PCA Case No. 2018-18

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE KINGDOM OF THE NETHERLANDS AND THE CZECH REPUBLIC FOR THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS, DATED 29 APRIL 1991

- and -

THE UNCITRAL ARBITRATION RULES 1976

- between -

FYNERDALE HOLDINGS B.V.

(the "Claimant")

- and -

THE CZECH REPUBLIC

(the "Respondent", and together with the Claimant, the "Parties")

SEPARATE OPINION

with respect to the

AWARD

by Dr. Wolfgang Kühn

The Arbitral Tribunal
Professor Dr. Dr. h.c. Rüdiger Wolfrum (Presiding Arbitrator)
Dr. Wolfgang Kühn
Professor Laurence Boisson de Chazournes

Registry
The Permanent Court of Arbitration

1. This Separate Opinion is issued by arbitrator Dr. Wolfgang Kühn with respect to the Tribunal's Award in the matter PCA Case No. 2018-18 (the "**Award**"). Dr. Wolfgang Kühn (the "**Arbitrator**") supports and agrees with the Award in all aspects except for the Tribunal's analysis according to which the legality of the Claimant's investment is a jurisdictional issue, being the basis for the Tribunal's decision to deny jurisdiction in this matter.

2. In contrast to the majority of the Tribunal, the Arbitrator is of the view that the legality of the Claimant's investment in the Czech Republic is not a jurisdictional issue but is a matter of substance which must be decided in the merits phase of these proceedings. The Arbitrator is concerned, in particular, that the denial of jurisdiction as decided by the majority of the Tribunal is outdated since the days of the well-known Judge Lagergren Decision (*see* paragraph 6 below). The denial of jurisdiction by the majority of the Tribunal in the given circumstances is problematic in the context of international investment treaty arbitration. The Arbitrator is of the view that by that denial of jurisdiction, the Claimant is foreclosed from exercising its basic right with respect to procedure and substance, which basic right is access to justice.

1. Judicial Economy No Reason to Deny Jurisdiction

3. The Arbitrator understands that in international arbitration the demand of judicial economy is an important issue. This is in particular the case in commercial arbitration where there must be a reasonable balance between the amount in dispute and the costs of the arbitration proceedings. With respect to investment arbitration, additional aspects must be considered. In investment arbitration, public funds are involved on the side of the defendants, which fact must be considered by the tribunal with due care. However, investment proceedings are public proceedings including the principles of international public policy. Jurisdiction under investment treaty arbitration is granted to protect the rights of individual investors versus the host State, which involves *per se* the public interest. The issue of judicial economy therefore must be balanced out against the public interest in granting justice.

4. The Tribunal must carefully consider this conflict and decide that as a matter of principle, jurisdiction must not be foreclosed for an investor unless it is "manifest" that the alleged claims are at the face ungrounded and blatant (*see Fraport AG Frankfurt Airport Services Worldwide v. Philippines (II)*, ICSID Case No. ARB/11/12, Award, 10 December 2014). This is obviously not the case in this arbitration, considering that the Claimant's damage claims in the amount of roughly CSK 3 billion are based on loans granted to individuals in the Czech Republic, which loans as such are not disputed between the Parties. Irrespective of whether those claims are

justified in substance, the Tribunal therefore must not foreclose jurisdiction on the basis of a demand of judicial economy, *i.e.* efficient management of the Tribunal's resources.

2. Alleged and Contested Illegality of Origin of Funds No Reason to Deny Jurisdiction

5. It is undisputed that a host State cannot be presumed to have accepted protecting investments made contrary to its own legal system. The decision on whether an investment was contrary to the host State's legal system and, therefore, must not be protected under the BIT, is a matter of substance, not of jurisdiction. This is true in particular in the present case, as it is undisputed that the Claimant (directly and indirectly) made investments in the Czech Republic.

6. In the case at hand, the origin of a small part of the invested funds was in dispute. The Tribunal was to decide to what extent the alleged lack of legality of the origin of the Claimant's invested funds may have an impact on the jurisdiction of the Tribunal. There is consensus in international arbitration that fraudulent activities such as corruption, bribery and money laundering are contrary to international public policy (N. Blackaby, C. Partasides, *et al.*, *Redfern and Hunter on International Arbitration*, 6th edition, Oxford University Press, 2015, paras. 2.147 and 5.90).

7. With respect to **bribery and corruption**, the fraudulent inducement of government officials to take certain actions and its impact on jurisdiction was first raised in 1963 before the distinguished Swedish jurist, Judge Gunnar Lagergren, who was acting as a sole arbitrator in ICC Arbitration No. 1110. In this landmark arbitration - the famous Judge Lagergren Decision - Judge Lagergren found that the dispute was not arbitrable, and denied jurisdiction based on the finding that the conclusion of the underlying contract was influenced by bribing the respective State officials for the purpose of obtaining the business. In Judge Lagergren's view, the parties to such a contract had "forfeited the right to ask for assistance of the machinery of justice" (ICC Award No. 1110 of 1963 by Judge G. Lagergren, YCA 1996, at 47 et seq., para. 23). As Redfern and Hunter (as cited, para. 2.151) carefully clarified, the Judge Lagergren approach is outdated:

> The modern approach – based on the concept of separability, which has now received widespread acceptance both nationally and internationally – is that an allegation of illegality does not in itself deprive the arbitral tribunal of jurisdiction. On the contrary, it is generally held that the arbitral tribunal is entitled to hear the arguments and receive evidence, and to determine for itself the question of illegality. Thus, in Switzerland, in a case involving a consultancy agreement, the Swiss Federal Tribunal decided that even if a consultancy agreement were, in effect, an agreement to pay a bribe (and this was not alleged, still less proven), the arbitration agreement would survive.

8. With respect to corruption, Redfern and Hunter (as cited, para. 2.152) referred to possible procedural consequences, such as shifting the burden of proof to the alleged party:

> Rather than raising questions of arbitrability, allegations of corruption made in an arbitration now raise the rather more substantive questions of proof and, if proven, the consequences of such impropriety under the relevant law. Accepting without question the arbitrability of allegations of impropriety, an ad hoc arbitral tribunal acting under the UNCITRAL Rules addressed allegations of corruption put before it thus:
>
> > "The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum divorced from reality. The arbitrators are well aware of the allegations that commitments by public sector entities have been made with respect to major projects in Indonesia without adequate heed to their economic contribution to public welfare, simply because they benefited a few influential people. The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption.
> >
> > But such grave accusations must be proven…Rumours or innuendo will not do."
> >
> > (*Himpurna California Energy Ltd v PT (Persero) Perusahaan Listruik Negara*, Final Award dated 4 May 1999, extracts of which are published in (2000) XXV YBCA 13. *See also* Partasides 'Proving corruption in international arbitration: A balanced standard for the real world' (2010) 25 ICSID Rev 47.)

9. Redfern and Hunter (para. 2.153), with reference to *Himpurna*, continued:

> If an allegation of corruption is made in plain language in the course of the arbitration proceedings, the arbitral tribunal is clearly under a duty to consider the allegation and to decide whether or not it is proven. It remains less clear, however, whether an arbitral tribunal has a duty to assume an inquisitorial role and to address the question of corruption on its own initiative where none is alleged. Initiating its own investigation and rendering a decision on the outcome of such self-initiated investigation might leave a tribunal open to charges of straying into territory that is *ultra petita*. Conversely, a failure to address the existence of such illegality may threaten the enforceability of an award and thus may sit uncomfortably with an arbitral tribunal's duty under some modern rules of arbitration to use its best endeavours to ensure that its award is enforceable. Striking the right balance between these competing considerations may not be easy. For now, the extent of an arbitral tribunal's duty – if any – to probe matters of illegality of its own motion remains unclear.

10. What seems to be clear from the discussion in *Redfern and Hunter* is that the issue is not that an arbitral tribunal is barred from jurisdiction but to what extent the arbitrators are obligated *sua sponte* to investigate the allegation of fraudulent behaviour, such as corruption. Based on the concept of separability this seems to be the modern and dominant view in international arbitration (in contrast to the view held by Judge Lagergren).

11. Accordingly, the Tribunal, with respect to this issue, should have decided that the alleged lack of legality of the Claimant's investments is not *per se* a jurisdictional issue and therefore must be decided in the merits phase.

12. This view is in particular supported by the fact that the Tribunal at the present stage of the proceedings is not convinced that it "is manifest that the [Claimant's] investment has been

performed in violation of the law", being the basis for the tribunal in *Phoenix v. Czech Republic* to deny jurisdiction (*Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 ("***Phoenix***"), para. 104). In contrast to *Phoenix*, the alleged violation of law in the present case is highly disputed between the Parties and the alleged (and controversially disputed) illegality of the sources of Loan 3 cannot affect the jurisdiction over the entirety of the Claimant's damages claims (as opposed to claims for the recovery of certain loans) in this arbitration.

13. With respect to the **allegation of fraud** in the procurement or performance of a contract, the situation with respect to the Tribunal's jurisdiction seems to be clear. Also in this regard, *Redfern and Hunter* stated with all clarity that there appears to be no reason for an arbitral tribunal to decline jurisdiction (as cited, para. 2.154), and, disregarding certain surprising decision by the Indian Supreme Court in *N. Radakrishnan v. Maestro Engineers* (2010) 1 SCC 72, as cited by Redfern and Hunter, there can be no doubt that an arbitral tribunal retains jurisdiction.

14. With respect to alleged **money laundering**, the issue of the illegality of the investment and its impact on jurisdiction is more complicated. Arbitral tribunals, arbitral institutions and counsel have dealt with the impact of alleged corruption and money laundering with increasing frequency in both commercial and investment arbitration. In 2019, the Competence Centre for Arbitration and Crime of the University of Basel and the Basel Institute on Governance (the "**Competence Centre for Arbitration and Crime**") published an outline (called Toolkit for Arbitrators (the "**Toolkit**")), which may assist arbitrators and counsel in navigating issues of corruption and money laundering (Kathrin Betz and Mark Pieth, *Corruption and Money Laundering in International Arbitration – A Toolkit for Arbitrators*, University of Basel, April 2019).[1]

15. With respect to alleged money laundering, the Competence Centre for Arbitration and Crime published a basic outline which confirmed certain standards and rules related thereto. The Arbitrator is of the view that this development with respect to the treatment of alleged money laundering must not be disregarded. First of all, it should be clarified and understood that alleged money laundering always requires a predicate offense from which the illicit funds originate. Further standards are set out in the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceed from Crime and in the 2008 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

[1] Available at https://baselgovernance.org/sites/default/files/2019-05/a_toolkit_for_arbitrators_29_05_2019_single_pages.pdf

16. The Arbitrator agrees with the Competence Centre for Arbitration and Crime's basic understanding: in respect of transnational public policy, there is widespread consensus that money laundering, as foreign public bribery, is against transnational public policy. Definitions for money laundering can be identified in international treaties since the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and various other international treaties.

17. The Competence Centre for Arbitration and Crime identified two different scenarios how money laundering could be related to the underlying dispute in arbitration proceedings (as cited, p. 19):

> In the first scenario that could be envisaged especially in commercial arbitration, an arbitration might be conducted in order to launder money. This means that both parties know that the funds are of illicit origin and they draw up a 'fake' dispute in order to get an arbitral award that can be enforced at the domestic level, presenting an apparently legitimate title for transferring illicit funds.
>
> In the second scenario (investment or commercial arbitration), the parties might be in a real dispute involving funds that are the proceeds of crime. For example, one party might seek to enforce a claim that involves the transfer of funds originating from a predicate offence. The predicate offence may for instance be foreign public bribery ('corruption money laundering'). The party might seek to obtain certain legitimate assets for which it wants to pay with funds of illicit origin. Or, the party might seek to obtain funds of illicit origin.

18. The Tribunal should have taken the view that the present arbitration does not suffer from the manipulation of the process by the Parties, particularly since there is no indication of sham proceedings as described in the above first scenario.

19. The Tribunal should have further considered that the second scenario might have an impact. As alleged by the Respondent certain loans forming the basis of the Claimant's damages claim might be funds of illicit origin. The Arbitrator considers that the Claimant's claim is not directed at recovering funds with alleged illicit origin but to claim damages for the loss of those funds having been invested by the Claimant in the Czech Republic. The Tribunal should have considered that this makes no difference with respect to the second scenario as described in the Toolkit. Therefore, the Tribunal in this arbitration should have determined the possible consequences with respect to alleged unknown origin of the funds at stake without plausible explanation how those funds were created legally.

20. With respect to the first scenario of sham arbitration proceedings, the issue of legality of the proceedings and its impact on jurisdiction of the Tribunal seems to be clear, as quite obviously BITs do not confer jurisdiction for sham arbitration proceedings. However, with respect to the second scenario, the alleged illegal origin of funds, the situation is different. The hurdle for denying jurisdiction is clear. As cited above, with respect to *Phoenix*, access to BIT jurisdiction

can only be denied in the jurisdictional phase, "if it is manifest that the investment had been performed in violation of the law" (para. 104). Otherwise, the legality of the investment is to be decided in the merits phase.

21. In accordance with the Toolkit of the Competence Centre for Arbitration and Crime, in a dispute falling under the second scenario (*i.e.* a real dispute involving funds of alleged illicit origin) the Tribunal should not have denied jurisdiction but should have considered "holding all claims involving those funds inadmissible" (p. 22).

22. In this respect, the Arbitrator also takes note of the commentary "Navigating through Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators and Counsel" (Kathrin Betz, Nadia Darwazeh, *et al*., *Navigating Through Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators and Counsel*, in Maxi Scherer (ed), *Journal of International Arbitration*, Volume 36, Issue 6, Kluwer Law International, 2019, pp. 671-678) with respect to investment arbitration. Any adverse legal consequences with respect to jurisdiction must be based on a clear and positive finding of money laundering, which however is, as the Arbitrator notices, in dispute in this arbitration. The key issue to be decided by the Tribunal in the jurisdictional phase is the "money laundering defense" of the Respondent, which defense is strongly objected to by the Claimant. A unilateral "money laundering defense" of a respondent is no way out for any arbitral tribunal to deny jurisdiction.

23. Some clarification may derive from a post on the Kluwer Arbitration Blog by Patricia Nacimiento, Tilmann Hertel and Catrice Gayer ("*Arbitration and Money Laundering: What Are The Obligations Placed On Counsel and Arbitrators And What Risks Do They Face*?", 10 November 2017).[2] The authors of this publication identify as the most critical questions the standard of proof which the arbitral tribunal should apply as well as the allocation of the burden of proof:

> As regards the standard of proof, there is precedent available concerning allegations of bribery and corruption. In three of the most prominent cases, arbitral tribunals in general applied a high standard of proof requiring *"clear and convincing evidence"* (*EDF Ltd vs Romania* – ICSID ARB/05/13), *"clear and convincing evidence amounting to more than a mere preponderance"* (Westinghouse vs the Republic of the Philippines, ICC Case No 6401) or proof *"beyond doubt"* (*Hilmarton vs OTV*, ICC Case No 5622). As regards the burden of proof, it remains to be settled whether this burden should entirely rest upon the party invoking the money laundering defence or whether this standard should be alleviated, e. g. by requiring the counterparty to bring counterevidence in case the allegation prima facie appears to be grounded. At present, this will still be decided on a case-by-case basis.

[2] Available at http://arbitrationblog kluwerarbitration.com/2017/11/10/arbitration-money-laundering/.

24. The Arbitrator notes that none of the arbitral tribunals in the cases cited above have denied jurisdiction. As a consequence, the Tribunal in the case at hand should conclude that the case law does not provide a proper basis to deny jurisdiction based on the alleged improper origin of the funds.

25. The Abitrator is also of the view that the present arbitration is in strong contrast to the decision in *World Duty Free v. Kenya*, a contract-based ISCID arbitration, where the tribunal found that it lacked jurisdiction on the basis that "[t]he relevant facts [of corruption] are indisputable on the evidence adduced before this Tribunal," and "the decisive evidential materials came from the [c]laimant itself, including Mr Ali's own written and oral testimony" (cited in Andrea Menaker, *Chapter 5: Proving Corruption in International Arbitration*, in Domitille Baizeau and Richard H. Kreindler (eds), *Addressing Issues of Corruption in Commercial and Investment Arbitration*, Dossiers of the ICC Institute of World Business Law, Volume 13, 2015, p.91).

26. The Arbitrator notes that lack of jurisdiction must be based on undisputable, relevant facts. Similarly, the *Fraport II* tribunal applied a high standard of clear and convincing evidence to the allegation of corruption but held that "considering the difficulty to prove corruption by direct evidence, the same may be circumstantial" (*Fraport AG Frankfurt Airport Services Worldwide v Philippines (II),* ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 299, cited in Andrea Menaker, as cited above):

> Regarding burden of proof, in accordance with the well-established rule of *onus probandi incumbit actori,* the burden of proof rests upon the party that is asserting affirmatively a claim or defense. Thus, with respect to objections to jurisdiction, Respondent bears the burden of proving the validity of such objections. The Tribunal accepts that if Respondent adduces evidence sufficient to present a *prima facie* case, Claimant must produce rebuttal evidence, although Respondent retains the ultimate burden to prove its jurisdictional objection.

27. The Arbitrator takes note that in this arbitration such indisputable evidence is at this point in time not available with respect to the allegedly fraudulent origin of the funds provided as loans to recipients in the Czech Republic. To the contrary, the origin of the funds is the object of this arbitration.

28. Also, the issue of the burden of proof must not be mixed up with the issue of jurisdiction.

29. As clarified by Hiroyuki Tezuka, the allegation that an investor's investment was corrupt is usually raised by host States as a "gateway issue" so that the host State can deny investment protection due to tainted contracts (Hiroyuki Tezuka, *Chapter 3: Corruption Issues in the Jurisdictional Phase of Investment Arbitrations, in* Domitille Baizeau and Richard Kreindler

(eds), *Addressing Issues of Corruption in Commercial and Investment Arbitratio*n, Dossiers of the ICC Institute of World Business Law, Volume 13, 2015, pp. 51 – 68, p. 51). Tezuka referred in his essay to the ICSID tribunal decision in *Rompetrol Group M.V. v. Romania* (ICSID Case No. ARB/06/3, Award, 6 May 2013 ("*Rompetrol*")). The *Rompetrol* tribunal rejected the concept of shifting the burden of proof because in its view the burden of proof is absolute. This view is supported by the tribunals in *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan* (ICSID Case No. ARB/05/16, Award of 29 July 2008, para. 709) (requiring clear and convincing evidence to prove alleged criminal conspiracy) and *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo* (ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, 29 July 2008, para. 52) (requiring irrefutable proof such as that resulting from criminal prosecution to prove corruption) (*see also* Hiroyuki Tezuka, p. 60).

30. Hiroyuki Tezuka further clarified (p. 63, para 2.2):

> Other ICSID tribunals have dismissed claims on the ground of corruption, fraud or other illegality, not relying upon the theory that there is an implicit legality requirement under Article 25 of the ICSID Convention, but based upon general principles of international law and public policy. For example, the ICSID tribunal in *Plama v. Bulgaria* found a fraudulent conduct by the investor in making its investment, violating the rules and principles of international law, including the principle of good faith, and held that granting the Claimant's investment the protections provided by the Energy Charter Treaty would be contrary to the principle of *memo audi tur pr opriam t urpitudinem al legans* and "contrary to the basic notion of international public policy—that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal."
>
> It should be noted that where the ICSID tribunals rely upon such general principles of public international law rather than the explicit legality requirement of the protected "investment" under the applicable BIT or the implicit legality requirement read into Article 25 of the ICSID Convention, they may dismiss the claims not on the lack of jurisdiction under the applicable BIT or ICSID Convention but on the basis of the lack of admissibility of claims, or on the lack of the merit of the claims.

31. The Tribunal therefore should conclude that the Respondent's (disputed) defense of money laundering must not be decided in the phase of jurisdiction but in the merits phase.

32. Such view is supported by prominent authors such as Andrew de Lotbinière McDougall (American University International Law Review, Volume 20, Issue 5, 2005, pp. 1021 *et seq*.) in his article " International Arbitration and Money Laundering". Elaborating on the issue of jurisdiction in detail including the aspect of international public policy, McDougall concludes (as cited, p. 1042):

> Therefore, with respect to the first option as to how an arbitral tribunal should proceed if faced with a contract involving money laundering that is valid and enforceable under its governing substantive law, the widely accepted view supports the conclusion that the

> arbitral tribunal should not refuse jurisdiction simply because of allegations or evidence of money laundering.

33. McDougall confirmed his view in his "Conclusion" (as cited, p. 1052):

> Where the contract at issue involves money laundering that is proven to the satisfaction of the arbitral tribunal, and the contract is invalid or unenforceable under the substantive law governing the contract, there should be no real debate. The only issue might be whether the arbitral tribunal should accept jurisdiction over the dispute. However, as noted in Part III above, it now appears to be widely accepted that an arbitral tribunal should accept jurisdiction to decide such disputes.

34. The Arbitrator is in agreement with McDougall that "an arbitral tribunal should not 'turn a blind eye' but, rather, should find a way to refuse to give effect to such a highly objectionable contract" (as cited, p. 1052). The Arbitrator is of the opinion that it is the Tribunal's duty to decide on alleged "highly objectionable contracts", which is a matter of merits, not jurisdiction.

35. This supports the Arbitrator's view that the dispute, including the issue of the origin of the funds, is not a matter of jurisdiction but a matter of substance to be decided in the merits phase of this arbitration. The Tribunal hereby should have taken into consideration that the allegation of fraudulent origin of the funds invested by the Claimant in the Czech Republic is a serious allegation, which must be substantiated and proven by hard and irrefutable facts. Any light-handed decision on jurisdiction, even supported by vague procedural principles, such as the alleged shifting of the burden of substantiation and proof, cannot be a proper basis to deny jurisdiction in an international arbitration. A denial of justice by denial of jurisdiction would be in strong contrast to internationally recognised basic principles of BIT arbitration. On the contrary, there is no way out for the Tribunal, which has to properly perform its duty to decide an international dispute in accordance with, and within the clean legal framework of, public international law in compliance with the overwhelming jurisprudence.

3. In Substance No Reason to Deny Jurisdiction

36. The Arbitrator's view that the Tribunal should have accepted jurisdiction in order to address the alleged illegality of the source of funds for the Claimant's investment in the merits phase is supported by strong inconsistencies of various expert witness statements with respect to the origin of the invested funds. In particular the expert witness Mr. [redacted] in the closing of his Expert Report dated 27 March 2020 ([redacted] Expert Report, p. 34) stated:

> In general, due to the fact that most of the essential occurrences happened over ten years ago, I had to rely on documents of which I can no longer examine the authenticity. However, the dividends paid by Skoda Group are well documented. Furthermore, I was able to reconstruct the chain of transfers from the Skoda Group dividends to Fynerdale, making it apparent that at least since May 2008 ('loan 4') the funding of the poppy seed

investments comes from undisputed legitimate sources. My analysis is further explained in the body of this report.

My findings related to the rebuttal are limited to the two following findings:

- I have studied the report of the Czech Republic expert. [Ms. [redacted] s Report] This report aims at discrediting Fynerdale, trying to demonstrate Fynerdale having used 'tainted' MUS money for its investments in the poppy seed business.

  For eight of the nine loans the Czech Republic expert report fails to provide any evidence that might serve its objective. Only loan 3 is challenged, based on Exhibit VEC-17 to the K2 report. I was able to confirm all flows of funds as stated on Exhibit VEC-17 with bank statements, Therefore I concur with the conclusion of the Czech Republic expert on loan 3 being funded by 'MUS' proceedings. However, the assumption of the Czech Republic expert that she "cannot exclude the possibility that" funds of all other loans have derived from the 'MUS' proceedings, based on her findings to loan 3, is simply invalid, while there is no indication that loan 3 is in anyway interconnected to other loans. On the contrary, I identified legitimate sources of funds following from Skoda Group dividends.

- Furthermore, I was informed that The Swiss Prosecutor had investigated whether the funds paid as a purchase price for the Skoda Holding shares did not originate from MUS and whether a crime of money laundering did not occur. The Swiss Federal Court has denied a part of the indictment of the Prosecutor. The Prosecutor did not appeal a part of the judgment of the Swiss Federal Court concerning the Skoda Holding acquisition. Therefore, all the activities in regard to Skoda Holding should be considered as legal and dividends paid to the shareholders (inter alia Mr. [redacted] and Mr. [redacted] have a legitimate source.

37. Indeed, the findings of Ms. [redacted]'s expert report are highly unconvincing. The Arbitrator notes that even with the understanding that Ms. [redacted] was instructed by the Respondent of this arbitration, the report quite obviously indicates Ms. [redacted]'s undisclosed efforts to support her client's factual and legal position in this arbitration. Ms. [redacted] was engaged to ([redacted] Expert Report, para. 1.6(i)-(iii)):

> conduct a forensic review and financial analysis of the documents produced by Fynerdale.
> (i) To establish the source of funds used by Fynerdale to provide the loans to the poppy seed business;
> (ii) To trace the flow of these funds between Mr [redacted], Mr [redacted] Fynerdale, the ultimate recipient of the financing and all companies involved in the transaction; and
> (iii) To determine whether there is any indication that (a) the funds used by Fynerdale are the proceeds of the fraud perpetrated against MUS and (b) the investment made in the poppy seed business and the underlying transactions exhibit indication of a money laundering scheme, (c) or that an attempt to money launder funds via loans cannot be excluded.

38. The key points of Ms. [redacted] s summary findings are:

> 2.4 As a result, it was not always possible to trace the originating source of funds due to a lack of documentation. That said, I have identified the source and traced the flow of funds to the full extent possible using the available documentation.
>
> […]

> **Loan 3**
>
> 2.6. From my analysis, I have identified that the funds used by Fynerdale to provide one of the nine Loans, Loan 3, ultimately derived from the Proceeds of the MUS transaction and thus the fraud perpetrated against MUS.
>
> **Loan 4**
>
> 2.7. I have identified that the funds used by Fynerdale to provide Loan 4 appear to have originated from a return on investment, namely a dividend payment from Skoda Holding S.A. ("Skoda"). Further information would be required to determine the source of funds used by Skoda to make the dividend payment.
>
> **Loans 5 to 9**
>
> 2.8. For Loans 5 to 9, based on the available documentation, I have been unable to identify the ultimate source of funds used to provide these loans.
>
> 2.9. My analysis shows that, funds originating from a bank account belonging to Tadorna provided the monies for Loan 5. Further information would be required to determine the purpose of this payment and the source of funds used by Tadorna to make the payment.
>
> 2.10. Further, funds originating from a bank account belonging to Mostra Investment Limited provided the monies for Loans 6 to 8.
>
> 2.11. Given that the ultimate source of funds has not been identified, I cannot exclude the possibility that the funds used for Loans 5 to 9 derived from the fraud perpetrated against MUS, particularly, given that, in my opinion, funds used for Loan 3 have derived from the MUS fraud.
>
> Further, the bank accounts of Mostra Investment Limited, which was connected to the MUS fraud and used as a conduit for the Loan 3 transaction, have also been utilised in providing monies to Fynerdale for Loans 6 to 8.
>
> 2.12. Overall, the Claimant has not provided sufficient information to enable me to determine, whether or not, the funds used for loans 1, 2, 4 and 5 to 9 derived from the fraud perpetrated against MUS.

39. Ms. [redacted] obviously exceeded the instructions and scope of work of fact finding. **First**, Ms. [redacted] in the summary did not point out that only a part of Loan 3 was identified as "ultimately derived from the Proceeds of the MUS transaction and thus the fraud perpetrated against MUS" (para 5.6). Ms. [redacted] further did not clarify that the identification of the alleged ultimate source of Loan 3 was not her own finding but was based on disputed publications and disputed legal proceedings.

40. **Second**, Ms. [redacted] identified the origin of the funds related to Loans 4 to 9 to be dividend payments from Škoda Holdings SA ("**Škoda**"). Ms. [redacted] s further remark that "[f]urther information would be required to determine the source of funds used by Skoda to make the dividend payment" (para. 5.7) casts doubts on the legality of dividend payments from Škoda, which is the leading industrial conglomerate of the Czech Republic traded at the stock exchange. There is not the slightest indication of doubt that Škoda dividends were or are not legal and in compliance with Czech laws and Ms. [redacted] did not provide for any fact for her improper suggestion.

41. **Lastly**, Ms. [redacted] offers an entirely incorrect, unsubstantiated and unproven suggestion (para. 9.5):

> Given that the ultimate source of funds has not been identified I cannot exclude the possibility that the funds used for Loans 5 to 9 derived from the fraud perpetrated against MUS, particularly, given that, in my opinion, funds used for Loan 3 have derived from the MUS fraud.
>
> Further, the bank accounts of Mostra Investment Limited, which was connected to the MUS fraud and used as a conduit for the Loan 3 transaction, have also been utilised in providing monies to Fynerdale for Loans 6 to 8.

42. This statement is not fact finding, but baseless party pleading and suggests a biased view outside the scope of Ms. [redacted]'s duties.

43. The Tribunal at the Hearing tried to verify the existence of any underlying and supportive facts for Ms. [redacted]'s accusation, without success. The conclusion is that Ms. [redacted]'s expert report cannot be regarded as a neutral report on facts and therefore must be disregarded.

44. The Arbitrator notes that the Claimant's expert, Mr. [redacted] states that there was no factual evidence to that effect, which was a clear-cut objection to Ms. [redacted]'s statements. The Tribunal therefore is obliged to address this issue, which is a matter of substance and to be dealt with extensively in the merits phase of this arbitration. Further, the Parties should have been entitled to deal with the addressed issues in the merits phase, as part of the Parties' basic right to be heard.

4. Conclusions

45. The Tribunal should not have denied jurisdiction, which denial is a violation of the Claimant's basic right, access to justice. The Tribunal should have decided to accept jurisdiction and decided on the dispute in the merits phase of this arbitration.

Done at the place of arbitration, The Hague, the Netherlands, on the date of the Award.

Dr. Wolfgang Kühn
Arbitrator