment 1 and Article 1.5 Restructuring Agreement which do not allow such changes to occur after August 31, 2001.

422 For the same reasons as developed above (*supra*, N 417), the Arbitral Tribunal finds the MoF's "objection of prescription" is to be dismissed. If the J. Ring

Receivables indeed prescribed on the dates put forth by the MoF, the Arbitral Tribunal does not find that such prescription was caused by CSOB, which in the relevant timeframe was entitled to believe that CSOB was no longer the owner of the J. Ring Receivables since February 28, 2002. Hence, the MoF argument that CSOB caused the prescription of the J. Ring Receivables cannot be upheld.

- 423 Based on the Arbitral Tribunal's findings, the MoF's "objection of prescription" is dismissed.

F. Quantum of Claimant's Claim

1. Claimant's Position

- 424 CSOB seeks an award ordering the MoF to pay to CSOB "the amount of CZK 1,655,588,264.95 plus interest 3M PRIBOR increased by 0.27 percent per annum and accruing on CZK 1,655,588,264.95 from 11 April 2005 until payment, plus default interest of 2 percent accruing on CZK 1,655,588,264.95 from 13 April 2005 until payment, all within 15 days from the delivery of the arbitration award."
- 425 In its Request for Arbitration, CSOB has explained the quantum of its claim as follows (RFA, paras. 31-34).
- 426 On February 9, 2004, CKA sent a letter to CSOB stating its rescission of the Assignment Agreements and requesting that CSOB return the consideration it had received for the assignment of the J. Ring Receivables in the principal amount of CZK 1,448,065,053, plus interest (Exhibits C16, C17 and C18).
- 427 CSOB refused to pay, and CKA subsequently initiated arbitration proceedings against CSOB before the Arbitration Court of the Economic Chamber of the Czech Republic.
- 428 On February 17, 2005, the arbitral tribunal concluded in its arbitration award Rsp 48/04 that CKA was entitled to claim for reimbursement of the consideration it had paid to CSOB under the Assignment Agreements (Exhibit C-19).
- 429 As ordered by the arbitral tribunal, on April 8, 2005, CSOB paid to CKA a total amount of CZK 1,655,588,264.95, which comprised (i) the principal amount of CKA 1,448,065,053, in reimbursement for the consideration received under the Assignment Agreements; (ii) the amount of CZK 206,050,532.25, as interest of

4.58% p.a. from February 28, 2002¹⁴ until April 8, 2005; and (iii) the amount of CZK 1,472,679.70, as reimbursement of the legal fees awarded to CKA.

430 On the same date, CSOB informed the MoF of its payment to CKA and requested the MoF to pay the amount of CZK 1,655,588,264.95 pursuant to Article 2.5 ASG (Exhibit C-20). On April 26, 2005, the MoF formally refused to proceed to the payment, arguing that CSOB's request would extend the scope of the MoF's original guarantee under the ASG.

431 Consequently, the quantum of CSOB's claim in the present arbitration comprises the following amounts.

a) A principal amount of CZK 1,655,588,264.95

432 CSOB seeks in principal to recover the total amount it was ordered to pay to CKA, *i.e.* (i) the consideration of CZK 1,448,065,053 it had originally received under the Assignment Agreements and was ordered to reimburse to CKA, plus (ii) accrued interest in the amount of CZK 206,050,532.25, plus (iii) the legal fees awarded to CKA in the amount of CZK 1,472,679.70.

433 In its Post-Hearing Brief, CSOB asserts that claiming for the total amount it was ordered to pay to CKA is in line with Article 2.5 ASG under which the MoF is obligated to reimburse CSOB for the "entire sum" CSOB has returned to CKA. Thus, reimbursing CSOB in particular for the accrued interest it was ordered to pay does not constitute unjust enrichment as alleged by the MoF (CPHB, para. 99).

b) Contractual Interest

434 CSOB seeks, in addition, contractual interest accruing on the principal of CZK 1,655,588,264.95 at the rate of 3M PRIBOR + 0.27% in accordance with Article 2.5 ASG (Exhibit C-1, p. 7), from April 11, 2005 until payment.

c) Statutory Default Interest

435 In addition to the contractual interest, CSOB claims to be entitled to statutory default interest accruing on the principal at the rate of 2% from April 13, 2005 until payment. CSOB justifies its request by the fact that the MoF has failed to pay the requested amount (RPHB, para. 101).

¹⁴ The Assignment Agreements were concluded on February 28, 2002 (Exhibits C-16 and C-17).

436 According to CSOB, it is well established in case law of the Czech courts that a creditor may claim for statutory default interest in addition to contractual interest. In this respect, CSOB refers in particular to two decisions of the Czech Supreme Court dated September 25, 2003 and June 27, 2007 holding that "*contractual interest and default interest may exist side-by-side*" (RPHB, para. 101 and footnote 150).

2. Respondent's Position

437 The MoF objected to the quantum of CSOB's claim in its Rejoinder (Rejoinder, paras. 191-203), and maintained its objections in its Post-Hearing Brief (RPHB, paras. 154-156). The MoF objects to the quantum of the principal amount, as well as to the interest claimed by CSOB.

a) Objections to quantum of principal amount

438 First, the MoF asserts that CSOB is not entitled to the accrued interest of CZK 206,050,532.30. CSOB was ordered to pay this amount to CKA as a consequence of its own breach of the Assignment Agreements. Allowing CSOB to recover this amount would lead the MoF to be held liable for the consequences of CSOB's own illegal conduct. Moreover, if CSOB were entitled to reimbursement of interest, CSOB would be granted the benefit of holding the proceeds of an invalid transaction. This would constitute unjust enrichment in violation of Article 2.5 ASG (Rejoinder, paras. 194-195).

439 Second, the MoF raises the defense that CSOB cannot be entitled to recover the arbitration fees and the costs of CKA's legal representation in the amount of CZK 1,472,679.70, because (i) the claims are not covered by Article 2.5 ASG, and (ii) it was CSOB that caused those costs to arise as a result of its breach of the Assignment Agreements (Rejoinder, paras. 196-199).

440 What the MoF suggests, in essence, is that if the decision in favor of CSOB is awarded, the principal amount of CSOB's claim should be reduced to CZK 1,448,065,053.

b) Objections to Interest

441 The MoF objects to CSOB's calculation of contractual interest and alleges that it is applied to the wrong principal amount as explained above (*supra*, N 440)

442 Moreover, CSOB cannot be entitled to statutory default interest in addition to contractual interest. The contractual interest of 3M PRIBOR + 0.27% agreed upon by the Parties in Article 2.5 ASG replaces the statutory default interest. The

MoF alleges that under Czech law, statutory default interest may apply only in the absence of an agreement between the Parties to a contractual interest rate. In support of its defense, the MoF relies on Section 369(1) of the Commercial Code which provides that "[i]f the debtor is in default with performance of monetary obligation [sic], the debtor has a duty to pay default interest from the unpaid amount as set forth in the agreement, otherwise as provided by legal regulations of civil law." (Rejoinder, para. 202 and footnote 232).

3. Decision of the Arbitral Tribunal

443 Based on the arguments presented by the Parties, the Arbitral Tribunal finds as follows.

a) Quantum of Principal Amount to be awarded to Claimant

444 With regard to the three issues raised in the determination of the principal amount to be awarded to CSOB, the Arbitral Tribunal finds as follows.

(i) Is CSOB entitled to the amount of CZK 1,448,065,053 it had originally received from CKA under the Assignment Agreements?

445 Based on its findings developed in Sections VI.A-VI.E, the Arbitral Tribunal finds that CSOB's claim against the MoF under Article 2.5 ASG is to be admitted.

446 The amount of CZK 1,448,065,053 falls within the scope of Article 2.5 ASG since CSOB had originally received that amount from CKA as consideration under the Assignment Agreements. This sum thus corresponds to a sum "returned" by CSOB to CKA in the sense of Article 2.5 ASG. Consequently, the amount of CZK 1,448,065,053 is awarded to CSOB.

(ii) Is CSOB entitled to the amount of CZK 206,050,532.25 representing the interest at a rate of 4.58% p.a. running from February 28, 2002 (i.e., the date of conclusion of the Assignment Agreements) to April 8, 2005 (i.e., the date on which CSOB paid that amount to CKA)?

447 Article 2.5 ASG states in its relevant part that the MoF must reimburse the CSOB for an amount "equaling the sum returned or paid in consequence of such circumstances" (i.e. following an invalid transfer of Items) to CKA by CSOB.

448 CSOB was ordered to pay CKA the interest it seeks in this Arbitration by Arbitration Award Rsp of February 17, 2005 (Exhibit C-19, p. 1). This interest was thus paid by CKA "in consequence of" the invalidity of the Assignment Agreements, in the sense of Article 2.5 ASG. Most importantly, Article 2.5 ASG

expressly refers to interest as being included in the amount returned by CSOB to CKA (Exhibit C-1, p. 7, para. 2).

- 449 The Arbitral Tribunal thus finds that the amount of CZK 206,050,532.25 falls within the scope of Article 2.5 ASG. Consequently, the amount of CZK 206,050,532.25 is awarded to CSOB.

(iii) Is CSOB entitled to the amount of CZK 1,472,679.70 representing CKA's legal costs CSOB was ordered to pay to CKA?

- 450 CSOB was ordered to pay CKA's legal costs as a result of having lost arbitral proceedings against CKA (Exhibit C-19, p. 1). CSOB now seeks compensation for these costs under Article 2.5 ASG. The question that lies before the Arbitral Tribunal is thus to determine whether the MoF's liability under Article 2.5 ASG should encompass CSOB's expenses relating to a dispute with a third party that CSOB ultimately lost and that led to the invalidation of a transfer of Items to CKA.

- 451 The Arbitral Tribunal does not consider the expression "*a sum paid in such circumstances*" as used in Article 2.5 ASG to cover such costs of arbitration and legal representation. Unlike the sum paid by CKA in the first place for the J. Ring Receivables (awarded above to CSOB at (i)) or the interest accruing on such sum (awarded above to CSOB at (ii)), costs of legal representation do not relate in any manner to the value of the J. Ring Receivables or to the price paid to acquire them. The Arbitral Tribunal thus finds that such costs are not covered by Article 2.5 ASG.

- 452 CSOB's claim for reimbursement under Article 2.5 ASG of the costs incurred in arbitral proceedings against CKA is dismissed.

(iv) Conclusion on Principal Amount Awarded to CSOB

- 453 Based on the above, CSOB's claim in this Arbitration is admitted in the principal amount of CZK 1,654,115,585.25.

b) Claimant's Entitlement to Interest Accruing on the Principal Amount

- 454 With respect to CSOB's entitlement to interest accruing on the principal amount awarded to CSOB as determined above (*supra*, N 453), the Arbitral Tribunal finds as follows.

(i) **Claimant's Entitlement to Contractual Interest**

- 455 CSOB seeks contractual interest accruing on the principal amount at a rate of 3M PRIBOR increased by 0.27 percent per annum from April 11, 2005 until payment. The contractual rate of interest sought by CSOB is foreseen at Article 2.5 ASG.
- 456 The MoF does not dispute CSOB's entitlement to contractual interest at the rate recalled above, but rather disputes the quantum of the principal amount on which it should accrue. However this issue has been adjudicated by the Arbitral Tribunal above at N 453.
- 457 The Arbitral Tribunal finds that the contractual rate sought by CSOB is correct as it the contractual rate foreseen by Article 2.5 ASG. However, Article 2.5 ASG also specifies that such interest runs **"from the day of the Bank returning the amount of the price (consideration) for an Item to KoB until payment by the MoF"** (Emphasis added). Since CSOB paid CKA on April 8, 2005 as evidenced by the letter of Mr. Knapp to Mr. Janota dated April 8, 2005 (Exhibit C-20), the Arbitral Tribunal finds that CSOB's claim for interest as of April 11, 2005 until payment by the MoF is to be granted.
- 458 The Arbitral Tribunal finds that CSOB is entitled to interest at a rate of 3M PRIBOR increased by 0.27 percent per annum and accruing on CZK 1,654,115,585.25 from April 11, 2005 until payment by the MoF.

(ii) **Claimant's Entitlement to Statutory Default Interest**

- 459 With respect to the statutory default interest sought by CSOB, the issue that lies before the Arbitral Tribunal is to determine whether CSOB should be granted – in addition to the contractual interest foreseen by Article 2.5 ASG which was awarded to CSOB (*supra*, N 458) – statutory default interest at a rate of 2% accruing on the principal amount awarded to CSOB in this Arbitration and running from April 13, 2005 until payment.
- 460 As recalled above, the MoF claims in essence that Section 369(1) of the Commercial Code prevents CSOB from claiming statutory default interest in addition to the agreed contractual interest of 3M PRIBOR+0.27% p.a. because statutory default interest would only apply in the absence of an agreement between the parties to a contract.
- 461 In its Post-Hearing Brief, CSOB objected to the MoF's interpretation of Section 369(1) of the Commercial Code. CSOB argues that Section 369(1) of the Commercial Code only applies to the issue of *default interest*, which can be pre-agreed by the parties or set out in regulation. Accordingly, Section 369(1) of the

Commercial Code does not prevent the parties from agreeing on a contractual interest rate, which is independent from the issue of default interest. Hence, CSOB claims that *"the contractual interest of Article 2.5 of the ASG and the statutory default interest may thus exist side-by-side."* (CPHB, para. 100). To support its position, CSOB partially quotes two decisions of the Supreme Court of the Czech Republic dated respectively September 25, 2003 and June 27, 2007 in a footnote to its Post-Hearing Brief (CPHB, footnote 150).

462 In order for the Arbitral Tribunal to adjudicate CSOB's claim for default interest, CSOB should have (i) clearly indicated on which statutory provision it relied in order to claim statutory default interest and produced in the record of the Arbitration the full version of this provision in Czech and in the language of these proceedings, *i.e.* in English; (ii) produced the case law it purports to rely on in Czech and in the language of these proceedings, *i.e.* in English; and (iii) explain in detail why the provision on interest in Article 2.5 ASG could not be conceived as full and exclusive regulation of the issue of interest among the Parties.

463 CSOB has however failed to do so.

464 Having considered the argumentation developed by CSOB in its Post-Hearing Brief, the Arbitral Tribunal remains at doubt as to which provision CSOB relies on to claim statutory default interest in this Arbitration. The Arbitral Tribunal notes that CSOB's Request for Arbitration and subsequent memorials did not indicate on which provision CSOB relied on to claim statutory default interest in addition to the agreed contractual interest. The reference to Section 369(1) of the Commercial Code was introduced by the MoF in its Rejoinder when it objected to CSOB's claim for default interest. Although CSOB objected to the MoF's interpretation of Section 369(1) of the Commercial Code it remains ambiguous whether or not CSOB is seeking the application of Section 369(1) of the Commercial Code. In addition it remains highly unclear on which provision of Czech law CSOB relies for the *2% interest rate* claimed.

465 The Arbitral Tribunal duly notes that CSOB has referred in particular to two decisions of the Czech Supreme Court in order to support its claim for additional default interest. However, CSOB has failed to produce either decision as such or an English translation thereof. CSOB limited itself to quoting isolated sentences of these decisions. Without knowing what was contractually agreed in the contracts at issue in those two decisions of the Czech Supreme Court, the Arbitral Tribunal does not see it appropriate to rely on these isolated sentences without a fuller context.

466 When considering the wording of Article 2.5 ASG, one could well assume that the Parties could have intended this provision to set out the full and sole regime of

interest matters. It has not been convincingly explained by CSOB to the Arbitral Tribunal why Article 2.5 ASG would not be a complete regulation of interest matters which leaves no room for additional default interest.

- 467 Consequently, given these unclarities, the Arbitral Tribunal does not see a sufficient legal ground to grant default interest to CSOB in addition to the contractual interest rate foreseen by Article 2.5 ASG.

4. Conclusion

- 468 Based on the foregoing conclusions presented in Section VI.A-E and VI.F, CSOB's claim is admitted in the principal amount of CZK 1,654,115,585.25. On this principal amount, CSOB is entitled to contractual interest at a rate of 3M PRIBOR increased by 0.27 percent per annum, running from April 11, 2005 until payment.

VII. Respondent's Counterclaim

A. Introduction to Respondent's Counterclaim

- 469 In its counterclaim the MoF asserts, in essence, that it should be entitled to a disgorgement of profits allegedly earned by CSOB as a result of the totality of the transactions undertaken on June 19, 2000 (SoDC, para. 178).
- 470 In its Statement of Defense and Counterclaim, the MoF explained the rationale of its counterclaim as follows (SoDC, paras. 171-184).
- 471 The MoF recalls that CSOB acquired IPB's Enterprise from IPB's forced administrator on June 19, 2000 in a state in which it was unable to continue its existence as a going concern unassisted. Pursuant to Article 11.2 of the Sale Agreement, the purchase price to be paid by CSOB to IPB's administrator for the acquisition of IPB's Enterprise was to be defined based on the value of IPB's Enterprise as at June 18, 2000, *i.e.* one day before the receipt of State aid. Hence, the State aid granted was not taken into account for the purpose of determining the value of IPB's Enterprise and thus determining the purchase price to be paid by CSOB.
- 472 The Sale Agreement was entered into in conjunction with the ASG, the Indemnity Agreement and the Declaration on Compensation, *i.e.* agreements signed between CSOB on the one hand, and the MoF and other agencies of the Czech State on the other.

- 473 The MoF claims in essence that as a result of the State aid measures granted under the above agreements, CSOB did not receive IPB's Enterprise as an enterprise with negative net worth, but instead *"acquired IPB as a viable going concern, maintaining the opportunity to exploit all synergies which it offered and to realize the future cashflows from (former) IPB's business"* (SoDC, para. 152). Based on the foregoing, the MoF asserts that CSOB cannot claim to have paid an "adequate price" or "proper consideration" for the acquisition of IPB's Enterprise (the MoF refers in this respect to CSOB's arguments at SoC, para. 27).
- 474 The MoF has thus estimated what it refers to as "the value of the assisted IPB's Enterprise upon its transfer to Claimant" (SoDC, para. 177). In its Answer to the Request for Arbitration, the MoF originally estimated this value at CZK 26,700,000,000. In its Statement of Defense and Counterclaim, the MoF then explained that this estimated value was subsequently reviewed in *ad hoc* arbitral proceedings unrelated to this Arbitration. The purpose of these proceedings was to enable the calculation of a settlement payment to be paid by the Czech Republic, after an arbitral tribunal found the Czech State to be liable for damages under the Czech-Dutch Bilateral Investment Treaty, under which Saluka Investments B.V. – one of IPB's former shareholders – initiated arbitration against the Czech State among other for breach of equitable treatment (Exhibit R-10). This review was carried out by the tribunal originally constituted for the Saluka case and led to the conclusion that "the fair value of IPB's Enterprise at the time of its acquisition by CSOB" was equal to CZK 34,200,000,000 (Exhibit R-101).
- 475 Thus, as a result of the totality of the transactions undertaken on June 19, 2000, the MoF argues that CSOB received "an economic benefit in the form of the positive value of the assisted IPB enterprise, and that such benefit amounted to CZK 34.2 billion at that time" (SoD, para. 178). On January 22, 2004, CSOB ultimately paid the MoF CZK 369,660,212 on the basis of the Declaration on Compensation, in order to compensate the MoF for the guarantee it provided under the ASG (Exhibit C-11). The MoF contends that this payment does not represent an economically adequate or fair consideration for the countervalue received by CSOB as a result of the June 19, 2000 agreements (SoDC, para. 179). The MoF does not dispute that the payments made under the Restructuring Agreement and the State's commitments under the ASG, the Indemnity Agreement and the Declaration on Compensation were State aid measures, not undertaken on commercial terms and consequently, appropriately cleared and approved. However, the MoF asserts that the "further benefit" obtained by CSOB as a result of the ASG, the Restructuring Agreement and the Declaration on Compensation – in conjunction with the Sale Agreement – was not. Put in the MoF's own terms, CSOB cannot receive a *"cleaned IPB as a gift"* (SoDC, para. 183).

- 476 Based on the above, the MoF is claiming the right to be paid the difference between "the fair value of IPB's assisted enterprise" and the compensation received by the MoF under the Declaration on Compensation.
- 477 The MoF brings its counterclaim on the basis of contract and law. The contractual basis is that in light of the purpose of the IPB transaction and of the intention of the parties when entering into the transaction, the ASG, in conjunction with all the other contractual agreements entered into on June 19, 2000, do not allow CSOB to keep the positive net business asset value of IPB's Enterprise following its transfer to CSOB. In the alternative, the MoF argues that it would be entitled to receive back the positive net business value of IPB's Enterprise created by the performances of the MoF under the ASG – in conjunction with the other contracts entered into in June 19, 2000 – *ex lege*, either because CSOB has no legal title or because such value constitutes unjust enrichment on the part of CSOB or unapproved and hence illegal State aid.
- 478 As indicated above (*supra*, Section II.G.), the scope of the present award with regard to the counterclaim is limited to a determination of CSOB's liability for the counterclaim raised by the MoF.
- 479 The Parties' respective positions and the findings of the Arbitral Tribunal with respect to the MoF's contractual claim (*infra*, Section VII.B.) and the MoF non-contractual claim (*infra*, Section VII.C.) are set forth in the following sections of this Award.

B. Respondent's Counterclaim as a Contractual Claim

- 480 In order for the MoF to prevail in its contractual claim, the Arbitral Tribunal must find (i) that CSOB breached a duty owed to the MoF under a specific contract, and (ii) that the breach caused the MoF to suffer damages as a result.

1. Which contract was allegedly breached by Claimant?

a) Respondent's Position

- 481 The MoF's contractual claim is based on the ASG and what it asserts to be the proper interpretation of the Zero NAV Principle underlying the ASG (SoDC, paras. 185 and 189; RPHB, paras. 157 and 159).
- 482 However, the MoF has also asserted when presenting its arguments in relation to its contractual claim that the transactions that took place on June 19, 2000 "*have to be seen and judged in their totality*" (Rejoinder, para. 215). As set forth above (*supra*, N 477), the MoF has argued that it would be entitled to the restitution of

the positive net asset value of IPB's Enterprise on the basis of the ASG, "in conjunction" with the Sale Agreement, the Indemnity Agreement, the Restructuring Agreement and the Declaration on Compensation.

b) Claimant's Position

483 CSOB objects in full to the MoF's contractual claim.

484 In its Post-Hearing Brief, CSOB stressed that the basis of the MoF's contractual claim remained unclear (CPHB, paras. 105 *et seq.*).

485 According to CSOB, the MoF is seemingly confusing two distinct contractual agreements, namely the Sale Agreement entered into between CSOB and IPB's forced administrator on the one hand, and the ASG entered into between CSOB and the MoF on the other (Reply, para. 234).

486 In any event, CSOB argues that there is no contractual basis to such a claim (Reply, paras. 234 *et seq.*).

c) Decision of the Arbitral Tribunal

487 As a basis to its contractual claim, the Arbitral Tribunal first stresses that the MoF may only rely on the provisions – and on an alleged breach of such provisions – of a contract to which the MoF and CSOB are both signatories. Thus, in this Arbitration the MoF could theoretically only rely on a breach of the ASG, the Declaration on Compensation or the Restructuring Agreement. In particular and as correctly stressed by CSOB, the MoF is not a party to the Sale Agreement which was entered into by CSOB and IPB's forced administrator.

488 Although the Arbitral Tribunal is well aware of the intricate nature of all agreements entered into on June 19, 2000 in order to rescue IPB which in itself leads to certain difficulties in assessing the various contractual agreements as independent agreements, the Arbitral Tribunal finds nonetheless – from the outset – that the basis of the MoF's contractual claim is unclear.

489 The unclarity results in essence from the fact that the MoF has argued that it is basing its contractual claim on the ASG while arguing at the same time that the various contractual agreements entered into on June 19, 2000 must be interpreted as a whole.

490 The unclarity further results from the fact that the MoF's contractual claim amounts to asserting in essence that CSOB did not pay sufficient consideration for the acquisition of IPB's Enterprise. This would implicitly amount to rely on the

Sale Agreement. However the Arbitral Tribunal finds that the MoF cannot in any event rely on the provisions of the Sale Agreement to bring a contractual claim against CSOB: as recalled above, the MoF is not a party to the Sale Agreement. The Arbitral Tribunal has noted that the MoF argued during the Hearing that the forced administrator of IPB functioned as an officer of the Czech State and thus that the forced administrator's sale of IPB's Enterprise fell within the notion of state resources (Tr. Day 1, page 82). Given the function of the administrator and the interests which his task is to protect, the Arbitral Tribunal finds this argument to be unconvincing.

491 However, the Arbitral Tribunal understands from the MoF's explanations that the MoF is relying *primarily* on the ASG as a basis to its contractual claim.

492 The Tribunal further notes that the MoF is not relying on a contractual provision in particular, but rather on its alleged interpretation of the Zero NAV Principle implemented by the ASG.

493 Based on the foregoing, the Arbitral Tribunal would have to find that CSOB acted in breach of the ASG for the MoF to prevail in its contractual claim. The Arbitral Tribunal turns to this question in the following Section.

2. In what way did Claimant breach that contract?

a) Respondent's Position

494 The MoF argues in essence that the Zero NAV Principle as implemented by the ASG does not allow CSOB to gain any benefit from the acquisition of IPB's Enterprise.

495 The MoF submits that the key purpose of the ASG was to ensure that IPB's Enterprise had *zero equity* following its transfer to CSOB. The MoF relies on the legal definition of equity as set forth in Section 6(3) of the Czech Commercial Code which defines the term "equity" as the remaining positive value of a business after deduction of all liabilities (Exhibit R-75). Based on this definition, it is the MoF's position that CSOB should not have been enriched by any positive value transferred to it as part of the transaction which took place on June 19, 2000 (RPHB, para. 157).

496 Indeed the MoF argues that it was the common intent of the Parties that neither Party be enriched to the detriment of the other. In sum, the MoF construes the Zero NAV Principle to mean that IPB's Enterprise was to have "zero equity" upon its transfer to CSOB. According to the MoF, the purpose of the ASG was to ensure that no negative value of IPB's Enterprise be borne by CSOB when it

acquired it. In turn, the Zero NAV Principle properly construed also prevents CSOB from keeping *"the windfall of a positive equity value of that enterprise, following the package of State aid granted to it effectively for free"* (SoDC, para. 188).

b) Claimant's Position

497 CSOB denies the existence of any breach on its part of the provisions of the ASG, nor of any other contract it entered into in the context of the acquisition of IPB's Enterprise.

498 CSOB recalls that it received nothing other than what it was entitled to under the agreements it entered into. Consequently, since the MoF did not provide anything beyond the agreed provisions, CSOB asserts that there is no contractual basis to the MoF's counterclaim. In particular, CSOB puts forth that none of the provisions of the ASG could support the MoF's counterclaim.

499 CSOB finally points to the fact that it was not until July 2007, *i.e.* more than seven years after the conclusion of the ASG, that the MoF asserted this counterclaim against CSOB. Before that date, the MoF never notified CSOB of any such breach of any of the contracts it had entered into with CSOB (CPHB, para. 118).

c) Decision of the Arbitral Tribunal

500 The Arbitral Tribunal has considered the Parties' respective arguments and finds that the MoF has failed to prove the existence of any breach of any provision of the ASG on CSOB's part.

501 The Arbitral Tribunal is unconvinced by the MoF's argument based on what it alleges to be the correct interpretation of the term "equity" under Czech law. The Parties did not agree to the principle of "zero equity" but rather agreed to what they commonly defined as the "Zero NAV Principle", according to which IPB's assets were to equal its liabilities upon the transfer of IPB's Enterprise to CSOB on June 19, 2000.

502 The wording of the ASG is clear and provided for a detailed mechanism in order to calculate the net asset value of IPB's Enterprise. Following the conclusion of the Restructuring Agreement and of the transfers of many doubtful assets to CKA, the Parties were well aware of the fact the Final NAV Statement – used to achieve the Zero NAV Principle – could either result in a negative net asset value or in a positive net asset value. Hence, the Parties had anticipated that CSOB might have to make a balance payment to the MoF in order to achieve the Zero NAV Principle. It was thus in the presence of a positive net asset value, that

CSOB's payment obligation would have arisen under the ASG as amended by Amendment 1.

- 503 The Arbitral Tribunal stresses yet again that the Final NAV Statement resulted in a net positive value of CZK 3.4 billion. Had CSOB kept this net positive value of IPB's Enterprise and refused to transfer that amount to the MoF, CSOB would have indeed acted in breach of the ASG as amended by Amendment 1 and the MoF would have standing to sue CSOB under the ASG.
- 504 However, this was not the case. CSOB paid back to the MoF the net positive value of IPB's Enterprise, together with the agreed interest. As stated above in Section V, on January 9, 2004, CSOB paid to the MoF the positive value of the Final NAV Statement in the amount of CZK 3,710,781,629. This fact is undisputed by the MoF in this Arbitration.
- 505 Hence CSOB's sole payment obligation towards the MoF pursuant to the terms of the ASG as amended – and thus according to the Zero NAV Principle - was to pay to the MoF a potential positive value of the Final NAV Statement. Since this obligation has been complied with, the Arbitral Tribunal finds that on the basis of the provisions of the ASG, CSOB has already fulfilled its obligations under the ASG and is under no obligation to pay any other amount to the MoF.
- 506 Absent any breach of the ASG by CSOB, the MoF's contractual claim is dismissed.
- 507 Only for the sake of completeness - since the MoF's contractual claim is already dismissed on the basis of an absence of breach - the Arbitral Tribunal addresses hereinafter the issue of whether the MoF has suffered any damages at all.

3. Which damages would have been incurred by Respondent had there been a breach?

a) Respondent's Position

- 508 As stated above (*supra*, N 475-476), the MoF asserts that as a result of the State aid it received, CSOB received an additional benefit in the amount corresponding to the difference between what it alleges was the fair value of the assisted IPB and the amount actually paid by CSOB under the Declaration on Compensation.
- 509 In order to support its main underlying argument – *i.e.* that the "assisted IPB" was worth CZK 34,200,000,000 upon its transfer to CSOB – the MoF relies on a valuation carried out by an arbitral tribunal in an unrelated *ad hoc* arbitration (Exhibit R-101).

510 The MoF claims in essence that it was deprived of the fair consideration it should have received given the fact that the positive value of IPB's Enterprise was created by providing State aid to CSOB (SoDC, para. 180).

b) Claimant's Position

511 Since CSOB denies the existence of any breach of the ASG, CSOB asserts that the MoF did not incur any damages.

512 In any event, CSOB stresses that the MoF is claiming for an "additional value" which does not exist and to which, even if it existed, it has no right (CPHB, paras. 120-121).

c) Decision of the Arbitral Tribunal

513 The Arbitral Tribunal has considered the Parties' respective arguments and finds that the MoF does not meet the burden of proving that it incurred damages in the case at hand.

514 The MoF's claim for contractual damages raised in this Arbitral is based on the assumptions that (i) IPB's Enterprise was transferred to CSOB with a positive value of CZK 34 billion, (ii) such positive value was created by the funds granted by the Czech State and (iii) that the MoF should be entitled to a so-called market consideration for the transfer of IPB's Enterprise.

515 The Arbitral Tribunal finds the three assumptions underlying the MoF's counterclaim to be unconvincing and fundamentally contradictory to the contractual agreements reached on June 19, 2000.

516 First, the Arbitral Tribunal finds that it is highly uncertain that IPB's Enterprise was indeed transferred to CSOB with a positive value. The Arbitral Tribunal does not intend to question the findings of another arbitral tribunal. However, on the other hand, the MoF cannot expect that the Arbitral Tribunal would rely blindly on the result of a valuation carried out in another unrelated arbitral proceeding between different parties in order to assess the merits of the MoF's counterclaim in this Arbitration.

517 Rather, the Arbitral Tribunal is bound to assess the merits of the MoF's counterclaim based on the contractual agreements at the center of the present dispute. The Arbitral Tribunal finds that under the Sale Agreement signed between IPB's forced administrator and CSOB, a mechanism to determine the purchase price to be paid by CSOB for the acquisition of IPB's Enterprise was

explicitly agreed to by the parties. Article 11.2 of the Sale Agreement reads as follows in its relevant part (Exhibit C-9, p. 6):

"11.2 The Parties acknowledge that following the Effective Date [i.e. June 19, 2000] a valuation of the Enterprise as of the day prior to the Effective Date shall be completed by two independent sworn valuers (each a "Valuator") to the determine the exact and objective purchase price for the Enterprise." (Emphasis Added).

- 518 The Arbitral Tribunal finds that – in light of the express wording of the purchase price clause of the Sale Agreement – CSOB was to pay a purchase price based on a mechanism of valuation of IPB's Enterprise which expressly *excluded* to take into account the effect of the State aid granted on June 19, 2000. The MoF's counterclaim is thus from the outset in contradiction with Article 11.2 of the Sale Agreement.
- 519 Further, the Arbitral Tribunal stresses that the mechanism of Article 11.2 was implemented and led to results which also contradict the MoF's allegation that IPB's Enterprise was transferred to CSOB as "a going concern". Indeed, both party appointed valuers assessed the value of IPB's Enterprise to be deeply negative. Ultimately and pursuant to Article 11.7 of the Sale Agreement the "Adjusted Purchase Price" to be paid by CSOB under the Sale Agreement was set to CZK 1. This outcome is fully understandable since it is undisputed in this Arbitration that IPB was on the verge of bankruptcy prior to June 2000.
- 520 Further, the Arbitral Tribunal finds that other provisions of the contractual agreements entered into on June 19, 2000 preclude the MoF's counterclaim. For instance, the Arbitral Tribunal finds that the ASG itself provided that the State support granted under the ASG and the Indemnity Agreement should not be taken into account for the purpose of preparing the Final NAV Statement and hence determining the respective payment obligations of CSOB or the MoF. Article 1.2 of the ASG relating to the determination of the net asset value of IPB's Enterprise is in this respect unambiguous (Exhibit C-1):

"1.2 The Bank shall in good faith attempt to prepare within two months of the effective date of the Agreement on Sale of Enterprise a statement listing all of the Enterprise's assets, liabilities and off-balance sheet items as of 7 a.m. on the effective date of the Agreement on Sale of Enterprise (provided that in preparing such statement the content of this Agreement or the CNB Agreement shall not be taken into account with the exception of provisions in this Agreement regulating the procedure for preparing such statement)." (Emphasis added).

- 521 Based on the two provisions of the Sale Agreement and of the ASG analysed above – which define the fundamental obligations of CSOB and the MoF in the IPB Transaction – the Arbitral Tribunal finds the Parties did not agree at any

moment in time that the purchase price to be paid for the acquisition of IPB's Enterprise would have to take into account the effect of the State aid granted. In other terms, for the purpose of the ASG and the Sale Agreement, IPB's Enterprise was *not* transferred to CSOB with a *positive value*.

- 522 Further, the Arbitral Tribunal finds that the MoF has failed to establish why it could allege to have "created" the positive value of IPB's Enterprise. It is undeniable given the state of emergency in June 19, 2000 that without the assistance of the Czech State, IPB would have been declared bankrupt and finally wound-up. This has been explicitly recognized by both Parties in this Arbitration. However, the Arbitral Tribunal also stresses that without CSOB's acquisition of IPB's Enterprise it is presumable – and that seems to have been a reason and expectation for selling it to CSOB in the first place – that IPB could not have been rescued. Hence, the Arbitral Tribunal agrees with CSOB in finding that the positive value of IPB's Enterprise – if any – was created also as a result of CSOB's undertakings under the relevant agreements and synergies with its existing bank business.
- 523 Finally, the Arbitral Tribunal finds that none of the provisions of the ASG or other contractual agreements may support the MoF's counterclaim. The MoF cannot rely on the ASG or the Declaration on Compensation to purport that it was entitled to market price consideration for the transfer of IPB's Enterprise. Had CSOB truly been under an obligation to pay market consideration for the acquisition of IPB based on its value taking into account the State aid granted, it is presumable that CSOB would have been quite reluctant to enter into the IPB transaction since this would have led to a significant increase in the amount to be invested for the transaction. In any event, the Parties would have undoubtedly expressly stated their agreement in this respect in other of the provisions of the relevant contract. Finally, none of the authorities which assessed the IPB transaction ever addressed the issue of whether the MoF should be paid market consideration for the acquisition of IPB's Enterprise.
- 524 Overall, the Arbitral Tribunal finds that the MoF's counterclaim fundamentally contradicts the economics of the IPB transaction. As noted by the MoF itself, the IPB transaction was based on *State support*: by definition, State aid *excludes* any comparison with a transaction undertaken on normal commercial terms. In such cases, the grantor of State aid is never granted consideration based on market value in exchange of its support. The Arbitral Tribunal finds that the MoF's distinction between State support lawfully granted and further State support which created the positive value of IPB's Enterprise is artificial and amounts yet again to an attempt from hindsight to deconstruct the June 19, 2000 transaction.

525 Finally, the Arbitral Tribunal finds it determinant to stress in the case at hand that the MoF – while alleging that it transferred IPB's Enterprise "as a gift" to CSOB thus incurring damages in the amount for which it was not compensated – in reality also *benefited* from the IPB transaction. It is undisputed that the Czech State had a very high risk exposure in June 2000. The bankruptcy of IPB and a further run on the banks would have most presumably led to the collapse of the entire Czech banking system.¹⁵ By entering into the IPB transaction, the Czech State avoided a major crisis in its banking sector. Hence, and contrary to its allegations, the Arbitral Tribunal finds that the MoF cannot claim to have incurred any damage in relation to the IPB transaction.

d) Conclusion

526 Based on the foregoing and absent any breach by CSOB or damage incurred by the MoF, the MoF's contractual counterclaim is dismissed.

527 The Arbitral Tribunal now turns to the assessment of the alternative basis to the MoF's counterclaim.

C. Respondent's Counterclaim as a Non-Contractual Claim

528 In the alternative, the MoF has raised a non-contractual claim against CSOB in order to seek repayment of the alleged "benefit" CSOB would have made out of the IPB transaction. The basis of the MoF's non-contractual counterclaim is two-fold: the MoF asserts that it is entitled to restitution either on the basis of the concept of unjust enrichment (*infra*, Section C.1.), or because allowing CSOB to keep that benefit would constitute illegal State aid (*infra*, Section C.2.).

1. Respondent's Non-Contractual claim based on Unjust Enrichment

a) Respondent's Position

529 The MoF relies on the concept of unjust enrichment as set forth in Section 451 of the Czech Civil Code as a first basis to its non-contractual counterclaim.

530 Section 451 of the Civil Code reads as follows (Exhibit R-74):

¹⁵ Compare here with EU Commission Decision 2008/214/EC on State aid granted by the Czech Republic to GE Capital, Exhibit R-113, cited above at N 340.

"(1) Any person who, to the detriment of somebody else, is unjustly enriched must return what he has acquired.

(2) "Unjust enrichment" means a material benefit acquired by performance of an act for which there was no legal reason, by performance of an act based on a void legal act, or by performance in respect of a legal ground which did not occur, as well as a material benefit acquired from dishonest resources."

531 The MoF asserts that unjust enrichment is established *inter alia*, when a person receives a monetary or proprietary benefit without a legal title. It is the MoF's position that CSOB, in the case at hand, received *"the positive value of the assisted IPB enterprise"* as a benefit to which it has no valid legal title (SoDC, para. 193).

532 First, the MoF's alleges that the Sale Agreement does not constitute a valid legal title which would allow CSOB to benefit from the positive value of the "assisted IPB Enterprise" since the forced administrator of IPB transferred to CSOB an "unassisted enterprise" that was not a going concern without State assistance. The MoF asserts that IPB's Enterprise was "transformed" into a going concern and its positive value was created *only* as a result of the performances *by the MoF* under the ASG and the Restructuring Agreement and *by the CNB* under the Indemnity Agreement.

533 Second, the MoF asserts that the ASG does not represent title for that benefit either.

534 Consequently, the MoF seeks reimbursement for the value it created as a result of its performances under the ASG, the Restructuring Agreement, the Declaration on Compensation and the Indemnity Agreement in the "proprietary sphere" of CSOB for which no adequate compensation was received. Accordingly, the benefit currently held by CSOB constitutes unjust enrichment (SoDC, para. 195).

535 Section 458(1) of the Civil Code provides that unjust enrichment must be surrendered. In order to explain how the amount to be restituted by CSOB must be calculated, the MoF relies on the following commentary to Section 458(1) of the Civil Code (Exhibit R-102):

"[i]n a case of investments into another's property the claim for unjust enrichment is represented not by the value of the expended resources but rather by the appreciation of the property that the enriched obtained, i.e. the difference between the value of the property (market value) prior to the investments and thereafter."

536 The MoF acknowledges that the Parties *"did not contract for how that appreciation should be treated"* (SoDC, para. 197). Hence, it is the MoF's position that the positive value of IPB's Enterprise created by its sole performances under the agreements

recalled above must be treated in accordance with the general statutory provisions and in particular with the principle of unjust enrichment.

b) Claimant's Position

537 CSOB objects in full to the MoF's counterclaim based on unjust enrichment.

538 CSOB first stresses that the ASG and the Restructuring Agreement exclude the application of Section 451 of the Civil Code. Section 451 of the Civil Code can only apply in the absence of a valid contract. Since the ASG and the Restructuring Agreement constitute valid contracts and since the obligation of the MoF to provide State aid was born out of these contracts, the principle of unjust enrichment cannot apply to the present dispute (CPHB, paras. 124-127).

539 Second, CSOB argues that the alleged "benefit" was not created by the MoF. The MoF never invested in IPB's Enterprise beyond its commitments under the ASG and the Restructuring Agreement. The State aid granted only brought up the deeply negative net asset value of IPB's Enterprise up to zero and did not create any additional value. The State aid granted was only one of the components of the success of the transaction: without CSOB's substantial contributions which it assesses to amount to CZK 18.4 billion (CPHB; paras. 128-131; Exhibit C-24, pages 13-18, 64-71, 94-102 and Appendix F.), and CSOB's agreement to absorb significant risks associated with taking over IPB's Enterprise, IPB's business would not have been rescued. Hence, even if the alleged additional benefit existed, it was not provided by the MoF but rather generated by CSOB's own managerial skills and synergies with its existing bank business.

540 Third, for the MoF to be able to claim the return of the alleged unjust enrichment, the MoF would have to prove that it suffered a corresponding detriment. CSOB denies the existence of such detriment in the case at hand (CPHB, paras. 132-134).

541 Consequently, it is CSOB's position that there is no unjust enrichment in the case at hand.

542 In any event, CSOB further indicates that the concept of unjust enrichment would only allow the MoF to claim back what it actually provided to CSOB. Unjust enrichment cannot justify a claim for the secondary effect of performance which was provided on legal grounds (CPHB, para. 127).

c) Decision of the Arbitral Tribunal

- 543 The Arbitral Tribunal notes that while qualifying its claim based on unjust enrichment as an alternative claim, the MoF's bases its argumentation on the same underlying assumption as for its contractual counterclaim, namely that IPB's Enterprise was transferred to CSOB with a positive value for which it should be entitled to consideration based on market value.
- 544 In light of its foregoing conclusions set forth above at N 513 *et seq.*, the Arbitral Tribunal has explained that the assumption underlying the entirety of the MoF's counterclaim is fundamentally flawed.
- 545 For similar reasons, the Arbitral Tribunal finds that the MoF's claim based on unjust enrichment is to be dismissed.
- 546 The pre-requisite for a claim for disgorgement of profit based on Section 451 of the Czech Civil Code is logically that the requirements of the definition of unjust enrichment be met. The Arbitral Tribunal has considered the definition of unjust enrichment set forth under Section 451(2) of the Civil Code. Just as under other legal systems which acknowledge the existence of the concept of unjust enrichment, the Arbitral Tribunal understands that the three following conditions must be cumulatively met in the case at hand for the MoF's claim to prevail: the MoF bears the burden of proving (i) that CSOB received a material benefit, (ii) that CSOB did not have any legal title to receive such benefit, and (iii) that the MoF suffered a corresponding detriment.
- 547 The Arbitral Tribunal refers in full to its argumentation developed above at N 513 *et seq.* and finds that none of these conditions is met.
- 548 First, and based on the foregoing, the Arbitral Tribunal finds that CSOB did not receive any State support beyond what was agreed to under the ASG and other relevant contractual agreements. Hence, the Arbitral Tribunal follows CSOB in finding that pursuant to the terms of the ASG the State aid granted by the MoF "only" had the effect of bringing up the deeply negative value of IPB's Enterprise as at June 19, 2000 to zero in accordance with the Zero NAV Principle. Hence the MoF cannot claim that CSOB has received an "additional benefit".
- 549 Moreover, even if such "additional benefit" had truly existed, the Arbitral Tribunal finds that the MoF yet again failed to prove that it suffered any corresponding damage. As set forth above, the wording of the ASG and the Sale Agreement do not support the MoF's allegation that it was ever entitled to market-based compensation for the transfer of IPB's Enterprise to CSOB.

550 Hence, the requirements of unjust enrichment as set forth by Section 451 of the Civil Code are not met.

551 The MoF's counterclaim based on unjust enrichment is dismissed.

2. Respondent's Non-Contractual claim based on State Aid Law

552 As a further basis to its non-contractual claim, the MoF asserts that CSOB is in possession of prohibited State aid which it seeks to recover. In relation to this claim, CSOB has raised a jurisdictional objection. As recalled above, the MoF asserts that CSOB paid inadequate consideration for the asset – the "assisted IPB Enterprise" – it received. It is the MoF's position that the difference between the market value of IPB's Enterprise and the actual payment received by the MoF under the Declaration on Compensation was never approved by any State authority and thus constitutes illegal State aid (SoDC, para. 208). The MoF submits that under Czech law unapproved State aid must be returned by the beneficiary.

553 Based on the above, the MoF requests the Arbitral Tribunal to (i) assess whether the "additional benefit" received by CSOB constitutes State aid, (ii) assess whether such State aid was illegally granted, and (iii) if the Arbitral responds in the affirmative, to order CSOB to repay the amount of the "alleged additional benefit" to the MoF (RPHB, para. 165).

554 In relation to the MoF's counterclaim based on State aid law, the jurisdiction of the Arbitral Tribunal is in dispute between the Parties. The Arbitral Tribunal thus first turns to the preliminary issue of jurisdiction.

a) Preliminary issue – Does the Arbitral Tribunal have jurisdiction to adjudicate Respondent's Counterclaim based on State Aid Law?

(1) Respondent's Position

555 The MoF asserts that the Arbitral Tribunal has jurisdiction to adjudicate its claim based on State aid law (SoDC, paras. 233-243; Rejoinder, paras. 231-252, RPHB, paras. 163-167).

556 In response to CSOB's jurisdictional objection, the MoF explained that it did not ask the Arbitral Tribunal to rule upon the issue of whether the prohibited aid CSOB obtained is compatible or not with the common market. The MoF recognizes that this assessment falls within the scope of the exclusive competence of the European Commission.

557 Rather, the MoF submits that it is requesting the Arbitral Tribunal to apply the substantive rules of Czech law as well as public policy norms. The MoF indeed argues that the legal title from which CSOB has derived its right to the positive value of IPB's Enterprise (if any) is void as being contrary to the prohibition set of unapproved State aid set out in Section 2(1) of the Czech State Aid Act. The MoF submits that the invalidity of a contract in the case at hand would be a civil law consequence of a breach of a provision of Czech substantive law, which is the law applicable to the merits of the present dispute – and namely a consequence of Article 39 of the Czech Civil Code. Moreover, State aid rules constitute public policy norms which are binding upon state courts just as arbitral tribunals. The MoF has stressed in this respect that such civil law consequences exist in parallel with the OPC's powers under the State Aid Act (Rejoinder, N 247). As it must only adjudicate the civil law consequences of a violation of State aid rules, it is the MoF's position that the Arbitral Tribunal has jurisdiction to adjudicate its claims.

558 The MoF has finally argued with respect to its defense to CSOB's jurisdictional objection that the Arbitral Tribunal must also "reflect available EC jurisprudence" which the MoF claims to be applicable in the case at hand as a result of the incorporation clauses of the State Aid Act and the Europe Agreement.. By citing to the ECJ's judgment in cases C-261/01 and C-262/01, *Belgische Staat v Eugène van Claster and Felix Cleeren and Openbar Slachthuis*, the MoF has in particular stressed that "*where an aid measure of which the method of financing is an integral part has been implemented in breach of the obligation to notify, national courts [and hence, according to the MoF, arbitral tribunals] must in principle order reimbursement of charges or contributions levied specifically for the purpose of financing that aid*" (SoDC, N 222, Exhibit R-95).

(2) Claimant's Position

559 CSOB asserts that the Arbitral Tribunal does not have jurisdiction to adjudicate the MoF's counterclaim based on State aid law (Reply, paras. 263-267; Rejoinder to Counterclaim; CPHB, paras. 136-146).

560 CSOB does not dispute the applicability of the arbitration clause set out in Art. 6.6 ASG to the MoF's counterclaim based on State aid law.

561 However, CSOB argued on other grounds that this Arbitral Tribunal does not have jurisdiction to adjudicate the MoF's counterclaim based on State aid law.

562 In its Post-Hearing Brief, CSOB relied in particular on the oral testimony of Mr. Vrána, and asserted that the Arbitral Tribunal does not have the power to order the repayment of aid since such repayment could only be ordered following an assessment of compatibility of the measure at stake. CSOB argues that Section

10 of the Czech State Aid Act provides for a specific regime for the consequences of a State aid measure being paid before its approval. Under Section 10, the OPC is the only authority empowered to assess the compatibility of state aid, such an assessment being the necessary condition for the repayment of the measure to be ordered (RPHB, N 145).

- 563 CSOB argues that it follows *a fortiori* that an enforcement of the provisions of the State Aid Act, and in particular the issuance of an order to repay aid within the meaning of Section 2 of the State Aid Act by arbitral tribunal was – and still is – excluded as well. Therefore, CSOB concludes that even if the Czech State Aid Act had not been repealed in the meantime, the Arbitral Tribunal in these arbitral proceedings would appear to lack the legal basis to establish the existence of illegal State aid and hence the legal basis to order its repayment (see e.g., Eilmansberger, CEX-9, paras. 52-53).

(3) Decision of the Arbitral Tribunal

- 564 The Parties' dispute on jurisdiction centers in essence on the issue of whether an arbitral tribunal is empowered to order the repayment on an allegedly illegal State Aid measure.
- 565 In order to determine this issue, the Arbitral Tribunal has considered the expert witness conferencing that took place between Messrs. Vrána and Gerloch (Tr. Day 6, p. 895, line 17 *et seq.*).
- 566 The Parties' debate on the Arbitral Tribunal's jurisdiction to adjudicate the MoF's counterclaim based on State Aid law has focused to a significant extent on the existence (or non existence) of a standstill provision in Czech law at the relevant period of time and on the consequences of a breach of this provision. Prof. Gerloch relied upon by the MoF argued in his expert witness statement and in oral testimony that Section 2 of the Czech State Aid Act contains a standstill obligation according to which it is prohibited to provide any State aid prior to its approval by the competent authority (Exhibit REX-7, para. 44). Should State aid be granted in violation of this statutory provision, Prof. Gerloch argued that the agreement breaching the provision would be automatically considered void pursuant to Section 39 of the Civil Code (WT Gerloch, Tr. Day 6, pp. 901-902). On that basis, in sum, the MoF thus argues that the invalidity of the illegal agreement is pronounced on the basis of general rules of law contained in the Civil Code and that such invalidity gives rise to the recipient's obligation to refund the illegal aid it received. Based on the foregoing, Prof. Gerloch concluded that a civil court – or an arbitral tribunal – would have jurisdiction to order the above remedy (WT Gerloch, Tr. Day 6, p. 898, I.1-5).

567 Mr. Vrána for CSOB explained that he disagreed. According to Mr. Vrána, the Czech legislator provided in Section 10 of the State Aid Act for a *specific regime* for the consequences of State aid being paid before its approval by a competition authority. Such specific regime excludes the application of Section 39 of the Civil Code.

568 The Arbitral Tribunal refers to Section 10 of the State Aid Act which sets forth the procedure for "State aid cancellation " and which reads as follows in its relevant part (Exhibit R-78):

"(1) The procedure for state aid cancellation may be commenced on the initiative of the Office within 10 years after the state aid has been granted.

(2) The Provider or the Proposer, as appropriate, and the Beneficiary of the state aid concerned shall be parties to the procedure for state aid cancellation.

(3) The parties to the procedure shall supply on a request of the Office all complete data and information necessary for the decision of the Office.

(4) The Office imposes on the Provider or the Proposer obligation to stop granting of the aid without any delay, if the Office finds out that:

a. granted state aid has not been granted in compliance with decision of the Office according to § 6 (3), or

b. granted aid has been granted before the decision was in force, if the aid is not covered by § 4,

c. state aid is not used by the Beneficiary in accordance with conditions set out in the decision according to § 6 (3).

(5) The Office in cases mentioned in paragraph 4 a) and c) [renders a] decision about [the] obligation:

a. of the Provider or the Proposer to amend the conditions of granting of the state aid within a term set out by the Office, or

b. of the Beneficiary to repay either to the Provider or to the Proposer, as appropriate, within the term set out by the Office, the state aid granted from the date when it was first granted against provisions of this Act, provided that the obligation to repay it has not already been imposed according to special legislation,

(6) The Beneficiary is obliged to pay at the same time the interest on the amount due for each day from the date, when the aid was first granted or used against provisions of this Act; the applied interest rate being the discount rate of the Czech National Bank, applicable on the first day of the quarter concerned, increased by four percentage points. The interest shall be paid to the state budget. The interest shall be collected and exacted by the Office."

- 569 Mr. Vrána explained in particular that the OPC does not have the power to order a beneficiary to repay the State aid it was granted before a decision on its compatibility has been rendered, since the provision set forth under sub-section 4(b) was not reproduced in sub-section 5. Mr. Vrána explained that this rule resulted in his opinion from a conscious decision of the Czech Parliament when adopting the State Aid Act in 2000 given that the concept of State aid was rather new at the time in the Czech Republic and that the OPC had just been established. Providing for an automatic obligation to return State aid prior to the decision on its assessment was thus assessed as leading to too many practical difficulties (WT Vrána, Tr. Day 6, p.910).
- 570 As a consequence, Mr Vrána argued that under the State Aid Act, the OPC can only order repayment if and after it has made a full assessment that such aid was not permissible pursuant to Section 6(3) of the Czech State Aid Act. Questioned by the Chairman, Mr Vrána explained that in his opinion and based on the Czech State Aid Act in force at the relevant point in time, (i) "the OPC is the only body, the only institution that can decide whether an aid is impermissible or impermissible", and that (ii) he was also of the view that Section 10 of the Czech State Aid Act was "the only regime applicable to a return o to the consequences of an aid being granted, although it is impermissible." (WT Vrána, Tr. Day 6, p. 903, l. 12-19).
- 571 The Arbitral Tribunal notes that the issue truly at stake in assessing CSOB's jurisdictional objection is to determine whether an arbitral tribunal has jurisdiction to order the repayment of allegedly unlawful aid since granted without prior approval of the relevant authorities – regardless of its compatibility as stressed by the MoF – or to the contrary whether this remedy would be exclusively available before the Czech competition authority. The complexity of this issue arises from the fact that the alleged additional benefit arose out of a measure committed to in June 2000 (or at the latest on the date of the OPC Decision approving the measure), *i.e.* at a time during which the Czech Republic was preparing its accession to the European Union, without however being a Member State yet. The question at stake is thus to determine – as stressed by the Arbitral Tribunal during the expert conferencing referred to above – whether the Czech Republic, prior to its accession to the European Union on May 1, 2004, already had put into place a system akin to the State aid system existing within the European Union (see Arbitrator Blessing, Tr. Day 6, p. 905, lines 18 *et seq.*).
- 572 As of February of 1995, the Association Council was required to adopt within three years of the entry into force of the Europe Agreement, the necessary rules for the implementation of State aid rules, in view of the Czech Republic's subsequent accession to the European Union (Exhibit R-83). On June 24, 1998, the Council adopted Decision No. 1|98 which required the Czech Republic to

appoint a national institution or administration which was to become the competition authority in charge of monitoring and authorizing State aid measures in the Czech Republic (Exhibit R-100). Pursuant to the Annex to Decision No. 1/98 of the Council and yet again in view of the Czech Republic's accession to the European Union, the State aid rules to be applied by the monitoring authority were to reflect the criteria arising from the application of the rules of Article 87 of the Treaty Establishing the European Community. The Annex specifically mentioned that this obligation extended to "the present and future secondary legislation, **framework, guidelines and other relevant administrative acts in force in the Community, as well as the case law of the Court of First Instance and the Court of Justice of the European Communities and further special guidance**" - *i.e.*, the so-called *acquis communautaire* (See Exhibit R-100, emphasis added, and Reply, para. 70).

- 573 Moreover, as a matter of the Accession Treaty (in particular Annex IV.3 of the Act of Accession), it was clear to the Parties that the pre-accession State aid measures – previously notified to the Czech Competition Authorities and approved by them – also had to be notified and cleared by the EU Commission under the prevailing EU State aid rules. The requisite notification was made by letter dated December 17, 2003. The clearance procedure resulted in several requests, by the Commission, for further information, and – as can be seen from the Commission Decision of 14 July 2004 (Exhibit C-15), and three banks filed complaints regarding the pre-accession measures taken by the Czech Republic. This yet again illustrates the applicability of EU norms within the Czech Republic during the interim period following the entry into force of the Europe Agreement.
- 574 If follows from the above, that the Arbitral Tribunal is unconvinced of the argument brought forth by CSOB's Czech law expert regarding the exclusive application of the Czech State aid act to the issue of repayment of illegal State aid. The Arbitral Tribunal finds that it must rather assess the issue of its jurisdiction in light of the EU State aid law rules which were already entering into force in the Czech legal order as a result of the Europe Agreement and the Annex to the Council's decision No. 1/98 (Exhibit R-100).
- 575 Under EU State aid law, issues of compliance with State aid rules – but for a few exceptions which are not relevant in the present case – are generally arbitrable, quite similar to issues under Article 101/102 TFEU (formerly Articles 81/82 ECT). In fact, in all segments of competition law, the private enforcement through courts

and arbitral tribunals plays a key role, alongside with the distinctive role of the EU Commission and of national competition authorities.

- 576 Already the 1995 Commission Notice on the Cooperation with National Courts¹⁶ contained detailed guidance on the important function of courts.¹⁷ As stressed by the MoF, one of the most important functions of courts and arbitral tribunals is to review and decide on the civil law impact of State aid law, and to decide on the civil law remedies in the case of breach of State aid rules, a role which indeed falls outside the purview and competence of the EU Commission or of a national competition authority. Moreover, the Commission's handbook on enforcement of EU State aid law by national courts stresses that the role of national courts is to protect the rights of individuals affected by unlawful implementation of State aid and explicitly lists the recovery of unlawful aid (regardless of compatibility) as one of the remedies available to parties before a national court.¹⁸
- 577 There are, however, two rather obvious limits to the jurisdiction of State courts and arbitral tribunals as follows: (i) neither a national court nor an arbitral tribunal has jurisdiction to approve a new State aid measure under Article 107(2) TFEU, or to declare that a proposed State aid measure fulfils the criteria under Articles 107(2) and (3) TFEU; and (ii) neither State courts nor arbitral tribunals are empowered to declare that acts of the Community institutions invalid.¹⁹
- 578 The MoF acknowledges that the question of whether a State aid measure may be approved under Article 107(2) TFEU falls within the sole jurisdiction of the Commission. Prior to the entry of the Czech Republic into the European Union, the OPC had exclusive jurisdiction – based on the expert testimony of Mr Vrána – to rule on the question of the permissibility of a State aid measure, which is also acknowledged by the MoF (see RPHB, footnote 164). This was also true only to a certain extent since already prior to its accession to the European Union, the Czech Republic was under an obligation of cooperation with the Commission and had to notify existing schemes to the Commission in order to prepare its entry into the European Union.

¹⁶ Commission Notice OJ C 312, of November 23, 1995.

¹⁷ In this Notice, arbitral tribunals are not specifically mentioned alongside with national courts; however, it is undoubted and indeed undisputed that – with but a few exceptions which are not relevant in the present context – the references to State courts equally apply to arbitral tribunals who in practice play a key role in applying the EU competition law.

¹⁸ See European Commission, Competition Handbook Enforcement of EU State aid law by national courts – The Enforcement Notice and other relevant materials (2010), at N 19 *et seq.*

¹⁹ See European Commission, Competition Handbook Enforcement of EU State aid law by national courts – The Enforcement Notice and other relevant materials (2010); see also Commission Notice OJ C 85, of September 9, 2009.

579 However, the issue of whether the so-called "additional benefit" could fulfil the criteria of Article 107(2) TFEU is not at stake in the Arbitral Tribunal's present adjudication of the MoF's counterclaim based on State aid law: rather, the Arbitral Tribunal is requested to order repayment of aid alleged to be unlawful as a result of it having been granted before its approval by the competent authority. For the aforementioned reasons, the Arbitral Tribunal finds that this remedy does not fall within the exclusive jurisdiction of the OPC.

580 Based on the above, the Arbitral Tribunal finds that it has jurisdiction to order recovery of unlawful aid. The Arbitral Tribunal turns below to the question of the assessment of the existence of such State aid.

b) Is CSOB in possession of the so-called "additional benefit"?

(1) Respondent's Position

581 The MoF claims in essence that IPB's Enterprise was transferred to CSOB with a positive value without paying adequate consideration and that such positive value was created with State resources (RPHB, paras. 169-184). In sum, the MoF alleges that CSOB received an asset worth CZK 34.2 billion upon its transfer while the consideration calculated pursuant to the Declaration on Compensation amounted to CZK 947,516,894. The MoF has explained that on January 22, 2004 it actually only received the amount of CZK 369,660,211.99 from CSOB as the amount of the compensation calculated under the Declaration on Compensation was offset by the amount of funding advanced by CSOB to the forced administrator of IPB under the Sale Agreement and which CSOB was allegedly also compensated for by the MoF (SoDC, para. 200 and footnote 210).

582 The MoF asserts that this difference in value amounts to an "additional benefit" that was never approved by the OPC. The MoF relies on the wording of the OPC Decision as well as on the alleged explicit confirmation of the OPC in a letter to the MoF dated October 4, 2007 (Exhibit R-53). As alleged in its defense to CSOB's main claim in this Arbitration, the MoF contends that the OPC described specifically what State aid it approved and exempted in its Decision, and maintains that the State aid corresponding to the "additional benefit" created as a result of the IPB transaction was not part of such exempted aid (RPHB, paras. 185-188).

583 As it has argued in its defense to CSOB's claim, the MoF thus maintains that as this State aid was not approved by the OPC, it could not have been assessed by the European Commission under the Interim Mechanism (RPHB, paras. 126 and 189). The MoF finally contends that the wording of the EC Decision also confirms

that the issue of the additional aid resulting from the IPB transaction was not addressed by the European Commission.

584 Hence, this additional benefit constitutes illegal State aid.

(2) Claimant's Position

585 CSOB claims that the "additional benefit" does not exist.

586 Even if such additional benefit existed, CSOB argues that it does not constitute State aid but can only represent a consequence of the State aid provided in the IPB transaction and that such consequence was not created by the MoF (CPHB, para. 151).

587 Moreover, CSOB has put forth that it is entitled to rely on its legitimate expectations that any and all State aid it benefited from in the context of the IPB transaction was lawfully granted. To the extent the successful integration of IPB's Enterprise into CSOB's banking business gave rise to an "additional benefit" – which CSOB denies – CSOB argues that such benefit was based on the contractual documentation underlying the transaction and stresses that such documentation was already fully assessed and approved by the OPC. Under those circumstances, CSOB claims that it is fully entitled to rely on the legitimate expectation that any "additional benefit" was also approved by the OPC (Rejoinder to Counterclaim, paras. 85-86; RPHB, para. 161).

588 Finally, CSOB alleges that in any event any and all State aid granted by the MoF in the context of the IPB transaction was covered by the approval of the OPC and the assessment of the European Commission. CSOB thus denies the existence of any illegal additional benefit.

(3) Decision of the Arbitral Tribunal

589 Based on the arguments raised by the Parties, the Arbitral Tribunal has to assess whether CSOB should be ordered to repay aid unlawfully granted, i.e. whether the standstill obligation has been violated – if such standstill obligation existed in the legal framework of the Czech Republic at the relevant period.

590 Based on CSOB's defense, the preliminary questions to be adjudicated by the Arbitral Tribunal before turning to the question outlined above at N 589 is to determine if (i) CSOB is in possession of State Aid, i.e. of a selective benefit, in any form whatsoever, which was granted to it on a selective basis by a national public authority, (ii) if CSOB should be precluded from relying of its legitimate expectation that any and all State aid received was lawfully granted. It is only if

these two preliminary questions are to be answered in the affirmative that the issue of the existence and possible violation of a standstill obligation becomes of relevance.

- 591 The Arbitral Tribunal finds that the MoF's counterclaim must be dismissed already at the stage of the two first preliminary questions.
- 592 First and most importantly, the Arbitral Tribunal has previously explained that it is entirely unconvinced that such "additional benefit" ever existed economically (*supra*, N 516 *et seq.*). The MoF's counterclaim is based on the assumptions that (i) IPB's Enterprise was transferred to CSOB with a positive value of CZK 34 billion, (ii) such positive value was created by the funds granted by the Czech State and (iii) that the MoF should be entitled to a so-called market consideration for the transfer of IPB's Enterprise.
- 593 The Arbitral Tribunal is unconvinced by all three assumptions. In this respect, the Arbitral Tribunal refers to its previous conclusions denying the economical existence of a "benefit" (*supra*, N 516 *et seq.*). The Arbitral Tribunal stresses yet again that the MoF has failed to establish why it could allege to have "created" the positive value of IPB's Enterprise. It is undeniable given the state of emergency in June 19, 2000 – which both Parties acknowledge – that without the assistance of the Czech State, IPB would have been declared bankrupt and finally wound-up. However, the Arbitral Tribunal also stresses that without CSOB's acquisition IPB could not have been rescued. Hence, the Arbitral Tribunal is of the opinion that the positive value of IPB's Enterprise – if any – was created also – and maybe mostly – as a result of CSOB's undertakings under the relevant agreements and synergies with its existing bank business.
- 594 Moreover, the Tribunal finds that the economics of the acquisition of IPB's Enterprise should not be viewed with the benefit of hindsight but should rather be assessed as perceived by the Parties at the time the transactions in question were entered into, i.e. on June 19, 2000. The Arbitral Tribunal finds that the MoF's counterclaim brought on the basis of State aid law is largely incompatible with the Parties legitimate expectations and understanding of the transaction at the time it was entered into for the following reasons.
- 595 The Arbitral Tribunal stresses that this claim for return of unlawful State aid is brought by the *State* itself – and not by a competition authority or a competitor – against the *recipient* of a State aid measure of which the State does not deny that it was approved and exempted. The State rather argues that the recipient benefited from further State aid as a consequence of the approved State measure.

- 596 The Arbitral Tribunal first emphasizes in this respect that the obligation of notifying a State aid scheme – whether under Czech law or under EU State aid law – lies upon the grantor, *i.e.* the State, and not upon the recipient of State aid. As correctly stressed by CSOB, admitting the MoF's counterclaim based on State aid would lead to the result of entitling a State to rely to some extent on its failure to duly notify a State aid measure (Rejoinder to Counterclaim, N 84).
- 597 Moreover, even if the MoF had met the high burden of proving that IPB was transferred to CSOB with a positive value of CZK 34 billion, the Arbitral Tribunal finds that CSOB could in any event legitimately assume that the notification of the Czech State to the relevant competition authorities and their respective assessments extended to all relevant benefits the IPB transaction would give rise to. In other words, CSOB could *not* have expected to be ordered to repay to the Czech State a CZK 34 billion amount several years after the approval of the IPB transaction by the national competition authority. The Arbitral Tribunal finds that CSOB, had it indeed received an economical benefit as alleged by the MoF, would be entitled to rely on its legitimate expectation that such aid was lawfully granted.
- 598 The Arbitral Tribunal recalls at this place that it has previously found – when adjudicating CSOB's claim – that the State aid received by CSOB in the context of the IPB transaction was assessed by the relevant authorities (*supra*, N 306 *et seq.* and N 327 *et seq.*).
- 599 First, the Arbitral Tribunal has found that the OPC, based on all relevant contractual documents underlying the IPB transaction, explicitly exempted all State aid received by CSOB from the prohibition of State aid (*supra*, N 306 *et seq.*). Hence, the Arbitral Tribunal finds that even if one accepted the MoF's argument that the approval of its commitments in the context of the IPB transaction had created an "additional benefit" in a certain amount, this would have been a benefit of which the OPC would have been aware. The Arbitral Tribunal notes in this respect that it has considered the OPC's letter dated October 4, 2007 relied upon by Respondent (Exhibit R-53). However, this Arbitral Tribunal does not consider this letter to constitute sufficiently convincing evidence since it was written by the OPC months after CSOB had filed its request for arbitration in the present proceedings, *i.e.* long after the relevant transaction.
- 600 Moreover, the Arbitral Tribunal refers to its previous detailed findings on the scope and reach of the EU Commission's Decision regarding the acquisition of IPB's Enterprise by CSOB (*supra*, N 327 *et seq.*). The Arbitral Tribunal reiterates its finding that the EU Commission's Decision was well-grounded and in fact covered the entirety of the State aid received by CSOB in the context of the IPB transaction. The EU Commission's decision approved the measure as such

rather than being concerned with a particular amount. In order to assess the measure as "non applicable after accession" the EU Commission must have necessarily taken into account its overall effect on the recipient. Arguing that the EC Commission did not take into account the "positive effect" of the measure it assessed and that such effect would now have to be notified to the EU Commission for examination appears simply inconsistent with the EU Commission's practice in matters of State aid.

601 The Arbitral Tribunal stresses yet again that it is common practice that any State authority assessing the permissibility of a State aid measure takes the positive aspects of its approval necessarily into account (see e.g., Eilmansberger, CEX-9, N 77). This argument is also in line with the Commission's practice: one of the criteria consistently applied by the Commission in assessing State aid measure is the principle of "One Time, Last Time"²⁰, which basically means that rescue aid is a "one-off operation" in the sense that an applicant can come only once. For this reason the Commission always requires a Restructuring Plan which will sufficiently remove the financial difficulties of the company, so as to allow it to become again a viable competitor on the market.²¹ The Arbitral Tribunal stresses that this principle yet again has the effect of protecting the recipient's expectation that any and all aid received was lawfully approved.

602 Based on the above and since the MoF's counterclaim is to be dismissed on the two preliminary questions it should have availed on in order to succeed, the Arbitral Tribunal need not enter into further considerations regarding the existence of a standstill obligation in Czech law at the relevant point in time.

603 The MoF's counterclaim based on State aid law is thus dismissed.

D. Statute of Limitation: Is Respondent's Counterclaim time-barred?

604 The Arbitral Tribunal notes that in defense to the MoF's contractual and non-contractual counterclaim, CSOB has raised an objection of prescription based on Sections 391(1) and 397 of the Commercial Code. The MoF has responded that, on the contrary, its counterclaim is not time-barred.

605 Since the Arbitral Tribunal has dismissed the MoF's counterclaim in full on the grounds set forth above, the issue of the prescription of the counterclaim is moot.

²⁰ Tr. Day 6, at p. 971, 979.

²¹ The principle is for instance prominently referred to in the Community Guidelines on State aid for Rescuing and Restructuring Firms in difficulty (2004/C 244/02, Section 3.3 paras. 72-77).

E. Conclusion

606 The MoF's counterclaim is dismissed in full.

607 Since CSOB's liability is denied, the quantum of the MoF's counterclaim need not be further adjudicated by the Arbitral Tribunal.

608 As set forth above in Section II.G, this Award constitutes a Final Award.

VIII. Costs

A. Introduction

609 Pursuant to Art. 31(3) of the ICC Rules, *"the final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties"*.

610 The costs of the arbitration are defined in Art. 31(1) of the ICC Rules as *"the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration"*.

611 It is generally accepted that Art. 31 of the ICC Rules grants the arbitrators broad discretion in fixing and allocating the costs of the arbitration. In doing so, the arbitrators may consider the outcome of the case, the relative success of the parties' claims and defenses as measured in proportion to the relief sought, the reasonableness of the parties' positions, and the procedural conduct of the parties.

B. The ICC Costs and the Arbitrators' Fees and Expenses

612 The ICC Court has determined the fees and expenses of the Arbitral Tribunal and the administrative expenses of the ICC Court (the **ICC Costs**) at its session of November 25, 2010 at USD 1,245,000.

613 The Parties have advanced a total of USD 1,245,000 towards these costs. Claimant has advanced an amount of USD 467,500, and Respondent has advanced an amount of USD 777,500.

614 With respect to the VAT due by Prof. Böckstiegel on his arbitrator fees, the Parties have advanced an amount of USD 129,580 to the trust account

established by the Chairman of the Arbitral Tribunal. The record of the Arbitral Tribunal shows that each Party has advanced an amount of USD 64,790.

C. The Parties' Legal and Other Costs

1. Claimant's Costs

615 CSOB claims fees and expenses in the total net amount of CZK 138,457,357.63 (see CSOB's letter of September 21, 2010). At the current exchange rate such total amounts to USD 7,843,990.

616 CSOB requests in these proceedings that the MoF be ordered *"to bear the costs of this arbitration and to reimburse Ceskoslovenska obchodni banka a.s., Identification No: 0001350, with its seat at Praha 5, Radlicka 333/150, PSC 150 57, for all its legal and other costs of this arbitration."* (Reply, Prayer for Relief (c)). CSOB again reiterated this request in its Statement of Costs, requesting the Arbitral Tribunal to order the MoF to reimburse this amount *"within 15 days of the delivery of the arbitration award to Respondent"* (CSC, para. 23).

2. Respondent's Costs

617 The MoF claims fees and expenses in the amount of CZK 53,900,027 (USD 3,053,580) and EUR 259,408 (USD 361,955) and USD 864,763 (RSC, p. 3). In total, the MoF claims the equivalent of USD 4,280,298 at the current exchange rate.

618 The MoF has requested in its Prayer for Relief (iii) that the Arbitral Tribunal order CSOB *"to pay to the Czech Republic – Ministry of Finance, seated at Letenska 15, Praha 1, Post Code 118 10, the Czech Republic the cost of these arbitration proceedings, including the costs of the Tribunal and the legal and other costs incurred by the Czech Republic on a full indemnity basis"* (Rejoinder, Prayer for Relief (iii)).

619 In its Statement of Costs, the MoF reiterated this request and indicated the following in view of the bifurcation of proceedings (RSC, p.2):

"In relation to the Claim advanced by Claimant in this arbitration, Respondent respectfully requests that, in the event the Respondent prevails in defending against the Claim, the Claimant be ordered to reimburse the Respondent for the costs expended for (i) fees and expenses of the Arbitral Tribunal and the ICC administrative expenses and for (ii) the Respondent's legal and other costs incurred in the arbitration, as the same are more fully specified below.

Given the bifurcation of the proceedings with respect to the Counterclaim raised by Respondent in this arbitration, the Respondent respectfully requests that should the first Tribunal's award in respect of the Counterclaim not be a final award, the Tribunal render its decision on costs in the final award, based on the relative success of the parties. Should the first Tribunal's award in respect of the Counterclaim be a final award, Respondent respectfully requests that each party bears the costs of the arbitral proceedings incurred by it."

D. Decision of the Arbitral Tribunal

620 Taking all factors into account and exercising its discretion, the Arbitral Tribunal has reached the decision set forth below.

1. The ICC Costs and the Arbitrators' Fees and Expenses

621 Based on the arbitration clause set out in Article 6.6 ASG (*supra*, N 12) providing in its relevant part that "[t]he legal fees and expenses of the prevailing Party with respect to such award shall be paid in accordance with any award rendered by the arbitral tribunal" and since CSOB's claim is admitted – with two minor exceptions regarding the legal costs of CKA which CSOB was ordered to pay in the CKA|CSOB arbitration and the statutory default interest CSOB is seeking – and the MoF's counterclaim is fully dismissed, the Arbitral Tribunal finds that the MoF shall bear the full amount of the ICC Costs and the Arbitrators' fees and expenses.

622 The ICC Costs of USD 1,245,000 will be charged to the advances paid by the Parties. The MoF has already advanced an amount of USD 777,500 and CSOB an amount of USD 467,500. The MoF shall reimburse CSOB the amount of USD 467,500.

623 The VAT due by Prof. Böckstiegel on his arbitrator fees amounts to USD 61,326.30. Such amount shall be paid to Prof. Böckstiegel out of the trust account established by the Chairman of the Arbitral Tribunal (*supra* N 614). In view of the Arbitral Tribunal's decision that the MoF shall bear the costs of arbitration, the amount of VAT due by Prof. Böckstiegel will be paid to Prof. Böckstiegel out of the MoF's advance on VAT deposited on the Chairman's trust account. Consequently, the Chairman of the Arbitral Tribunal will reimburse to CSOB its advance on VAT in the full amount of USD 64,790. Since the VAT due by Prof. Böckstiegel on his arbitrator fees amounts to USD 61,326.30, the amount of USD 3,463.70 will be reimbursed to the MoF by the Chairman of the Arbitral Tribunal.

2. The Parties' Legal Costs and Expenses

624 Given the outcome of this arbitration (*supra*, N 621) the MoF shall bear its own legal costs and expenses for these proceedings.

625 Moreover, the MoF shall reimburse CSOB for the latter's reasonable costs incurred during these proceedings.

626 The Arbitral Tribunal has reviewed CSOB's Statement of Costs and the MoF's comments made with regard to the reasonableness of the costs sought. The Arbitral Tribunal finds as follows.

a) Claimant's Costs of Legal Representation

627 CSOB seeks reimbursement of the costs it incurred for Baker & McKenzie's legal services and expenses in the net amount of CZK 104,787,198.28.

628 The Arbitral Tribunal notes, as stressed by the MoF, that CSOB's costs of legal representation are substantially higher than the costs incurred by the MoF for its legal representation.

629 However, in view of the nature of the dispute and of the fact that the dispute required CSOB to seek legal services under Czech law as well as European law, the Arbitral Tribunal finds that CSOB was reasonably entitled to retain an international law firm able to provide such services. In the Arbitral Tribunal's view, the nature and financial volume of the dispute also justified that Baker & McKenzie provided such legal services through several counsel based in different jurisdictions.

630 Consequently, the Arbitral Tribunal finds that the amount of CZK 104,787,198.28 was reasonably incurred by CSOB and is thus to be borne by the MoF.

b) Claimant's Costs of Experts (CSC, Table 1 as corrected on September 21, 2010)

631 CSOB seeks reimbursement of the costs it incurred for the preparation of expert opinions relating to Czech law and European State aid law in the net amount of CZK 6,538,646.20.

632 As explained by CSOB, the Arbitral Tribunal notes that these costs were incurred by nine experts which ultimately provided twelve expert opinions. However, out of the nine experts, only three were required to give testimony at the Hearing. The Arbitral Tribunal refers to Table 1 of Claimant's Statement of Costs. Having

reviewed this Table, the Arbitral Tribunal finds that certain costs incurred by CSOB do not meet the requirement of reasonableness.

- 633 The Arbitral Tribunal notes that the expert opinions of Professors Nowotny, Mattout and Girsberger relate to the regulation of promissory notes in other jurisdictions than the Czech Republic and that these experts did not refer to Czech law but rather to the legal provisions of their respective jurisdiction. As CSOB and the MoF are two Czech parties and that Czech law applied to the present dispute to the exclusion of any other domestic legislation, the Arbitral Tribunal finds that these costs do not meet the requirement of reasonableness and must be borne by CSOB.
- 634 With respect to the costs incurred by CSOB for the expert opinions of Prof. Bakes and Mazars, the Arbitral Tribunal is unable to determine to what extent their respective expert statements have indeed participated in enabling the resolution of the present dispute. The Arbitral Tribunal finds that these costs do not meet the requirement of reasonableness and must be borne by CSOB.
- 635 On the other hand, the Arbitral Tribunal finds that the costs incurred for the expert testimony of Messrs. Urbanec and Vrana and of Sir Jacobs qualify as reasonable costs since they appeared at the Hearing and contributed to the adjudication of the merits of the present dispute by the Tribunal. Likewise, the Arbitral Tribunal relied on the written expert testimony of Prof. Eilmansberger. Hence, the Tribunal finds that these costs meet the requirement of reasonableness and are to be borne by the MoF.
- 636 Based on the above, the Arbitral Tribunal finds that an amount of CZK 4,589,424.52 must be borne by the MoF in relation to CSOB's costs of experts.
- c) Claimant's Costs of Obtaining Evidence (CSC, Table 2 as corrected on September 21, 2010)**
- 637 CSOB seeks reimbursement of the costs it incurred for obtaining evidence in the net amount of CZK 874,203.98.
- 638 CSOB has explained that these costs were incurred in order for Ernst & Young to search the archives of Arthur Andersen for the documents relating to the NAV Statement and to the treatment of the J. Ring Receivables.
- 639 As described in the finding of the Arbitral Tribunal above in Section IV, the heart of the present dispute related to the interpretation to be given to the NAV Statement and to the treatment of the J. Ring Receivables. Hence, the Arbitral

Tribunal finds that the costs incurred by CSOB in order to identify documentary evidence relating to this issue are reasonable and must be borne by the MoF.

640 Based on the above, the Arbitral Tribunal finds that the amount of CZK 874,203.98 incurred by CSOB for the purpose of obtaining evidence must be borne by the MoF.

d) Claimant's Costs of External Translation (CSC, Table 3 as corrected on September 21, 2010)

641 CSOB seeks reimbursement of the costs it incurred for external translation services in the net amount of CZK 594,749.46.

642 The Arbitral Tribunal notes, as correctly stressed by the MoF, that these costs represent more than double the expenses incurred by the MoF for the purpose of translation services.

643 The Arbitral Tribunal notes that both Parties submitted a similar volume of documentary evidence in the present Arbitration and does not find any reason indicating that CSOB would have had to translate more documents than the MoF. Hence, the Arbitral Tribunal considers that the costs incurred by CSOB in the amount of CZK 594,749.46 does not meet the requirement of reasonableness and that half of these costs must be borne by CSOB.

644 Based on the above, the Arbitral Tribunal finds that an amount of CZK 300,000 must be borne by the MoF towards CSOB's costs for translation services.

e) Claimant's Costs of Legal Consultants (CSC, Table 4 as corrected on September 21, 2010)

645 CSOB seeks reimbursement of the costs it incurred for the services of legal consultants in the net amount of CZK 10,858,846.42.

646 CSOB has indicated that these costs were incurred by its counsel in order to secure additional legal advice relating to European State aid law, Czech State aid law, Czech legislation related to promissory notes and accounting issues.

647 The Arbitral Tribunal has reviewed Table 4 of CSOB's Statement of Costs and finds that most of these costs have been incurred precisely for the reasons which justified CSOB to retain Baker & McKenzie as its legal counsel. The firm provides legal expertise in all of the fields described above. For these reasons, the Arbitral Tribunal finds that the costs of White & Case Brussels, Wilson & Partners, Prof. Bejcek, Dr. Munkova and Dr. Chalupa must be borne by CSOB.

648 However, based on the nature and financial volume of the present dispute, the Arbitral Tribunal finds that CSOB was reasonably entitled to seek additional advice from LECG regarding accounting and IAS issues and that such costs must be borne by the MoF.

649 Based on the above, the MoF must bear the costs of CSOB's legal consultants in the amount of CZK 900,531.15.

f) Claimant's Costs for Consultants for Accounting Purposes (CSC, Table 5 as corrected on September 21, 2010)

650 CSOB seeks reimbursement of the costs it incurred for accounting purposes in the net amount of CZK 4,297,183.38.

651 CSOB has asserted that these costs were incurred as a result of the counterclaim brought by the MoF in this Arbitration in order to determine whether CSOB should make corresponding provisions in its accounts.

652 The Arbitral Tribunal finds that such accounting issues qualify as issues faced in the normal course of business of a bank such as CSOB. Hence, the Arbitral Tribunal finds that the MoF must not be ordered to bear the costs of such services.

653 Based on the above, the Arbitral Tribunal finds that the amount of CZK 4,297,183.38 is to be borne by CSOB.

g) Conclusion

654 Based on the above, the MoF shall reimburse CSOB an amount of CZK 111,451,357.93 towards CSOB's legal costs and expenses.

3. Conclusion

655 Based on the above considerations, Respondent shall reimburse Claimant a total of USD 467,500 for the ICC Costs and Arbitrators' Fees and Expenses, and CZK 111,451,357.93 for its costs and expenses.

IX. Award

656 Based on the above considerations, the Arbitral Tribunal issues the following

Final Award

1. Regarding Claimant's Requests for Relief

- 1.1 Respondent, the Czech Republic – Ministry of Finance, is ordered to pay to Claimant, Ceskoslovenska Obchodni Banka, A.S., the principal amount of CZK 1,654,115,585.25, within 15 days from the delivery of this Award.
- 1.2 Respondent, the Czech Republic – Ministry of Finance, is ordered to pay to Claimant, Ceskoslovenska Obchodni Banka, A.S., interest accruing on CZK 1,654,115,585.25 at a rate of 3M PRIBOR increased by 0.27% per annum running from April 11, 2005 until payment by the Czech Republic – Ministry of Finance, within 15 days from the delivery of this Award.
- 1.3 All further requests of Claimant are denied, except as stated in the decision on costs set out below under Section 3.

2. Regarding Respondent's Requests for Relief

Respondent, the Czech Republic – Ministry of Finance's counterclaim based on contract, unjust enrichment and State aid is dismissed.

3. Costs

- 3.1 The costs of the arbitration (arbitrators' fees and expenses and the ICC Court's administrative charge) as fixed by the ICC Court at USD 1,245,000 shall be borne entirely by Respondent, the Czech Republic – Ministry of Finance. As these costs are charged to the cost advances which the Parties have paid in different shares of USD 467,500 for Claimant, and of USD 777,500 for Respondent, the Czech Republic – Ministry of Finance is ordered to reimburse to Claimant, Ceskoslovenska Obchodni Banka, A.S., an amount of USD 467,500.

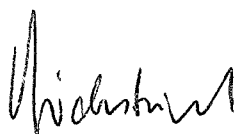
In addition, the cost of the VAT due by Prof. Böckstiegel on his arbitrator's fees shall be borne entirely by Respondent, the Czech Republic Ministry of Finance. The cost of VAT amounting to USD 61,326.30 will be charged to the VAT advance paid by the MoF and the remainder of the advance will be reimbursed to Respondent, the Czech Republic Ministry of Finance. Claimant, Ceskoslovenska Obchodni Banka, A.S., will be reimbursed its entire VAT advance.

3.2 Respondent, the Czech Republic – Ministry of Finance, is ordered to pay to Claimant, Ceskoslovenska Obchodni Banka, A.S., an amount of CZK 111,451,357.93 towards Ceskoslovenska Obchodni Banka, A.S.'s legal costs and expenses.

3.3 All other or further cost claims by the Parties are denied.

Place of Arbitration: Vienna, Austria.

Date: December 20, 2010



Prof. Dr. Karl-Heinz Böckstiegel



Dr. Marc Blessing



Dr. Markus Wirth, Chairman