INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

PAWLOWSKI AG AND PROJEKT SEVER S.R.O.

v.

CZECH REPUBLIC

(ICSID CASE NO. ARB/17/11)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated November 1, 2021.

Meg Kinnear
Secretary-General

Washington, D.C., November 1, 2021

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

PAWLOWSKI AG AND PROJEKT SEVER S.R.O.
(Claimants)

and

CZECH REPUBLIC
(Respondent)

ICSID CASE NO. ARB/17/11

AWARD

Members of the Tribunal
Prof. Juan Fernández-Armesto, President
Mr. John Beechey, CBE, Arbitrator
Prof. Vaughan Lowe, QC, Arbitrator

Secretary of the Tribunal
Ms. Anna Holloway

Assistant to the Tribunal
Ms. Krystle Baptista

Date of dispatch to the Parties: 1 November 2021

REPRESENTATION OF THE PARTIES

Representing Pawlowski AG and Projekt Sever s.r.o.:

[redacted]
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Switzerland

and

Dr. Jan Havlíček
Havlíček Law Offices
Masarykovo náměstí 110/64
CZ-58601 Jihlava
Czech Republic

Representing Czech Republic:

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Dechert (Paris) LLP
32 rue de Monceau
75008 Paris
France

and

Deputy Minister Ondřej Landa
Ms. Martina Matejová
Ms. Anna Bilanová
Mr. Jaroslav Kudrna
Mr. Martin Nováček
Ministry of Finance of the Czech Republic
Letenská 15
118 10 Prague 1
Czech Republic

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GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

Annulment Decision	Judgment of the Prague Municipal Court annulling the Zoning Plan Change (Z-1294/07), dated 26 April 2013
Annulment Request	Judicial request filed by Benice and two neighbors in June 2012 seeking annulment of the Zoning Plan Change
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Benice Lawsuit	Benice's lawsuit filed in October 2009 with the District Court of Prague against Projekt Sever, contesting the validity of Projekt Sever's purchase of land under the Prague Purchase Contract
Benice Residential Complex or Project	The planned residential complex which Claimants sought to develop in the Municipal District of Benice
BIT or Treaty	The Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments signed on October 5, 1990, which entered into force on 7 August 1991
Boháč WS	Witness Statement of Mr. Ondřej Boháč
C-[#]	Claimants' Exhibit
C-I	Claimants' Memorial on the Merits dated 28 June 2018
C-II	Claimants' Reply on the Merits and Counter-Memorial on Preliminary Objections dated 3 July 2019
C-III	Claimants' Rejoinder on Preliminary Objections dated 4 December 2019
C-PHB	Claimants' Post Hearing Brief dated 15 July 2020
CL-[#]	Claimants' Legal Authority
Central Group	Central Group a.s., a Cypriot owned company and developer with projects in the City of Prague

Claimants	Pawlowski AG and Projekt Sever s.r.o.
Coller WS I	First Witness Statement of Mr. Milan Coller
Coller WS II	Second Witness Statement of Mr. Milan Coller
Concept	Required in the third phase of the procurement of a zoning change, during the procurement of the Concept the environmental authority must approve the environmental impact assessment
Costs of the Proceeding	The lodging fee for this arbitration and the advance on costs paid to ICSID
Decision to Procure	The first step in the procurement of a zoning change, in which the Prague City Council initiates a zoning plan change
Defense Expenses	The expenses incurred by the Parties to further their position in the arbitration
Defense Purchase Contract	Agreement between Projekt Sever and the Ministry of Defense for 1,135 m^2 of land, and for the right to tear down structures and dispose of rubble on the land
Draft	Required in the fourth phase of the procurement of a zoning change, a Draft must be prepared by the procurer, be subject to public discussion, and reviewed for compliance with the law and superior land use planning documents
FET	Fair and equitable treatment
Hearing	Hearing on the Merits, Jurisdiction, and *Quantum* held 26-30 January 2020
HT [page:line]	Hearing Transcript
Hudeček WS I	First Witness Statement of Dr. Tomáš Hudeček
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
[redacted] ER I	First Expert Report of [redacted]

Langmajer WS I	First Witness Statement of Mr. Martin Langmajer
Langmajer WS II	Second Witness Statement of Mr. Martin Langmajer
Malčánek WS	Witness Statement of Mr. Jaroslav Malčánek
MFN	Most Favored Nation standard
[redacted] WS	Witness Statement of Mr. [redacted]
NT	National Treatment standard
Outline	Required in the second phase of the procurement of a zoning change, a draft outline of a zoning plan change must be prepared by the Procurer, made available for review, and approved by the Prague City Assembly
Parties	Claimants and Respondent
Pawlowski AG	Pawlowski AG, Claimant in this arbitration, is a company incorporated under the laws of Switzerland
Pawlowski WS I	First Witness Statement of Mr. Sebastian Pawlowski
Prague Purchase Contract	Agreement between Projekt Sever and the District of Uhříněves for the purchase of 43,784 m^2 of land owned by the City of Prague.
Procurer	The Zoning Plan Division of the Prague Municipal Office
Project Area	An area of approximately 270.000 m^2 located in the Municipal District of Benice and bordering the District of Uhříněves, in which Claimants sought to develop the Project
Projekt Sever	Projekt Sever s.r.o., Claimant in this arbitration, is a company incorporated under the law of the Czech Republic
R-[#]	Respondent's Exhibit
R-I	Respondent's Counter-Memorial on the Merits and Memorial on Preliminary Objections dated 5 December 2018
R-II	Respondent's Rejoinder on the Merits and Reply on Preliminary Objections dated 6 November 2019

R-PHB	Respondent's Post Hearing Brief dated 15 July 2020
RL-[#]	Respondent's Legal Authority
Respondent	The Czech Republic
[redacted] ER I	First Expert Report of Mr. [redacted] of AlixPartners
[redacted] ER II	Second Expert Report of Mr. [redacted] of AlixPartners
TaK	The architectural and engineering studio Tichý and Kolářová
[redacted] WS	Witness Statement of [redacted]
[redacted] ER I	First Expert Report of [redacted]
[redacted] ER II	Second Expert Report of [redacted]
Topičová WS I	First Witness Statement of Ms. Věra Topičová
Topičová WS II	Second Witness Statement of Ms. Věra Topičová
Turnovský WS	Witness Statement of Mr. Martin Turnovský
Tribunal	Arbitral tribunal constituted on 6 November 2017
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969
Votava WS	Witness Statement of Mr. Bořek Votava
Z-1424/07	A zoning plan change impacting land purchased by Central Group which was annulled by the Prague City Court
Zoning Plan Change	The Zoning Plan Change Z-1294/07 concerning the Project Area, initially approved by the Prague City Assembly on 26 March 2010, entering into force on 16 April 2010, and later annulled by the Prague Municipal Court on 26 April 2013.
[redacted] WS	Witness Statement of [redacted]

LIST OF CASES

Alps Finance	*Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (Redacted), dated 5 March 2011, **RL-18**
Al Tamimi	*Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, dated 3 November 2015, **RL-104**
Barcelona Traction	*Barcelona Traction, Light and Power Co., Ltd (Belgium v. Spain*), Judgment, dated 5 February 1970, **CL-87**
Bayindir Insaat	*Bayindir Insaat Turizim Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, dated 27 August 2009, **RL-76**
Binder	*Binder v. Czech Republic*, UNCITRAL, Final Award, dated 15 July 2011, **CL-119**
Caratube	*Caratube International Oil Company LLP v. Republic of Kazakhstan,* ICSID Case ARB/08/12, Award, dated 5 June 2012, **RL-31**
Cervin	*Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, dated 7 March 2017, **RL-97**
Chorzów	*Factory at Chorzów (Germany v. Poland)*, Merits, 1928 PCIJ (Ser. A) No. 17, Award, dated 13 September 1928, **CL-73**
CME	*CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, dated September 13, 2001, **CL-25**
Crystallex	*Crystallex International Corp v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, dated 4 April 2016, **CL-12**
ECE	*ECE Projektmanagement v. The Czech Republic*, PCA Case No. 2010-5, Award, dated 19 September 2013, **RL-55**
Edenred	*Edenred S.A. v. Hungary*, ICSID Case No. ARB/13/21, Award, dated 13 December 2016
EDF	*EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, dated 8 October 2009, **RL-180**
Eiser	*Eiser Infrastructure Limited and Energia Solar Luxembourg v. Kingdom of Spai*n, ICSID Case No. ARB/13/36, Award, dated 4 May 2017, **CL-56**
Elsi	*Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgement, dated 20 July 1989, **RL-56**
Emmis	*Emmis International Holding, B.V. et al v. Hungary*, ICSID Case No. ARB/12/2, Award, dated 16 April 2014, **RL-109**
Flemingo DutyFree	*Flemingo DutyFree Shop Private Limited v. Republic of Poland*, PCA, Award, dated 12 August 2016, **CL-37**
Foresight Luxembourg	*Foresight Luxembourg Solar 1 S.A.R.L., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, dated 14 November 2018, **CL-52**
Frontier Petroleum	*Frontier Petroleum Services v. Czech Republic*, UNCITRAL, Final Award, dated 12 November 2010, **CL-21**
Gami Investments	*Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Award, dated 15 November 2004, **RL-47**

Gavrilovic	*Georg Gavrilovic and Gavrilovic D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, dated 26 July 2018, **RL-81**
Generation Ukraine	*Generation Ukraine Inc v. Ukraine*, ICSID Case No. ARB/00/9, Award, dated 16 September 2003, **RL-45**
Genin	*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, dated 25 June 2001, **CL-105**
Glamis Gold	*Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, dated 8 June 2009, **RL-95**
Glencore	*Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, dated 27 August 2019, **CL-113**
Global Trading	*Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, dated 1 December 2010, **RL-9**
Goetz	*Antoine Goetz et consorts v. République du Burundi*, Award, dated 10 February 1999, **CL-67**
Hassan Awdi	*Hassan Awdi, Enterprise Business Consultants, Inc., and Alfa el Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, dated 2 March 2015, **CL-100**
Invesmart	*Invesmart v. The Czech Republic*, UNCITRAL, Award (Redacted), dated 26 June 2009, **RL-2**
Jan de Nul	*Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, dated 6 November 2008, **RL-70**
Joy Mining	*Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, dated 6 August 2004, **RL-21**
JSW Solar (Dissenting Opinion)	*JSW Solar v. Czech Republic*, PCA Case No. 201403, Final Award, dated 11 October 2017, dissenting opinion of GARY BORN, **CL-53**
Lauder	*Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Award, dated 3 September 2001
Lemire	*Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, dated 14 January 2010, **RL-83**
LG&E	*LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, dated 3 October 2006, **CL-68**
Loewen	*The Loewen Group, Inc. and Raymond L. Loewen (Claimants) and United States of America,* ICSID Case No. ARB(AF)/98/3, Award, dated 26 June 2003, **RL-53**
Mamidoil	*Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania,* ICSID Case No. ARB/11/2, Award, dated 30 March 2015, **RL-49**
Marvin Feldman	*Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, dated 16 December 2002, **RL-108**

Mauritius	*Republic of Mauritius v. United Kingdom*, PCA (UNCLOS) 2011-03, Award, dated 18 March 2015, **CL-120**
Mera	Mera Investment Fund Limited v. Republic of Serbia, ICSID Case No. ARB/17/2, Decision on Jurisdiction, dated 30 November 2018, **CL-85**
Metalclad	*Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB/97/1, Award, dated 30 August 2000, **CL-33**
Micula I	*Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, dated 11 December 2013, **CL-26**
Middle East Cement	*Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, dated 12 April 2002, **CL-66**
Mondev	*Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated 11 October 2002, **CL-13**
MTD Equity	*MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSD Case No. ARB/01/7, Award, dated 25 May 2004, **CL-9**
Nycomb	*Nycomb v. Latvia*, Award, SCC Case No. 118/2001, Award, dated 16 December 2003, **CL-60**
Occidental	*Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, dated 1 July 2004, **RL-134**
OI European	*OI European Group B. V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/25, Award, dated 10 March 2015**, RL-64**
Olin Holdings	*Olin Holdings Limited v. state of Libya*, ICC Case No. 20355/MCP, Final Award, dated 25 May 2018, **CL-61**
Parkerings	*Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, dated 11 September 2007, **CL-8**
Philip Morris	*Philip Morris Brand et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, dated 2 July 2013, **CL-10**
Phoenix Action	*Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, dated 15 April 2009, **RL-5**
Pope & Talbot	*Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, dated 10 April 2001, **CL-108**
Rumeli Telekom	*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, **CL-15**
Quiborax	*Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational state of Bolivia*, ICSID Case No. ARB/06/2, Award, dated 16 September 2015, **RL-110**
Romak	*Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, dated 26 November 2009, **RL-17**
Rompetrol	*The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, dated 6 May 2013, **RL-40**
Rusoro	*Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, dated 22 August 2016, **RL-79**
Saba Fakes	*Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, dated 14 July 2010, **RL-32**

Saluka	*Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, Partial Award, dated 17 March 2006, **RL-84**
S.D. Myers	*S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Partial Award, dated 13 November 2000, **RL-98**
SolES Badajoz	*SolEs Badajoz v. Spain*, ICSID Case No. ARB/15/38, Award, dated 31 July 2019, **CL-114**
Standard Chartered	*Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, dated 11 October 2019, **CL-111**
Stati	*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, dated 19 December 2013, **RL-130**
Tecmed	*Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, dated 29 May 2003, **CL-17**
Tenaris	*Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela (I),* ICSID Case No. ARB/11/26, Award, dated 29 January 2016, **CL-91**
Thunderbird	*International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, dated 14 February 2007, **RL-48**
Tippets	*Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consenting Engineers of Iran et al.,* Iran-U.S. Claims *Tribunal*, Award No. 141/7/2, dated 22 June 1984, **CL-65**
Total	*Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, dated 27 December 2006, **RL-85**
Tza Yap Shum	*Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, dated 7 July 2011, **CL-69**
UAB	*UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, dated 22 December 2017, **RL-72**
United Utilities	*United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, dated 21 June 2019, **RL-183**
Vannessa Ventures	*Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, dated 16 January 2013, **CL-106**
Vestey Group	*Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, dated 15 April 2016, **RL-16**
Waste Management II	*Waste Management, Inc. v. United Mexican States (II*), ICSID Case No. ARB(AF)/00/3, Award, dated 30 April 2004, **CL-14**
Watkins Holdings	Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, dated 21 January 2020, **CL-112**
White Industries	*White Industries Australia Ltd. v. India*, UNCITRAL, Award, dated 30 November 2011, **RL-80**
Wena Hotels	*Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, dated 8 December 2000, **CL-64**
Wirtgen	*Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, dated 11 October 2017, **RL-20**

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments signed on October 5, 1990, which entered into force on August 7, 1991 (the "**BIT**" or "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force generally on October 14, 1966 (the "**ICSID Convention**"), and entered into force for the Swiss Confederation and the Slovak Federal Republic on June 14, 1968 and June 26, 1994, respectively.

1. THE PARTIES

A. Claimants

2. The Claimants are Pawlowski AG ("**Pawlowski AG**"), a company incorporated under the laws of Switzerland, and Projekt Sever s.r.o. ("**Projekt Sever**"), a company incorporated under the laws of the Czech Republic (together, the "**Claimants**").

3. Claimants are represented by

[redacted]
Homburger AG
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Zurich, Switzerland

JUDr. Jan Havlíček
Havlíček Law Offices
Masarykovo náměstí 110/64
CZ-58601
Jihlava, Czech Republic

B. Respondent

4. The Respondent is the Czech Republic ("**Respondent**").

5. Respondent is represented by

Anna Bilanová
Ministry of Finance of the Czech Republic
Letenská 15, 118 10
Prague, Czech Republic

[redacted]
Dechert (Paris) LLP
32, rue de Monceau, 75008
Paris, France

6. Claimants and Respondent shall henceforth be referred to as the "Parties."

C. **The Arbitral Tribunal**

7. The Arbitral Tribunal is composed of

Mr. Juan Fernández-Armesto (President)
Armesto & Asociados
General Pardiñas, 102 8vo izq.
28006
Madrid, Spain

Prof. Vaughan Lowe
Essex Court Chambers
24 Lincoln's Inn Fields
WC2A 3EG
London, United Kingdom

Mr. John Beechey
Arbitration Chambers
Lamb Building
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EC4Y7AS
London, United Kingdom

2. THE TREATY: DISPUTE RESOLUTION CLAUSE

8. Article 9 of the BIT provides:

Article 9

Disputes between a Contracting Party and an investor of the other Contracting Party

1. For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.

2. If these consultations do not result in a solution within six months, the dispute shall upon request of the investor be submitted to an arbitral tribunal. Such arbitral tribunal shall be established as follows:

a) The arbitral tribunal shall be constituted for each individual case. Unless the parties to the dispute have agreed otherwise, each of them shall appoint one arbitrator and these two arbitrators shall nominate a chairman who shall be a national of a third State. The arbitrators are to be appointed within two months of the receipt of the request for arbitration and the chairman is to be nominated within further two months.

b) If the periods specified in paragraph (a) of this Article have not been observed, either party to the dispute may, in the absence of any other arrangements, invite the President of the Court of Arbitration of the International Chamber of Commerce in Paris to make the necessary appointments. If the President is prevented from carrying out the said function or if he is a national of a Contracting Party the provisions in paragraph (5) of Article 10 of this Agreement shall be applied mutatis mutandis.

c) Unless the parties to the dispute have agreed otherwise, the tribunal shall determine its procedure. Its decisions are final and binding. Each Contracting Party shall ensure the recognition and execution of the arbitral award.

d) Each party to the dispute shall bear the costs of its own member of the tribunal and of its representation in the arbitral proceedings; the costs of the chairman and the remaining cost shall be borne in equal parts by both parties to the dispute. The tribunal may, however, in its award decide on a different proportion of costs to be borne by the parties and this award shall be binding on both parties.

3. In the event of both Contracting Parties having become members of the Convention of Washington of March 18, 1965 on the Settlement of Investment Disputes between States and Nationals of other States, disputes under this article may, upon request of the investor, as an alternative to the procedure mentioned in paragraph 2 of this article, be submitted to the International Center for Settlement of Investment Disputes.

4. The Contracting State which is a party to the dispute shall at no time whatever during a procedure specified in paragraphs (2) and (3) of this Article or during the execution of the respective sentence assert as a defense the fact that the investor has received compensation under an insurance contract covering the whole or part of the incurred damage.

5. Neither Contracting State shall pursue through diplomatic channels a dispute submitted to arbitration, unless the other Contracting State does not abide by or comply with the award rendered by an arbitral tribunal.

II. PROCEDURAL HISTORY

9. On 7 April 2017, ICSID received a request for arbitration from Pawlowski AG and Projekt Sever s.r.o. against the Czech Republic (the "Request").

10. On 14 April 2017, ICSID asked the requesting parties to provide further information in support of the Request. That information was submitted on 2 May 2017.

11. On 3 May 2017, the Secretary-General of ICSID registered the Request, as supplemented, in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

12. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding, arbitrator to be appointed by agreement of the Parties.

13. The Tribunal is composed of Juan Fernández-Armesto, a national of Spain, President, appointed by agreement of the Parties; John Beechey, a national of the United Kingdom, appointed by the Claimants; and Vaughan Lowe, a national of the United Kingdom, appointed by the Respondent.

14. On 6 November 2017, the Acting Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Lindsay Gastrell, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. Ms. Gastrell was subsequently replaced by Ms. Anna Holloway, Legal Counsel.

15. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 24 January 2018 by teleconference.

16. Following the first session, on 23 February 2018, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France. Procedural Order No. 1 also set out the agreed schedule for the proceedings.

17. In accordance with Procedural Order No. 1, on 28 June 2018, the Claimants filed a Memorial on the merits, together with the Witness Statements of Mr. Sebastian Pawlowski, Mr. Milan Coller, [redacted] Mr. [redacted] and Mr. Martin

Langmajer, the Expert Reports of [redacted] (including Exhibits VT-0001 through VT-0024), Mr. [redacted] of AlixPartners GmbH (including Exhibits AP-001 through AP-074), Exhibits C-0016 through C-0100, and Legal Authorities CL-0001 through CL-0048).

18. On 25 July 2018, the Respondent confirmed that it would not request bifurcation of the proceeding.

19. On 14 August 2018, the Tribunal issued Procedural Order No. 2 concerning production of documents.

20. On 6 November 2018, the Respondent requested a three-week extension for filing of its Counter-Memorial citing difficulties in meeting the original deadline due to a number of departures at the division of the Ministry of Finance in charge of investment arbitration and other parallel filings that the state had to manage.

21. On 7 November 2018, the Claimants opposed the Respondent's request for extension noting that no compelling reason was stated to justify such an extension which would unduly disrupt the procedural calendar. In the event that the extension were granted to the Respondent, the Claimants argued, a corresponding extension for the Claimants would serve no practical purpose as the Claimants' counsel would be engaged in another hearing at that time.

22. On 9 November 2018, the Tribunal decided to grant an additional three weeks to each Party for preparation of their briefs. The Tribunal gave the Parties the liberty of choosing how they each wished to allocate the total additional time between the two written submissions each Party still had to present.

23. On 19 November 2018, the Parties submitted agreed amendments to the procedural timetable and the Tribunal adopted those amendments on 28 November 2018.

24. In accordance with the amended timetable, on 5 December 2018, the Respondent filed its Counter-Memorial on the Merits and Memorial on Preliminary Objections, together with the Witness Statements of Dr. Tomáš Hudeček and Ms. Věra Topičova, the Expert Reports of KPMG (including Exhibits KPMG-1 through KPMG-6) and [redacted] (including Exhibits SK-1 through SK-84), Exhibits R-1 through R-26, and Legal Authorities RL-1 through RL-143).

25. On 13 March 2019, the Tribunal issued Procedural Order No. 3 concerning production of documents.

26. On 3 July 2019, the Claimants filed a Reply on the Merits and a Counter-Memorial on Preliminary Objections, together with the Witness Statements of Mr. Bořek Votava, Mr. [redacted] Mr. Jaroslav Malčánek, and Mr. Martin Turnovský, the Second Witness Statements of Mr. Sebastian Pawlowski, Mr. Milan Coller, Mr. Martin Langmajer, and Mr. [redacted], Second Expert Reports of [redacted] (including Annexes 1 through 6 and Exhibits VT-0025 through VT-0083) and Mr. [redacted] of AlixPartners GmbH

(including Appendices AP-G through AP-L and Exhibits AP-075 through AP-121), Exhibits C-0076a, C-0106 through C-0212, and Legal Authorities CL-0049 through CL-0108.

27. On 6 November 2019, the Respondent filed a Rejoinder on the Merits and a Reply on Preliminary Objections, together with the Witness statements of Ms. [redacted], Mr. Ondřej Boháč, and Mr. Matěj Stropnický, the Second Witness statements of Ms. Věra Topičová and Dr. Tomáš Hudeček, the Second Expert Reports of [redacted] (including Exhibits SKII-1 through SKII-36) and KPMG (including Exhibits KPMG-7 through KPMG-37), Exhibits R-27 through R-76, and Legal Authorities RL-144 through RL-212.

28. On 28 November 2019, the Claimants requested leave to submit new evidence into the record. The Respondent confirmed that it had no objection on 5 December 2019, following which, on 8 December 2019, the Tribunal instructed the Claimant to file new exhibits.

29. On 4 December 2019, the Claimants filed a Rejoinder on Preliminary Objections, together with Legal Authorities CL-0109 and CL-0110.

30. On 11 December 2019, the Claimants submitted additional Exhibits C-0213 through C-0215 in accordance with the Tribunal's instructions.

31. On 16 December 2019, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.

32. On 17 December 2019, the Claimants requested leave to submit additional evidence and indicated that the Respondent did not object to the request.

33. The Tribunal granted leave to the Claimants to submit two new additional exhibits on 19 December 2019, pursuant to which, on 20 December 2019, the Claimants submitted further Exhibits C-0216 and C-0217.

34. On 6 January 2020, the Tribunal issued Procedural Order No. 4 concerning the organization of the hearing.

35. On 7 January 2020, in response to a request from the Respondent, the Claimants submitted replacement versions of the Exhibits AP-083 and AP-084 to Mr. [redacted]'s Second Expert Report, containing additional translations.

36. A hearing on jurisdiction, merits and quantum was held in Paris, France from 26 January to 30 January 2020 (the "Hearing"). The following persons were present at the Hearing:

Tribunal:

Prof. Juan Fernández-Armesto	President
Mr. John Beechey, CBE	Arbitrator
Prof. Vaughan Lowe, QC	Arbitrator

Assistant to the Tribunal

Ms. Krystle Baptista Serna	Armesto & Asociados

ICSID Secretariat:

Ms. Lindsay Gastrell	Secretary of the Tribunal

For the Claimants:

[redacted]	Homburger AG
	Homburger AG
	Homburger AG
	Homburger AG
Dr. Jan Havlíček	Havlíček Law Offices
[redacted]	Havlíček Law Offices
	Homburger AG (Assistant)
	Homburger AG (Assistant)
Mr. Sebastian Pawlowski	Pawlowski AG and Projekt Sever s.r.o.
[redacted]	Interpreter

For the Respondent:

[redacted]	Dechert LLP
	Dechert LLP
	Dechert LLP
	Dechert LLP
	Dechert LLP
	Dechert LLP
	Dechert LLP
	Dechert LLP
	Dechert LLP
Mr. Ondřej Landa	Ministry of Finance, Czech Republic
Ms. Martina Matejová	Ministry of Finance, Czech Republic
Ms. Anna Bilanová	Ministry of Finance, Czech Republic
Mr. Jaroslav Kudrna	Ministry of Finance, Czech Republic
Mr. Martin Nováček	Ministry of Finance, Czech Republic

Court Reporter:

Ms. Diana Burden

Interpreters:

[redacted]	Independent
	Independent
	Independent

37. During the Hearing, the following persons were examined:

On behalf of the Claimants:

Mr. Sebastian Pawlowski	Fact Witness for Claimants
Mr. Milan Coller	Fact Witness for Claimants
[redacted]	Fact Witness for Claimants
Mr. Martin Langmajer	Fact Witness for Claimants
Mr. (Ing.) Borek Votava	Fact Witness for Claimants
[redacted]	Fact Witness for Claimants
[redacted]	Fact Witness for Claimants
Mr. Jaroslav Malčánek	Fact Witness for Claimants
[redacted]	Claimants' Legal Expert and [redacted]
[redacted]	Claimants' Quantum Expert and AlixPartners GmbH
[redacted]	AlixPartners GmbH

On behalf of the Respondent:

Ms. Věra Topičová	Fact Witness for Respondent
Mr. Tomáš Hudeček	Fact Witness for Respondent
Mr. Ondřej Boháč	Prague Institute of Planning and Development
Mr. Matěj Stropnický	Fact Witness for Respondent
[redacted]	Fact Witness for Respondent
[redacted]	Masaryk University, Faculty of Law [redacted]
[redacted]	KPMG
[redacted]	KPMG
[redacted]	KPMG

38. During the Hearing, on 26 January 2020, the Claimants submitted new Exhibit C-218 in accordance with the Tribunal's instructions.

39. On 5 February 2020, the Tribunal issued guidance to the Parties in connection with issues to be clarified in their post-hearing submissions.

40. On 18 February 2020, the Parties indicated their agreement on several outstanding issues and on post-Hearing deadlines.

41. On 20 February 2020, the Tribunal confirmed the agreed calendar for the post-Hearing submissions.

42. On 10 March 2020, the Claimants submitted an agreed translation of Exhibit H-3 and a replacement page for Exhibit C-135 in accordance with the Parties' agreement.

43. On 16 April 2020, the Secretary-General notified the Members of the Tribunal and the Parties that Ms. Anna Holloway, ICSID Legal Counsel, would be replacing Ms. Lindsay Gastrell as Secretary of the Tribunal.

44. On 24 April 2020, the Claimants requested an extension of the remaining deadlines in the post-Hearing procedural calendar, indicating that the Respondent had agreed to the proposed extensions.

45. On 27 May 2020, the Claimants requested leave to submit new evidence, specifically, a new exhibit containing a Facebook post of Ms. [redacted], one of the witnesses who had testified at the Hearing on behalf of the Respondent. The Claimants cited Ms. [redacted]'s alleged "untruthful testimony" as an exceptional circumstance to justify the admission of new evidence.

46. After invitation from the Tribunal, on 3 June 2020, the Respondent submitted its comments upon the Claimants' request. The Respondent maintained that the request was "belated and unwarranted." It argued that the Claimants' request should be rejected noting that the allegedly new evidence had been available to the Claimants since before this arbitration proceeding began. The introduction of the proposed new evidence would cause prejudice to the Respondent since Ms. [redacted] would not be able to respond to it.

47. On 16 June 2020, the Tribunal issued Procedural Order No. 5 allowing the Claimants to submit the requested new evidence and allowing the Respondent, in turn, to submit an affidavit from Ms. [redacted] addressing the new evidence. The Tribunal also granted the extensions on the remaining procedural submissions.

48. In accordance with the Tribunal's directions, on 18 June 2020, the Claimant filed an additional exhibit C-219. The Respondent submitted the Affidavit of Ms. [redacted] on 29 June 2020.

49. The Parties filed simultaneous post-hearing briefs on 15 July 2020, and their submissions on costs on 6 August 2020.

50. The proceeding was closed on 5 October 2021.

III. FACTS

51. Mr. Sebastian Pawlowski, a citizen of Switzerland, is the 100% shareholder and sole statutory representative of Pawlowski AG; he is also the executive director of Projekt Sever s.r.o, which is 100% owned by Pawlowski AG.[1]

52. Mr. Pawlowski was among the first foreigners to begin investing in the Czech Republic in the early 1990s.[2] Over time, Mr. Pawlowski became involved in a variety of entrepreneurial and non-profit activities in the Czech Republic, primarily through Pawlowski AG. These activities included his involvement and participation in numerous large scale property developments, his co-founding of a business with retail locations throughout the Czech Republic and his investment in several news and media companies in the country. Mr. Pawlowski has also been involved in the development of cultural centers in the country. He is the founder of the Franz Kafka Museum and the Alphonse Mucha Museum, both of which are located in Prague.[3]

The City of Prague

53. Following a peaceful transition of power, the country then known as Czechoslovakia held its first democratic elections in half a century in the summer of 1990. Not long thereafter, in 1993 Czechoslovakia peacefully split into the independent countries of the Czech Republic and the Slovak Republic. The Czech Republic's new government implemented a number of economic reforms, including the privatization of state-owned industry and the removal of price controls, as the country worked towards the goal of establishing a robust market economy.

54. Due to these changes, the City of Prague developed rapidly and became an important economic centre. Today it is one of the most economically developed areas within the European Union.[4] Prague's economic growth has attracted many people to move to the city, resulting in consistent high demand for residential real estate.[5] This demand is expected to continue to grow, as the city's strong economy and very low unemployment attract new residents, with estimates forecasting a 20% population increase by 2050.[6]

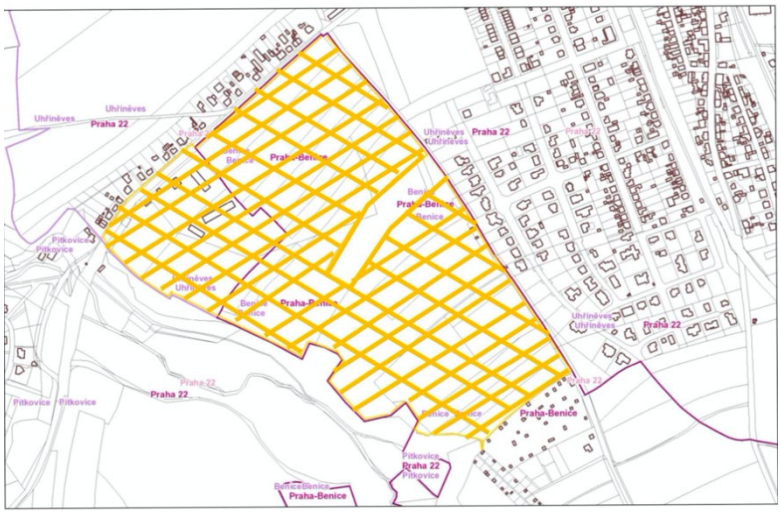
55. The City of Prague is the highest municipal authority. It is headed by three democratically elected bodies: the Mayor, the Prague City Council and the Prague City Assembly. Management, directed by a Chief Executive, is divided into various sections, including the Spatial Planning and Development Sections (the latter

[1] Pawlowski WS I, para. 1.
[2] Pawlowski WS I, para. 4.
[3] Pawlowski WS I, paras. 7-9.
[4] [redacted] ER I, para. 51, referring to AP-33 (European Commission, Region Prague).
[5] [redacted] ER I, chapter 6.4.
[6] [redacted] ER I, para. 52, referring to: AP-30; AP-35, p. 5.

subsequently renamed Prague Institute of Planning and Development), which is responsible for zoning issues.[7]

56. Within the City of Prague there are 57 Municipal Districts – or boroughs – each with its own legislative branch (the District Assembly) and executive branch (the District Council and District Mayor). Prague's Municipal Districts are congregated into 22 numbered administrative districts, which perform administrative functions for the Municipal Districts within their zone.[8] One such administrative district is "Prague-22 Uhříněves" – which performs administrative functions for itself and four neighbouring Municipal Districts, including the District of Benice[9].

57. The dispute in the present case relates to the change of the zoning regulation affecting a certain tract of land, with an area of approximately 270,000 m^2 [10] located in the Municipal District of Benice and bordering the District of Uhříněves (the "**Project Area**"). The Project Area is shown on this cadastral map:[11]



58. To properly understand the dispute, the Tribunal will first explain how zoning plan changes are procured and approved in the City of Prague [**1.**] and thereafter it will describe how the zoning plan of the Project Area changed over time [**2.**].

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[7] OECD, "The Governance of Land Use in the Czech Republic: The Case of Prague", OECD Publishing, Paris 2017, pp. 95-96, **R-6**.
[8] Coller WS I, para. 3.
[9] Coller WS I, para. 5.
[10] Judgment of the Prague Supreme Administrative Court, 6 Aos 2/2013, 26 February 2014, p.2, **C-95**; note, as pointed out by Claimants in C-II, fn. 121: the precise total land area is stated differently in various planning and official documents. See, e.g., Study for New Benice Residential Complex, KAAMA s.r.o. architects, June 2004, **C-137**, p. 11 (276,030 m^2); Study of the Municipal Districts of Prague Benice Skalka and Part of Uhříněves (submitted as an attachment to Application for zoning plan change by Prague-Uhříněves), dated 2 October 2003, **R-8**, p. 3 (270,000 m^2); TaK, First Architectural Concept, 12 October 2007, **C-18**, p. 3 (284,829 m^2); [redacted] WS, para. 8 (the project area spanned "almost 285,000 m^2 of land"); EIA Screening Decision of the Environmental Division of the Municipal Office of Prague, 17 July 2009, **C-53**, p. 1 ("approximately 290,300 m^2").
[11] Cadastral map illustrating plots of land owned by Projekt Sever, **C-32**.

1. THE PROCUREMENT OF ZONING PLANS

59. Land use planning in the Czech Republic is administered through a combination of state administration and territorial self-governance.[12] Generally, the designated use for land in the Czech Republic is established through two higher planning norms: the "Spatial Development Policy", which coordinates the land planning activities of the different regions, and the "Regional Development Principles", which establishes a strategic plan for the development of a specific territory.[13]

60. The procurement of a zoning plan change typically proceeds through several established steps, with each stage involving notification to and comment from various authorities, city Districts and the public. Proposed changes to Prague's land use plan are so frequent that they are grouped together into so-called "waves", which proceed through the process together.[14] Overall, the process for a zoning change of the land use plan is a long and democratic administrative process, which is divided into several consecutive steps and which requires decision-making from the Prague City Assembly (the highest political body, elected by the citizens of Prague) at all relevant stages.[15]

61. First Phase – Decision to Procure: the initial step is a formal act (a "**Decision to Procure**") in which the Prague City Council initiates a zoning plan change. This may be made at the request of any municipal District, acting on its own initiative, or on the initiative of a private individual. However, any initiative for a zoning plan change by a private individual still must be submitted via the municipal District in which the area is located.[16]

62. Second Phase – Approval of an "**Outline**": the second phase requires the Zoning Plan Division of the Prague Municipal Office (the "**Procurer**") to prepare a draft Outline, which is made available for review and comment by all interested Authorities and city Districts, as well as by the public; thereafter, the Prague City Assembly must approve the Outline.[17]

63. Third Phase – the "**Concept**": If the Outline includes a requirement for an environmental impact assessment, the elaboration and approval of a zoning change Concept is the next stage of the procurement process.[18] During the procurement of

[12] [redacted] ER I, paras. 33, 40, 44.
[13] [redacted] ER I, para. 56.
[14] [redacted] ER I, para. 42.
[15] Boháč WS, para. 24.
[16] Article 17(2), Act No. 50/1976 Coll. on spatial planning and building regulations, **VT-13**; [redacted] ER II, para. 166.
[17] Article 20(2) and (6), Act No. 50/1976 Coll. on spatial planning and building regulations, **VT-13**; Article 11(3) of the Decree of the Ministry of Regional Development No. 135/2001 Coll., on land use planning background materials and land use planning documentation, **VT-14**.
[18] Article 48(1) of the Building Act 2006 (version valid till 31 December 2012), **VT-12**.

the Concept, the environmental authority must approve the environmental impact assessment. The Concept is again subject to public discussion.[19]

64. Fourth Phase – the preparation of a "**Draft**": Based on public discussion and all the submitted statements, comments and objections, the Procurer prepares a Draft.[20] Then, the Draft zoning change is subject to public discussion and all interested authorities and the superior planning authority submit their statements.[21] After the public discussion, the Procurer assesses the results of the public discussion and, if necessary, weighs competing views, reviews the compliance of the draft with the law and superior land use planning documents and prepares the reasoning for the zoning change.[22]

65. Final Phase – Approval: The Prague City Assembly considers the Draft, including the reasoning, and approves it by majority. The approved zoning change is issued in the legal form of a measure of general nature.[23]

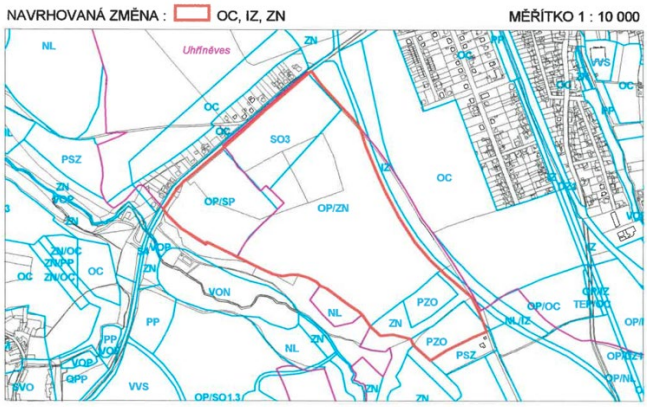
2. CHANGE IN THE ZONING PLAN OF THE PROJECT AREA

66. At the beginning of the XXI Century, the Project Area was zoned for "recreation", "growing vegetables", and "gardens and allotments."[24] As it is close to the metropolitan area, and there is a high demand for new housing projects, there was a keen interest in changing the permitted use of the land, so as to authorise residential use. There were two attempts to obtain such re-zoning.

2.1 FIRST REZONING ATTEMPT: Z 0592/04

67. Sometime in the early 2000s a first change in the zoning plan of the Project Area was formally initiated and discussed within the administration of the City of Prague; the request, which received the number Z 0592/04, proposed that the use of the land be reclassified as residential with housing for approximately 800 residents.[25] The map below, taken from file Z 0592/04, establishes that this first attempt affected the Project Area:[26]

[19] Article 48(2) of the Building Act 2006 (version valid till 31 December 2012), **VT-12**; Article 25(4)-(6) of the Generally Binding Ordinance No. 55/2000 Coll. of capital city of Prague, by which the Statute of the capital city of Prague is enacted ("the Prague Statute") (version valid till 31 October 2009), **VT-15**.
[20] Article 49(1) of the Building Act 2006 (version valid till 31 December 2012), **VT-12**.
[21] Article 50(2) of the Building Act 2006 (version valid till 31 December 2012), **VT-12**; Article 25 (7-9) of the Prague Statute (version valid till 31 October 2009), **VT-15**.
[22] Article 53(4-5) of the Building Act 2006 (version valid till 31 December 2012), **VT-12**.
[23] Article 54(2) of the Building Act 2006 (version valid till 31 December 2012), **VT-12**.
[24] Resolution of the Benice District Assembly, 13 March 2002, **C-19**; Resolution of the Uhříněves District Assembly, 10 July 2002, **C-20**; Application for zoning plan change by Prague-Uhříněves, 2 October 2003, **C-21**.
[25] Annex to Draft Zoning Change Z 0592/04, **R-37**, p. 1
[26] Annex to Draft Zoning Change Z 0592/04, **R-37**, p. 4.



68. The first attempt was unsuccessful: in August 2002, file Z 0592/04 received a negative opinion from the Environmental Division, because of its proximity to a natural park:

> "From the viewpoint of the interests protected by us, the change is inadmissible – the Botič – Milíčov natural park." [27]

69. On the basis of this negative opinion, the proposed change was rejected by the Prague City Assembly on 29 May 2003.[28]

2.2 SECOND REZONING ATTEMPT: Z 1294/06

70. The second attempt to re-zone the Project Area, instigated by the owners of 17 real estate units[29], was filed before the first zoning change had been formally rejected. On 13 March 2002, the Benice District Assembly approved this second proposal.[30] A few months thereafter, on 10 July 2002, the Uhříněves District Assembly ratified the request.[31]

71. A year later, on 2 October 2003, when Z 0592/04 had already been formally dismissed, the Deputy Mayor of Uhříněves, Mr. Martin Langmajer, transferred the proposed zoning amendment (Z 1294/06) to the Development Section of the Municipal Office of Prague[32]. A later submission, dated 26 April 2004, specified that what was being requested was a change in the use of the Project Area from

[27] Opinion of Environmental Division of the Municipal Office of the City of Prague on Draft Change Z 0592/04, 30 August 2002, **R-39**.
[28] Prague City Assembly Resolution 08/13, 29 May 2003, **R-38**.
[29] R-I, para. 36; Resolution of the Benice District Assembly, 13 March 2002, **C-19**; Resolution of the Uhříněves District Assembly, 10 July 2002, **C-20**.
[30] Resolution of the Benice District Assembly, 13 March 2002, **C-19**.
[31] Resolution of the Uhříněves District Assembly, 10 July 2002, **C-20**.
[32] Application for zoning plan change by Prague-Uhříněves, 2 October 2003, **C-21**.

agricultural use to "purely residential use", consisting of "low buildings with envisaged use rate code C."[33] The reason given for the proposed change was:

> "[t]he possible development of the territory on the border of Prague Benice and Prague Uhříněves boroughs, i.e. the creation of a new residential complex surrounded by nature with the possibility of connecting it to commercial, cultural and sporting facilities in Prague Uhříněves and simultaneously within reach of the Čestlice – Průhonice commercial zone."[34]

72. The Districts' proposals were included in "wave 6" of the various proposed changes being considered for Prague's land use plan. They were numbered as change "Z 1294/06", later renumbered as "Z 1294/07" (the "**Zoning Plan Change Z 1294/07**" or simply the "**Zoning Plan Change**").[35] This marked the official start of the long procurement and approval process for the proposed re-zoning.[36]

The Outline

73. As a first step, an Outline of the Zoning Plan Change was prepared by the Zoning Plan Division of the Municipal Office of the City of Prague. The Outline[37] was made available for the review and comment of all interested Authorities and City Districts, displayed for public viewing in the zoning plan processor's office and posted online.[38] Additionally, a public discussion of the Outline was scheduled for 28 February 2005.[39]

74. Position statements were submitted by the Environmental Division of the Municipal Office of the City of Prague on 17 March 2005, and by the Ministry of Regional Development on 12 October 2005.[40] The position statement of the Ministry of Regional Development confirmed the compliance of the Outline with all applicable regulations and procedural requirements, and the Environmental Division accepted the Outline, on condition that a detailed urban study (including an assessment of the impact on the Botič-Milíčov nature park) be undertaken and provided.[41]

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[33] Application for zoning plan change by Prague-Benice, 26 April 2004, **C-22**.

[34] Application for zoning plan change by Prague-Benice, 26 April 2004, **C-22**.

[35] [redacted] ER I, para. 42.

[36] Langmajer WS I, paras. 8-9.

[37] The Outline has not been submitted as evidence.

[38] Public Announcement of a Hearing on the Draft Outline of Changes, 14 February 2005, **C-33**.

[39] Public Announcement of a Hearing on the Draft Outline of Changes, 14 February 2005, **C-33**; Position statement of the Ministry of Regional Development (MMR), 12 October 2005, p. 4, **C-34**.

[40] Position statement of the Ministry of Regional Development (MMR), 12 October 2005, **C-34**; Position statement on Wave 06 Zoning Plan Changes by the Environmental Division of the Municipal Office of the City of Prague, 17 March 2005, **C-35**.

[41] Position statement on Wave 06 Zoning Plan Changes by the Environmental Division of the Municipal Office of the City of Prague, 17 March 2005, **C-35**.

75. On 23 February 2006, following the review of the Outline by the relevant City and state authorities and the public, the Prague City Assembly approved the Outline for the zoning plan change.[42]

The Concept

76. The second step of the process was to obtain approval for the Concept from the Development Section and from the Environmental Division. A Concept was elaborated and made available to the interested authorities, to the City Districts, and for public comment, and was subsequently approved by the Development Section on 24 April 2008.[43] An environmental impact assessment was also prepared and provided to the Environmental Division, which issued a positive position statement on 7 May 2008.[44]

77. Based on these approvals, the Concept was submitted to the City Assembly, which approved it by issuing an "affirmative opinion with conditions" in its resolution of 30 October 2008.[45]

78. It is to be noted that this was the current stage of the Zoning Plan Change when Claimants purchased the land constituting the Project Area – see *infra* section [**4.**].

The Draft

79. In the final stage of the procurement process, the Development Section of the Municipal Office of Prague prepared the Draft of the zoning plan change in the form of a zoning map, based on the Outline.[46] At this point, several of the proposed changes in "wave 6" were split out and reassigned into a "wave 07", which proceeded more quickly than the changes that remained in "wave 06." Procedure Z 1294/06 was moved to "wave 07" and was thereafter referred to as Z-1294/07.[47]

80. The Draft went through two rounds of deliberations and was made available to the relevant Authorities and to the public.[48] As part of the approval process, a joint hearing was held on 15 May 2009, followed by a public hearing.[49]

81. The interested authorities – including the Environmental Division and the Ministry of Regional Development – approved the Draft in the context of both hearings.[50]

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[42] Substantiation of Change Z 1294/07, **C-46**.
[43] Position statement by the Development Section, 24 April 2008, **C- 38**.
[44] Position statement by the Environmental Division, 7 May 2008, **C-37**.
[45] City Assembly Resolution no. 20/71, 30 October 2008, **C-39**.
[46] [redacted] ER I, para. 38.
[47] Position statement of the Ministry of Regional Development, 3 November 2009, p. 2, **C-40**. See also Letter from Mr. Lukaš Wagenknecht to the Mayor of Prague, Dr. Tomáš Hudeček, 23 July 2014, **C-41**, p. 4.
[48] BIT, **C-1**, para. 75.
[49] Position statement of the Ministry of Regional Development, 3 November 2009, p. 2, **C-40**; Substantiation of Change Z 1294/07, **C-46**.
[50] Position statement of the Ministry of Regional Development, 3 November 2009, **C-40**; Position statement of the Environmental Division, 5 January 2010, **C-43**.

Since the reactions of the Authorities had been favorable, and no comments had been received from the public, the Development Section submitted it directly to the City Assembly.[51]

2.3 APPROVAL OF ZONING PLAN CHANGE Z 1294/07

82. On 26 March 2010, Prague's City Assembly approved the Zoning Plan Change Z 1294/07 relating to the Project Area ("**Zoning Plan Change**") and implemented it through a "Measure of General Nature" of the same date.[52] The Zoning Plan Change entered into force on 16 April 2010 – eight years after the Benice District Assembly had first discussed and approved the proposal for the re-zoning of the Project Area. But the approval was still subject to judicial review, which could lead to the annulment of the Zoning Plan Change, at the request of any District or any other affected party.[53]

3. MR. PAWLOWSKI'S INTRODUCTION TO THE INVESTMENT OPPORTUNITY IN BENICE / UHŘÍNĚVES

83. In 2007 Mr. Pawlowski, who was actively looking for investment opportunities, was introduced to the Mayor of Uhříněves, Mr. Coller, and to his Deputy Mayor, Mr. Langmajer. In the course of their discussions, Mr. Coller and Mr. Langmajer informed Mr. Pawlowski of the ongoing efforts by the district of Uhříněves to find a developer to construct a residential project (the "**Benice Residential Complex**", or the "**Project**") in the Project Area.[54]

4. CLAIMANTS' PURCHASE OF LAND

84. Following these enquiries, Pawlowski AG acquired the shelf company Projekt Sever s.r.o. in February 2007 for the purpose of realising the project.[55] Projekt Sever then hired a real estate lawyer, [redacted], who began to work towards concluding purchase agreements for the land in the Project Area.[56] Projekt Sever eventually concluded all of the relevant land purchases between June 2007 and December 2008,[57] at a time when the re-zoning was still underway (it would only be approved two years later in 2010).

85. Projekt Sever acquired the Project Area from different owners. In particular, it purchased land from private landowners [**4.1**], the City of Prague [**4.2**] and the Czech Republic [**4.3** and **4.4**].

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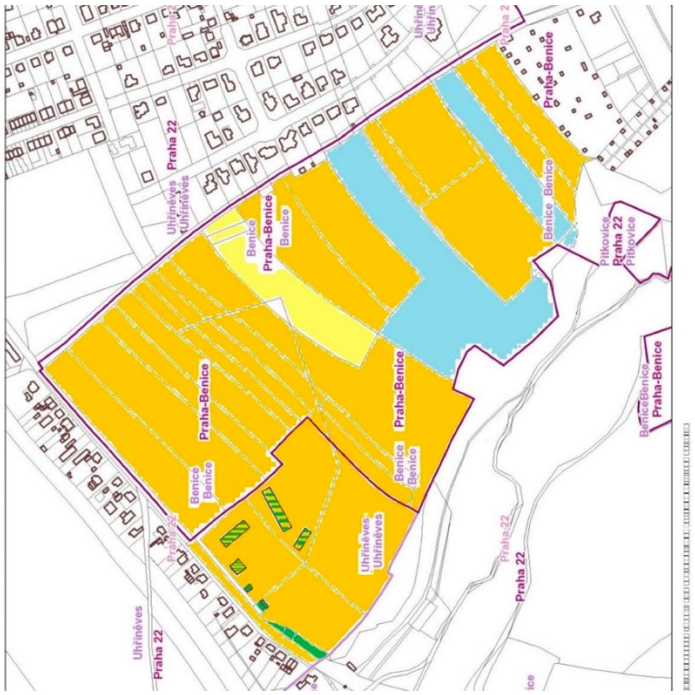
[51] C-I, para. 77; City Assembly Resolution no. 35/38, 26 March 2010, **C-44**.
[52] City Assembly Resolution no. 35/38, 26 March 2010, **C-44**; Measure of General Nature no. 9/2010, 26 March 2010, **C-45**.
[53] [redacted] ER I, para. 63, citing to Art. 101a — 101d of the Code of Administrative Justice.
[54] Pawlowski WS I, paras. 11-12; [redacted] WS, paras. 6, 9; Coller WS I, paras. 13-14.
[55] Pawlowski WS I, para. 21; Excerpt of Municipal Court Registry for Projekt Sever s.r.o., **C-5**; Long Form Extract of Municipal Court Registry for Projekt Sever s.r.o., **C-12**.
[56] [redacted] WS, paras. 5-22.
[57] See *infra*, sections III.4.2 - III.4.4.

86. The map below shows the land purchased from private owners (orange), the City of Prague (blue), and the Czech Republic's Ministry of Defense (green) and Czech Land Fund (yellow).[58]



4.1 PROJEKT SEVER'S PURCHASE OF LAND FROM PRIVATE LANDOWNERS

87. As can be seen in the map above, the majority of the Project Area involved land previously owned by private landowners (shaded in orange).

88. The re-zoning process had at this point been underway for five years, a Concept had been approved by the City Assembly and Projekt Sever thus paid the landowners a price, which as Mayor Coller acknowledged, was "… considerably higher than it would have been for agricultural land."[59] [redacted] Claimants' attorney for the land acquisitions, explains that:

> "[t]he prices agreed with the private land owners reflected an average price of CZK 1,250 per square meter, which was much higher than the price of farming land in the same area at that time due to the fact that the zoning process was in a very advanced stage." [60]

4.2 PROJEKT SEVER'S PURCHASE OF LAND FROM THE CITY OF PRAGUE

89. Claimants also sought to purchase certain plots of land located within the District of Benice and owned by the City of Prague.[61] Since June 2000, the Benice District

[58] Cadastral map illustrating ownership of plots of land prior to the acquisitions by Projekt Sever, **C-24**.
[59] Pawlowski WS I, paras. 23-24; Coller WS I, para. 15; [redacted] WS, paras. 11, 14.
[60] [redacted] WS, para 14.
[61] [redacted] WS, paras. 15-16.

Assembly had delegated the administration of these plots to the neighboring District of Uhříněves,[62] and Claimants therefore negotiated directly with officials from Uhříněves.

90. A tender was launched, and Projekt Sever was the only bidder. The Council and the Assembly of Uhříněves approved the sale of the land.[63] On 20 June 2007 Projekt Sever and Prague 22 District signed a contract (the "**Prague Purchase Contract**"), which described the asset as "arable land"; the buyer paid CZK 43,820,000 for the 43,784 m^2 of land owned by the City of Prague.[64]

4.3 PURCHASE OF MILITARY OWNED LAND FROM THE MINISTRY OF DEFENSE

91. In addition, Projekt Sever also purchased a small proportion of land (about 8% of the total) from the Czech Republic's Ministry of Defense, which owned several small plots of land in the Project Area as well as old buildings that had once served as housing for military personnel. They included structures such as workshops, fencing, and outdoor lighting.[65] By 1992, the military had mostly abandoned the complex and returned much of the land beneath the buildings to private individuals, but the buildings and related structures remained. As of 2007, the majority of the former military owned buildings and fixtures were in a state of disrepair.[66]

92. On 8 December 2008, Projekt Sever signed an agreement with the Ministry of Defense (the "**Defense Purchase Contract**"). It paid CZK 10,854,281 to the Ministry for 1,135 m^2 of land, and for the right to tear down the structures and to dispose of the rubble.[67] The Defense Purchase Contract describes the object of the sale as "structures" and "miscellaneous" and "unfertile" land.[68]

4.4 OPTION TO PURCHASE LAND OWNED BY THE CZECH LAND FUND

93. Uhříněves officials also offered to assist Projekt Sever with the purchase of a strip of land which was owned by the Czech Land Fund: Projekt Sever agreed to a plan whereby Uhříněves would apply for a transfer of land to the District and the District would in turn sell the land to Projekt Sever.[69]

94. Dealing with the Czech Land Fund land took longer than anticipated (due to a restitution lawsuit which had been started against the Czech Land Fund for the

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[62] Resolution by the Benice District Assembly, 28 June 2000, **C-25**.
[63] Uhříněves Assembly Resolution regarding approval of sale to Projekt Sever, 13 June 2007, **C-67** p. 1/3.
[64] Purchase Agreement between Prague 22 district Uhříněves and Projekt Sever, 20 June 2007, **C-26**.
[65] Pawlowski WS I, para. 26; Cadastral map illustrating ownership of plots of land prior to the acquisitions by Projekt Sever, **C-24**; Appraisal for the Department of Defense, 19 May 2008, **C-29**.
[66] [redacted] WS, para. 19; Appraisal for the Department of Defense, 19 May 2008, **C-29**.
[67] [redacted] WS, para. 21; Appraisal for the Department of Defense, 19 May 2008, **C-29**; Email communication between [redacted] and [redacted] 24 and 25 November 2008, **C-30**; Purchase Agreement between the Czech Republic – Czech Ministry of Defense and Projekt Sever, 8 December 2008, **C-31**.
[68] Purchase Agreement between the Czech Republic – Czech Ministry of Defense and Projekt Sever, 8 December 2008, **C-31**, p. 2/12
[69] [redacted] WS, para. 22; Pawlowski WS I, para. 20.

same plot of land). Ultimately, Projekt Sever entered into an agreement with the prospective private owner, with an option to purchase the property, if the restitution lawsuit was successful.[70]

95. The restitution suit ultimately was successful, but due to the eventual annulment of the Zoning Plan Change, the purchase of this plot of land was never completed.[71]

5. THE BENICE LAWSUIT

96. The Prague Purchase Contract had been entered into between Projekt Sever and District 22 of the City of Prague. The land sold was located in the District of Benice, but it was administered by the District of Uhříněves. The distinction is relevant, because the sales price paid by the buyer went to the District which administered the land, not to that in which it was located.[72]

97. The District of Benice was not satisfied with this solution. In October 2009, Benice filed a lawsuit with the District Court of Prague against Projekt Sever (not against the District of Uhříněves), contesting the validity of Projekt Sever's purchase of land under the Prague Purchase Contract (the "**Benice Lawsuit**"). Benice asserted that its District, and not the District of Uhříněves, should have represented the City of Prague during the sale of the landand should have received the proceeds.[73]

98. Once the Benice Lawsuit was filed, a lawyer representing the District of Benice informed Mr. Pawlowski's lawyer that Benice was willing to withdraw the lawsuit if the Claimants paid the District CZK 20 million.[74] Mr. Pawlowski refused to make the payment.[75]

6. PERMITS OF THE PROJECT

99. In the Czech Republic, once a zoning plan is approved or changed, a developer must obtain three permits for the construction and subsequent use of real estate.[76] These are a planning permit, a building permit and a final inspection approval:[77]

- As a first step, the developer must obtain a planning permit from the competent building authority, which ensures that the project conforms to the zoning plan and that the proposed construction complies with legal requirements, including water, electricity, fire protection and other public health requirements;[78]

[70] Pawlowski WS I, para. 27; Letter from [redacted] to Projekt Sever, 30 May 2018, **C-28.**
[71] Letter from [redacted] to Projekt Sever, May 30, 2018, **C-28.**
[72] Pawlowski WS I, para. 34; Topičová WS I, para. 18.
[73] Pawlowski WS I, paras. 33-34; Topičová WS I, para. 27.
[74] Pawlowski, WS I, para. 35; Topičová WS II, para. 31.
[75] Pawlowski WS I, para. 38.
[76] [redacted] ER I, para. 30.
[77] [redacted] ER I, para. 70.
[78] [redacted] ER I, para. 69.

- After obtaining the planning permit, a developer must secure a building permit, which describes the layout and technical details of the planned construction; once the developer has obtained the building permit, construction may start;[79]

- Last, the completed construction requires inspection approval, which confirms that the construction complies with the building permit; once the inspection approval is granted, the buildings may be used for their planned purpose.[80]

100. After purchasing the land in the summer of 2007,[81] Project Sever hired the architectural and engineering studio Tichý and Kolářová ("**TaK**").[82] An architectural agreement was concluded on 23 December 2007[83] and immediately thereafter, the planning activity began. It went on for almost four years. The formal application for a planning permit was finally filed in January 2012 (i.e., two years after the Zoning Plan Change Z 1294/07 had been adopted by the City of Prague Assembly).[84]

101. Projekt Sever and TaK had to take numerous steps in order to obtain preliminary approvals from the relevant authorities. For example, Projekt Sever was obliged to confirm that the residential complex could be connected to the municipal sewage system. This involved discussions with local authorities, and ultimately led to the solution that Projekt Sever would cooperate with another developer in the area, constructing a new wastewater pumping station and pressure line, at their own cost.[85]

102. Another extensive process was the preparation of the documentation related to the environmental impact assessment for the project. For this, TaK had to obtain statements from a number of authorities. TaK adapted the Project's design to incorporate the comments received from and the agreements reached with the authorities.[86] However, before the formal application for a planning permit could be filed, an application for an increase in density was required.

7. APPLICATION FOR AN INCREASE IN DENSITY

103. As mentioned previously, on 16 April 2010, Zoning Plan Change Z 1294/07 was approved by the Prague Assembly and the Project Area was zoned as residential land[87] within the category "OB-B", *i.e.,* residential use with a density coefficient

[79] [redacted] ER I, para. 30.
[80] [redacted] ER I, para. 79.
[81] C-I, para. 87.
[82] [redacted] WS, para. 7.
[83] Pawlowski WS I, para. 28; Offer for Architectural Work by TaK, 17 September 2007, **C-49**; TaK, First Architectural Concept, 12 October 2007, **C-18**; Agreement on Design Work and Engineering Activities between Projekt Sever and TaK, 23 December 2007, **C-50**.
[84] [redacted] WS, paras. 15, 17; Application for Planning Permit from Projekt Sever to Prague 22 Construction Division, 31 May 2012, **C-175**.
[85] Pawlowski WS I, para. 31.
[86] [redacted] WS, paras. 13-14.
[87] Measure of General Nature no. 9/2010, 26 March 2010, **C-45**.

of 0.3. This implied that Projekt Sever could build approximately 100,000 m^2 of apartments and houses on the site, subject to obtaining planning and building permits.[88]

Proposal for an increase in the density coefficient

104. Six months later, on 19 January 2011, Projekt Sever submitted a proposal to increase the density coefficient from 0.3 ("OB-B") to 0.5 ("OB-C")[89] – which was the density coefficient that had originally been sought in the applications for the zoning plan change submitted by Benice and Uhříněves, but which had been reduced to OB-B by the Prague City Assembly in its resolution approving Draft Change Z 1294/07.[90]

105. The process for the increase of the density coefficient was simpler than for the zoning plan change, since it qualified as an adjustment and not as a change.[91] Approvals were sought from the relevant authorities, including the Districts of Benice and Uhříněves, the Construction Department of Uhříněves, the Development Section of the Municipal Office of Prague, and the Environmental Division.[92]

106. The Construction Division of Prague 22 and the Deputy Mayor of Uhříněves, Mr. Martin Turnovský, both approved the density increase.[93]

107. Benice, however, opposed the density increase and on 7 March 2011 issued a negative opinion, noting that it stood by its original statement on the project from December 2008:

> "Prague-Benice Borough stands by its original statement on the investment project from December 2008. In the minutes of the consultation of the borough's comments on the zoning plan concept of 31.3.2009, it is stated that

[88] C-I, para. 80; Position statement by the Environmental Division of the Municipal Office of the City of Prague, 9 April 2008, pp. 1, 9-11, **C-36**.
[89] Guidelines for the Land Use Plan for the Capital City of Prague, 1 November 2002, **C-135**, p. 24.
[90] Pawlowski WS I, para. 29; Application for zoning plan change by Prague-Uhříněves, 2 October 2003, **C-21**; Application for zoning plan change by Prague-Benice, 26 April 2004, **C-22**; Approval of the increase of density coefficient by the Construction Department of Uhříněves, 24 January 2011, **C-56**; City Assembly Resolution 35/38, 26 March 2010, **C-44**, p. 3; Guidelines for the Land Use Plan for the Capital City of Prague, 1 November 2002, **C-135**, p. 23.
[91] C-I, para. 102.
[92] Approval of the increase of density coefficient by Uhříněves, 1 February 2011, **C-57**; Approval of the increase of density coefficient by Benice, 9 May 2011, **C-58**; Approval of the increase of density coefficient by the Development Section of the Municipal Office of Prague, 29 July 2011, **C-60**; Approval of the increase of density coefficient by the Environmental Division of the Municipal Office of the City of Prague, 27 May 2011, **C-59**.
[93] Approval of the increase of density coefficient by Uhříněves, 1 February 2011, **C-57**; Approval of the increase of density coefficient by the Development Section of the Municipal Office of Prague, 29 July 2011, **C-60**; Approval of the increase of density coefficient by the Environmental Division of the Municipal Office of the City of Prague, 27 May 2011, **C-59**.

> a request for low-rise construction up to 3 levels above ground will be accepted."[94]

108. Shortly thereafter, Benice's Mayor Topičová informed Claimants' lawyer that the District could accept a density increase, but she requested a payment from Projekt Sever as consideration for the District's smooth cooperation.[95]

109. No such payment was made.

Approval of the increase in the density coefficient

110. The District of Benice ultimately waived its opposition and gave its approval to the increase in the density coefficient. Mayor Topičová has justified the change of position, explaining that the District was threatened with losing access to Uhříněves' kindergarten. Mayor Topičová testified that Uhříněves' Deputy Mayor Turnovský met with her at Benice's municipal office and threatened that, if Benice withheld its consent to the change in the density coefficient, Uhříněves' kindergarten would turn away all the children from Benice.[96]

111. Mr. Turnovský rejected Ms. Topičová's presentation of the facts, maintaining that he reached a mutual agreement with Ms. Topičová so that both boroughs would support the change in density, in order to secure the greatest possible involvement of the investor, particularly for the creation of a new kindergarten.[97] Mr. Turnovský explained that the issue of a new kindergarten was important, precisely because Uhříněves would not have the capacity to admit the additional children of the proposed new Residential Complex Benice.[98] According to Mr. Turnovský, the discussion did not involve threats to turn away children from Benice from Uhříněves' kindergarten; rather, Uhříněves agreed to admit a specific maximum number of children, regardless of the further evolution of the Project.[99]

112. Be that as it may, it is a fact that the District of Benice gave its consent, as did the District of Uhříněves, and that on 16 August 2011, the Zoning Plan Division of the Municipal Office of Prague modified the zoning plan to reflect the increased density coefficient of 0.5 ("OB-C").[100]

8. APPLICATION FOR A PLANNING PERMIT

113. Six months later, on 3 January 2012, the Zoning Plan Department of the Municipal Office of Prague confirmed that TaK's design of the residential complex was in

[94] Negative statement of Benice on Zoning Plan Modification U969, 7 March 2011, **C-65**.
[95] C-I, paras. 119-122; C-II, para. 219; Pawlowski WS I, para. 42; E-Mail from Mayor Topičová to [redacted] 6 May 2011, **C-68**.
[96] Topičová WS I, para. 32.
[97] Turnovský WS, para. 22.
[98] Turnovský WS, paras. 22-23.
[99] Turnovský WS, paras. 24-25.
[100] Modification of the zoning plan with respect to the density coefficient by the Zoning Plan Division of the Municipal Office of the City of Prague, 16 August 2011, **C-61**.

line with the functional use permitted in the zoning plan.[101] Following this confirmation, TaK filed the planning permit application and supporting documentation for the Project with the building office of Uhříněves,[102] anticipating the construction of 796 apartments and houses on the Project Area.[103]

114. On 30 January 2012, Claimants' representative, Mr. Jaroslav Malčánek, sent a written request for consent from Benice regarding the Project's connections to gas lines and to the sewer system on City land administered by Benice.[104] When no response was received, Mr. Malčánek made an appointment with Mayor Topičová to discuss the matter in person. According to Claimants, there followed a number of face-to-face meetings between their representatives and Mayor Topičová, although she ultimately refused the request for consent and told Mr. Malčánek that Mr. Pawlowski should meet with her in person.[105]

115. Although in her witness statement Mayor Topičová denied having met with Mr. Malčánek,[106] during the Hearing she admitted that, in fact, she had met with Mr. Malčánek with respect to the connection to the gas lines.[107]

116. Eventually, the Prague Property Records, Management and Use Division sent a letter warning Benice that if it failed to issue the requested statement and failed to follow the standard procedure for the planning permit process, the City, as landowner, would respond to the request. Mayor Topičová also noted her irritation that Claimants continued to negotiate with Prague 22 Borough, rather than with Benice, even though the Project area was located on Benice's cadastral area.[108]

9. THE BENICE LAWSUIT IS DISMISSED

117. By early 2012, the development of the Project seemed to be proceeding as planned: the zoning change had been approved, the increase in density had been accepted and the planning permit application had been submitted by Claimants' architects to the relevant authorities.

118. At that time, the Benice Lawsuit, Benice's judicial challenge against the Prague Purchase Contract was still pending. On 8 March 2012, the District Court issued its decision: it dismissed the Benice Lawsuit, with the result that the purchase price paid by Projekt Sever would flow to Uhříněves and that Benice would not be entitled to receive any funding.[109] In its decision, the Court considered that Benice lacked standing to bring the case, because Municipal Districts cannot own property

[101] Zoning Plan Department Confirmation of Project Conformity with Zoning Plan, 3 January 2012, **C-62**.
[102] [redacted] WS, para. 17.
[103] Zoning Plan Department Confirmation of Project Conformity with Zoning Plan, 3 January 2012, **C-62**; C-I, paras. 10, 105.
[104] Letter from Jaroslav Malčánek to Benice, 30 January 2012, **C-70**; Malčánek WS, para. 7.
[105] Malčánek, para. 8; HT 469:14−471:15, 490:6-18, 493:23−494:6.
[106] Topičová WS II, para. 34.
[107] HT 717:5-17.
[108] Letter from Mayor Topičová to the Municipal Office of the City of Prague, 24 September 2012, **C-74**.
[109] District Court Judgment in file 28 C 349/2009-78, 8 March 2012, **C-64**.

and act only as managers of entrusted property.[110] Additionally, the Court rejected the argument that Benice was in charge of the administration of the plots of land and confirmed that Uhříněves was the rightful administrator.[111]

119. Benice's Mayor Topičová promptly decided to appeal the decision.[112] On 29 May 2012, Projekt Sever sent a letter to Mayor Topičová, objecting to the filing of the appeal and protesting once again that Projekt Sever could not be held hostage in the dispute between Benice and Uhříněves.[113]

120. The appeal was eventually dismissed,[114] and Projekt Sever's purchase of land owned by the City of Prague under the Prague Purchase Contract became unassailable.

10. BENICE'S ANNULMENT REQUEST

121. The extent of the Residential Complex planned by Projekt Sever was causing concern to neighbours who owned real estate in the proximity. In May 2012, two neighbours, Mr. [redacted] and Ms. [redacted],[115] contacted Mayor Topičová and held a meeting with her and with Benice's lawyer, Mr. [redacted], to voice their concern.[116] It was during this meeting that the possibility of a judicial request for the annulment of the Zoning Plan Change was first discussed (the "**Annulment Request**").[117]

122. After obtaining the authorization of the Benice District Assembly, on 28 June 2012 the Annulment Request was filed with the Court. In this action, the City of Prague (not Projekt Sever) was named as respondent, and the relief sought was the annulment of the Zoning Plan Change, based on substantive and procedural shortcomings.[118]

123. Projekt Sever was invited to take part in the proceedings through a notification sent by the Municipal Court on 25 July 2012. However, by the time Projekt Sever attempted to do so in March 2013, the deadline had already passed, and the Court denied Projekt Sever's request to participate.[119]

124. The City of Prague, as respondent in the annulment action, replied and opposed the arguments made by the plaintiffs.[120]

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[110] District Court Judgment in file 28 C 349/2009-78, 8 March 2012, **C-64,** pp. 12-13.
[111] District Court Judgment in file 28 C 349/2009-78, 8 March 2012, **C-64,** p. 14.
[112] [redacted] WS, para. 27.
[113] Letter by Projekt Sever to the Mayor of Benice and Benice Assembly members, 29 May 2012, **C-71**.
[114] [redacted] WS, para. 29.
[115] Topičová WS I, para. 38; Minutes of the Benice District Assembly, 21 June 2012, **C-75**; Resolution of the Benice District Assembly, 21 June 2012, **C-76**.
[116] HT 650; [redacted] WS, para. 12.
[117] HT 650-651, 659-661.
[118] Judgment of the Prague Supreme Administrative Court, 6 Aos 2/2013, 26 February 2014, **C-95**, p. 1.
[119] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94,** p. 29.
[120] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 10.

Decision of the Municipal Court

125. The City Court reviewed the case, and on 26 April 2013, it issued a long and fully reasoned decision (the "**Annulment Decision**"),[121] finding that Zoning Plan Change Z 1294/07 should be annulled, because:

- (i) it had been issued in contravention of the law; and

- (ii) it lacked proper reasoning.

Decision of the Prague Supreme Administrative Court

126. Initially, the Mayor of Prague, Mr. Tomáš Hudeček, stated publicly that the city "welcome[d] the Court's judgment" and that the City of Prague would not file a cassation complaint to the Prague Supreme Administrative Court.[122]

127. Contrary to Mr. Hudeček's remarks, the City of Prague did in fact file a cassation complaint.[123] At the time, Mayor Hudeček was quoted as saying that "lawyers had convinced [him] that if Prague had not appealed, it could have harmed its position in any arbitration."[124]

128. The cassation complaint was dismissed by the Supreme Administrative Court one year later, on 26 February 2014, thus confirming the annulment of the Zoning Plan Change.[125]

129. As a consequence of the cassation judgment, the Annulment Decision became *res judicata.*

Projekt Sever's unsuccessful appeals to the Constitutional Court

130. Projekt Sever filed two further actions before the Constitutional Court, in an effort to undo the annulment of the Zoning Plan Change.[126]

131. In the first case, Projekt Sever challenged the decision of the Municipal Court, denying Projekt Sever's standing, due to its failure to appear by the deadline established by the Court. On 4 December 2014 the Constitutional Court confirmed the Municipal Court's decision and dismissed the complaint.[127]

132. In the second, later, case, Projekt Sever challenged the merits of the Annulment Decision itself. This case was likewise dismissed by the Constitutional Court on 21

[121] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**.
[122] "Sebastian Pawloski not allowed to build in Benice", E15.cz News, 2 May 2013, **C-78**.
[123] Judgment of the Prague Supreme Administrative Court, 6 Aos 2/2013, 26 February 2014, **C-95**.
[124] "Hudeček, as constant as a weather vane", Nevideitelny Pes, 22 November 2013, **C-79**.
[125] Judgment of the Prague Supreme Administrative Court, 6 Aos 2/2013, 26 February 2014, **C-95**.
[126] Constitutional Court Resolution, 4 December 2014, **R-15**; Constitutional Court Resolution, 21 February 2017, **R-13**.
[127] Constitutional Court Resolution, 4 December 2014, **R-15**.

February 2017, with the Court finding that Projekt Sever's fundamental rights under the Constitution and international treaties binding upon the Czech Republic had not been breached.[128]

11. DEVELOPMENTS AFTER THE ANNULMENT DECISION

133. The Annulment Decision had a devastating effect on the Project: the use of the land reverted to the previous category (agriculture, forest, and recreation), making any residential development impossible. Projekt Sever's application for a planning permit became moot.

134. It is not in dispute that the partial or total annulment of a zoning plan is a frequent occurrence in the Czech Republic.[129] The Building Act has a specific provision, Section 55(3), establishing the principles which a Municipal authority must follow in such cases.[130] Claimants say that Section 55(3) required the Prague City Assembly to take up the question of re-procurement without delay (**11.1**) – an interpretation which was initially contested by the Municipality (**11.2**; **11.3** and **11.4**). When Claimants' interpretation was supported by the Ministry of Regional Development (**11.5**), the City changed tack and in 2015 submitted the issue of re-procurement to the City Assembly – which eventually decided not to start a new zoning change procedure, leaving the Project Area with its original status of agricultural and recreational land, on which residential development is impossible (**12**).

135. These events will be explained in more detail in the following sub-sections.

11.1 CLAIMANTS' LETTER TO MAYOR HUDEČEK

136. Two months after the Supreme Court decision, Mr. Pawlowski (in the name of Projekt Sever) sent a letter to Mayor Hudeček, explaining that the annulment of the Zoning Plan Change had caused massive damage to Projekt Sever (quantified at a minimum of CZK 2.5 billion) and requesting that the matter be included on the agenda of the next session of the City Assembly.[131]

137. The following month, Mayor Hudeček reacted. By letter dated 19 May 2014, he informed Projekt Sever that Section 55(3) did not apply to this case, and that the only possible course of action was the filing of a new application for a zoning plan change.[132]

[128] Constitutional Court Resolution, 21 February 2017, **R-13**.
[129] "Changes affected by a court decision", **R-60**.
[130] Section 55(3) of the Building Act (unofficial translation), **R-58**.
[131] Letter from Projekt Sever to Mayor of the City of Prague, 7 April 2014, **C-80**.
[132] Letter from Mayor of Prague to Projekt Sever, 19 May 2014, **C-82**.

11.2 DISCUSSION AT THE CITY ASSEMBLY MEETING OF 29 MAY 2014

138. At the meeting of the Prague City Assembly on 29 May 2014 (10 days after Mayor Hudeček's letter), Assembly member Dr. Blažek asked Mayor Hudeček about the delay in bringing the matter of the annulment of the Zoning Plan Change before the Assembly, noting the potential exposure to damages that the City of Prague was facing.[133] (Dr. Blažek was an important figure in the "ODS" party, a rival and opponent of Mayor Hudeček's "TOP09" party).[134]

139. Mayor Hudeček responded by asserting that:

> "[t]he error is not in the official procedure [of the zoning change]; the error is that the Prague City Assembly ever approved it."[135]

140. Mayor Hudeček suggested that there had been improper conduct in obtaining the Zoning Plan Change: the Zoning Plan Division initially had a negative opinion, and undue pressure had been exerted upon it to change its opinion. He also told the Assembly that files relating to the approval of the Zoning Plan Change had been sent to the Police.[136] Mayor Hudeček further insinuated that there had been criminality involved in the re-zoning process.[137]

11.3 DISCUSSION AT THE CITY ASSEMBLY MEETING OF 19 JUNE 2014

141. One month later, at the 19 June 2014 City Assembly meeting, Dr. Blažek once again brought up the annulment of the Zoning Plan Change, proposing that the City restart the re-procurement process, and noting the potential future risks that the City Assembly members could face if they did not act. Dr. Blažek proposed placing the matter on the agenda.[138]

142. In response to Dr. Blažek's concerns, Mayor Hudeček replied that:

> "If part of a zoning plan is annulled and there is no valid zoning plan in the given part of the city or territory, the assembly has to act without delay. That means that we have here the opinion of lawyers from the zoning plan division headed by Mrs. Engineer Cvetlerová. Based on this opinion I think that we really don't have to deal with this situation now and consequently I won't submit the prints either. I consequently will not second Doctor Blaežek's motion."[139] [Emphasis added].

143. Mayor Hudeček thus refused Dr. Blažek's motion to place the matter on the agenda for discussion.

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[133] City Assembly Meeting Transcript, 29 May 2014, **C-96**, pp. 1-2.
[134] Hudeček WS I, para. 16; [redacted] ER I, para. 78.
[135] City Assembly Meeting Transcript, 29 May 2014, **C-96**, p. 2.
[136] City Assembly Meeting Transcript, 29 May 2014, **C-96**, p. 2.
[137] City Assembly Meeting Transcript, 29 May 2014, **C-96**, p. 3.
[138] City Assembly Meeting Transcript, 19 June 2014, **C-97**, pp. 1-2; [redacted] ER I, para. 78.
[139] City Assembly Meeting Transcript, 19 June 2014, **C-97**, pp. 2-3.

11.4 DISCUSSION AT THE CITY ASSEMBLY MEETING OF 11 SEPTEMBER 2014

144. Three months later, at the 11 September 2014 meeting of the City Assembly, Dr. Blažek accused Mayor Hudeček of being driven by personal animosity against Mr. Pawlowski, stating:

> "Perhaps I even understand that you don't like Mr Pawlowski. Personal feelings are a fundamental driving force of your actions, but that's all right. You will happily play it down in six months' time […]"[140]

145. In reply, Mayor Hudeček noted that the land in question belonged to Mr. Pawlowski, and he alleged that Mr. Pawlowski was trying to force the Assembly to take up the issue of the re-zoning. Mayor Hudeček then once again urged the Assembly members not to give in to pressure from Mr. Pawlowski, suggesting that all of Prague was against the Zoning Plan Change and questioning Dr. Blažek's motivations for raising the issue.[141]

11.5 OPINION OF THE MINISTRY OF REGIONAL DEVELOPMENT

146. In the meantime, Mayor Coller of Uhříněves had approached the Ministry of Regional Development for a legal opinion regarding the annulment of the Zoning Plan Change. The Ministry reacted on 27 October 2014, with a letter addressed to Mayor Coller, in which it explained the Ministry's position.[142] The interpretation given by the Ministry to existing Czech legislation was that, upon annulment of a zoning plan change, the matter must be submitted to the relevant Municipal Assembly, which was obliged to assess the situation and to adopt a reasoned decision

- to re-procure the Zoning Plan Change (which would require amending the shortcomings established in the annulment judgement) or

- to confirm the annulment, in which case the previous zoning rules would apply.[143]

12. THE CITY ASSEMBLY TERMINATES THE RE-PROCUREMENT

147. Mayor Hudeček's mandate ended in November 2014. Thereafter, at some unspecified time, the City of Prague decided to change tack. The City abandoned the position that no new discussion in the Assembly was required and accepted the Ministry's interpretation of the Building Law, namely: if a zoning plan change is annulled by the Courts, the Municipal Assembly is bound to assess the annulment (*i.e.* to re-procure the file), and to adopt a reasoned decision either remedying the

[140] City Assembly Meeting Transcript, 11 September 2014, **C-98**, p. 2.
[141] City Assembly Meeting Transcript, 11 September 2014, **C-98**, pp. 2-3.
[142] Opinion of the Ministry of Regional Development re Section 55 of the Building Act, 27 October 2014, **C-99**.
[143] Opinion of the Ministry of Regional Development re Section 55 of the Building Act, 27 October 2014, **C-99**, pp. 3-4.

shortcomings found by the Courts or finding that the post-annulment situation is satisfactory.

148. By this time, Deputy Mayor Matěj Stropnický of the Green Party had assumed responsibility for spatial planning issues in Prague. As a first step, he put the annulment of the Zoning Plan Change on the agenda of the Committee on Spatial Development meeting to be held on 15 February 2015. Subsequently, the City Council discussed the issue at its 31 March 2015 meeting and instructed Deputy Mayor Stropnický to submit the matter to the Assembly, with the recommendation that the procurement of Change Z 1294/07 be terminated (*i.e.* that the procurement should not be reinitiated, to correct the shortcomings found by the Court).[144]

Decision of the Assembly

149. The annulment of Zoning Plan Change Z 1294/07 was placed on the agenda for the Prague City Assembly meeting of 14 April 2015.

150. At this meeting, Deputy Mayor Stropnický proposed the termination of the procurement of Change Z 1294/07.[145] Mayor Krnáčová then called for a vote from the City Assembly members.[146]

151. 51 members voted in favor of the motion to terminate, and none abstained or voted against it.[147]

152. Thus, on 14 April 2015 – 13 years after the initial idea for the re-zoning, five years after the Zoning Plan Change had been approved and 14 months after the Supreme Court's Annulment Decision – the Prague City Assembly terminated the procurement of the re-zoning of the Project Area. Thus, the land purchased by Projekt Sever to develop the Benice Residential Complex reverted to its original use as agricultural, forest and recreational land.

13. LEGAL REMEDIES

153. The Parties have debated the legal remedies that Claimants could theoretically have pursued in order to resolve the situation. As summarized below, Respondent says that Claimants did not make use of all of the potential remedies available to them by law, including their ability to re-initiate the procurement for the zoning change or their ability to challenge the City Assembly's resolution itself. Claimants considered both alternatives to be futile.

[144] City Assembly Meeting Transcript and Resolution no. 6/12, 14 April 2015, **C-100,** p. 9.
[145] City Assembly Meeting Transcript and Resolution no. 6/12, 14 April 2015, **C-100,** p. 1.
[146] City Assembly Meeting Transcript and Resolution no. 6/12, 14 April 2015, **C-100,** p. 5.
[147] City Assembly Meeting Transcript and Resolution no. 6/12, 14 April 2015, **C-100**, p. 1.

Claimants' ability to re-initiate the procurement of the zoning change

154. According to Respondent's expert, Projekt Sever, as an owner of the plots affected by the Zoning Plan Change to the Prague land use plan, had the right to submit a proposal under the 2006 Building Act to procure a change to the Prague land use plan either on its own or by petitioning the District Assembly. Respondent's expert acknowledges, however, that the Prague City Assembly was not bound to accept such proposals.[148]

155. Claimants' expert, on the other hand, explains that although it is true that, following the Prague City Assembly's vote to terminate the procurement, Claimants could, in theory, have applied for a new zoning change, but they were not obliged to do so.[149] Claimants' expert explains that since neither Benice, nor the Prague City Assembly supported the zoning plan change following its annulment, an application by the Claimants would have had no chance of success.[150] Rather, it was the Prague planning authorities, who were obliged to promote the re-procurement, preparing a better substantiation in order to remedy the deficits identified by the Courts.[151]

Claimants' ability to challenge the Assembly's resolution

156. With respect to the Claimants' ability to challenge the Assembly's Resolution of 14 April 2015, which terminated the re-procurement of the Zoning Plan Change, Respondent's expert explained that if Projekt Sever considered this resolution to be an illegal interference with its rights, it could hypothetically have brought an action before the administrative courts of the Czech Republic. However, Respondent's expert also noted that because (in his view) Projekt Sever is not vested with any public subjective right that could have been curtailed, a challenge of the resolution of the Prague Assembly would not have been likely to succeed.[152]

157. Claimants' expert agreed that there would have been little to no chance of success in challenging the City Assembly's resolution.[153] Furthermore, Claimants' expert noted that, based on the Administrative Procedure Act, the Claimants would only have been able to submit a request, which would not actually bind the Ministry of the Interior to take action or to set the resolution of the Prague City Assembly aside.[154]

148 [redacted] ER, para. 169.
149 [redacted] ER II, para. 165.
150 [redacted] ER II, para. 166.
151 [redacted] ER II, para. 165.
152 [redacted] ER, paras. 191-195.
153 [redacted] ER, para. 190.
154 [redacted] ER II, paras. 165-170.

IV. REQUESTS FOR RELIEF

Claimants' request for relief

158. In their Memorial, Claimants submitted the following request for relief:

> "For the reasons set out in this Memorial, Claimants respectfully request that the Arbitral Tribunal grant the following relief:
>
> 1. Declare that the Czech Republic's actions and omissions at issue, including those of its instrumentalities for which it is internationally responsible, violated Articles 3 and 4 of the Bilateral Investment Treaty between Switzerland and the Czech Republic by failing to grant the necessary permits in connection with such investments, by failing to treat Claimants' investments fairly and equitably and by impairing Claimants' investments through unreasonable and discriminatory measures;
>
> 2. Declare that the Czech Republic's actions and omissions at issue, including those of its instrumentalities for which it is internationally responsible, constitute an indirect expropriation without prompt, adequate and effective compensation in violation of Article 6 of the Bilateral Investment Treaty between Switzerland and the Czech Republic;
>
> 3. Award compensation to Claimants, including pre-award interest as of July 31, 2020, in the amount of 4,950,382,717 Czech Crowns (CZK);
>
> 4. Award Claimants' all costs associated with these proceedings, including the costs and expenses of ICSID and of the arbitrators as well as fees and disbursements for Claimants' attorneys and experts;
>
> 5. Award post-award interest on all sums awarded from the date of the award until Respondent pays the award and all accrued interest in full, at the repo rate set by the Czech National Bank for the first day of the calendar half-year in which the default occurs plus eight percentage points (8%); and
>
> 6. Any further relief that the Arbitral Tribunal deems appropriate in the circumstances."[155]

159. In their Reply on the Merits and Counter-Memorial on Preliminary Objections, Claimants slightly amended their Request for relief:

> "For the reasons set out in this Memorial, Claimants respectfully request that the Arbitral Tribunal grant the following relief:
>
> 1. Declare that the Czech Republic's actions and omissions at issue, including those of its instrumentalities for which it is internationally responsible, violated Articles 3 and 4 of the Bilateral Investment Treaty between Switzerland and the Czech Republic (i) by failing to grant and uphold the

[155] C-I, pp. 2-3.

necessary permits in connection with such investments, (ii) by failing to treat Claimants' investments fairly and equitably, and (iii) by impairing Claimants' investments through unreasonable and discriminatory measures;

2. Declare that the Czech Republic's actions and omissions at issue, including those of its instrumentalities for which it is internationally responsible, constitute an indirect expropriation without prompt, adequate and effective compensation in violation of Article 6 of the Bilateral Investment Treaty between Switzerland and the Czech Republic;

3. Award compensation to Claimants, including pre-award interest as of July 31, 2020, in the amount of 5,266,622,342 Czech Crowns (CZK);

4. Award Claimants' all costs associated with these proceedings, including the costs and expenses of ICSID and of the arbitrators as well as fees and disbursements for Claimants' attorneys and experts;

5. Award post-award interest on all sums awarded from the date of the award until Respondent pays the award and all accrued interest in full, at the repo rate set by the Czech National Bank for the first day of the calendar half-year in which the default occurs plus eight percentage points (8%); and

6. Any further relief that the Arbitral Tribunal deems appropriate in the circum- stances."[156]

160. In their Post-Hearing Brief, Claimants submitted a request identical to that formulated in their Reply on the Merits and Counter-Memorial on Preliminary Objections.[157]

Respondent's request for relief

161. In its Counter-Memorial, the Czech Republic submitted several jurisdictional objections and requested that the Tribunal:

"- DECLARE that it has no jurisdiction over Claimant 1;

- DECLARE that it has no jurisdiction over Claimants' claims;

- In the alternative, DECLARE that the Czech Republic has not breached the Treaty and DISMISS all of Claimants' claims in their entirety;

- In the further alternative, DECLARE that the damages Claimants claim are not due; and

[156] C-II, p. 2.
[157] C-III, pp. 2-3.

> - In any event, ORDER Claimants to fully reimburse the Czech Republic for the costs it has incurred in defending its interests in this arbitration (plus interest)."[158]

162. In its Rejoinder, the Czech Republic slightly amended its request for relief:

> "For the foregoing reasons, the Czech Republic respectfully requests that the Tribunal:
>
> - DECLARE that it has no jurisdiction over Claimants' claims;
>
> - DECLARE that it has no jurisdiction over Claimant 1;
>
> - In the alternative, DECLARE that the Czech Republic has not breached the Treaty and DISMISS all of Claimants' claims in their entirety;
>
> - In the further alternative, DECLARE that the damages Claimants claim are not due;
>
> - In the even further alternative, DECLARE that the damages Claimants claim should be limited to their sunk costs, quantified at CZK 28.9 million; and
>
> - In any event, ORDER Claimants to fully reimburse the Czech Republic for the costs it has incurred in defending its interests in this arbitration (plus interest)."[159]

163. In its Post-Hearing Brief, the Czech Republic submitted a request for relief identical to that formulated in its Rejoinder.[160]

[158] R-I, para. 476.
[159] R-II, para. 604.
[160] R-PHB, para. 286.

V. APPLICABLE LAW

164. The dispute arises under the Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments signed on October 5, 1990, which entered into force on August 7, 1991 (the BIT), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the ICSID Convention).

165. The BIT is silent on the applicable law. However, Article 42(1) of the ICSID Convention establishes the following:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

166. Thus, the Tribunal must apply the BIT, the law of Czech Republic and the rules of international law.

VI. JURISDICTIONAL OBJECTIONS

167. Respondent submits that Claimants' claims and investments fall outside the jurisdiction of the Centre and the competence of the Tribunal, for the following reasons:

- Pawlowski AG does not qualify as a protected investor under Article 1(1)(b) or under Article 1(1)(c) of the BIT [**Jurisdiction "*Ratione Personae*"**] [**VI.1**];

- Both Pawlowski AG and Projekt Sever have failed to establish that their alleged investments are protected under the BIT and the ICSID Convention [**Jurisdiction** "***Ratione Materiae***"] [**VI.2**].

168. Respondent additionally argues that Claimants' claims are inadmissible, because they are purely domestic claims and because Claimants have not clarified which acts or omissions, if proven, could constitute a breach of the BIT [**Domestic Law Objection**] [**VI.3**].

169. Claimants disagree. They insist that the Tribunal has jurisdiction for the following reasons:

- Both Pawlowski AG and Projekt Sever qualify as protected investors under Article 1(1) of the BIT;

- Pawlowski AG and Projekt Sever made investments that qualify for protection under the BIT; and

- Both Claimants have fulfilled all other obligations required under the BIT and the ICSID Convention.

170. Furthermore, Claimants reject the Respondent's objection to admissibility and aver that their claims are for violations of the BIT.

VI.1. JURISDICTION *RATIONE PERSONAE*

171. In the following sections, the Tribunal will summarize Respondent's *ratione personae* objection to jurisdiction [**1.**], followed by Claimants' position [**2.**], and finally make its decision [**3.**].

1. POSITION OF RESPONDENT

172. Respondent argues that the Tribunal must decline jurisdiction *ratione personae* over Claimant 1 (Pawlowski AG), because Pawlowski AG does not qualify as a protected investor under Article 1(1) of the BIT.[161] Respondent does not raise objections to the Tribunal's jurisdiction *ratione personae* over Claimant 2 (Projekt Sever).

173. According to Respondent, Pawlowski AG does not qualify as a protected investor under Article 1(1)(b) of the BIT, because it has neither real economic activities, nor its seat, in Switzerland [**1.1**],[162] and it is not protected under Article 1(1)(c), because an investor that fails to qualify under Article 1(1)(b) cannot requalify as a protected investor under Article 1(1)(c) [**1.2**].[163]

1.1 PAWLOWSKI AG IS NOT A PROTECTED INVESTOR UNDER ARTICLE 1(1)(B)

174. According to Respondent, Article 1(1)(b) of the BIT requires a protected investor to demonstrate that it has "real economic activities" in Switzerland [**A.**] and that it has its "seat" in Switzerland [**B.**].[164]

A. Pawlowski AG does not carry out "real economic activities" in Switzerland

175. Respondent argues that Pawlowski AG is an "investment holding company",[165] that does not carry out real economic activities, and that it is only Pawlowski AG's subsidiaries that carry out such activities.[166]

176. Respondent refers to a "seven-prong" test, set forth by the *Alps Finance* tribunal, to assess whether an investor meets the requirements of "real economic activities."[167] It is the Respondent's view that Pawlowski AG cannot satisfy this test.

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[161] R-PHB, para. 132; R-II, 3.2; R-I, 3.2.
[162] R-PHB, para. 133.
[163] R-PHB, para. 136.
[164] R-PHB, para. 133.
[165] R-PHB, para. 134, referring to Claimants' Opening Statement, **H-1**, p. 4.
[166] R-PHB, para. 134.
[167] R-II, para. 243, referring to *Alps Finance,* **RL-18**, paras. 219-223.

177. Respondent argues that Claimant 1 relies not on its own economic activities, but on the activities of an entirely different company, Dmura AG, for the alleged economic activities of Pawlowski AG.[168]

B. **Claimants have not established a Swiss "seat" for Pawlowski AG**

178. With respect to the company's "seat", Respondent argues that a company's "seat" must be interpreted as the effective place of management and administration of its business operations. Respondent notes that this was the definition adopted by the *Alps Finance* tribunal – which is the only other tribunal to have been constituted under the BIT and called upon to apply Article 1(1)(c).[169]

179. According to Respondent, Mr. Pawlowski was unable to identify a "given Swiss place" from which the company was managed and administered.[170] Respondent notes that Mr. Pawlowski identified the seat of another company, Dmura AG, which is located in Zuoz, Switzerland, as the place where he usually works. Additionally, Respondent notes that Pawlowski AG has its registered offices in the care of an investment fund, Quadris AG, which is where Pawlowski AG has its registered place of business as well as available office space.[171]

1.2 PAWLOWSKI AG IS NOT A PROTECTED INVESTOR UNDER ARTICLE 1(1)(C)

180. Respondent argues that Article 1(1)(c) is not intended to cover companies, which, while registered in Switzerland, fail to pass the test of Article 1(1)(b).[172] Thus, according to Respondent, because Pawlowski AG is not a protected investor under Article 1(1)(b) of the BIT, it cannot requalify as an investor under Article 1(1)(c).[173]

181. Respondent argues that Article 1(1)(c) cannot be read in isolation, because such a reading would render meaningless the restrictions of Article 1(1)(b) in contravention of the principle of *effet utile.*[174] Respondent notes the *Alps Finance* finding that Article 1(1)(b) of the BIT is a "special and uncommon clause", included specifically "to exclude from treaty protection 'mailbox' or 'paper' companies." According to Respondent, Pawlowski AG is such a company.[175]

182. Additionally, according to Respondent, Article 1(1)(c) of the BIT only covers two types of companies:

- those which are Czech-registered but ultimately Swiss-controlled, and

[168] R-II, para. 243.
[169] R-PHB, para. 135, referring to *Alps Finance,* **RL-18**, para. 217.
[170] R-PHB, para. 135.
[171] R-PHB, para. 135, referring to HT 194, 196.
[172] R-PHB, para. 136; HT 126.
[173] R-PHB, para. 136.
[174] R-II, para. 247.
[175] R-II, para. 249, referring to *Alps Finance,* **RL-18**, para. 224.

- those which are registered in any country outside of the two Contracting Parties, yet are ultimately Swiss-controlled (Respondent notes that the reverse would be true in the case of a claim brought against Switzerland).[176]

183. Since Pawlowski AG is neither Czech-registered but ultimately Swiss-controlled, nor registered in a third country but Swiss-controlled, it cannot be considered an investor under Article 1(1)(c).[177]

2. POSITION OF CLAIMANTS

184. Claimants reject Respondent's *ratione personae* jurisdiction objections. They assert that both Pawlowski AG and Projekt Sever qualify as protected investors under Article 1(1) of the BIT.[178]

185. It is common ground between the Parties that Projekt Sever is a protected investor under Article 1(1)(c) of the BIT.[179] With respect to Pawlowski AG, Claimants argue that it qualifies as a protected investor under Article 1(1)(b) [**2.1**] as well as under Article 1(1)(c) [**2.2**] of the BIT.[180]

2.1 PAWLOWSKI AG QUALIFIES AS A PROTECTED INVESTOR UNDER ARTICLE 1(1)(B)

186. Claimants explain that for Pawlowski AG to qualify as a protected investor under the provisions of Article 1(1)(b), it must show that it is established in Switzerland and demonstrate that it has [**A.**] real economic activities in Switzerland and [**B.**] its seat located in Switzerland. Claimants note that Pawlowski AG's establishment under the laws of Switzerland is undisputed.[181]

A. Pawlowski AG carries out "real economic activities" in Switzerland

187. Claimants assert that Pawlowski AG does carry out real economic activities in Switzerland, noting Pawlowski AG's ownership and administration of its participation in a number of businesses in Switzerland.

188. Claimants accuse Respondent of misrepresenting the findings of the *Alps Finance* case to the extent that they seek falsely to imply that the "seven-prong test" set forth in *Alps Finance* is a cumulative test rather than a series of discrete examples, and by ignoring the distinction between "brass plate" companies that carry out their operations in other countries and corporations with an effective seat of management

[176] R-II, para. 246.
[177] R-II, fn. 359.
[178] C-III, para. 36.
[179] C-III, para. 36.
[180] C-III, paras. 37-79.
[181] C-III, para. 40, referring to R-II, para. 238.

in the host country.[182] Thus, argue Claimants, fulfilling just one of the *Alps Finance* criteria would be sufficient to prove real economic activities in the host state.[183]

189. Claimants argue that the Tribunal should consider the nature and activities of Pawlowski AG in the round. Claimants explain that Pawlowski AG acts as an investment holding company, and thus does not have direct operational responsibilities and does not require large offices and staff – but that this does not mean that Pawlowski AG is not engaged in real economic activities in Switzerland.[184]

190. Claimants note that it is in the nature of holding companies to conduct business through their subsidiaries. Claimants also note that Respondent does not refute that Dmura AG is Pawlowski AG's subsidiary, or that Pawlowski AG is a substantial shareholder of Lyceum Alpinum Zuoz. According to Claimants, Pawlowski AG brings benefit to the Swiss economy through its daughter company and through its holding in Lyceum Alpinum Zuoz.[185]

191. Claimants explain that Pawlowski AG has more than a modest turnover, pays substantial fees for various legal and bookkeeping services, and has handled payments and contributions via its Swiss bank accounts, including the payment of remuneration to former board members.[186]

192. Claimants additionally note that accepting Respondent's interpretation would lead to the untenable result of excluding holding companies from the BIT's protection entirely, and that this result would contradict both the purpose of the BIT as well as jurisprudence and doctrine.[187]

B. <u>Pawlowski AG has its "seat" in Switzerland</u>

193. According to Claimants, the Swiss statutory seat of Pawlowski AG is sufficient to fulfill the BIT's requirement of a seat in Switzerland.[188] Claimants refer to case law for the proposition that a company's seat shall be interpreted by way of *renvoi* to municipal law.[189] Claimants assert that, pursuant to Article 56 of the Swiss Civil Code, the seat of a legal entity is located where its administration is carried out, unless its articles of association provide otherwise.[190]

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[182] C-III, para. 51.
[183] C-III, para. 58.
[184] C-III, para. 53.
[185] C-III, para. 56.
[186] C-III, para. 57, referring to C-II, para. 63, and *Alps Finance,* **RL-18**, paras. 219, 223.
[187] C-III, para. 59; C-II, para. 52, referring to *Tenaris*, **CL-91**, para. 199.
[188] C-III, para. 41; C-PHB, para 8, referring to *Mera*, **CL-85**, para 89; *Barcelona Traction*, **CL-87**, para. 38; *Wirtgen*, **RL-20**, para. 215.
[189] C-II, para. 38, referring to *Mera*, **CL-85**, para. 89.
[190] C-II, para. 39, referring to Swiss Civil Code, Article 56, **CL-88**.

194. Claimants explain that Pawlowski AG's articles of association name Zug, Switzerland, as its seat.[191] Claimants also explain that, according to the Swiss Private International Law Act, the seat of a company is the place specified in the articles of association or the partnership agreement.[192] Finally, Claimants note that the Zug Commercial Registry lists Zug as the seat of Pawlowski AG.[193]

195. Claimants argue that Respondent's interpretation of the BIT is wrong.

196. Claimants note that Respondent relies upon the *Wirtgen* tribunal in support of the proposition that the definitions contained in Article 1 are meant to be autonomous and treaty-specific, and hence, according to Respondent, "seat" should be read in accordance with international law rather than Swiss law.[194] However, according to Claimants, the *Wirtgen* position is not that a term such as "seat" should be interpreted in accordance with international law; rather, the *Wirtgen* tribunal explained that when it appears that the contracting parties did not wish to give a term a particular meaning which it may have in national law, then a treaty term may be interpreted independently from the national law of the parties. Claimants assert that in the present case there is no indication that the Contracting Parties did not wish tribunals to consider national law in interpreting the BITs terms.[195]

197. Claimants note that, as a practical matter, it does not make a difference whether the Tribunal accepts Claimants' or Respondent's arguments regarding the interpretation of the term "seat" in the BIT. According to Claimants, even if Respondent's interpretation of "seat" (meaning the effective place of management and administration of a company) were correct (*quod non*), Claimants have submitted evidence sufficient to demonstrate that Pawlowski AG is effectively managed and administered in Zug and Zuoz, Switzerland, notably that:[196]

- The general meetings of shareholders are held in Switzerland;
- Corporate and accounting records are maintained in Switzerland;
- All administrative services, including bookkeeping and accounting, have been provided in Switzerland;
- At all material times, an active bank account has been maintained, and is still maintained, in Switzerland;
- The office in Zug is the only office worldwide, with substantive administrative work being done in Zuoz; and

[191] C-II, para. 39, referring to Pawlowski AG Articles of Association, Article 1, **C-106**.
[192] C-II, para. 39, referring to Swiss Private International Law Act, Article 21, **CL-89**.
[193] C-II, para. 39, referring to Swiss Commercial Registry for Pawlowski AG, **C-3**.
[194] C-III, para. 44, referring to R-II, para. 239.
[195] C-III, para. 46.
[196] C-III, para. 42; C-II, paras. 50 *et seq.*

- The auditors have always been companies with their seat in Switzerland.

2.2 PAWLOWSKI AG ALSO QUALIFIES AS AN INVESTOR UNDER ARTICLE 1(1)(C)

198. Claimants argue that, regardless of the Tribunal's interpretation of Article 1(1)(b) of the BIT, Pawlowski AG separately and independently qualifies as an investor under the BIT under Article 1(1)(c), because Pawlowski AG is 100% owned and controlled by a Swiss national, Mr. Sebastian Pawlowski.[197]

199. Claimants explain that Article 1(1)(c) of the BIT applies to two types of potential investors:

- legal entities that are controlled by Swiss nationals, and
- legal entities that are controlled by Swiss entities that also have real economic activities in Switzerland.[198]

According to Claimants, the Tribunal has jurisdiction over Pawlowski AG in the present case by virtue of Mr. Pawlowski's citizenship as a Swiss national and his ultimate control of Pawlowski AG.[199]

200. Claimants reject Respondent's argument that Article 1(1)(c) only applies to Swiss-controlled companies registered either in the Czech Republic or in any country other than Switzerland or the Czech Republic. According to Claimants, this argument goes against the terms of the BIT, particularly since the text of Article 1(1)(c) states that it applies to "legal entities established under the law of **any** country."[200]

201. Claimants additionally reject Respondent's argument that granting jurisdiction under Article 1(1)(c) would be in contravention of the principle of *effet utile*. According to Claimants, the principle of *effet utile* aims to make the object and purpose of the BIT possible or effectuated through interpretation. Claimants explain that the object and purpose of the BIT is, *inter alia*, to "create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party." Thus, in order to qualify as an "investor of one Contracting Party", Pawlowski AG is required to show a sufficient link to Switzerland. According to Claimants, by including both Article 1(1)(b) and Article 1(1)(c) in the BIT, it follows that the Contracting Parties deemed these to be different links, satisfaction of either one of which is sufficient to secure qualification as a protected investor.[201]

202. Thus, according to Claimants, Pawlowski AG qualifies as an investor either if it

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[197] C-III, paras. 61, 79.
[198] C-II, para. 22.
[199] C-III, para. 64.
[200] C-III, para. 66, referring to BIT Article 1(1)(c) [emphasis added by Claimants].
[201] C-III, para. 70.

- has its seat, together with real economic activities in Switzerland (under Article 1(1)(b))

- or alternatively, if, in conformity with Article 1(1)(c), it is controlled by a Swiss national (under Article 1(2)(c)).

Claimants' position is that Pawlowski AG has demonstrated sufficient links to Switzerland to satisfy the conditions to qualify as an investor under both possible avenues.[202]

3. DECISION OF THE ARBITRAL TRIBUNAL

203. According to Respondent, Pawlowski AG does not fulfil the requirements under Article 1(1) of the BIT and therefore does not qualify as a protected investor under the BIT. Specifically, Respondent asserts that:

- Pawlowski AG does not qualify under Article 1(1)(b), because it has not established that it has real economic activities and its "seat" in Switzerland; and

- Pawlowski AG cannot requalify under Article 1(1)(c), because this clause is not intended to apply to investors who otherwise fail to meet the requirements under Article 1(1)(b).

204. According to Claimants, Pawlowski AG qualifies as a protected investor under Article 1(1)(b) and, separately, under Article 1(1)(c) of the BIT.[203]

205. The Tribunal notes that there is no dispute between the Parties with respect to the Tribunal's jurisdiction over Projekt Sever. For the sake of completeness, the Tribunal will quickly go over the facts pertinent to its jurisdiction *ratione personae* over Projekt Sever.

206. Claimants have shown that:

- Projekt Sever is a company established in 2007 under the laws of the Czech Republic, registered with the Municipal Court in Prague under Company ID No. 278 61 503[204];

- 100% of the shares of Projekt Sever have been held by Pawlowski AG at all times relevant to this dispute[205]; and

[202] C-III, para. 71.
[203] C-III, paras. 37-79.
[204] Excerpt of Municipal Court Registry for Projekt Sever s.r.o. (printed on 9 June 2016), **C-5**.
[205] Excerpt of Municipal Court Registry for Projekt Sever s.r.o. (printed on 9 June 2016), **C-5**.

- Pawlowski AG is a Swiss established company[206] fully owned and controlled by Mr. Pawlowski – himself a Swiss Citizen.[207]

207. Article 1(1)(c) of the BIT provides protection to investors, who are defined as:

> "legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party."

208. Projekt Sever is a legal entity established under the law of the Czech Republic. Projekt Sever also fulfills the additional requirements for protection under Article 1(1)(c): it is a legal entity which is (i) controlled directly by the Swiss company Pawlowski AG through its 100% share ownership, and (ii) controlled indirectly by Mr. Pawlowski, who is a national of Switzerland.

209. Thus, the Tribunal determines that it has jurisdiction *ratione personae* over Projekt Sever.

210. The Tribunal will now turn to Respondent's objection to the Tribunal's jurisdiction *ratione personae* over Pawlowski AG. The Tribunal will begin by establishing the facts [**A.**] and will then explain why it dismisses Respondent's objection [**B.**].

A. **Proven facts**

211. As previously noted, Pawlowski AG is fully owned and controlled by Mr. Sebastian Pawlowski, who is a Swiss citizen.[208]

212. Pawlowski AG is a company which was incorporated under the laws of Switzerland on 20 September 1996.[209] Pawlowski AG's Articles of Association establish that its seat is in Zug and that:

> "The purpose of the company is to acquire and manage all types of investments in domestic and foreign companies.
>
> The company may acquire, hold and dispose of real estate and engage in all commercial, financial and other activities related to the purpose of the company."[210]

213. Pawlowski AG's activities are consistent with the above. It acts primarily as a holding company, which, through its subsidiaries, owns and controls investments in Switzerland and abroad, *inter alia*:

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[206] Pawlowski AG Articles of Association, **C-106**.
[207] Passport of Mr. Sebastian Pawlowski, **C-14**.
[208] Pawlowski AG Articles of Association, **C-106**; Passport of Mr. Sebastian Pawlowski, **C-14**.
[209] Excerpt of Swiss Commercial Registry for Pawlowski AG (printed on 17 March 2017), **C-3**.
[210] Pawlowski AG Articles of Association, Article 2, **C-106**.

- Besides its ownership and control of Projekt Sever, Pawlowski AG also owns 100% of the shares of the Swiss company Dmura AG;[211]

- Dmura AG, in turn, runs the Swiss hotels Parkhütte Varusch,[212] Hotel Engiadina,[213] and Hotel Crusch Alva,[214] all of which employ significant numbers of personnel;[215]

- Dmura AG is also active in the real estate business in Switzerland, having engaged in the construction and sale of apartment buildings, especially in the Canton of Graubünden;[216]

- Pawlowski AG has also directly invested in the Lyceum Alpinum Zuoz, a well-known Swiss international boarding school, where Mr. Pawlowski serves as the chairman of the board of directors.[217]

B. **Discussion**

214. Article 1(1) of the BIT explains that:

> "(1) In the case of either Contracting Party, the term "investor" refers to:
>
> (a) natural persons who are nationals of that Contracting Party in accordance with its laws;
>
> (b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of the same Contracting Party;
>
> (c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal

[211] Share Purchase Agreement (Dmura AG), 31 December 2008, **C-110**, Letter from Credit Suisse AG for Pawlowski AG re Securities Receipt Notification, 3 March 2009, **C-111**; Excerpt of Commercial Register (Dmura AG), 27 June 2019, **C-112**.
[212] Extract from Website of Parkhütte Varusch, 22 June 2019, **C-113**.
[213] Extract from Website of Hotel Engiadina, 22 June 2019, **C-114**; Department of Food Safety Inspection Report (Hotel Engiadina), 22 September 2016, **C-115**.
[214] Extract from Website of Hotel Crusch Alva, 3 July 2019, **C-116**; Department of Food Safety Inspection Report (Hotel Crush Alva), 15 April 2019, **C-117**.
[215] Letter from AXA Winterthur to Hotel Engiadina regarding Final Premium statement UVG (AXA), 9 April 2008, **C-119**, (Insurance for Employees); Letter from Hotela Foundation to Dmura AG regarding Final Account Year 2009, 6 May 2010, **C-120**; Letter from Municipal Tax Office of Zouz to Dmura AG regarding Account of Withholding Tax, 14 December 2009, **C-121**.
[216] See *e.g.*, Contract of Sale regarding Condominium ownership, 29 October 2010, **C-122**; Letter from Municipality Zuoz to Dmura AG re Final Account, 15 August 2014, **C-123**.
[217] Letter from Lyceum Alpinum Zuoz AG to Pawlowski AG regarding Share Certificate of Lyceum Alpinum Zuoz, 2 February 2005, **C-124**; Excerpt of Commercial Register (Lyceum Alpinum), 22 June 2019, **C-125**.

> entities having their seat, together with real economic activities, in the territory of that Contracting Party." [Emphasis added]

215. Respondent argues that Pawlowski AG cannot qualify as an investor under Article 1(1)(c) of the BIT, because this provision is not intended to extend to companies registered in Switzerland which fail to pass the test of Article 1(1)(b).[218]

216. The Tribunal does not agree.

217. Under the rules of interpretation set forth in Article 31 of the VCLT:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[219]

218. The Tribunal does not see any language in the text of Article 1(1) of the BIT which suggests that a failure to qualify under one clause would prohibit qualification under the other. Thus, the Tribunal finds that Pawlowski AG may qualify as a protected investor under Article 1(1)(c) independently of the requirements of Article 1(1)(b).

Article 1(1)(c)

219. Two elements are required for Pawlowski AG to qualify as a protected investor under Article 1(1)(c) of the BIT:

- First, it must be a legal entity established under the law of Switzerland; and
- Second, it must be controlled, directly or indirectly, by: (i) nationals of Switzerland, or (ii) legal entities which are seated and have real economic activities in Switzerland.

220. It has already been shown that Pawlowski AG was incorporated under the laws of Switzerland in 1996,[220] satisfying the first requirement.

221. It has also been established that Pawlowski AG is fully owned and controlled by a Swiss national, Mr. Sebastian Pawlowski,[221] meeting the second requirement.

222. Consequently, the Tribunal determines that it has jurisdiction *ratione personae* with respect to Pawlowski AG under Article 1(1)(c) of the BIT.

* * *

[218] R-PHB, para. 136; HT 126.
[219] Vienna Convention on the Law of Treaties, 23 May1969, **CL-72**.
[220] Excerpt of Swiss Commercial Registry for Pawlowski AG (printed on 17 March 2017), **C-3**.
[221] Pawlowski AG Share Register, **C-13**; Passport of Mr. Sebastian Pawlowski, **C-14**.

223. Having determined that Pawlowski AG qualifies as a protected investor under Article 1(1)(c), the Tribunal finds that Respondent's objections with respect to Article 1(1)(b) are moot.

VI.2. JURISDICTION *RATIONE MATERIAE*

224. Claimants submit that they made investments under the BIT and the ICSID Convention by undertaking several interrelated economic activities which lead to the implementation of a project. In particular:

- Pawlowski AG invested in all the shares and capital of Projekt Sever;
- Projekt Sever, in turn, invested in 276,134 m^2 of real property in Prague in order to construct the Project; and
- Projekt Sever also invested capital in the planning process of the Project.

225. In the following sections the Tribunal will summarize Respondent's *ratione materiae* objection to jurisdiction [**1.**], followed by Claimants' position [**2.**], and finally make its decision [**3.**].

1. POSITION OF RESPONDENT

226. Respondent argues that, under the BIT and under Article 25(1) of the ICSID Convention, a protected investment involves contribution, duration and risk. According to Respondent, the Claimants' submissions focused solely on the criterion of contribution and they have thus failed to prove that their investments meet all of these criteria.[222] Respondent presents *ratione materiae* objections to the Tribunal's jurisdiction over the investments of both Pawlowski AG (Claimant 1) [**1.1**] and Projekt Sever (Claimant 2) [**1.2**].

1.1 PAWLOWSKI AG'S SHAREHOLDING IS NOT A PROTECTED INVESTMENT

227. Respondent notes that Pawlowski AG's investment consists solely of its shares in, and payment for those shares to, Projekt Sever. Respondent argues that this shareholding is insufficient to qualify as a protected investment, because Claimants paid only an admittedly nominal price of CZK 200,000 for the shares in Projekt Sever.[223] According to Respondent, the payment of a purely nominal price for shares puts in doubt the existence of a contribution and, in turn, that of a protected investment.[224] Furthermore, Respondent argues that Pawlowski AG cannot possibly hold a protected investment, since it only holds shares in Projekt Sever, which itself does not hold a protected investment.[225]

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[222] R-PHB, paras. 130-131.
[223] R-II, para. 227, referring to C-II, para. 75.
[224] R-II, para. 227, referring to *Phoenix Action*, **RL-5,** para. 119; *Caratube*, **RL-31**, para. 435; *Saba Fakes*, **RL-32**, para. 139.
[225] R-II, para. 228.

1.2 PROJEKT SEVER'S ALLEGED INVESTMENTS ARE NOT PROTECTED

228. According to Respondent, none of the three components of Projekt Sever's alleged investment is protected, namely:

- the purchase of land;
- the capital spent on the planning process; or
- the expectation that the Project would finally be implemented.[226]

229. Respondent argues that Projekt Sever's purchase of land is a one-off commercial transaction, devoid of any risk and duration, which thus does not fulfil the inherent criteria of a protected investment.[227] Respondent also argues that, because the Claimants' project never materialised, any pre-investment expenditures or capital spent on the planning process cannot form a part of a protected investment.[228] Finally, Respondent argues that Claimants have failed to prove that Projekt Sever's investment can consist of the expectation that the Project would finally be implemented – an impossible task, since such expectation does not fulfil the criteria of contribution, duration and risk.[229]

2. POSITION OF CLAIMANTS

230. Claimants dismiss Respondent's objections with respect to both Pawlowski AG and Projekt Sever. As a preliminary matter, Claimants note that Respondent does not contest that Pawlowski AG's investments (its purchase of the shares in Projekt Sever, its capital contributions to Projekt Sever, Projekt Sever's purchase of the real estate at issue, and the costs incurred by Projekt Sever in connection with the planning and development of Residential Complex Benice) would not have come about but for Claimants' decision to develop and dedicate Projekt Sever's resources to the Project. According to Claimants, this by itself is sufficient to establish the existence of a protected investment.[230]

231. Claimants have presented submissions arguing that both Pawlowski AG [**2.1**] and Projekt Sever [**2.2**] made protected investments as defined in Article 25(1) of the ICSID Convention and in the BIT.[231]

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[226] R-II, para. 229.
[227] R-II, para. 230, referring to *Joy Mining*, **RL-21**, paras. 54-58; *Romak*, **RL-17**, paras. 178-188; *Global Trading*, **RL-9**, paras. 55-57.
[228] R-II, para. 233.
[229] R-I, para. 184; R-II, para. 233.
[230] C-III, para. 10.
[231] C-PHB, para. 9.

2.1 PAWLOWSKI AG MADE PROTECTED INVESTMENTS

232. Claimants note that it is not in dispute that Pawlowski AG purchased 100% of the shares of Projekt Sever for CZK 200,000.[232] According to Claimants, this alone qualifies as an investment by Pawlowski AG under Article 1(2)(b) of the BIT, regardless of the amount paid for such shares.[233] Claimants note that Pawlowski AG also made additional capital contributions and loans to Projekt Sever totaling CZK 649,027,000 as of 31 December 2018.[234]

233. Claimants assert that Pawlowski AG acquired Projekt Sever as a shelf company and made loans and capital contributions to it for the sole purpose of constructing the Project in Prague.[235] Additionally, Claimants argue that the elements of duration and risk faced by Projekt Sever also apply to Pawlowski AG's investments in Projekt Sever.[236]

2.2 PROJEKT SEVER MADE PROTECTED INVESTMENTS

234. Claimants assert that Projekt Sever's purchases of real estate for the development of a residential housing project (at prices for residential land) were investments in a long-term economic activity and not one-off commercial transactions.[237] According to Claimants, it would require years of effort and substantial costs after the land purchases to realise a return on these investments, such that Projekt Sever was subject to the inherent risks of such development projects.[238]

235. Additionally, Claimants argue that the costs incurred by Projekt Sever in the course of designing and planning the project, including costs incurred pursuant to binding contracts, also qualify as investments.[239] According to Claimants, such costs are not "pre-investment expenditures", as such a term could only be applied to the costs incurred in connection with Claimants' due diligence efforts prior to deciding to purchase land for the Project. Thus, in the Claimants view, all costs incurred from the moment of the first land purchase were investments in a development project that commenced with that land purchase.[240]

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[232] Excerpt of Municipal Court Registry for Projekt Sever s.r.o. (printed on 9 June 2016), **C-5**; Contract concerning the Assignment of a Company share (Projekt Sever), 21 February 2007, **C-131**.
[233] C-PHB, para. 12, referring to *Lemire*, **RL-83**, para. 89; *Invesmart,* **RL-2**, para. 189; *Hassan Awdi*, **CL-100**, para. 201; *Romak*, **RL-17**, para. 205; *Genin*, **CL-105**, para. 324; *Vannessa Ventures,* **CL-106**, para. 126.
[234] C-PHB, para. 12.
[235] C-PHB, para. 14.
[236] C-PHB, para. 14.
[237] C-PHB, paras. 10, 37-40; C-III, paras. 25-26.
[238] C-PHB, para. 10.
[239] C-PHB, para. 11, referring to Agreement on Design Work and Engineering Activities between Projekt Sever and TaK, 23 December 2007, **C-50**; Letter from PVS confirming construction of wastewater pumping station, 7 May 2014, **C-208**; Various Invoices to Projekt Sever from 2007 to 2017, **C-132**.
[240] C-PHB, para. 11.

3. DECISION OF THE ARBITRAL TRIBUNAL

236. The Tribunal must determine whether the investments made by Claimants qualify as "protected investments" under the BIT and Article 25(1) of the ICSID Convention.

237. Claimants rely on the following investments:

- Pawlowski AG's invested CZK 200,000.00 in purchasing its 100% shareholding in Projekt Sever;
- Pawlowski AG made capital contributions and loans to Projekt Sever for the purpose of purchasing the land for development of the Project;
- Projekt Sever invested CZK 343,693,031.00 in its purchase of 276,134 m^2 of real estate in Prague;[241] and
- Projekt Sever invested additional capital in the planning and designing of the Project.

A. Proven facts

238. Claimants have provided evidence that Pawlowski AG paid CZK 200,000 for its 100% share ownership of Projekt Sever.

239. The contract concerning the assignment of Projekt Sever's shares declares that:[242]

> "The seller paid his contribution of CZK 200,000,- to the company's nominal capital in full. His share, which is determined by the ratio of his contribution to the company's nominal capital, is 100%.
>
> […]
>
> The seller assigns its entire share in the above-mentioned Company, corresponding to a contribution of CZK 200,000,-, to the Buyer [identified as Pawlowski AG].
>
> […]
>
> The seller assigns its company share at a price of CZK 200,000,- (in words: two hundred thousand Czech crowns)."

240. The extract from the Commercial Register of the Municipal Court in Prague lists Pawlowski AG as the sole shareholder of Projekt Sever, showing a 100% paid

[241] C-I, para. 237.
[242] Contract concerning the Assignment of a Company share (Projekt Sever), 21 February 2007, **C-131**.

contribution of CZK 200,000 equating to a 100% business share in Projekt Sever.[243]

241. Documentary evidence submitted by Claimants shows that Pawlowski AG provided significant funding to Projekt Sever, including (as of 31 December 2018):

- Equity contributions totaling CZK 414,707,000;[244]
- Loans totaling CZK 649,027,000.[245]

242. With respect to Projekt Sever's alleged investments, it is undisputed that Projekt Sever purchased the land for the Project from private landowners, the City of Prague and the Czech Republic's Ministry of Defense.[246]

B. **Discussion**

243. Article 1(2) of BIT provides the following definition of "investments":

> "The term "investments" shall include every kind of assets and particularly:
>
> (a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
>
> (b) shares, parts or any other kinds of participation in companies;
>
> (c) claims and rights to any performance having an economic value;
>
> (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;
>
> (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law." [Emphasis added]

[243] Excerpt of Municipal Court Registry for Projekt Sever, **C-5**.
[244] Financial statements of Projekt Sever for the Year 2018, Balance Sheets, Payables to Partners, **AP-117**.
[245] Financial statements of Projekt Sever for the Year 2018, Balance Sheets, Payables to Partners, **AP-117**; Loan Contract between Pawlowski AG and Projekt Sever, 16 February 2007, **C-127**; Addendum 1 to Loan Contract between Pawlowski AG and Projekt Sever, 29 December 2013, **C-128**; Financial statements of Projekt Sever for the Years 2007 to 2017, Balance Sheets, Liabilities to Partners and Participants in an Association - Payables to Partners, **AP-74**; Financial statements of Projekt Sever for the Year 2018, Balance Sheets, Payables to Partners, **AP-117**; Bank statements of Projekt Sever from 2008 to 2016, **C-133** (Contributions); Capital Contribution from Pawlowski AG to Projekt Sever (Bank statement), 26 June 2007, **C-134**.
[246] Coller WS I, para. 16; [redacted] WS, paras. 11-14; Purchase Contract with Ministry of Defense, 8 December 2008, **C-31**; Purchase Agreement between Prague 22 district Uhříněves and Projekt Sever, 20 June 2007, **C-26**.

244. Article 25(1) of the ICSID Convention provides:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting state (or any constituent subdivision or agency of a Contracting state designated to the Centre by that state) and a national of another Contracting state, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

245. The Tribunal will assess the investments of each Claimant in turn.

Pawlowski AG's investments

246. Article 1(2) of the BIT makes clear that "investments" includes "shares, parts or any other kinds of participation in companies."

247. It has already been established that Pawlowski AG paid the sum of CZK 200,000.00 for its 100% shareholding in Projekt Sever. There is therefore nothing to cause the Tribunal to doubt that Pawlowski AG's shareholding in Projekt Sever qualifies as a protected investment.

248. Pawlowski AG also indirectly invested in the Project through its equity contributions to Projekt Sever.

249. With respect to the question of whether loans and other equity contributions could be considered an investment, the tribunal in *Standard Chartered* noted that:

> "The Tribunal accepts that loans and financial instruments standing alone without any link to some economic venture intended to provide for the improvement of the State's development would not be considered an '*investment'*."[247]

250. However, the *Standard Chartered* tribunal also noted that it had no doubt that such loans, when made in the context of financing the construction and operation of a facility, clearly carried inherent investment risks, thus satisfying the requirement of "investment risk" under Article 25 of the ICSID Convention. As noted by the tribunal in *Standard Chartered,* this finding has been confirmed by numerous other tribunals.[248]

251. The Tribunal finds that the loans and contributions extended by Pawlowski AG to Projekt Sever were analogous to those contemplated by the *Standard Chartered*

[247] *Standard Chartered*, **CL-111**, para. 220.
[248] *Standard Chartered*, **CL-111**, para. 221 (itself referring to *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997; *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016).

tribunal, as they were made for the direct purpose of financing the purchase and development of the Project.

252. The Tribunal therefore finds that Pawlowski AG's loans and equity contributions, made to Projekt Sever to support the purchase of land and the development of the Project, also qualify as protected investments under the BIT and Article 25 of the ICSID Convention.

Projekt Sever's investments

253. Projekt Sever's alleged investments include its direct investments in the purchase of land for the Project, and its direct investment in designing and planning the Project, as well as associated costs.

254. Article 1(2) of the BIT states explicitly that "investments" shall include "movable and immovable property."

255. Projekt Sever's purchases of land for the purpose of realising the construction of a residential development has been well established. These land purchases clearly fall within the meaning of "investments" provided by the BIT.

256. Projekt Sever's expenditures in connection with the design and planning of the Project have likewise been established, and the Tribunal considers that these expenditures also qualify under the terms of the BIT, as they constitute "claims and rights to any performance having an economic value."

257. The Tribunal finds that the purchase of land is a perfectly legitimate first step in an incremental investment intended to be realised in a multi-unit development. Indeed, Projekt Sever's further expenditures towards the design and planning of the Project prove that they were not "one-off commercial transactions", but rather a series of distinct expenditures all made for the purpose of realising the development of the Project.

258. In this case, Pawlowski AG assumed the legal and financial risk of being the 100% shareholder of the Czech company Projekt Sever. Pawlowski AG then contributed capital in the form of equity and loans extended to Projekt Sever in order to enable it to carry out entrepreneurial activity in the Czech Republic – consisting in the purchase of land for, and the design and planned development of, the residential project in Benice. The Tribunal thus finds that Respondent's *ratione materiae* objections are inapposite; however "investment" is defined, there is no question that foreign direct investment, where the foreign investor directly owns and manages an enterprise situated in the host country, and where said enterprise carries out entrepreneurial activities in the host country, qualifies as such.[249]

* * *

[249] See *e.g.*, *OI European*, **RL-64**, para. 224; *Edenred*, para. 177.

259. In view of the above, the Tribunal finds that

- Pawlowski AG's shareholding in, and its equity contributions to, Projekt Sever, and

- Projekt Sever's land purchases and expenditure towards the design and development of the Project,

each qualify as protected investments under the BIT.

260. Consequently, the Tribunal dismisses Respondent's *ratione materiae* objection.

VI.3. DOMESTIC LAW OBJECTION

1. POSITION OF RESPONDENT

261. Respondent argues that Claimants' claims are inadmissible, because they are purely domestic claims involving Czech urban planning law, over which the Tribunal does not have jurisdiction.[250]

262. Additionally, Respondent argues that Claimants have merely listed several Treaty standards that they say were breached, and that they have not clarified which act or omission of the Czech Republic, if proven, could constitute a breach of the BIT, nor have they established any actual interrelationship between their domestic claims and Treaty claims.[251]

2. POSITION OF CLAIMANTS

263. Claimants reject Respondent's objection to admissibility and aver that their claims are for violations of the BIT. According to Claimants, Czech domestic law provides relevant factual context, but Claimants' claims do not depend on proving any violation of Czech law.[252]

264. Claimants refute the relevance of the case law cited by Respondent, noting that the *Generation Ukraine* tribunal, in coming to the conclusion that it lacked jurisdiction, found that the claimant in that case had raised no international law claims.[253]

265. Claimants assert that in the present case it is obvious from reading Claimants' submissions on the merits that their claims are for violations of the BIT, not for violations of domestic Czech law.[254] Claimants explain that this case does not turn on the question of whether the district of Benice was required under Czech law to refrain from filing a lawsuit to challenge the re-zoning of the Project Area to residential, or whether the Prague City Assembly was required under Czech law to restore the zoning plan change after it had been annulled by the Czech courts. Rather, according to Claimants, the relevant question pertinent to the claims in this arbitration is whether Respondent's treatment of Claimants violated international law, and, in particular, the BIT.[255]

[250] R-PHB, para. 137; R-II, para 263, referring to *Generation Ukraine*, **RL-45.**
[251] R-PHB, para. 140.
[252] C-PHB, para. 15.
[253] C-III, para. 83, referring to *Generation Ukraine*, **RL-45**, paras. 8.9-8.12.
[254] C-III, para. 84.
[255] C-II, para. 383.

3. DECISION OF THE ARBITRAL TRIBUNAL

266. Claimants have made several claims under the BIT. Specifically, Claimants allege that:

- Respondent has violated the BIT's Article 4 obligations, including the requirements to provide fair and equitable treatment, to refrain from unreasonable, arbitrary and bad faith measures, and to refrain from discriminatory and less favorable treatment;

- Respondent has breached its obligation pursuant to Article 3 of the BIT to "provide the necessary permits" in connection with Claimants' investment; and

- Respondent's actions resulted in an indirect expropriation of Claimants' investment, in violation of Article 6 of the BIT.

267. The Tribunal finds that, while several of Claimants' arguments refer to Czech domestic law, such references are made in order to provide context for Claimants' claims under the BIT. This conclusion is consistent with the finding in *Binder*, where the tribunal noted that:

> "390. The BIT is an international treaty and should be interpreted in accordance with the principles of international treaty law, as codified in the Geneva Convention on the Law of Treaties. The Arbitral Tribunal derives its competence exclusively from the BIT and is not competent to decide how Czech law ls to be interpreted, this being a matter for the Czech courts. Consequently, the Tribunal cannot review the interpretation of domestic law in Czech court decisions. Nor can the Tribunal express an opinion on the interpretation of Czech law on matters which have not been decided by Czech courts.
>
> 391. However, in this arbitration Czech law is one of the factual elements which the Tribunal must take into account when establishing whether the Czech Republic has observed its undertakings in the Czech-German BIT. It is the Tribunal's task to examine whether Czech Law, as it was applied to the Claimant and his company CARGO, may have violated the obligations of the Czech Republic in the BIT. In other words, if it should be found that Czech law had such contents, or was applied in such manner, as to violate any of these treaty obligations, the Tribunal is competent to establish that a violation occurred and to draw the legal conclusions following from it. The Tribunal's examination may not only concern specific acts by the Czech authorities but also extend to general questions of whether the Czech legal system, including the availability of judicial and administrative remedies, was sufficient to provide the Claimant with adequate protection for his investment in the Czech Republic." [256] [Emphasis added]

[256] *Binder*, **CL-119**, paras. 390-391.

268. The Tribunal does not have any doubt that Claimants' claims arise under the BIT. Indeed, each of Claimants' claims requires the Tribunal to determine whether Respondent has violated the BIT with respect to Claimant's protected investments.

269. While the Tribunal may have to undertake an examination of Czech Law or the Czech legal framework, such analysis is only undertaken in order to enable the Tribunal to make determinations as to the merits of Claimants' international law claims arising under the BIT.

270. The Tribunal therefore dismisses Respondent's domestic law objection.

VII. MERITS

271. Having determined that it has jurisdiction, the Tribunal now turns to the merits and to Claimants' allegation that the Czech Republic's conduct towards their investments was in breach of Articles 3, 4, and 6 of the BIT.

272. Claimants make four general points with respect to the merits:

273. First, Claimants ask that the Tribunal consider the Preamble of the BIT, which records the Contracting States' desire "to intensify economic cooperation" and "to promote and protect foreign investments" as well as their desire to "create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party."[257]

274. Second, Claimants note that they are not required to prove fault in the sense of intention to harm. Claimants quote *Mondev*, which found that "it is only the act of a state that matters, independently of any intention."[258]

275. Third, Claimants argue that a violation of a treaty obligation is not excused by the fact that the acts in question may have complied with the internal laws of the state.[259]

276. Fourth, Claimants argue that the Tribunal does not need to decide whether each of Benice's and the City of Prague's individual actions was wrongful; the events should be considered "cumulatively in context to each other,"[260] with the ultimate question being whether the cumulative effect of Respondent's actions amounts to a violation of the BIT.[261]

277. Respondent rejects all of the claims, arguing that Claimants not only misconstrue the legal standards applicable to Articles 3, 4, and 6 of the BIT, but also that they fail to demonstrate facts that could amount to a treaty violation; the claims, it says, are nothing more than alleged breaches of Czech domestic law.

278. First, according to Respondent, it is a foundational principle of international law that its norms are separate and distinct from those of domestic law. A breach of

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[257] C-PHB, para. 18; BIT, p. 1.
[258] C-PHB, para. 19, referring to ILC Articles, **CL-5**, Article 2, Commentary, para. 10. See also *Mondev*, **CL-13**, para. 116.
[259] C-PHB, para. 20, referring to ILC Articles, **CL-5**, Article 3 and Commentary; also Article 32 (re the lack of relevance of internal law); *Watkins Holdings,* **CL-112**, para. 505 (local law "should not be used as a tool to override [a state's] international obligations"); *Hopkins v. Mexico* (1926), cited in *S.D. Myers*, **CL-49**, paras. 259-261; *CME*, **CL-25**, para. 611; *Flemingo DutyFree,* **CL-37**, para. 531; C. Schreuer and R. Dolzer, *Principles of International Investment Law*, Oxford University Press 2012, **CL-50**, p. 133.
[260] C-PHB, para. 21, referring to *Stati*, **RL-130**, para. 1095.
[261] C-PHB, para. 21, referring to *Rompetrol,* **RL-40**, para. 271.

domestic law does not, therefore, automatically amount to a breach international law.[262]

279. Second, Respondent explains that Claimants' claims centre around the Municipal Court of Prague's and the Supreme Administrative Court's annulment of the Zoning Plan Change and the City of Prague's subsequent failure to override those court judgments. Claimants are only submitting breaches of domestic law and they have failed to include arguments that could convert their claims into breaches of international law.[263]

280. Third, Respondent argues that, even if the Tribunal were to find that Claimants presented international law claims, the Czech Republic did not violate Articles 3, 4, or 6 of the BIT.[264]

281. The Tribunal will start by analysing whether the Czech Republic has breached Article 4 of the BIT [**VII.1**], Claimant's main claim, and it will devote separate sections to the two ancillary claims submitted: the breach of the obligation to grant the necessary permits under Article 3 [**VII.2**] and the breach of the prohibition to expropriate under Article 6 [**VII.3**].

[262] R-I, paras. 244-245.
[263] R-I, para. 252.
[264] R-I, paras. 265-266.

VII.1. BREACH OF ARTICLE 4 OF THE BIT

282. Claimants' principal claim is that the Czech Republic breached its duty to guarantee "fair and equitable treatment" ("**FET**") as required by Article 4(2) and the prohibition against "unreasonable or discriminatory measures" provided for in Article 4(1) of the BIT.[265]

283. Article 4 of the BIT reads as follows:

> "(1) Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and liquidation of such investments. […]
>
> (2) Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to the investments made within its territory by its own investors or than that granted by each Contracting Party to the investments within its territory by investors of the most favoured nation, if this latter is more favourable. […]" [Emphasis added]

284. The rule thus imposes both a positive and a negative obligation upon the Czech Republic:

- The positive obligation is to accord within its territory FET to the protected investments of Swiss investors; and the standard applied must not be less than the treatment given to its own investors or those of the most favoured nation;

- The negative obligation is to abstain from impairing any protected investment through the adoption of measures which are either unreasonable or discriminatory.

285. Claimants argue that Respondent breached the FET standard enshrined in Article 4 in three ways:

- By adopting unreasonable measures [**VII.1.2**];

- By adopting discriminatory measures, which provided less favorable treatment to Claimants' investments [**VII.1.3.**] and

- By violating Claimants' legitimate expectations [**VII.1.4.**].

[265] C-II, para. 398.

286. Before analyzing each of the alleged breaches, the Tribunal will devote a section to analyse Article 4 in general [**VII.1.1**].

VII.1.1. APPLICABLE LAW: ARTICLE 4 OF THE BIT

287. Claimants say that Respondent's conduct resulted in a breach of Articles 4(1) and (2) of the BIT.

1. THE FET STANDARD

288. The first sentence of Article 4(2) of the BIT is a rule of laconic brevity and delphic obscurity: it simply obliges the Contracting States to ensure "fair and equitable treatment" to investments of protected investors.

289. The FET standard requires that the host state treat the protected investment in an even-handed and just manner, avoiding intentional harassment and denial of justice. The precise scope of protection is intimately related:

- to the legitimate and reasonable expectations on which the investor relied, including the stability of the host State's legal framework; and

- to the specific undertakings and representations proffered by the host State at the time when the investment was made.

290. The legitimacy or reasonableness of the investor's expectations must be assessed in conjunction with the political, socioeconomic, cultural and historical conditions in the host State, and in particular, balancing the right of the State under international law to regulate within its borders.

291. The obligation to provide FET binds the State as a whole. It can be breached by the conduct of any branch of government. In principle, then, the FET standard can be breached:

- by the executive or administrative branch or its separate agencies by means of administrative acts that directly target the investment;

- by the State's judicial system as a whole, when it is responsible for a denial of justice which affects the investment; or

- by the enactment of laws or regulations of general application, which radically modify the applicable legal framework to the detriment of the investment.

292. The threshold of propriety required by FET must be determined by the Tribunal in light of all the relevant circumstances of the case. To this end, the Tribunal must carefully analyse and take into consideration all the relevant facts, and, *inter alia,* weigh the following factors:

- whether the State made specific representations to the investor before the investment was made and then acted contrary to such representations;

- whether the State has failed to offer a stable and predictable legal framework, in breach of the investor's legitimate expectations;

- whether the host State has engaged in harassment, coercion, abuse of power, or other bad faith conduct against the investor[266];

- whether the State has respected the principles of due process, consistency and transparency when adopting the measures at issue.

293. In evaluating the State's conduct, the Tribunal must balance the investor's right to be protected from improper State conduct against other legally relevant interests and countervailing factors. First among these factors is the principle that legislation and regulation are dynamic, and that (absent a treaty obligation to the contrary) States enjoy a sovereign right to amend their laws and regulations and to adopt new ones in furtherance of the public interest. Other countervailing factors affect the investor: it is the investor's duty to perform an appropriate pre-investment due diligence review and to conduct itself in accordance with the law both before and during the investment.[267]

2. UNREASONABLE MEASURES

294. Under Article 4(1) of the BIT, the Czech Republic has assumed the negative obligation to abstain from unreasonable or discriminatory measures affecting protected investments. A literal interpretation of the rule shows that for a measure to amount to a violation of the BIT it is sufficient if it is either unreasonable or discriminatory; it need not be both.

295. Any unreasonable or discriminatory measure may, by definition, also be said to be unfair and inequitable. The reverse is not true, though. A government measure may fall short of the FET standard, for reasons other than that it is discriminatory or unreasonable.[268]

296. An interesting feature of Article 4(1) of the BIT is the drafters' choice of terminology. Other BITs include a prohibition against "arbitrary or discriminatory" measures. The Swiss-Czech BIT however uses the expression "unreasonable or discriminatory" measures.

297. Are "unreasonable measures" and "arbitrary measures" synonymous?

[266] Bad faith conduct is a factor which must be taken into consideration by the Tribunal, but the Claimant is not required to prove fault in the sense of intention to harm; See *Mondev*, **CL-13**, para. 116.
[267] *Rusoro*, **RL-79**, para. 525; *Lemire*, **RL-83**, para. 285.
[268] *Lemire*, **RL-83**, para. 259.

Arbitrary measures

298. Arbitrariness has been described as "founded on prejudice or preference rather than on reason or fact";[269] "[…] contrary to the law because: '[it] shocks, or at least surprises, a sense of juridical propriety'";[270] or (in very similar terms) "willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety";[271] or as conduct which "manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination."[272]

299. In *EDF*, Professor Schreuer, appearing as an expert, defined as "arbitrary":[273]

> "a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
>
> b. a measure that is not based on legal standards, but on discretion, prejudice or personal preference;
>
> c. a measure taken for reasons that are different from those put forward by the decision maker;
>
> d. a measure taken in willful disregard of due process and proper procedure."

And the *EDF* tribunal seemed to accept his definition in its analysis and ultimate rejection of the claim that Romania had adopted arbitrary measures.[274]

Unreasonable measures

300. The BIT does not refer to "arbitrary measures." It prohibits "unreasonable measures", *i.e.,* measures adopted by the host State that are irrational in themselves or result from an irrational decision-making process. All arbitrary measures are, by definition, unreasonable, because rational State action cannot result in the substitution of the rule of law by prejudice, preference or bias.[275] The opposite is not necessarily true: an irrational decision-making process may result in an unreasonable measure, but the content of the measure does not have to be arbitrary (although in most cases, unreasonable decision-making will result in arbitrary results). In any case, the exposure to irrational processes may by itself be a breach of the duty to act in accordance with the FET standard.

[269] *Occidental*, **RL-134**, para. 162, quoting *Lauder*, para. 221.
[270] *Tecmed,* **CL-17**, para. 154, quoting *ELSI,* **RL-56,** para. 128.
[271] *ELSI*, **RL-56,** para. 128; quoted in *Loewen*, **RL-53**, para. 131.
[272] *Saluka,* **RL-84**, para. 307.
[273] *EDF*, **RL-180**, para. 303.
[274] *EDF*, **RL-180**, para. 303.
[275] *Lemire*, **RL-83**, paras. 262-263.

301. The tribunal in *LG&E* said that the contracting states (in that case Argentina and the United States)[276]

> "wanted to prohibit themselves from implementing measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process." [Emphasis added]

302. The *LG&E* tribunal added:

> "Certainly a State that fails to base its actions on reasoned judgement, and uses abusive arguments instead, would not 'stimulate the flow of private capital'." [Emphasis added]

303. It is noteworthy that the treaty under consideration in *LG&E* contained a prohibition in respect of "arbitrary or discriminatory measures", and that the tribunal concluded that unreasonable or irrational measures breached such prohibition – proving the proximity of and overlap between both concepts. The Tribunal agrees with Claimants' conclusion that in investment arbitration cases, the term "unreasonable" is often used interchangeably with the terms "unjustified" or "arbitrary."[277]

304. Be that as it may, in the present case, Claimants plead the higher standard: they say that the measures adopted by the Czech Republic were not only unreasonable, but that they also meet the arbitrariness test.

3. DISCRIMINATORY MEASURES

305. Article 4(1) of the BIT also prohibits the adoption by the Czech Republic of discriminatory measures against a protected investment. Article 4(2) provides an additional rule: the treatment must not be less favourable than the treatment granted to investments made by Czech investors, or by investors of the most favoured nation, if this latter treatment is more favourable.

306. Discrimination means unequal or different treatment. But this, in itself, is insufficient. To amount to discrimination, the protected investment must be treated differently from similar cases without justification[278] such that the host State "expos[es] the claimant to sectional or racial prejudice"[279] or "target[s] Claimants' investments specifically as foreign investments."[280]

307. Discrimination is a relative standard, which requires a comparative analysis between the measures applied to the protected investment and the measures applied to investments in similar situations. One leading commentator provides the

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[276] *LG&E*, **CL-68**, para. 158.
[277] C-I, para. 297, referring to C. Schreuer, "Protection Against Arbitrary or Discriminatory Matters", in C. Rogers and R. Alford (eds.), The Future of Investment Arbitration, Oxford 2009, **CL-29**, p. 183.
[278] *Saluka*, **RL-84**, para. 313.
[279] *Waste Management II*, **CL-14**, para. 98.
[280] *LG&E*, **CL-68**, para. 147.

following guidance by which to establish whether similar cases are being treated differently[281]:

> "… start by looking at a narrow circle of comparators that are closest to the case at hand. In other words, the treatment of other investors in the same line of business will have to be looked at first. If there are clear indications of discrimination already on that basis, the matter may be regarded as settled. But the absence of discrimination within this narrow group is not necessarily conclusive. For instance, if the particular sector of the economy is small or is strongly dominated by foreign interests, it would not be sufficient for the tribunal to satisfy itself that no discrimination has occurred within that group of investors. The circle may be widened to a broader sector of activity that includes a variety of economic actors until a workable basis for comparison can be found."

National Treatment and Most Favored-Nation treatment

308. Article 4(2) of the BIT defines the National Treatment ("**NT**") and the Most Favored-Nation ("**MFN**") standards:

> "This treatment shall not be less favourable than that granted by each Contracting Party to the investments made within its territory by its own investors or than that granted by each Contracting Party to the investments within its territory by investors of the most favoured nation, if this latter is more favourable." [Emphasis added]

309. The NT and MFN standards, which are closely related to the wider and overreaching FET standard,[282] prohibit discrimination based on nationality. Under these standards the Czech Republic may not subject protected investors or their investments to a treatment which is "less favourable" than that which the host State accords to investments owned by other investors – either Czech or from other countries. To establish that the treatment effectively is "less favourable," a comparator in like circumstances must be defined.[283] It is also widely accepted that there must be no objective reason which justifies the differential treatment.[284]

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[281] C. Schreuer, "Protection Against Arbitrary or Discriminatory Matters", in C. Rogers and R. Alford (eds.), The Future of Investment Arbitration, Oxford 2009, **CL-29,** p. 196.
[282] A. Newcombe and L. Paradell: "Law and Practice of Investment Treaties: Standards of Treatment", Kluwer Law International 2009, pp. 194, 224 and 290.
[283] *Parkering*s, **CL-8,** para. 369.
[284] *Bayindir Insaat,* **RL-76**, para. 399; See also C. Schreuer and R. Dolzer, *Principles of International Investment Law*, Oxford University Press 2012, p. 202.

VII.1.2. UNREASONABLE MEASURES

310. Claimants argue that certain measures adopted by the Czech Republic, or by agents and institutions for which the State is responsible under international law, were not only unreasonable, but that these measures also met the test of being arbitrary (and even in bad faith).

311. The Tribunal will first summarise the position of Claimants and Respondent [**1.** and **2.**] and then state its own decision [**3.**]

1. POSITION OF CLAIMANTS

312. Claimants say that the conduct of Benice [**1.1**] and of the City of Prague [**1.2**] – which is directly attributable to the Czech Republic[285] – was unreasonable, arbitrary and lacking in good faith. It thereby violated the protection against unreasonable treatment in Article 4(1) and the guarantees of FET under Article 4(2), as explained below.

1.1 THE CONDUCT OF BENICE'S MAYOR AND THE BENICE DISTRICT ASSEMBLY WAS ARBITRARY, UNREASONABLE AND IN BAD FAITH

313. Claimants point to three particular actions of Mayor Topičová and the Benice District Assembly which they argue were arbitrary, unreasonable and in bad faith:

- Mayor Topičová's multiple attempts to extract payment from Claimants [**A.**];
- Benice's filing of the Annulment Request, seeking to annul the Zoning Plan Change [**B.**]; and
- Benice's opposition to reprocuring the Zoning Plan Change [**C.**].

314. Claimants also argue that these actions taken by officials of Benice and of the City of Prague were not only arbitrary, unreasonable and taken in bad faith, but that they also violated the FET standard for want of transparency.[286] According to Claimants, the lack of transparency stems from Respondent's inconsistent application of its own laws and from its incoherent behaviour surrounding the procurement of the Zoning Plan Change.[287]

A. Benice's attempts to extract payment from Claimants violated the FET standard

315. Claimants assert that Mayor Topičová was the driving force behind Benice's attempts to annul the zoning plan change and thereby destroy the Project. According to Claimants, Mayor Topičová exercised her power as Mayor of Benice to try to extort unjustified

[285] C-I, paras. 66-68; an argument which Respondent does not deny.
[286] C-II, para. 482.
[287] C-II, para. 479.

payments from Claimants. When these efforts were unsuccessful, she retaliated by filing the Annulment Request.[288]

316. Claimants identify three actions taken by Mayor Topičová in violation of the FET standard:

317. First, Claimants say that Mayor Topičová attempted to extort funds from them with the 2009 Benice Lawsuit, which challenged Projekt Sever's title to the land it had purchased from the City of Prague. Claimants note that Ms. Topičová has not denied that Benice made these payment demands, and that she refused to answer when asked at the Hearing whether she would have challenged the zoning change if Projekt Sever had paid what Benice demanded in 2009.[289]

318. Second, Claimants say that Mayor Topičová tried again to extort payment from them by withholding Benice's approval of the density increase from OB-B to OB-C in early 2011. In this case Mayor Topičová withheld approval while asking for a payment from Claimants of CZK 15 million in exchange for Benice's "smooth cooperation in the permitting stages." Claimants note that Ms. Topičová does not deny this, and that she admits having met with Mr. Pawlowski and asking him to contribute to "civil amenities."[290]

319. Third, Claimants point to Mayor Topičová's lack of response regarding the connection of the Project to gas lines and to the sewer system. Claimants argue that while such requests are normally acted on within a matter of days, in this case Benice did not respond. Claimants believe that Mayor Topičová was again attempting to extract payments from Mr. Pawlowski by using this request as leverage.[291]

B. **Benice's Annulment Request was unreasonable**

320. Claimants argue that Benice's filing of the Annulment Request to prevent residential development of the area altogether was a use of legal process for a purpose for which it was not intended, in violation of the FET standard.[292] According to Claimants, this would still be the case even if the Tribunal were to find that Benice had filed the Annulment Request due to its alleged concerns about the scale of the Project[293]; the filing of an annulment lawsuit should still be considered a disproportionate measure in light of available alternatives (such as seeking to reduce the scope of the Project) and that it was thus a violation of the FET standard.[294]

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[288] C-PHB, para. 80.
[289] C-PHB, para. 81, referring to Topičová WS I, paras. 28-29; Topičová WS II, para. 26; HT 699:7−700:4, 744:9-12; HT 700:22−701:22; See also C-II, paras. 245-252.
[290] C-PHB, para. 83.
[291] C-PHB, para. 84.
[292] C-PHB, para. 104, referring to *Tecmed*, **CL-17**, para. 154; *Frontier Petroleum,* **CL-21**, para. 300; See also C-II, paras. 253-262.
[293] C-PHB, paras. 106-107.
[294] C-PHB, para. 106, referring to *Watkins Holdings,* **CL-112**, para. 601; *SolEs Badajoz,* **CL-114**, para. 328.

321. Furthermore, since Benice acted to destroy the Claimants' investment without providing any advance notice, this also violated the FET standard transparency requirement.[295]

C. **Benice's opposition to re-procure the Zoning Plan Change was unreasonable**

322. According to Claimants, Benice's insistence that there should be no residential development of the Project Area whatsoever was entirely unreasonable and disproportionate in the context of the achievement of the policy aims claimed by Respondent. This subsequent behaviour both confirms that Benice's filing of the annulment lawsuit was not brought in good faith and for proper purposes and is itself a violation of the FET standard.[296]

323. Claimants assert that after the Annulment Decision was issued, Benice could, and should, have supported re-procurement of the Zoning Plan Change, while at the same time addressing its alleged concerns with respect to the scope and potential impact of the Project on the local community.

1.2 THE ACTIONS OF THE CITY OF PRAGUE WERE UNREASONABLE

324. Claimants also maintain that the City of Prague acted unreasonably. Specifically, Claimants allege that Mayor Hudeček's blocking of the normal re-procurement process [**A.**] and the City Assembly's decision to terminate the procurement of the Zoning Plan Change [**B.**] amounted to breaches of Article 4 of the BIT.

A. **Mayor Hudeček's refusal to allow the normal re-procurement process to proceed**

325. According to Claimants, if the landowner wanted to pursue the change, the normal course of action following the Annulment Decision would have been for the City of Prague's Zoning Plan Division (the Procurer) promptly to remedy the deficiencies.[297] Claimants assert that this would have only required drafting a more detailed substantiation for approval by the City Assembly, and there were no substantive reasons why the zoning plan change could not have been re-procured.[298]

326. Claimants allege that the normal course of action was interrupted by Mayor Hudeček, who prevented the City from moving forward with the re-procurement during his entire term in office.[299]

B. **The City's decision to terminate the procurement**

327. In Claimants' view, not only was it standard practice for the City Assembly to re-procure zoning changes annulled by Czech Courts, it was also outside the City Assembly's discretion to decide whether or not to proceed with the procurement.[300] Thus, Claimants argue that the

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[295] C-PHB, para. 106, referring to *Glencore*, **CL-113**, para. 1448.
[296] C-PHB, para. 113.
[297] C-PHB, para. 117, referring to [redacted] Police statement, 17 June 2015, **C-84**, p. 3; [redacted] WS, paras. 19-20, 38; Langmajer WS I, paras. 22-26; Langmajer WS II, para. 12; Votava WS, para. 23.
[298] C-PHB, paras. 116-117.
[299] C-PHB, para. 118, referring to [redacted] WS, para. 21; HT 412:24−413:10, 414:5−415:5, 415:23−416:13.
[300] C-II, paras. 263-289.

Prague City Assembly's decision to terminate the procurement was unreasonable, arbitrary and disproportionate.[301]

328. Claimants allege that Deputy Mayor Stropnický acted arbitrarily and unreasonably, because he opposed the re-procurement of the Zoning Plan Change without visiting the site or examining the substance or history of the Project. According to Claimants, in all other cases where a request had been made for re-procurement, the re-procurement was initiated without being subjected to a vote of the City Assembly.[302]

329. Claimants also note that the City of Prague's treatment of Claimants was different from what would usually be expected, since it marked the first time in the history of the Czech Republic that an applicant for a zoning change had requested annulment of the zoning change after it had come into effect, and that a zoning change was annulled for formal reasons and not re-procured again, notwithstanding the landowner's request.[303]

2. POSITION OF RESPONDENT

330. Respondent denies that Benice [**2.1**] or the City of Prague [**2.2**] acted arbitrarily, unreasonably or in bad faith, and makes the following preliminary clarifications regarding both bad faith and transparency:

Bad faith

331. Respondent argues that Claimants' description of the requirement of good faith is flawed. Respondent argues that Claimants have in any event failed to prove any bad faith on the part of the State, while noting that the standard of proof for allegations of bad faith is "a demanding one."[304]

332. According to Respondent, it cannot have acted in bad faith, since there were legitimate and objective reasons which led the City Assembly to terminate the procurement of the Zoning Plan Change, including:

- The non-applicability of Section 55(3) to the annulled Zoning Change with the consequence that the Prague Assembly had no obligation to resume the procurement process;
- The fact that the annulment of the Zoning Change had restored the land to its original functional use;
- Benice's opposition to the procurement process;

[301] C-PHB, paras. 133-153.
[302] C-PHB, para. 135, referring to City Assembly Meeting Transcript and Resolution no. 6/12, 14 April 2015, **C-100**, pp. 7-8; HT 790:10−795:7.
[303] C-PHB, para. 146.
[304] R-I, para. 282, referring to *Bayindir Insaat,* **RL-76**, paras. 143, 223.

- The various substantive and procedural defects of the annulled Zoning Change, as determined by the Municipal Court and the Supreme Administrative Court; and

- The fact that Projekt Server was specifically advised of the possibility of filing a new application for a zoning change.

- Projekt Sever had bought the land while it was zoned for agricultural purposes, the same use to which the land was restored.[305]

Transparency

333. Respondent argues that there is no basis for Claimants' assertions of non-transparency. According to Respondent, the simple fact that the Czech Republic might have departed from usual practice does not establish a lack of transparency or arbitrariness.[306]

2.1 NEITHER BENICE'S MAYOR NOR THE BENICE DISTRICT ASSEMBLY ACTED IN AN UNREASONABLE OR ARBITRARY MANNER

334. According to Respondent, the threshold for a finding of arbitrariness is very high, requiring conduct which "shocks, or at least surprises, a sense of judicial propriety."[307]

335. Respondent argues that Claimants' allegations are unfounded. It maintains that Mayor Topičová never tried to extort money from Claimants [**A.**] and Benice's actions were within its prerogatives and neither unreasonable, nor unjustifiable [**B.**].

A. The Mayor of Benice never tried to extort money from Claimants

336. Respondent rejects the assertion that Mayor Topičová improperly attempted to extract payments from Claimants. Rather, Mayor Topičová's main concern was ensuring that Benice had sufficient resources to adapt its infrastructure to the anticipated large influx of new residents.[308]

337. With respect to Mayor Topičová's request for CZK 15 million, Respondent claims that Mayor Topičová was simply defending the interests of her community by attempting to negotiate with Mr. Pawlowski and thereby obtain funds to renovate Benice's civic amenities and infrastructure.[309]

338. As regards Mayor Topičová's requests for CZK 20 and 30 million, Respondent argues that Mayor Topičová was simply negotiating (through Benice's lawyers) to recover the proceeds of the land sale through a settlement.[310]

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[305] R-I, para. 289.
[306] R-II, paras. 412-413.
[307] R-PHB, para. 186, citing *Crystallex*, **CL-12**, para. 577.
[308] R-I, para. 285; R-II, para. 413.
[309] R-PHB, para. 45.
[310] R-PHB, para. 46.

B. **Benice did not act in an arbitrary or unreasonable manner**

339. Respondent avers that there was no abuse of legal process in Benice seeking annulment of the Zoning Change, and that Benice was simply exerting its legal right before the Czech courts.[311]

340. Respondent also notes that there were no improper motives behind Benice's exercise of its legal right to seek annulment of the Zoning Change. Respondent asserts that Mayor Topičová had no personal animosity against Mr. Pawlowski or any reason to "retaliate" against him. Rather, Mayor Topičová simply acted in the interests of Benice, due to the impact that Claimants' huge Project would have had on the municipality and its inhabitants.[312]

341. Respondent rejects the notion that it was unheard of for a municipality to propose, and later to challenge, the same zoning plan change. To the contrary, Respondent argues that, as zoning plan changes are the subject of a long and democratic process, it is in fact a frequent occurrence that a borough, after having applied for a zoning change, will then change its mind and withdraw it.[313]

Proportionality

342. With respect to proportionality, Respondent argues that proportionality suggests an alternative which existed to achieve a similar result, while being less detrimental to the Claimants. However, Respondent argues, in this case Benice had no alternative way to avoid the construction of the Project – which would have had a negative impact on Benice and its inhabitants.[314]

343. Respondent says that Benice would not have been able to influence the Project's development during the permitting stage: once a zoning change comes into force, from that moment on, the local government "does not interfere into the permitting process in the way it could during the procurement of the zoning change."[315] Thus, Benice's only means of alleviating its concerns was to seek annulment of the Zoning Plan Change through the Czech Courts.

2.2 THE CITY OF PRAGUE DID NOT ACT UNREASONABLY OR ARBITRARILY

344. Respondent rejects the complaint that the City of Prague acted arbitrarily or unreasonably.

A. **Mayor Hudeček acted appropriately**

345. Respondents aver that neither the Mayor, nor his Deputy Mayor, acted arbitrarily. Respondent rejects the claim that Mayor Hudeček "refused" to address the Zoning Plan

[311] R-II, paras. 291-292; R-PHB, para. 191.
[312] R-PHB, para. 192.
[313] R-PHB, para. 193, referring to: HT 544:1-545:10 (Boháč, Direct). See also WS Boháč, para. 53, referring to Prague City Assembly Resolution 35/06, 23 February 2006, **R-40**; Prague City Assembly Resolution 20/15, 25 October 2012, **R-41**.
[314] R-PHB, para. 194.
[315] R-PHB, para. 195, referring to HT 896-897.

Change at the meetings of the City Assembly. According to Respondent, both Mayor Hudeček and Mr. Boháč have confirmed that the regular practice in dealing with zoning changes was followed, and that the Mayor adhered to the technical advice of the Zoning Plan Division.[316]

346. Respondent also rejects the allegation that Deputy Mayor Stropnický made statements to the Assembly inimical to the interests of Mr. Pawlowski or the zoning plan change.[317] To the extent that the Deputy Mayor may have been opposed to the Claimants' Project in principle, Respondent argues that this was not the result of any animosity or arbitrary action against Mr. Pawlowski, but due to Deputy Mayor Stropnický's political views, which were in line with those of the Green Party which he represented, and which were generally against developers, who have sought to develop the outskirts of the City of Prague for maximum profit and at the expense of the City.[318]

B. **The Prague City Assembly also acted appropriately**

347. With respect to the actions of the Prague City Assembly, Respondent argues that these actions cannot be construed as arbitrary or unjustifiable, since in all instances, the Assembly acted in full compliance with Czech law, demonstrating no abuse of administrative discretion.[319]

348. Respondent asserts that Claimants' claim is based on the premise that, following the Annulment Decision, the Prague City Assembly acted abusively and in breach of the applicable law, particularly Section 55(3) of the 2006 Building Act. However, according to Respondent, the Prague City Assembly was never in breach of Section 55(3) of the Building Act, since[320]:

- this section of the Building Act applies to annulled zoning plans, and not annulled zoning changes[321];
- the Prague City Assembly nevertheless decided "without delay" on the re-procurement of the Zoning Plan Change[322]; and
- irrespective of whether Section 55(3) applied in the circumstances, it did not impose any obligation on the Prague City Assembly to re-procure an annulled zoning change.[323]

3. DECISION OF THE ARBITRAL TRIBUNAL

349. Claimants argue that certain measures adopted by the Czech Republic, or by agents and institutions for which the State is responsible under international law, were not only

[316] R-PHB, para. 105; R-II, paras. 130-134.
[317] R-PHB, para. 109.
[318] R-PHB, para. 118.
[319] R-II, para. 208; R-PHB, para. 197.
[320] See also R-II, paras. 121-126.
[321] R-PHB, paras. 63-70.
[322] R-PHB, paras. 71-75.
[323] R-PHB, para. 76.

unreasonable, but that these measures also met the test of being arbitrary, and even in bad faith, in breach of the general prohibition of "unreasonable measures" contained in Article 4(1) (and of the FET standard enshrined in Article 4(2) of the BIT).

350. Claimants single out the following measures:

- Mayor Topičová's attempts to extract payment from Claimants;
- Benice's filing of the Annulment Request, by which it sought to annul the Zoning Plan Change;
- Benice's opposition to the re-procurement of the Zoning Plan Change;
- Mayor Hudeček's refusal to re-procure the Zoning Plan Change; and
- The City Assembly's decision to terminate the procurement.

351. Respondent disagrees:

- It says that Mayor Topičová never tried to extort money from Claimants and that Benice's actions were within its prerogatives and neither unreasonable nor unjustifiable;
- As regards the actions of Mayor Topičová and Deputy Mayor Stropnický, Respondents aver that neither the Mayor, nor the Deputy Mayor acted arbitrarily;
- With respect to the actions of the Prague City Assembly, Respondent argues that these actions cannot be construed as arbitrary or unjustifiable, since in all instances the Assembly acted in full compliance with Czech law, demonstrating no abuse of administrative discretion.[324]

352. In the following subsections, the Tribunal will analyze Mayor Topičová's conduct with respect to the requests for payment [**3.1.**], the filing by Benice of the annulment [**3.2.**], Mayor Hudeček's refusal to support the re-procurement [**3.3.**] the City Assembly's decision to terminate the procurement [**3.4.**] and Benice's opposition to the re-procurement [**3.5.**].

3.1 THE REQUESTS FOR PAYMENT

353. The Tribunal will first briefly recall the facts [**A.**] and will then analyse whether such conduct violates the BIT [**B.**].

A. Proven facts

354. The proven facts show that Benice's Mayor requested funds from the investor on two occasions. Claimants also refer to certain other instances,[325] where the conduct of Mayor

[324] R-II, para. 208; R-PHB, para. 197.
[325] C-PHB, paras. 84 *et seq*.

Topičová allegedly was detrimental to Claimants' interests, but the Tribunal has found no evidence that these incidents resulted from improper requests for the disbursements of funds.

First attempt

355. In October 2009, Benice filed the Benice Lawsuit against Project Sever, contesting the validity of Projekt Sever's purchase of land from the City of Prague. Benice asseverated that its District, and not the District of Uhříněves, should have represented the City of Prague in the sale of the land[326] and that the purchase price should have been received by Benice and not by Uhříněves.[327]

356. Shortly after Benice filed the lawsuit, a lawyer representing the District of Benice informed [redacted] (Mr. Pawlowski's lawyer) that Benice would be willing to withdraw the Court case if Claimants paid the District CZK 20 million.[328] Mr. Pawlowski met with Benice's Mayor Topičova, who explained that the District had been deprived of the funds that the City of Prague had received for the land purchased and that CZK 30 million (an increase from the CZK 20 million previously mentioned by Benice's lawyer to Mr. Pawlowski's lawyer) would be an adequate compensation to reach an amicable settlement.[329] Mr. Pawlowski refused to make the payment and protested against what he saw as an the attempt to hold him hostage in these circumstances.[330]

Second attempt

357. On 19 January 2011, Projekt Sever submitted a proposal to increase the density coefficient from 0.3 ("OB-B") to 0.5 ("OB-C").[331] The Construction Division of Prague 22 and the Deputy Mayor of Uhříněves both approved the proposal. Benice, however, issued a negative opinion, noting that it stood by its original statement on the project from December 2008.[332]

358. Shortly thereafter, Mayor Topičová informed [redacted], a lawyer with DLA Piper hired to assist Claimants on planning issues, that the District could accept a density increase, but requested a payment from Projekt Sever to the District of Benice, as consideration for its cooperation.[333] On 6 May 2011, Mayor Topičová, using her private email address, sent an email to [redacted] confirming that a meeting had taken place and that the matter discussed had been "retracting our original negative opinion" to the modification of the Zoning Plan from OB-B to OB-C. She requested Mr. Pawlowski to make a concrete proposal.[334]

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[326] Pawlowski WS I, para. 33; Topičová WS I, para. 27.
[327] Pawlowski WS I, para. 34; Topičová WS I, para. 18.
[328] Pawlowski WS I, para. 35; Topičová WS II, para. 31.
[329] Pawlowski WS I, para. 37; Topičová WS II, para. 31.
[330] Pawlowski WS I, para. 38.
[331] Guidelines for the Land Use Plan for the Capital City of Prague, 1 November 2002, **C-135**, p. 24/89.
[332] Negative statement of Benice on Zoning Plan Modification U969, 7 March 2011, **C-65**.
[333] C-I, paras. 119-122; C-II, para. 219; Pawlowski WS I, para. 42; E-Mail from Mayor Topičová to [redacted] 6 May 2011, **C-68**.
[334] E-Mail from Mayor Topičová to [redacted] 6 May 2011, **C-68.**

359. No such proposal was made.

B. **Decision**

360. The proven facts can be summarized as follows:

- On two occasions, Mayor Topičová, acting on behalf of the District of Benice, asked Claimants for certain payments; the first request was made in 2009 and the second in 2011;

- The first request was for an amount of initially CZK 20 million, thereafter increased to CZK 30 million; the second request was apparently for CZK 15 million (this is the amount averred by Claimants; the Mayor, although acknowledging that the request took place, does not recall the specific amount);[335]

- It is acknowledged that the suggestion was that Projekt Sever should pay the funds to the District of Benice – not personally to Mayor Topičová;

- Projekt Sever was under no legal obligation to make these payments; Respondent has not drawn the Tribunal's attention to any legal provision creating such obligation. To the contrary, Mayor Topičová presented the payments as a *quid pro quo*; if Projekt Sever made the first payment, the District would withdraw the Benice Lawsuit, and if it made the second payment, the District would abandon its opposition to the increase in the density coefficient;

- Mayor Topičová explained in her witness statements that the purpose of the first payment request was "to reach an amicable settlement in the context of the lawsuit that contested the sale"[336] of the land to Projekt Sever, and the purpose of the second request was to "renovate Bernice's civic amenities";[337]

- Mr. Pawlowski and Claimants rejected both payment requests.

Discussion

361. The question before the Tribunal is whether the payment requests made by Mayor Topičová, on behalf of the District of Benice, constitute an unreasonable measure, in breach of the specific prohibition and of the general FET standard guaranteed in Article 4 of the BIT.

362. The Tribunal finds that Benice's conduct does indeed constitute a breach of Article 4 of the BIT. In coming to this conclusion, the Tribunal finds the following arguments compelling:

363. First, public authorities are vested with wide ranging powers, to be exercised in the furtherance of the common good; to prevent misuse, it is a generally accepted principle of the rule of law that such powers should be established by law and exercised in accordance with proper procedure. The risk of misuse is especially severe when powers are used to impose on citizens payments to the benefit of the State; taxation, and any other measures

[335] Topičová WS II, para. 31.
[336] Topičová WS II, para. 31.
[337] HT 711:16-17; Topičová WS II, para. 31.

requiring citizens to contribute funds to public institutions, must strictly respect the principles of legality and proper administrative procedure.

364. In the present case, these principles have not been adhered to:

- Respondent has failed to refer to any Czech law, authorising the Mayor of Benice to condition the withdrawal of a lawsuit or the consent to a change in the zoning requirements upon the making of payments by the affected private individuals; the necessary conclusion is that Mayor Topičová acted on her own initiative, her conduct being neither foreseen in, nor authorized by, any legal norm;

- The proven facts also show that Mayor Topičová did not adhere to any proper administrative procedure; there is no evidence in the file that she sought the authorisation of the Benice District Assembly or of any other administrative body, nor that she initiated any administrative procedure to document and formalise the payment requests. She informally convened meetings with Mr. Pawlowski or with his counsel, which were not recorded or summarised in writing, and in the course of these meetings she informed the investor that if certain amounts were paid, the District would amend its conduct to the benefit of the investor. It is telling that the only communication in the file which Mayor Topičova sent to Claimants or their counsel regarding the requests for payment was issued from her private gmail account, and not from her official account at the Municipality;

- There is no evidence in the file that the amounts requested (CZK 15 million, CZK 20 million and eventually CZK 30 million) were established on the basis of rational analysis or by reference to the specific costs and benefits to the District of Benice to which the Project would give rise; to the contrary, the figures seem to have been estimated by Mayor Topičová as the highest amounts which the investor was likely to accept; in the email sent to [redacted] (Claimants' counsel), the Mayor went so far as to request the developer to make a counter-offer:

> "[…] we would like to see at least some concept of the agreement, so that we can discuss it. Could I ask you to inform me of Mr. Pawlowski's view of the matter?"[338]

Arbitrariness

365. As the Tribunal has noted at para. 299 above, Professor Schreuer has defined as "arbitrary" measures which fall into four categories:

> "a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
>
> b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
>
> c. a measure taken for reasons that are different from those put forward by the decision maker;

[338] E-Mail from Mayor Topičová to [redacted] 6 May 2011, **C-68**.

d. a measure taken in willful disregard of due process and proper procedure."[339]

366. Mayor Topičová's actions fall within two of Prof. Schreuer's categories:

- the requests for payments were not based on any legal standard and had no objective rational basis, and

- they were made in total disregard of due process and proper procedure.

The necessary consequence is that these measures must be considered arbitrary – and by extension unreasonable; all arbitrary measures are by definition unreasonable, because rational action on the part of a State cannot result in the substitution of the rule of law by prejudice, preference or bias.[340]

367. Second, Claimants say that Mr. Pawlowski was faced with a classic "red flag" situation, in which it appeared that a public official was demanding corrupt payments for doing a job that should be done anyway, as required by law, and that for this reason he (properly) refused to make a payment.[341] Mr. Pawlowski adds that he became suspicious, because the amount asked for was very high compared with the annual budget of the Benice District, which only amounted to CZK 3 million (most of the administration being done by the District of Uhříněves).[342]

368. The Tribunal has sympathy for Mr. Pawlowski's predicament, even accepting that Mayor Topičová's aim was to obtain monies for the benefit of Benice District.

369. The request made by Mayor Topičová did constitute a "red flag." Investors should not be required to make, and they are entitled to, and should, abstain from making, ostensibly facilitative payments in favour of public institutions of the host State, as a *quid pro quo* for administrative measures which, by law, such institutions are obliged to provide for free – especially if such payments have no support in law and the amount has been essentially plucked out of the air by the public official concerned. Had Mr. Pawlowski paid, he would have opened the floodgates to a possible challenge or even incrimination that the investment was procured through corrupt means.

370. Third, Mayor Topičová's decision to file the Benice Lawsuit against Projekt Sever, the buyer of the land, but not against Uhříněves, the seller, might seem counterintuitive and legally flawed. In fact, there are indications that, by suing Projekt Sever but not Uhříněves, Benice's real aim was to force a negotiation with the investor and to extract additional payments:

- Benice's main argument in the Benice Lawsuit was that the purchase price of the land should flow to Benice and not to Uhříněves; Projekt Sever, the buyer, had already paid the full purchase price to Uhříněves, and the reasonable way to proceed would have been to request that the recipient of the funds disgorge the allegedly ill-gotten proceeds;

[339] *EDF*, **RL-180**, para. 303.
[340] *Lemire*, **RL-83**, paras. 262-263.
[341] C-PHB, para. 98; HT 178:1-179:3; Pawlowski WS I, paras. 40, 43-44; Pawlowski WS II, paras. 61-62.
[342] Pawlowski WS I, para. 40.

- At the Hearing, when questioned about the payment required from Claimants in order to drop the lawsuit, Mayor Topičová admitted to instructing Benice's lawyers "to get the sum of money for the sale of the land located in our cadastral territory",[343] and refused to comment further;[344]

- The Benice Lawsuit was ultimately dismissed, in the first instance by the District Court and thereafter on appeal, due to Benice's lack of standing: Municipal Districts cannot own property and only act as managers of entrusted property;[345] additionally, the Court rejected the argument that Benice was in charge of administering the plots of land and confirmed that Uhříněves was the rightful administrator.[346]

371. Summing up, while the Tribunal is prepared to accept that the requests for significant payments from Projekt Sever as a condition for the withdrawal of the Benice Lawsuit filed by the District and for the District's change of opinion with regard to the increase in the density coefficient, were made for the benefit of the residents of Benice, the fact remains that the requests were made without any support in Czech law and outside any established administrative procedure. The investors were entitled to consider such requests to be irregular, improper, and even indicative of, or as an invitation to engage in, conduct that is unlawful.

372. The Tribunal does not consider it fair that investors should be put in a position where they are requested by a public authority to make payments to secure the progress of their projects, unless the invitations are made within an established and transparent legal and administrative framework. That is so regardless of the motives or the intended use of any funds paid or sought to be procured. For this reason, the Tribunal considers that the requests made to Projekt Sever on behalf of Benice District do not meet the standard of reasonableness mandated by Article 4(1) and fall short of the standard of Fair and Equitable Treatment that Article 4(2) requires the Respondent to ensure.

373. The Mayor of Benice represents an organ of the Czech Republic at a territorial level, and in accordance with Article 4 of the ILC Articles her conduct must be attributed to the Czech Republic. The necessary consequence is that the Czech Republic has committed an internationally wrongful act in breach of the BIT.

3.2 FILING OF THE ANNULMENT REQUEST BY BENICE

374. Claimants argue that Benice's 2012 filing of the Annulment Request of the Zoning Change was an arbitrary[347] and disproportionate[348] measure in violation of Article 4(1) of the BIT. Respondent avers that there was no abuse of legal process in Benice seeking annulment of

[343] HT 700:2-4.
[344] HT 700:20-21.
[345] District Court Judgment in file 28 C 349/2009-78, 8 March 2012, **C-64**, pp. 12-13.
[346] District Court Judgment in file 28 C 349/2009-78, 8 March 2012, **C-64**, p. 14.
[347] C-II, paras. 253-262; C-PHB, para. 104.
[348] C-PHB, paras. 106-107.

the Zoning Change, and that Benice was simply exerting its legal right before the Czech Courts.[349]

375. In order to determine whether Benice's filing of the Annulment Request constitutes a violation of the BIT, the Tribunal will first briefly set out the facts [**A.**], and will then discuss and decide the issue [**B.**].

A. **Proven facts**

376. *Pro memoria*, by early 2012, the development of the Project seemed to be proceeding as planned: the Zoning Change had been approved by the Prague Assembly, the increase in density had been accepted by the Municipal authority and the planning permit application, the last step before the building permit, had been submitted by Claimants' architects.

377. But then the District of Benice, led by Mayor Topičová, and two residents of Uhříněves (and immediate neighbours to the Project area),[350] decided to file the Annulment Request. On 21 June 2012 Mayor Topičová informed the Benice District Assembly of her meeting with the two neighbours and of her proposal to file the Request. Upon Mayor Topičová's proposals, the Assembly decided to cooperate with the two neighbours and to submit the Request to the Municipal Court of Prague, seeking annulment of the Zoning Plan Change, in order to "prevent the realization of the [Project] or at least to minimize its scale."[351]

378. A week thereafter, on 28 June 2012, the Annulment Request against the City of Prague was presented, seeking the annulment of the Zoning Plan Change Z 1294/07 on grounds of substantive and procedural shortcomings.[352] In particular, the complainants alleged that the Zoning Plan Change:

- Did not respect the high-speed rail VR1 and the railway corridor that would run through the Project Area;[353]

- Failed to respect protected natural areas and impaired the green belt surrounding Prague;[354]

- Created a new zone of supra-local significance, which had no support in the Prague Spatial Development Principles;[355]

- Defined a new developable area, without sufficient assessment of the need for new construction zones according to Section 55(3) of the Building Act 2006;[356]

[349] R-II, paras. 291-292; R-PHB, para. 191.
[350] Topičová WS I, para. 38; Minutes of the Benice District Assembly, 21 June 2012, **C-75**; Resolution of the Benice District Assembly, 21 June 2012, **C-76**.
[351] Resolution of the Benice District Assembly, 21 June 2012, **C-76**.
[352] Judgment of the Prague Supreme Administrative Court, 6 Aos 2/2013, dated February 26, 2014, **C-95**, p. 1.
[353] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 3.
[354] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 4.
[355] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 4.
[356] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 5.

- Was incompatible with the case law of the Supreme Administrative Court;[357]

- Was in conflict with the requirements of two Authorities (the Regional Organizer of Prague Integrated Transport and the Railway Infrastructure Administration);[358]

- The allocation of Change Z 1294 from wave 06 to wave 07 was illegal;[359]

- The Project did not properly reflect the environmental impact assessment;[360]

- It conflicted with the nature park Botič-Milíčov;[361] and

- It contravened the law on protection against noise pollution and the law on protection of farmland.[362]

379. Projekt Sever was invited to take part in the proceedings through a notification sent by the Municipal Court on 25 July 2012. However, by the time Projekt Sever attempted to take part in the proceedings in March 2013, the deadline had already passed, and the Court denied Projekt Sever's request to participate.[363]

380. The City of Prague, as respondent in the annulment action, replied and opposed the arguments made by the complainants.[364]

Decision of the Municipal Court

381. The Municipal Court reviewed the case, and on 26 April 2013 issued the Annulment Decision, finding that the Zoning Plan Change (Change Z 1294/07) should be annulled, because

- it had been issued in contravention of the law and

- lacked proper reasoning.[365]

382. The Municipal Court held that the Zoning Plan Change "was issued in contravention of the law", because:

- Change Z 1294/07 conflicted with Prague's Special Development Principles;[366]

[357] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 5.
[358] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 6.
[359] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 6.
[360] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 7.
[361] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 7.
[362] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 7.
[363] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 29. (See also paras. 406-408 *infra*).
[364] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, pp. 8-10.
[365] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 28.
[366] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, pp. 19-20.

- The Botič-Milíčov nature park was affected by Change Z 1294/07 and it had been established as a "construction freeze" area;[367]

- Change Z 1294/07 created a new developable area, but failed to demonstrate that the already delimited developable areas could not be used and it was, thus, in violation of the Building Act;[368]

- The area subject to Change Z 1294/07 was a "zone of supra-local significance", since it affected more than one Municipality, and therefore the re-zoning required the amendment of the Spatial Development Principles (and not just the zoning plan);[369] and

- Change Z 1294/07 did not demonstrate its compliance with the Prague-Benešov-České Budějovice railway corridor, established both in the Spatial Development Policy and Spatial Development Principles.[370]

383. The Court additionally determined that the proceedings had been procedurally flawed, because the transfer from "wave 06" to "wave 07" had not been properly publicised.[371]

Decision of the Prague Supreme Administrative Court

384. Initially, the Mayor of Prague, Mr. Tomáš Hudeček, stated publicly that the City of Prague would not file a cassation complaint to the Prague Supreme Administrative Court.[372] However, the City did eventually file a cassation complaint,[373] which was dismissed by the Supreme Administrative Court one year later, on 26 February 2014, thus confirming the annulment of the Zoning Change.[374]

B. **Decision**

385. Under Czech law, the approval of a zoning change in Prague entails a long and democratic administrative process, divided into several consecutive steps, which culminates in a Measure of General Nature adopted by the Prague City Assembly (the highest political body, elected by the citizens of Prague).[375] But this political decision is not final: it is subject to review by the Courts, which are authorised to scrutinise the procedure and the content in order to safeguard that no breach of law has been committed.

386. This is precisely what happened in the present case: the Zoning Plan Change was approved by Prague's City Assembly. Thereafter, two private individuals, owners of properties directly affected by the Project, and the District of Benice, the Borough where the Project was located, filed a challenge against the approval before the Municipal Court. The District

[367] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 23.
[368] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 24.
[369] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, pp. 22-23.
[370] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 19.
[371] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, pp. 26-27.
[372] "Sebastian Pawloski not allowed to build in Benice", E15.cz News, 2 May 2013, **C-78**.
[373] Judgment of the Prague Supreme Administrative Court, 6 Aos 2/2013, 26 February 2014, **C-95**.
[374] Judgment of the Prague Supreme Administrative Court, 6 Aos 2/2013, 26 February 2014, **C-95**.
[375] See paras. 55-60 *supra*.

was duly authorised to participate by a decision passed by the District Assembly – its highest political body.[376] In due course, the Municipal Court issued its judgment, accepting that the complainants had proper standing to file the case, and, on the merits, finding that the Zoning Plan Change should be annulled

- because it had been issued in contravention of Czech law and,
- furthermore, because it lacked proper reasoning.[377]

387. The first instance decision of the Municipal Court was eventually confirmed by the Supreme Administrative Court.

The judgments do not infringe Article 4 of the BIT …

388. Claimants do not contend that the judgments of the Municipal Court and of the Supreme Administrative Court constitute a denial of justice. Absent an allegation of denial of justice, the Zoning Plan Change must be deemed properly annulled, and the judgments rendered by the Municipal Court and by the Supreme Administrative Court cannot, and do not, constitute a breach of Article 4 of the BIT.

… nor does the decision of the District to file the Annulment Request

389. The decision by the District of Benice to file the Annulment Request does not result in a violation of the BIT either.

390. The system of checks and balances developed by Czech law worked as any investor could and should have expected: the political decision of the Prague City Assembly was conditional upon review as to its legality by the Czech Courts. Any aggrieved party had the right to request such review. Two affected citizens plus the District of Benice did so. The District acted under the instruction of its highest organ, the Assembly; it exercised its legal right to challenge the Zoning Plan Change, and it did so adhering to proper administrative procedure.

391. *Qui iure suo utitur neminem laedit.*[378]

C. **Claimants' counterarguments**

392. Claimants make two counterarguments.

a. **First counterargument**

393. Claimants argue that Benice's decision to file the Annulment Request in an attempt entirely to prevent the residential development of the Project Area was an arbitrary act, a personal retaliation of Mayor Topičova, that inflicted damage on the investor without serving any

[376] [redacted] ER I, paras. 63-64.
[377] Judgment of the Prague Municipal Court, no. 9A 113/2012, 26 April 2013, **C-94**, p. 28.
[378] He who uses a right injures no one.

purpose;[379] legal process was used for a purpose for which it was not intended, in violation of the FET standard.[380]

394. The Tribunal is not persuaded by that argument.

395. *Pro memoria*: in 2002 the Districts of Benice and Uhříněves, upon approval of their respective District Assemblies, had initiated the administrative procedure for the Zoning Plan Change. Eight years later, in 2010, the procedure had culminated in political approval by the Prague City Assembly. The decision of the District Assembly of Benice, which authorised the filing of the Annulment Request, was adopted in June 2012 – ten years after the initial decision to proceed. Since District Assemblies are elected democratically, it is likely that the composition of the Benice Assembly had undergone significant changes between the initial decision to proceed and the final decision to seek annulment of the Zoning Plan Change.

396. Claimants say that the decision to file the Annulment Request was a personal decision of Mayor Topičová, adopted as a retaliation for Claimants' refusal to pay the additional sums that she had sought to extract from them.

397. If this were indeed the case, such conduct could constitute a breach of the FET standard enshrined in Article 4 of the BIT.

398. There are, however, three reasons which undermine Claimants' argument:

- First, the decision to file the Annulment Request was taken by the democratic organ of the District of Benice, its Assembly, not by Mayor Topičová singlehandedly; there is no evidence that the Assembly was aware of Mayor Topičová's unsuccessful efforts to extract funds from the developer and there is no evidence that the Assembly's motives were to retaliate against the investor;

- Second, the Assembly justified its decision with the following arguments:

> "To prevent the execution of the submitted Benice Residential Complex project or at least to minimise its scale to a level that will not constitute a significant traffic growth in the area, will not disrupt aesthetic and natural features of value of the Botič-Milíčov nature park, and will not be an urbanistically and socially disproportionate intervention in the development of Prague — Benice borough."[381]

  The justification rings true. The construction of a new, very large, housing estate is often an unwelcome development for existing home-owners, who fear a deterioration of the environment and a reduction in the quality of public services;

[379] C-PHB, paras. 103-110.
[380] C-PHB, para. 104, referring to *Tecmed*, **CL-17**, para. 154; *Frontier Petroleum,* **CL-21**, para. 300; See also C-II, paras. 253-262.
[381] Resolution of the Benice District Assembly, 21 June 2012, **C-76**.

- Third, the subsequent judgments rendered by the Courts retroactively justified the District's decision: the Zoning Plan Change was indeed held to be illegal and lacking in proper reasoning, as the District had been claiming.

b. **Second counterargument**

399. Claimants submit a second counterargument.

400. Claimants say that even if the Tribunal were to find that Benice had a legitimate reason to oppose the Project, the filing of an Annulment Request should still be considered a disproportionate measure in light of available alternatives (such as seeking to reduce the scope of the Project),[382] and was thus a violation of the FET standard.[383] Further, since Benice acted to destroy Claimants' investment without providing any advance notice, this also violated the FET standard's transparency requirement.[384]

401. Claimants rely on the opinion of their legal expert, [redacted] In her second report, [redacted] says that Benice could have used any of the many rights that city Districts have to object to, or at least influence, the scale of a building project:[385] Benice did not comment on or object to the Zoning Plan Change,[386] thus missing several opportunities to influence the scale of the Project and in 2011, it did not even object to the increase in the density coefficient. [redacted] also suggests[387] that Benice could have limited its request to the annulment of the increase in the density coefficient, without asking for the annulment of the totality of the Zoning Plan Change.

402. In the course of the hearing, Mayor Topičová contradicted [redacted]'s assertions. She explained that in her view, the only way to prevent the impact of the Project on the Benice borough was to file for the annulment of the Zoning Plan Change in its totality; if the Zoning Plan Change remained in force, and the permits process was authorised to commence, Benice would have had no opportunity to minimise the Project's impact on the municipality and its inhabitants[388]:

> "MS TOPIČOVÁ: Because we did not manage to negotiate a reduction in the size of the project to a level that would be acceptable to us as the borough, we were looking for a solution how to cancel the project. […]
>
> [redacted] […] Now, I just heard you say that your goal was to prevent the project. What was the goal when you decided to annul the filed lawsuit?
>
> MS TOPIČOVÁ: I think I answered the question. We did not manage to reduce the scope that would be acceptable to our municipality.

[382] C-PHB, para. 106.
[383] C-PHB, para. 106, referring to *Watkins Holdings,* **CL-112**, para. 601; *SolEs Badajoz*, **CL-114**, para. 328.
[384] C-PHB, para. 107, referring to *Glencore,* **CL-113**, para. 1448.
[385] [redacted] ER II, paras. 46- 66.
[386] [redacted] ER II, para. 66.
[387] [redacted] ER II, para. 66.
[388] HT 731:16-732:18 (Topičová, Cross).

[redacted]: So, at the end of paragraph 29, what you really wanted to say was that the consensual goal was now to prevent the development, is that what you are now saying?

MS TOPIČOVÁ: Yes, to prevent the size of the project. We did not find any other way."

403. The Tribunal accepts [redacted] s conclusion that the District could have been more vocal in its opposition, and that alternative courses of action may have been available, such that the challenge could have been limited to certain aspects of the Project. But these hypothetical alternatives cannot detract from an undisputed fact: the Zoning Plan Change did indeed breach Czech law, as confirmed by the decisions of the Courts. The District's decision to challenge it was a decision taken in observance of proper procedures and in conformity with the rule of law. Such a decision (or a proper and regular judgment ruling upon it) cannot be labelled as disproportionate, arbitrary or unreasonable, or in breach of the FET standard.

Advance notice

404. The Tribunal does not accept Claimant's subsidiary argument that Benice failed to provide advance notice, in violation of the FET standard's transparency requirement.

405. Projekt Sever was in due course informed, through a notification sent by the Municipal Court on 25 July 2012, that the District had filed the Annulment Request. However, by the time Projekt Sever attempted to participate in the proceedings in March 2013, the applicable legal deadline to appear had lapsed, and the Court denied Projekt Sever's request.[389] Projekt Sever challenged the decision of the Municipal Court, but on 4 December 2014 the Constitutional Court confirmed the Municipal Court's decision and dismissed the complaint.[390]

406. The Tribunal sees no violation of the FET standard. Public authorities are not under an obligation to provide advance notice of their intention to launch lawsuits which affect protected investors; what due process requires is that the respondent in a lawsuit be properly notified, and that the respondent be afforded a reasonable time within which to appear.

407. These requirements were met: when the Annulment Request was filed, Projekt Sever was duly notified through the Court. For reasons which are not to be imputed to Respondent, Projekt Sever then failed to appear within the time frame established by Czech procedural law. Its subsequent request, filed once the time period for appearance had already lapsed, was denied. Projekt Sever appealed the decision up to the Constitutional Court, but it was unsuccessful.

408. Claimants are not submitting that the decision of the Constitutional Court implied a denial of justice.

[389] Judgment of the Prague Municipal Court, no. 9A 113/2012, dated 26 April 2013, **C-94**, p. 29.
[390] Constitutional Court Resolution, 4 December 2014, **R-15**.

409. In the absence of any such allegation, much less any evidence of a denial of justice, the Tribunal concludes that there is no breach of Article 4 of the BIT.

3.3 MAYOR HUDEČEK'S OPPOSITION TO RE-PROCUREMENT

410. According to Claimants, the City of Prague could have re-procured the annulled Zoning Plan Change promptly, there being no substantive reason why the deficiencies identified by the Court in its Annulment Decision could not have been remedied; all that was required was the drafting of a more detailed substantiation and obtaining an approval by the City Assembly.[391] Instead, Claimants say that Mayor Hudeček did not advance the re-procurement during his term in office, and his conduct was unreasonable and arbitrary, in breach of Article 4 of the BIT.

411. Respondent denies that Mayor Hudeček engaged in improper conduct and avers that he followed standard procedure in addressing the re-procurement of the Zoning Plan Change.[392]

412. The Tribunal will again summarise the proven facts relevant to this issue [**A.**]. It will then take a decision [**B.**] leading to its conclusion that Claimants' counterarguments should be dismissed [**C.**].

A. **Proven facts**

413. Two months after the Cassation Decision, Mr. Pawlowski (representing Projekt Sever) sent a letter to Mayor Hudeček. He stated that the annulment of the Zoning Plan Change had caused massive damage to Projekt Sever (quantified at a minimum of CZK 2.5 billion) and he requested that the matter be included in the agenda of the next session of the City Assembly.[393] Projekt Sever sent another letter in May 2014 to Prague's Zoning Plan Division, citing the City's obligations under Section 55(3) of Building Act and requesting that the City Assembly continue the process of re-procuring Zoning Plan Change Z-1294/07.[394]

414. A few days later, on 19 May 2014, Mayor Hudeček reacted, informing Projekt Sever that Section 55(3) did not apply to this case and that the only possible course of action was the filing of a new application for a zoning plan change.[395] Mayor Hudeček explained that any such instigation of a zoning plan change could originate from the original applicants (in this case, the two Municipal Districts), but he also noted that if Projekt Sever applied for the Zoning Plan Change itself, discussion of the Zoning Plan Change could be commenced, but it would only apply to Projekt Sever.[396]

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[391] C-PHB, paras. 116-117.
[392] R-PHB, para. 105; R-II, paras. 130-134.
[393] Letter from Projekt Sever to Mayor of the City of Prague, 7 April 2014, **C-80**.
[394] Letter from Projekt Sever to the Zoning Plan Division of the City of Prague, 19 May 2014, **C-81**.
[395] Letter from Mayor of Prague to Projekt Sever, 19 May 2014, **C-82**.
[396] Letter from Mayor of Prague to Projekt Sever, 19 May 2014, **C-82**.

Meeting at the Spatial Development Division

415. [redacted] a Municipal lawyer working for the City Spatial Development Division, participated in a meeting held around the same time, involving Mr. Pawlowski, his lawyers, and civil servants from that Division.[397] [redacted] describes the meeting in the following terms:

> "I did not sense any effort on the part of Prague City Hall to support the project or the zoning plan change itself: it was kind of like 'it's happened, nothing we can do about it'. In response to an enquiry from Mr Pawlowski, a reply was sent saying that the annulment of the change automatically restored the previous state of regulation. In other cases where a zoning plan change was annulled, a possible solution was proactively offered; only in this case that did not happen. The only option the City of Prague offered Mr Pawlowski at this meeting was that he himself could ask for a new zoning plan application to be processed." [398]

416. [redacted] recalled that this treatment contrasted with that granted to other investors in equivalent situations:

> "I remember that many equivalent meetings were also held with other investors if zoning plan changes or modifications were annulled by a court. We usually discussed the situation that had arisen with the investor and offered a solution, which consisted in a re-submission of the application, with the understanding that in the new processing of the application we would eliminate the errors identified by the court as the grounds for annulment." [399]

417. During the Hearing, [redacted] was questioned about what would normally happen when a zoning plan change was annulled by a Court. He stated that:

> "[T]here would be a meeting with the investor, the land owner. It would be explained to him what was the cause of the annulment of the zoning plan change, what are the reasons, and he would be asked whether he wants to insist on the change. If he says yes, then we take a step or two back; we go back to the point which is not covered by the decision of the court; what was annulled would be processed again, and the change could be adopted again."[400]

418. [redacted] clarified what he found to be "non-standard" about the procedure applied to Projekt Sever's case. Rather than going back to the last valid step in the zoning process and resuming from there, [redacted] explained:

> "[I]n this specific case it was requested that Mr Pawlowski make a new application himself, and the change would be reprocessed from the very beginning again."[401]

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[397] [redacted] WS, para. 18.
[398] [redacted] WS, para. 21.
[399] [redacted] WS, para. 19.
[400] HT 410:15-24.
[401] HT 391:18-22.

Discussion at the City Assembly Meeting of 29 May 2014

419. At the meeting of the Prague City Assembly on 29 May 2014 (10 days after Mayor Hudeček's letter), Assembly member Dr. Blažek asked Mayor Hudeček about the delay in bringing the matter of the annulment of the Zoning Plan Change before the Assembly, noting the potential damages that the City of Prague was facing.[402] (To recall, Dr. Blažek was an important figure in the "ODS" party, a political rival of Mayor Hudeček's "TOP09" party[403]).

420. Mayor Hudeček responded by asserting that

> "[t]he error is not in the administrative procedure [of the zoning change]; the error is that the Prague City Assembly ever approved it."[404]

Allegations of improper conduct

421. Mayor Hudeček added that there had been improper conduct in obtaining the Zoning Plan Change: the Zoning Plan Division initially had a negative opinion, and undue pressure had been exerted to cause it to change its opinion. He also told the Assembly that files relating to the approval of the Zoning Plan Change had been sent to the Police:[405]

> "A zoning plan change was approved that conflicted with the Spatial Development Principles at the time. The Institute of Urban Planning and Development, then known as the Development Section, did not consent, but director Votava subsequently changed the opinion to an affirmative one. That is documented. That was part of the 'Blue Files' and was sent to the police. The Railway Infrastructure Administration, as a concerned state authority, did not consent. ROPIT did not consent. The Zoning Plan Division did not consent, but then, under pressure from Councillor Manhart, had to change its opinion, but even so the Prague City Assembly, which you were a part of, approved it on 26 March 2010."[406] [Emphasis added].

422. Mayor Hudeček further insinuated that there had been criminality involved in the process. Noting the City of Prague's cassation appeal against the Municipal Court's first instance decision, Mayor Hudeček stated:

> "It is not true that we then did nothing. The City of Prague then filed a cassation complaint against it for the very reason that the city could say 'we did something' in the event of the kind of litigation that followed. I cannot say that I personally agree with the cassation complaint. Not a bit. After what I read, it would be quite enough for me if someone was locked up, not that it was discussed further. I remind you that the Prague City Assembly that voted on it is the main argument."[407] [Emphasis added].

[402] City Assembly Meeting Transcript, May 29, 2014, **C-96**, pp. 1-2.
[403] Hudecek WS I, para. 16; [redacted] WS I, para. 78.
[404] City Assembly Meeting Transcript, 29 May 2014, **C-96**, p. 2.
[405] City Assembly Meeting Transcript, 29 May 2014, **C-96**, p. 2.
[406] City Assembly Meeting Transcript, 29 May 2014, **C-96**, p. 2.
[407] City Assembly Meeting Transcript, 29 May 2014, **C-96**, p. 3.

423. Mayor Hudeček also referred to "legal opinions" supporting his view that the City had no responsibility to act, and finally added:

> "For that reason, if I were to summarise, the city did everything to ensure that any court fine or arbitration was basically out of the question. At the same time Mr Pawlowski wants us, as assembly members, to immediately start to issue a new zoning plan change. To tell you the truth, having acquainted myself with it and after what I read here, I personally cannot imagine that I personally would initiate that change. The change can be initiated by a city borough, however. We have received no such instigation, so I think that the Prague City Assembly literally has no work to do at this moment."[408]

Discussion at the City Assembly Meeting of 19 June 2014

424. One month later, at the 19 June 2014 City Assembly meeting, Dr. Blažek once again brought up the annulment of Change Z-1294/07. He proposed that the City restart the procurement process, and he noted the potential future risks that the City Assembly members could face if they did not act. Dr. Blažek proposed placing the matter on the agenda for full discussion.[409]

425. In response to Dr. Blažek's concerns, Mayor Hudeček replied that:

> "If part of a zoning plan is annulled and there is no valid zoning plan in the given part of the city or territory, the assembly has to act without delay. That means that we have here the opinion of lawyers from the zoning plan division headed by Mrs. Engineer Cvetlerová. Based on this opinion I think that we really don't have to deal with this situation now and consequently I won't submit the prints either. I consequently will not second Doctor Blaežek's motion."[410] [Emphasis added].

426. Dr. Blažek responded to Mayor Hudeček's remarks, noting that he was:

> "[G]lad that you say here that they are lawyers from the zoning plan division, which is great, because four years ago the same lawyers, the same division, guaranteed the Assembly here that everything is *de lege*, that everything is in order, and when the Assembly voted on the change four years ago, we were persuaded and it was also drawn up by this division, these lawyers, and I guess the same people, when we were told that it is absolutely in order. Today, four years later, we are in a situation where it has been annulled and so we are repeatedly being called on by the investor to act."[411]

427. Nevertheless, Mayor Hudeček refused Dr. Blažek's motion to place the matter on the agenda for discussion. Additionally, Mayor Hudeček did not correct any of the statements made at the 29 May 2014 meeting.

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[408] City Assembly Meeting Transcript, 29 May 2014, **C-96**, p. 3.
[409] City Assembly Meeting Transcript, 19 June 2014, **C-97**, pp. 1-2; [redacted] ER I, para. 78.
[410] City Assembly Meeting Transcript, 19 June 2014, **C-97**, p. 2.
[411] City Assembly Meeting Transcript, 19 June 2014, **C-97**, p. 3.

Discussion at the City Assembly Meeting of 11 September 2014

428. Three months later, at the 11 September 2014 meeting of the City Assembly, Dr. Blažek accused Mayor Hudeček of being motivated by personal *animus* against Mr. Pawlowski, stating:

> "Perhaps I even understand that you don't like Mr Pawlowski. Personal feelings are a fundamental driving force of your actions, but that's all right. You will happily play it down in six months' time […]"[412]

429. Dr. Blažek also accused Mayor Hudeček of having previously misled the City Assembly by relying on a legal assessment which, he said, did not exist, and by having claimed that the City Assembly acted under pressure from Councilor Manhart – who did not even know about the Assembly meeting, nor the issues being discussed.[413]

430. Finally, Dr. Blažek questioned Mayor Hudeček's prior statements claiming reliance on a legal opinion. Dr. Blažek asked Mayor Hudeček:

> "[E]xplain to me, please, when you said in June 2014 that it is evident, it is clear, on the basis of legal assessments, why you didn't submit a single legal assessment. It's because you didn't have any; you had the opinion of the zoning plan division, that's all right. But I am just putting it out there and reminding you that that was the same division that submitted its opinion to the assembly that [the zoning plan change] can be voted for and that it is in order."[414] [Emphasis added].

431. In reply, Mayor Hudeček noted that the land in question belonged to Mr. Pawlowski and he alleged that Mr. Pawlowski was trying to force the Assembly to take up the issue of the re-procurement.

432. Mayor Hudeček insisted that he had commissioned a legal opinion, stating:

> "So the legal opinion is here. That means that it is an opinion by the law firm of Čalfa, Bartošík a partneři. […] The only thing that was annulled is the discussion of a certain zoning plan change. And here this assessment by the law firm that originated in the zoning plan division – it therefore does not follow from a simple linguistic interpretation of the said provision that the Assembly's obligation to decide without delay on the procurement of the zoning plan or a change thereto and on its substance applies to the case of the annulment of a change to a zoning plan or a part thereof."[415] [Emphasis added].

433. Mayor Hudeček then once again urged the Assembly members not to give in to pressure from Mr. Pawlowski, suggesting that all of Prague was against the Zoning Plan Change, and questioning Dr. Blažek's motivations for raising the issue:

[412] City Assembly Meeting Transcript, 11 September 2014, **C-98**, p. 2.
[413] City Assembly Meeting Transcript, 11 September 2014, **C-98**, p. 2.
[414] City Assembly Meeting Transcript, 11 September 2014, **C-98**, p. 2.
[415] City Assembly Meeting Transcript, 11 September 2014, **C-98**, pp. 2-3.

> "So, ladies and gentlemen, I recommend not yielding to the pressure from the investor who is seeking the annulment of a zoning plan change against which that entire part of Prague protested. And of course I understand Doctor Blažek, who is probably somehow linked to this investor, but the law and the assessment state clearly that the necessity does not follow."[416] [Emphasis added].

Projekt Sever files a complaint, alleging abuse of office

434. On 22 October 2014, Projekt Sever filed a criminal complaint (which was investigated by the "Corruption and Financial Crime Detection Unit of the Czech Police") against Mayor Topičová, Mayor Hudeček, and other relevant persons. The complaint alleged, *inter alia*, conspiracy and abuse of office by Mayor Topičová and Mayor Hudeček in seeking to annul Change Z-1294/07 and blocking the construction of Claimants' planned Residential Complex.[417]

435. Ultimately, the police investigation did not proceed. Projekt Sever included in its Constitutional Court challenge a complaint over the discontinuation of the police investigation; the Constitutional Court, however, found all of Projekt Sever's complaints inadmissible.

Opinion of the Ministry of Regional Development

436. In the meantime, Mayor Coller of Uhříněves had approached the Ministry of Regional Development, requesting a legal opinion regarding the annulment of Zoning Plan Change Z-1294/07. The Ministry reacted on 27 October 2014, with a letter addressed to Mayor Coller, in which it explained the Ministry's position:[418]

- First, the letter states that if a zoning plan change is annulled, the previous zoning plan is applied;[419]

- Second, the letter explains that if the annulment is made because the proposed change lacks reasoning, it is possible to remedy such shortcoming; the same applies to procedural defects; if the annulment is for substantive reasons, the original project will have to be modified to expunge the offending elements;[420]

- Third, Section 55(3) of the Building Act "imposes an obligation on the Municipal Assembly to act in these extraordinary situations";[421] it is the right and the duty of

[416] City Assembly Meeting Transcript, 11 September 2014, **C-98**, pp. 2-3.
[417] C-I, paras. 184-185; R-I, para. 171; Hudeček WS I, para. 18. (The Tribunal notes that the Complaint itself has not been submitted as evidence.)
[418] Opinion of the Ministry of Regional Development regarding Section 55 of the Building Act, 27 October 2014, **C-99**.
[419] Opinion of the Ministry of Regional Development regarding Section 55 of the Building Act, 27 October 2014, **C-99**, p. 2.
[420] Opinion of the Ministry of Regional Development regarding Section 55 of the Building Act, 27 October 2014, **C-99**, p. 3.
[421] Opinion of the Ministry of Regional Development regarding Section 55 of the Building Act, 27 October 2014, **C-99**, p. 3.

the Assembly to assess the situation as it stands after the annulment and adopt the proper decision, which must be duly substantiated;[422]

- Fourth, the Ministry finally explains that it cannot "be ruled out that a Municipal Assembly will decide, having weighed up all facts, that the state of affairs after the annulment of the change is satisfactory and no change will be made."[423]

437. Summing up, the interpretation given by the Ministry to existing Czech legislation was that, upon annulment of a zoning plan change, the matter must be submitted to the relevant Municipal Assembly, which must assess the situation and adopt a reasoned decision:

- to re-procure the Zoning Plan Change (amending the shortcomings established in the annulment judgment); or

- to confirm the annulment, in which case the previous zoning rules will apply.

438. Three months thereafter, in December 2014, the Ministry issued a "Methodological Recommendation" regarding zoning plan changes,[424] which confirmed that the proper interpretation of Section 55(3) of the Building Act requires that, when a zoning plan change is annulled, "the municipal assembly decides without delay on the procurement of the zoning plan or of the change and on its substance."[425]

The re-procurement is finally tabled

439. In November 2014, Mayor Hudeček's term of office ended. At some unspecified time, probably when Mayor Hudeček was no longer Mayor, the City initiated the formal procedure for re-procurement of the Zoning Plan Change. The decision whether to re-procure or not was finally placed on the agenda of the Prague City Assembly meeting of 14 April 2015, when the Assembly decided to reject the re-procurement as will be analysed separately in section [**3.4**] below).

B. **Decision**

440. The final Cassation Decision, annulling the Zoning Plan Change, was issued on 26 February 2014. The re-procurement of the Zoning Plan Change was debated (and dismissed) by the Prague City Assembly more than one year thereafter, on 14 April 2015. The Tribunal must decide whether Mayor Hudeček's initial reluctance even to debate the re-procurement, based on an interpretation of Section 55(3) of the Building Act, which led to a delay of more than one year, was conduct that can be considered unreasonable, arbitrary or in contravention of Article 4 of the BIT.

[422] Opinion of the Ministry of Regional Development regarding Section 55 of the Building Act, 27 October 2014, **C-99**, p. 4.
[423] Opinion of the Ministry of Regional Development regarding Section 55 of the Building Act, 27 October 2014, **C-99**, p. 4.
[424] Methodological Recommendation of the Ministry of Regional Development, December 2014, **H-3**, p. 2.
[425] Methodological Recommendation of the Ministry of Regional Development, December 2014, **H-3**, p. 2.

Section 55(3) of the Building Act

441. Partial or total annulment by the judiciary of a zoning plan change approved by a Municipality is a frequent occurrence in the Czech Republic.[426] The Building Act has a specific provision, establishing the principles which a Municipal authority must follow in such cases. The precise wording of the Building Act has changed several times over the past ten years. From 1 January 2013 to 31 December 2017, Section 55(3) of the Building Act provided as follows:

> "If a part of a zoning plan is annulled or it cannot serve as a ground for a decision pursuant to Section 54 paras. 4 and 5, the municipal assembly shall without delay decide on the procurement of the zoning plan or its change and its content. […] If an entire zoning plan is annulled, the process of procuring shall continue from the last action, which was not challenged by the annulment."[427] [Emphasis added]

442. Projekt Sever argued that Section 55(3) required the Prague City Assembly to take up the question of re-procurement without delay. That interpretation was initially contested by Mayor Hudeček and by the Municipality, which considered that Section 55(3) was only applicable to zoning plans annulled in part or in their entirety, but not to the annulment of zoning plan changes.[428] This construction was based on a literal reading of the law – the Parties' legal experts agree that from a textual perspective, Section 55(3) does not explicitly refer to the annulment of a zoning plan change.[429]

443. Mr. Boháč, who was the Director of Mayor Hudeček's office, explained in his witness statement the background to Mayor Hudeček's opinion: while evaluating Mr. Pawlowski's case, the Mayor's office had approached the Spatial Development Department. It had received a written opinion, explaining that Section 55(3) of the Building Act dealt with a situation in which a part of a zoning plan had been annulled, but it did not provide for a situation, as in the case of the Project, where a change to an existing zoning plan had been annulled.[430] Both Mayor Hudeček[431] and Mr. Boháč[432] aver that this was the regular practice in dealing with zoning changes.[433]

444. To settle the different interpretations of the law, Mayor Coller of Uhříněves approached the Ministry of Regional Development and asked for a legal opinion regarding the annulment of

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[426] "Zoning Changes affected by a court decision", City of Prague, **R-60**.
[427] Section 55 of the Building Act, wording effective from 1 January 2013 until 31 December 2017, (unofficial translation), **R-58**.
[428] Letter from Mayor of Prague to Projekt Sever, 19 May 2014, **C-82**; R-PHB, para. 63.
[429] HT 1004:17-21. ([redacted], Cross) ("Mr. [redacted] […] I don't like to put these types of questions, but the word 'change' that was added to the last -- the word change was only added to the last sentence of Article 55(3) in 2018, correct? [redacted] Yes. That is correct."). See also HT 933:10-950:14 (Tribunal's questions to the legal experts).
[430] Boháč WS, para. 48.
[431] HT 837:17-839:23 (Hudeček Cross)
[432] HT 586:2-588:7 (Boháč Cross, questioned by the President of the Tribunal).
[433] R-PHB, para. 105; R-II, paras. 130-134.

Zoning Plan Change Z-1294/07. In October 2014, the Ministry issued its decision, supporting Claimants' interpretation.[434]

The City changes tack

445. The City accepted the Ministry's interpretation, abandoned its prior position and initiated the procedure for the re-procurement of the Zoning Plan Change. In April 2015, the decision whether to accept or to dismiss the re-procurement of the Zoning Plan Change was submitted to a vote by the City Assembly.

446. Since the City eventually instigated the procedure for re-procuring the Zoning Plan Change, the complaint that Mayor Hudeček's conduct deprived Projekt Sever of the right to have the Zoning Plan Change re-procured cannot be sustained. The only outstanding question is whether the delay which occurred in instigating the re-procurement could give rise to a breach of Article 4 of the BIT.

Delay

447. There was indeed a period of 14 months between the Cassation Decision (26 February 2014), and the decision of the City Assembly on re-procurement (14 April 2015). But there are circumstances which justify this delay: in all jurisdictions, zoning and re-zoning decisions are lengthy procedures, requiring that different authorities with sometimes conflicting mandates canvass and analyse the opinions of stakeholders and that environmental, social and political factors be weighed.

448. In the present case, the Zoning Plan Change had been initiated by the Districts in 2006. It had been approved by the Assembly in 2010 and annulled by the judiciary in 2014. It took Mr. Pawlowski two months following the annulment to send his first communication to the Municipality, requesting re-procurement. And it was October 2014 before the Ministry for Regional Development informed the City that its interpretation was wrong, and that Section 55(3) should also be applied to the annulment of zoning changes. In December 2014, the Ministry finally issued a "Methodological Recommendation" regarding zoning plan changes, which confirmed the proper interpretation of Section 55(3) of the Building Act.[435] The decision of the Assembly was issued four months thereafter.

449. Under these circumstances, the Tribunal finds that the delay in submitting the re-procurement to the City Assembly was not so unreasonable as to constitute a breach of the BIT and an international delict of the Czech Republic.

[434] Opinion of the Ministry of Regional Development regarding Section 55(3) of the Building Act, 27 October 2014, **C-99**.

[435] HT 293:25-294:2 (Coller, Cross) ("MR [redacted] And it is my understanding, Mr Coller, that you requested that opinion from the Ministry after the annulment of the zoning change that concerned Mr Pawlowski's project, yes or no? MR COLLER: Yes[.]").

C. **Claimants' counterarguments**

450. In reaching that decision the Tribunal has considered Claimants' three counterarguments and rejected them for the following reasons.

a. **First counterargument**

451. First, Claimants argue that Mayor Hudeček, during his entire term in office, which ended in November 2014, prevented the City from moving forward with the re-procurement;[436] he refused Claimants' repeated requests to re-procure the Zoning Plan Change, even suggesting that Claimants should start the process all over again and from the very beginning.[437]

452. The Tribunal sees things differently.

453. It is true that Mayor Hudeček supported a literal interpretation of Section 55(3) of the Building Act, which eventually was abandoned by the Municipality, upon the recommendation of the Ministry. It is also true that the Mayor left office in November 2014, at a time when the re-procurement had still to be tabled before the Assembly. But from the point of view of the international responsibility of the Czech Republic, what is relevant is not the personal opinion of a single officer, but the fact that, within a period of time which cannot be labelled as unreasonable, the City of Prague finally submitted the re-procurement for approval by the City Assembly.

b. **Second counterargument**

454. Second, Claimants also assert that Mayor Hudeček acted out of personal opposition to the Zoning Plan Change and hostility to Mr. Pawlowski[438] and made tendentious statements to the Assembly.[439]

455. The evidence does show that Mayor Hudeček personally opposed the initial approval of the Zoning Plan Change and that on several occasions he made inaccurate statements before the City Assembly.

Personal opposition

456. There can be no doubt that Mayor Hudeček personally opposed the development of the Project in general, and the re-procurement of the Zoning Plan Change in particular. But opinions are free: that a political representative holds the view that a certain real estate development is not in the interest of the City by itself does not give rise to an international delict of the Czech Republic.

[436] C-PHB, para. 118.
[437] C-PHB, para. 118.
[438] C-PHB, para. 121.
[439] HT 16:3-17; 655:1-657:22.

Inaccurate statements

457. Did Mayor Hudeček make inaccurate statements to the City Assembly?

458. At the meeting of the Prague City Assembly on 29 May 2014, Mayor Hudeček suggested that there had been improper conduct in obtaining the Zoning Plan Change and that Councillor Manhart had exercised undue pressure. He also told the Assembly that files relating to the approval of the zoning change had been sent to the Police[440] and further insinuated that there had been criminality involved.[441]

459. In direct contradiction to his statements made before the City Assembly, Mayor Hudeček later admitted that no Police investigation had actually taken place. In a letter dated 5 August 2014 addressed to Mrs. [redacted] a member of the Committee of Bonum Commune, Mayor Hudeček explained that no representations had been made to the criminal justice authorities[442] and he corrected his statement with respect to Councilor Manhart having exercised undue pressure.[443]

460. During the hearing, Mayor Hudeček provided additional information: the files had in fact been sent to the police, because he had found irregularities in the documents submitted for the approval of the Zoning Plan Change. Such irregularities included multiple instances of amendments to documents which had previously been marked "for this reason we disagree." The original notation had been crossed out and replaced with "we agree" and signed by Director Votava.[444] Ultimately, however, the Police determined that there was insufficient proof of any wrongdoing and the investigation was dropped.[445]

461. The record seems to bear out the fact that at the 29 April 2014 Assembly meeting, Mayor Hudeček's statements regarding the alleged illegality of Zoning Plan Change Z 1294/07,

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[440] City Assembly Meeting Transcript, 29 May 2014, p. 2, **C-96**: "A zoning plan change was approved that conflicted with the Spatial Development Principles at the time. The Institute of Urban Planning and Development, then known as the Development Section, did not consent, but director Votava subsequently changed the opinion to an affirmative one. That is documented. That was part of the 'Blue Files' and was sent to the police. The Railway Infrastructure Administration, as a concerned state authority, did not consent. ROPIT did not consent. The Zoning Plan Division did not consent, but then, under pressure from Councillor Manhart, had to change its opinion, but even so the Prague City Assembly, which you were a part of, approved it on 26 March 2010." [Emphasis added].

[441] City Assembly Meeting Transcript, 29 May 2014, p. 3, **C-96**. "It is not true that we then did nothing. The City of Prague then filed a cassation complaint against it for the very reason that the city could say 'we did something' in the event of the kind of litigation that followed. I cannot say that I personally agree with the cassation complaint. Not a bit. After what I read, it would be quite enough for me if someone was locked up, not that it was discussed further. I remind you that the Prague City Assembly that voted on it is the main argument." [Emphasis added].

[442] Letter from the Mayor of Prague to Committee Bonum Commune, 5 August 2014, **C-93**: "The Municipal Office of Prague did not address any submissions to the authorities responsible for criminal justice police. The Municipal Office of Prague performed an in-depth check, the outcome of which is that there is reasonable suspicion of unethical, immoral procedure, but evidence of a breach of the law was not found. Unfortunately, the problem is therefore merely ethical and political, not unlawful." [Emphasis added].

[443] Letter from the Mayor of Prague to Committee Bonum Commune, 5 August 2014, **C-93**: "There was no pressure placed on officials in the matter of zoning plan change no. 1294/07 by Councillor Manhart. It was my mistake, as I erroneously mixed up his name with the name of the former councilor for spatial development in the years 2007 – 2010, Martin Langmajer (ODS), when I addressed the Prague City Assembly."

[444] HT 852.

[445] HT 853-854.

even if not outright false (the City had indeed sent certain files for the Police to investigate), were at least inaccurate and exaggerated (because Councillor Manhart was not involved, and no criminality was found).

462. Mayor Hudeček's conduct cannot be lauded. There are however certain mitigating factors to consider:

- The 29 April 2019 discussion in the Prague Assembly was of a political character; no specific resolution with regard to the re-procurement of the Zoning Plan Change was tabled or discussed. The re-procurement was only put on the agenda of, and discussed in, the Assembly on 14 April 2015, almost one year thereafter (at a time when Mayor Hudeček was no longer in office).

- Mayor Hudeček explained at the Hearing that his statements were part of a political strategy necessary to survive at the City Assembly:[446]

> "[A]t the Assembly I act as leader of the ruling coalition, and I have to make sure that the procedure agreed, or order agreed by the coalition is maintained. So anyone, even Mr Blažek -- and if you are not a politician you may find this odd -- Mr Blažek is not saying that it should be included on the agenda; his purpose is that this is said there. If he would like to include it on the agenda he would have approached me a week earlier and we would have agreed to include on it the agenda. So on his part it is a bit of political game, and it is up to me to play this political game as well as I can. So it is quite apparent here that what I am saying here: 'Mr Blažek, you are the causer of this change being approved, in spite of the fact that here were a number of opinions saying no, this change shouldn't have been approved'. And in this political game, I am smiling while I say this, even though it is quite sad, but in this political game it is much easier to beat someone over the head with this political argument, rather than bother the 65 Assembly members with expert opinions and details, when they are bored and want to get on with voting. In spite of that, when I see what I was saying, I think I actually did a good job, that there is the explanation why the reason is what we say […]."

* * *

463. The Tribunal finds that position to be credible. Mayor Hudeček's stance opposing re-procurement of the Zoning Plan Change was in essence motivated by political considerations. He considered that the development would be detrimental to the future of the City, and he vigorously defended his position at the City Assembly, a political body, using the exaggerations and inaccuracies common in political speech. These exaggerations and inaccuracies

  - had no influence on the Assembly's eventual decision to dismiss the re-procurement of the Zoning Plan Change (a decision which was taken a year later, when Mayor Hudeček's term had already come to an end) and

[446] HT 845:11-846:13; See also HT 838:16-839:3.

- did not constitute an offence under Czech municipal law (Claimants' criminal complaint having been dismissed).

In the Tribunal's opinion, Mayor Hudeček's economies with the truth are not of such gravity as to provoke an international delict on the part of the Czech Republic.

c. **Third counterargument**

464. Finally, Claimants make a third counterargument.

465. Claimants argue that rather than following standard procedure and requesting advice from the appropriate Municipal authority, Mayor Hudeček tasked a compliant law firm with generating an opinion that supported his refusal to move forward with re-procurement.[447]

466. At the 29 May 2014 Assembly meeting, Mayor Hudeček stated that he was relying on legal assessment from the law firm Calfa, Bartošík a partneři. But the evidentiary record demonstrates that such legal opinion was only commissioned and issued at a much later date. A letter from the Director of the Building and Zoning Plan Division to Projekt Sever establishes that the legal opinion was commissioned on 23 June 2014 and delivered on 30 July 2014:

> "[W]e are sending you a copy of the legal assessment of 30 June 2014 done by the law firm of Calfa, Bartošík a partneři; […]
>
> Re 3) the assessment was commissioned on 23 June 2014
>
> Re 4) the said assessment was handed over by employees of the law firm on 30 July 2014 (see submission stamp of the copy of the assessment)."[448] [Emphasis added].

467. This letter confirms Dr. Blažek's final remarks directed to Mayor Hudeček during an Assembly Meeting, where Dr. Blažek stated:

> "You [Mayor Hudeček] commissioned that legal opinion after the June Assembly session, because you didn't have one before then. That is a declaration, it is the truth, it is a statement of fact."[449]

468. The record shows that Mayor Hudeček made an untrue statement before the City Assembly: he referred to an outside legal opinion which had yet to be commissioned and issued.

469. The inaccuracy is to be lamented. But an incidental inaccuracy by a public authority, in a speech before a political body, which is not directly related to a protected investor or investment, does not constitute a breach by the Czech Republic of the duty to refrain from acting in an unreasonable manner, as required under Article 4 of the BIT.

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[447] C-PHB, para. 130.
[448] Letter from Zoning Plan Division to Projekt Sever, 31 October 2014, **C-92**, p. 1.
[449] City Assembly Meeting Transcript, 11 September 2014, **C-98**, p. 3.

3.4 THE ASSEMBLY'S DECISION NOT TO RE-PROCURE

470. Claimants argue that the decision of the Prague City Assembly dismissing the re-procurement of the Zoning Plan Change was unreasonable, arbitrary and disproportionate.[450]

471. Respondent counters that the Assembly acted in full compliance with Czech law, without abuse or arbitrariness.[451]

472. The Tribunal will first make a summary of the relevant facts [**A.**], explain its decision [**B.**], and dismiss Claimants' counterarguments [**C.**].

A. **Proven facts**

473. The re-procurement of Zoning Plan Change Z 1294/07 was finally placed on the agenda for the Prague City Assembly meeting of 14 April 2015. The Assembly was presented with an extensive summary of the underlying facts, including a reference to the letter of the Ministry of Regional Affairs dated 27 October 2014, and with two alternatives from which it had to choose:

- to consent to continuation of the re-procurement or
- to consent to its termination.[452]

474. Deputy Mayor Stropnický made a short introductory remark, acknowledging that the City Assembly "could comply with the Court's recommendation" and "commence the procurement of the change on the basis of the Court's recommendations", but he proposed to the Assembly that the re-procurement be dismissed.[453]

475. Mayor Krnáčová then called for a vote.

476. The totality of the 51 members of the City Assembly members voted in favour of terminating the procurement of Zoning Plan Change Z 1294/07 (*i.e.*, of dismissing the re-procurement); not a single member of the Assembly voted against termination or abstained.[454]

477. Thus, on 14 April 2015, the Prague City Assembly finally terminated the procurement of Zoning Plan Change Z 1294/07 and the land purchased by Projekt Sever to develop the Benice Residential Complex reverted to agricultural, forest and recreational use.

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[450] C-PHB, paras. 133-153.
[451] R-II, para. 208; R-PHB, para. 197.
[452] City Assembly Meeting Transcript and Resolution no. 6/12, 14 April 2015, **C-100**, p. 5.
[453] City Assembly Meeting Transcript and Resolution no. 6/12, 14 April 2015, **C-100**, p. 5.
[454] City Assembly Meeting Transcript and Resolution no. 6/12, 14 April 2015, **C-100**, p. 1.

B. **Decision**

478. The issue before the Tribunal is whether the City of Prague, in deciding not to re-procure Zoning Plan Change Z 1294/07, acted unreasonably or arbitrarily in breach of Article 4 of the BIT.

479. The Tribunal sees no unreasonable or arbitrary decision, nor a breach of the FET standard.

480. Section 55(3) of the Building Act – as interpreted in the 27 October 2014 letter from the Ministry of Regional Development – imposes an obligation on the Municipal Assembly to act when a zoning change plan has been annulled by the Courts;[455] but the City Assembly is empowered to assess the new situation and adopt the most appropriate decision.[456] As the Ministry acknowledged, it cannot "be ruled out that a municipal assembly will decide, having weighed up all facts, that the state of affairs after the annulment of the change is satisfactory and no change will be made."[457] The only requirement which the Assembly must meet is that its decision must be substantiated.

481. In accordance with Section 55(3), the City of Prague Assembly, faced with the decision of the Courts to annul the Zoning Plan Change, was under an obligation to review the situation without unreasonable delay, and, after weighing up all facts, to issue a discretionary decision either re-procuring the Zoning Plan Change, with the modifications necessary to satisfy the Court ruling, or terminating the procurement. To avoid arbitrariness, the decision had to be "duly substantiated" or "informed", i.e., properly reasoned, weighing all countervailing factors.[458]

482. Mr. Langmajer (who was Deputy Mayor of Uhříněves and who appeared as a witness for Claimants) acknowledged that the decision of the Assembly "can be positive or negative."[459]

Proper substantiation

483. When asked at the Hearing about the standard under Czech law by which a decision may be deemed to be substantiated or informed, [redacted], Claimants' legal expert, referred the Tribunal to her legal opinion.[460] It states that the Assembly was required to:

> "(1) […] assess the nature of the defect for which the zoning change was annulled, to evaluate the impacts of the City Court's decision on the conceptual design of the Prague Land Use Plan, and to consider its consequences, including its impact on the legitimate expectations of any affected persons. […]"[461]

[455] Opinion of the Ministry of Regional Development re Section 55 of the Building Act, 27 October 2014, **C-99**, p.3.
[456] Opinion of the Ministry of Regional Development re Section 55 of the Building Act, 27 October 2014, **C-99**, p.4.
[457] Opinion of the Ministry of Regional Development re Section 55 of the Building Act, 27 October 2014, **C-99**, p.4.
[458] HT 951:4-18; HT 952:19-953:6; See also HT 906:9-13.
[459] HT 345:15-16.
[460] HT 951:6-952:10.
[461] [redacted] ER I, para. 77.

484. [redacted], Respondent's legal expert, agreed that the decision of the Assembly had to be informed, but pointed out that there is no "specific process for this,"[462] a statement which Claimants' expert did not contradict.

485. In the present case, the decision of the City Assembly to terminate the procurement of the Zoning Plan Change included the following reasoning:

> "– assent to termination
>
> - one of the applicants for the change filed an action against the issued zoning plan change and expresses no interest in new procurement after its annulment by the court
>
> - the new procurement would take place against the will of the relevant city borough as the party that filed the action for the annulment of the zoning plan change
>
> - the substantiation of the court judgment is of such a nature that the outcome of further procurement of the change would be uncertain in terms of attaining compliance with the court's legal opinion
>
> - the annulment of the change restored the territory to its original functional use, which can form the basis for decision-making in the territory at this moment; from the point of view of consequences for the substance (conceptual solution) of the zoning plan, the procurement of change Z 1294/07 is not essential
>
> - Projekt Sever, s.r.o., as the owner of most of the land in the territory in question demanding the continuation of the procurement of the zoning plan change on the grounds of minimising the damages it has incurred, became the owner of the land at a time when the procurement of Z 1294/07 had not been completed and its functional use corresponded to the current functional use of the area in the zoning plan, i.e. the functional use of the area after the annulment of the zoning plan change."[463]

486. The Tribunal finds that the reasoning provided by the Assembly covers the most significant issues: it explains that the District of Benice, which had been one of the applicants of the Zoning Plan Change, had at a later stage requested its judicial annulment, and now opposed the possibility of re-procurement; that the re-procurement faced difficulties in trying to comply with the deficiencies identified by the Court; that the land would be restored to its original designated use under the zoning plan, the same use which had been applicable when Projekt Sever had made the purchase.

487. The Tribunal also notes that the reasoning meets the requirements set forth by [redacted] in her report:

- It assesses the nature of the defects, and concludes that it is "uncertain" whether re-procurement could "[attain] compliance with the court's legal opinion";

[462] HT 953:2-3.
[463] City Assembly Meeting Transcript and Resolution no. 6/12, 14 April 2015, **C-100**, p. 3.

- It evaluates the impact on the conceptual design, explaining that the territory will be restored to its "original functional design" and that the re-procurement is not essential for the conceptual solution of the zoning plan;

- It considers the consequences, including the legitimate expectations of the affected persons, pointing out that Projekt Sever had acquired the Project Area when the zoning change had yet to be approved and that the land now had the same use than it had at the time the investor acquired it,[464] adding that the developer could start the procedure anew and provide better substantiation.[465]

488. Summing up, Claimants argue that the decision of the Prague City Assembly dismissing the re-procurement of the Zoning Plan Change was unreasonable, disproportionate and arbitrary. The Tribunal disagrees. The unanimous decision of the Assembly to dismiss the proposal to re-procure the Zoning Plan Change was properly substantiated and consequently it was a reasoned decision, which did not breach the prohibition of unreasonable measures provided for in Article 4 of the BIT.

C. **Counterargument**

489. In reaching that decision the Tribunal has considered Claimants' counterargument and rejects it for the following reasons.

490. Claimants argue that Deputy Mayor Stropnický, who was responsible for spatial planning issues at the City of Prague, made less than candid statements to the Assembly to ensure that the re-procurement was not approved.[466]

491. The facts do not support Claimants' argument.

492. By early 2015, Deputy Mayor Stropnický of the Green Party was responsible for spatial planning issues in Prague, the area of the Municipality in charge of the re-procurement of the Zoning Plan Change. In this capacity, he put the re-procurement on the agenda of the Committee on Spatial Development meeting (on 15 February 2015) and of the City Council (on 31 March 2015). The Council discussed the issue and instructed Deputy Mayor Stropnický to submit the matter to the Assembly, with the recommendation that the Assembly vote to dismiss the re-procurement.[467]

493. Immediately thereafter, the City published a press release, stating that the City Council had proposed that the Assembly should not re-procure Zoning Plan Change Z 1294/07. In the release, entitled "Sebastian Pawlowski's big residential complex between Benice and Uhříněves is not going to happen", Deputy Mayor Stropnický is quoted as saying:

> "This means that the intent for a residential complex in this location is cancelled. At the same type this is a systemic step. The practice ends where developers speculate on the

[464] Resolution of the Prague City Assembly no. 6/12 of 14 April 2015, **C-100**, Annex I, p. 3.
[465] Resolution of the Prague City Assembly no. 6/12 of 14 April 2015, **C-100**, Annex I, p. 5.
[466] HT 58:18-24; C-PHB, paras. 133-141.
[467] City Assembly Meeting Transcript and Resolution no. 6/12, 14 April 2015, **C-100**, p. 9.

> purchase of cheap farmland and afterwards claw back from the City the change to lucrative land for construction. Who buys farm land will have farm land […].”[468]

494. He then added:

> “The majority owner of the land of the zoning change (Z-1294/07), the company Projekt Sever s.r.o was informed about the court decision. At the same time the company was asked, should it wish a new procurement, to request this through the City borough concerned. […] The owner is threatening with arbitration for lost investment but the City Council did not react to the threat. There is no legal right to have the zoning changed.”

495. Two weeks later, on 14 April 2015, the re-procurement was tabled on the agenda of the Prague Assembly, and Deputy Mayor Stropnický presented the matter making a short introduction:

> “This is about the relatively well-known land belonging to Projekt Sever, which is owned by the well-known businessman Sebastian Pawlowski, and it is about land plots, which were bought as a field and the owner of the land has afterwards sought to have the land judicially transformed into building land, which we judged to be unacceptable pressure; there is no legal entitlement to the procurement of zoning plan changes. […]
>
> We therefore propose that the termination of the procurement of this change be approved. I would add that the change was annulled by a court, but we could now actually comply with the court’s observations, recommended in respect of this change, and we could commence the procurement of the change again, on the basis of the court’s recommendations.
>
> However, I do not propose that we pay any more attention to this change. I propose that we do not procure it at all, i.e. I propose that the termination of the procurement of this change be approved.”[469]

496. After this short speech, the debate was opened. Only one Assembly member took the floor, to state, in a two-line declaration, that he fully agreed with the proposal to dismiss. Thereafter the vote was taken, resulting in a 51:0 result in favour of dismissing re-procurement.

Discussion

497. The record establishes that Deputy Mayor Stropnický was firmly opposed to the possibility of re-procuring the Zoning Plan Change. But it does not show that he made false statements in the press release (i) or that he ‘manipulated’ the Assembly (ii).

498. (i) Claimants take issue with the fact that in the quote included in the press release, the Deputy Mayor stated that developers speculate by buying “cheap farmland”, while Projekt

[468] “Sebastian Pawlowski´s big residential complex between Benice and Uhrineves is not going to happen”, City of Prague announcement, 1 April 2015, **C-181**.
[469] City Assembly meeting transcript and resolution no. 6/12, 14 April 2015, **C-100**, p. 1.

Sever had bought the land from the Ministry of Defense, the Municipality and from private landowners at a price which exceeded that for farmland.

499. The criticism is misguided: Claimants bought the land for an average price of CZK 1,253 per sqm, which is well below the maximum prices paid for developed land, which could reach CZK 2,900 per m^2, as confirmed by Claimants' valuation expert, Mr. [redacted] of AlixPartners:

> "The Claimants' site was prospective building land and priced accordingly; the Claimants paid an average price of about CZK 1,253 per sqm. As a comparison, according to Respondent's data, in 2007 the official prices for already developed land (with buildings and infrastructure) in the larger area around Claimants' site most often ranged from CZK 510 per sqm to CZK 2,900 per sqm." [470]

500. (ii) Deputy Mayor Stropnický's words before the Assembly can also not be faulted. He expressed his preference for the Assembly to dismiss the re-procurement option, but he also explained that the alternative to continue with the procurement, abiding by the Court Decision, was available. The Assembly unanimously voted for the first alternative.

501. The Tribunal sees no "manipulation."

3.5 BENICE'S OPPOSITION TO THE RE-PROCUREMENT

502. Claimants finally submit that Benice's insistence, after the Annulment Decision, that there should be no re-procurement was highly unusual, unreasonable and disproportionate to achieve its policy aims.[471]

503. Respondent rejects the notion that it was unheard of for a municipality to propose and later challenge the same zoning plan change. To the contrary, Respondent argues that in the course of zoning plan changes, a long and democratic process, it is in fact a frequent occurrence that a borough, after having applied for a zoning change, then changes its mind and withdraws the application(s).[472]

Discussion

504. The underlying facts are straightforward: In the spring of 2015, when the Prague City finally took up the issue whether to re-procure Zoning Plan Change Z 1294/07, a representative of Benice attended the Prague City Council where the issue was being discussed and insisted that Benice was opposed to re-procurement.[473]

505. Districts have a very limited role in the re-procurement of a zoning plan change which has been annulled by the Courts. The decision must be taken by the Prague City Assembly, upon a proposal of the Council. In this case a representative of the District was invited to attend the Council, and there expressed the District's position that the re-procurement should be

[470] [redacted] ER I, para 127 [internal footnotes omitted].
[471] C-PHB, para. 113.
[472] R-PHB, para. 193.
[473] City Assembly meeting transcript and resolution no. 6/12, 14 April 2015, **C-100**, p. 1; HT 812:8-813:20.

rejected.[474] In his speech before the Assembly, Deputy Mayor Stropnický then publicly stated that the District did not agree with the re-procurement (as was the case).[475]

506. There is no evidence that Benice's opposition to the re-procurement swayed the (unanimous) decision of the City Assembly. But even if it had, the District's conduct in this case could not constitute a breach of the BIT. The District took the position that the Zoning Plan Change was illegal, and its position had been upheld by the Courts. When the possibility of re-procurement was tabled, it was only coherent for the District to voice opposition.

[474] HT 812:13-813:24.
[475] City Assembly meeting transcript and resolution no. 6/12, 14 April 2015, **C-100**, p. 1.

VII.1.3. DISCRIMINATORY MEASURES

507. Claimants allege, and Respondent denies, that the Czech Republic breached the BIT's prohibition against "discriminatory measures" and "less favourable treatment" under Articles 4(1) and 4(2), because it approved (and re-procured) zoning changes for other projects while simultaneously terminating Claimants' Project.

508. The Tribunal will summarize Claimants' and Respondent's position [**1.** and **2.**] and then adopt a decision [**3.**].

1. POSITION OF CLAIMANTS

509. Claimants say that Benice and the City of Prague singled out Claimants and prohibited the Zoning Plan Change, while numerous other developers were authorised to construct new residential complexes near Claimants' Project Area.[476]

510. Claimants explain that they are in the same line of business as five other investors (Skanska, CPI, Ekospol, Vivius, and Central Group), noting that these entities were all similarly placed in the market and all were developing residential buildings in the immediate vicinity of Prague during the same period of time.[477]

511. Additionally, Claimants assert that it is sufficient if the investors themselves – and not necessarily the investors' projects – are comparable. Claimants argue that it is not necessary to prove that all of the projects are of the same scale or are located in the exact same area.[478]

512. Claimants allege that both Benice [**A.**] and the City of Prague [**B.**] subjected Claimants and their investments to discriminatory and less favorable treatment in violation of the BIT.

A. Benice's conduct discriminated against Claimants

513. Claimants argue that Benice treated Claimants' investment less favorably than it did other investments. According to Claimants, at the same time as Claimants' Project was being destroyed, other zoning changes were being approved and permits were being granted which allowed development of numerous projects by other investors in direct proximity to Claimants' Project Area. Claimants maintain that several companies in the immediate area (Skanska, CPI, Ekospol, Vivius, and Central Group) received more favorable treatment than they did.[479]

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[476] C-II, para. 487.
[477] C-II, para. 490, referring to *Invesmart,* **RL-2**, para. 415; C. Schreuer and R. Dolzer, *Principles of International Investment Law*", Oxford University Press 2012, **CL- 50**, p. 200.
[478] C-II, paras. 491-492, referring to *Nycomb*, **CL-60**, p. 53; *Olin Holdings*, **CL-61**, para. 207 (where the fact that two factories operated in the same business sector was an appropriate comparator, reinforced by the existence of a similar location.)
[479] C-I, para. 207.

514. Additionally, Claimants note that of those companies, only one (Skanska) is a non-Czech company. According to Claimants, this suggests that Mr. Pawlowski was singled out in part because he is a foreigner.[480]

515. Claimants allege that Benice's reasons for opposing Claimants' Project are not legitimate and reveal their less favorable treatment of Claimants' investments. At the same time that Benice acted to prevent Claimants' Project, it did nothing to oppose a zoning change (Z-1278) which converted an area of land designated for a kindergarten, a primary school and a secondary school into an area zoned for the development of a multi-story hotel tower and complex owned by a private investor.[481]

B. **The City of Prague treated Claimants less favorably**

516. Claimants argue that by refusing to apply its standard procedure after the Annulment Decision, the City of Prague treated Claimants less favorably than other investors, in violation of Article 4(2) of the BIT.[482]

517. According to Claimants, upon the annulment of the Zoning Plan Change, the normal course of action would have been for the Zoning Plan Division promptly to remedy the deficiencies identified by the Court, assuming that the applicant wanted to pursue the Zoning Plan Change.[483]

518. Claimants rely on the testimony of [redacted], in which he explained that the City's decision to terminate the procurement of the Zoning Change Plan was political. [redacted] also noted that while in other cases the City worked proactively with the developer to eliminate errors identified by a court, it refused to do so in Claimants' case.[484]

519. Claimants allege that the City of Prague's treatment of the Project was unique: it marked the first time in the history of the Czech Republic that a zoning change was annulled for formal reasons and not procured again, in a case in which the applicant required that the procurement continue.[485]

520. Claimants identify Central Group a.s. ("**Central Group**") as one of the Czech developers which was in a similar situation (having had its zoning plan change annulled) and which was treated more favorably than Claimants by the City of Prague. According to Claimants, the City repeatedly re-procured Central Group's zoning plan change Z-1424/07, after it had been annulled multiple times.[486]

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[480] C-I, para. 208.
[481] C-II, paras. 322-323, referring to Langmajer WS II, para. 17.
[482] C-PHB, para. 120, referring to *Pope & Talbot,* **CL-108**, para. 42.
[483] C-PHB, para. 118.
[484] C-PHB, para. 118, referring to [redacted] WS, para. 21; HT 412:24−413:10, 414:5−415:5, 415:23−416:13.
[485] C-PHB, para. 146.
[486] C-PHB, paras. 149-151.

2. POSITION OF RESPONDENT

521. Respondent rejects Claimants' allegations and avers that the Czech Republic did not discriminate against Claimants or treat their investments "less favorably" than those of Czech investors.[487]

522. Respondent asserts that Claimants have not identified an appropriate comparator upon which to base their allegations of discrimination: it maintains that Claimants are required to identify a Czech real estate developer, which had applied for a zoning plan change under conditions substantively similar to those of Claimants. Respondent additionally notes that such conditions include the size and location of the comparator project, and the applicant's conduct in the re-zoning process.[488]

A. Benice did not discriminate against Claimants

523. Respondent argues that Mr. Pawlowski's Project was not singled out by Benice or by its Mayor. Respondent notes that most of the projects referred to by Claimants are not within Benice's territory, and Benice therefore could not have opposed them.[489]

524. With respect to the two projects within Benice, Respondent argues that they are not relevant comparators, because Claimants have not shown that they belonged to Czech investors, and so they are irrelevant to Claimants' discrimination claims based on national treatment. Additionally, Respondent notes that the two projects were vastly different from Claimants' project in terms of their size: one of the projects comprised 49 low-rise houses and the other comprised a single hotel building with less than 50 rooms. Claimants' Project, in contrast, would have added 4,000 permanent residents to an area currently housing 500 residents.[490]

B. The City of Prague did not discriminate against Claimants

525. Respondents also reject Claimants' allegation that the City of Prague discriminated against Claimants or their Project. The decision to terminate the re-procurement complied with Czech law, was thoroughly justified, and was not impacted by the fact that Mr. Pawlowski was a foreigner.[491]

526. Respondent adds that none of the other developers to which Claimants refer was in a situation similar to that of Claimants or their Project. Respondent explains that of the developers to

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[487] R-I, paras. 341-357; R-II, paras. 416-425.
[488] R-PHB, para. 203, referring to *Invesmart*, **RL-2**, para. 415 (finding adequate comparators "requires more than an identification of single points of similarity [...]. There must be a broad coincidence of similarities covering a range of factors. The comparators be similarly placed in the market and the circumstances of the request [...] must be similar"); *Al Tamimi*, **RL-104**, para. 463 ("The Claimant must point to evidence that a domestic operator which possessed the same or substantially similar approvals as the Claimant, and carried out the same or substantially similar material conduct was treated less harshly or according to a different standard.").
[489] R-PHB, para. 206.
[490] R-PHB, para. 207, referring to Cpi Residence Family houses Benice, **R-26**; Rooms - Park Holiday Congress & Wellness Hotel Praha, **R-76**.
[491] R-PHB, para. 218.

which Claimants refer, only one, Central Group, had its zoning change annulled by the Czech courts and later re-procured.[492]

527. Respondent notes that Central Group is a Cypriot company, and it should not therefore impact on Claimants' national treatment claim.[493] Additionally, Respondent explains that the land impacted by Central Group's project comprised a far smaller area than that affected by Claimants' project.[494] Respondent emphasises a further distinction: following the annulment of the zoning change affecting Central Group's project, Central Group itself swiftly applied for its re-procurement. Respondent notes that in this case, Claimants were entitled to apply for the re-procurement of the Zoning Plan Change, but they chose not to do so.[495]

528. Finally, Respondent argues that even if Claimants had identified an appropriate comparator, any alleged difference in treatment was justified by the particularities of each zoning change. According to Respondent, tribunals have consistently found that reasonable distinctions between domestic and foreign investors do not constitute a breach of the national treatment standard.[496]

3. DECISION OF THE ARBITRAL TRIBUNAL

529. Claimants argue that the Prague Municipality discriminated against them and treated their investment less favorably than the investments of other domestic and foreign investors: during the relevant time period, other zoning changes were approved and permits were granted, which allowed the development of numerous projects by other investors in direct proximity to Claimants' Project Area. Furthermore, Claimants argue that by refusing to follow its standard procedure after the Annulment Decision, the City of Prague treated Claimants less favorably than other investors, in violation of Article 4(2) of the BIT.[497]

530. Respondent denies any discrimination or less favourable treatment to Claimants' detriment: Claimants' Project was not singled out by Benice or its Mayor and the Prague City Assembly's decision to terminate the re-procurement was in compliance with Czech law, was justified and was not influenced by the fact that Mr. Pawlowski was a foreigner.[498]

Discrimination

531. Article 4(1) of the BIT prohibits "discriminatory measures", which impair the use or enjoyment of a protected investment. Discrimination is a relative standard, which requires a comparative analysis between measures applied to the protected investment and measures applied to other investments in similar situations.

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[492] R-PHB, paras. 210-211, referring to HT 62:8-14.
[493] R-PHB, para. 212.
[494] R-PHB, para. 213.
[495] R-PHB, para. 215.
[496] R-I, paras. 358-362.
[497] C-PHB, para. 120, referring to *Pope & Talbot*, **CL-108**, para. 42.
[498] R-PHB, para. 218.

532. Article 4(2) defines the NT and MFN standards, which prohibit discrimination based on nationality: the Czech Republic may not subject protected investors or their investments to treatment which is "less favourable" than that accorded to investments owned by other investors – either Czech or from other countries. To establish that the treatment effectively is "less favourable", a comparator in like circumstances must be defined.[499]

533. It is also widely accepted that there must be no objective reason which justifies the differential treatment.[500]

534. Summing up, if a claim based on discrimination or breach of the NT and MFN standards is to succeed, the following three-pronged test must be satisfied:

- First, an appropriate comparator must be identified, *i.e.,* an investor which is in a situation similar to that of Claimants (or an investment which is in a situation similar to Claimants' investment in the Czech Republic);[501]

- Second, Claimant must prove that the Czech Republic has applied to this comparator a treatment more favourable than that accorded to Pawlowski AG and Projekt Sever, or to their investment in the Czech Republic;

- Third, there must be a lack of a reasonable or objective justification for the difference of treatment.[502]

535. The burden of proving these three elements lies with Claimants.

Discussion

536. Claimants argue that Mr. Pawlowski was singled out because he was a foreigner,[503] and that at the same time that Claimants' Project was being destroyed, other zoning changes were being approved and permits were being granted, allowing the development of numerous projects by other investors in direct proximity to Claimants' Project Area. Claimants specifically aver that several companies in the immediate area (Skanska, CPI, Ekospol, Vivius, and Central Group) received more favorable treatment than Claimants themselves.[504]

537. The Tribunal accepts that several other residential projects in the surrounding area of the Project were being promoted during the same period: in 2015 different real estate projects were underway near the Claimants' holdings, including projects being developed by the five developers identified by Claimants.[505]

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[499] *Parkerings*, **CL-8**, para. 369.
[500] *Bayindir Insaat*, **RL-76**, para. 399. See also C. Schreuer and R. Dolzer, *Principles of International Investment Law,* Oxford University Press 2012, **CL-50**, p. 202.
[501] *Invesmart*, **RL-2**, para. 415; *Al Tamimi,* **RL-104**, para. 463.
[502] *Parkerings,* **CL-8**, para. 368; *Marvin Feldman,* **RL-108**, para. 170.
[503] C-I, para. 208.
[504] C-I, para. 207.
[505] C-I, paras. 207-208.

538. But Claimants have not established that the treatment given to these investors was discriminatory or in breach of the FT and MFN standards:

539. First, two of the aforementioned investors were Czech (Ekospol and Vivus), while the other three were foreigners (Skanska is from Sweden, CPI Group is from Luxembourg, and Central Group is owned and controlled by a Cypriot investor).[506] This fact alone is sufficient to dispose of any notion that the Czech Republic singled out Mr. Pawlowski because he was a foreigner, and there is no suggestion of any discrimination specifically against Swiss investors.

540. Second, Claimants have failed to prove that the projects developed by these companies constitute adequate comparators to the Residential Complex envisaged by the Claimants in Benice:

- in the case of Ekospol, the scale of the project (176 apartments)[507] is not comparable with Claimants' proposed Residential Complex with housing for 4,000 residents;

- CPI's project, the only development located in Benice and owned by a foreign investor, consisted in 49 low-rise houses;[508] again, that is not comparable with Claimants' Project;

- Claimants have failed to provide further information on the Skanska and Vivus projects.

Central Group

541. As regards Central Group, the project was located in a different district of Prague (Komorany, which is twice the size and has twice the population of Benice) and concerned the re-zoning of an area eight times smaller than that of Claimants' Project.[509] In 2009, Central Group had bought agricultural land in the district of Komorany, which was undergoing a zoning change procurement process. Central Group, much like Projekt Sever, invested while awaiting the completion of a zoning plan change ("**Z-1424/07**").[510]

542. After the approval of zoning change Z-1424/07, Central Group initiated the planning permit procedure. In 2013 the District Prague 12 filed an action before the City Court requesting annulment. The City Court annulled zoning change Z-1424/07 on 5 February 2014, due to insufficient substantiation of the density coefficient increase and insufficient public discussion. The Supreme Administrative Court upheld the decision on 24 October 2014.[511]

543. Upon annulment of its zoning change, Central Group applied for re-procurement, but it did so on the basis that it withdrew its prior request for increase in the density coefficient (the cause of the annulment).[512] The Prague Municipality prepared a new substantiation and held

[506] Skanska AB Company Profile (Reuters), **R-22**; Cpi Property Group SA Company Profile (Reuters), **R-23**; Central Group a.s., **R-24**.
[507] Ekocity Uhříněves I – ZipReality.cv, **R-25**.
[508] Cpi Residence Family houses Benice, **R-26**.
[509] R-PHB, para. 213, referring to HT 910:7-13; C-II, para. 106.
[510] [redacted] ER II, para. 156.
[511] [redacted] ER II, para. 158-159.
[512] R-PHB, para. 215; referring to HT 149:15-19.

a new public discussion. Thereafter, zoning change Z-1424/07 was approved by the Prague City Assembly for the second time on 15 September 2016.[513]

544. In 2017, the zoning change was challenged again, this time by the civic association "Spolek pro Komoařany" and by a private citizen. Despite a better substantiation, on 20 June 2017 the City Court annulled the zoning change once again for other deficits in the substantiation.[514] The re-procurement process was again initiated[515] and on 19 September 2019 the Prague City Assembly approved the re-procurement of zoning change Z-1424/07 for the third time.[516]

545. The Arbitral Tribunal agrees with Claimants' expert that the case of Central Group shows that the Prague City Assembly is authorised to re-procure an annulled zoning change.[517] But this is beside the point. The fact that Central Group's zoning change was annulled and re-procured twice does not make the case comparable to Claimants', there being significant differences between both:

- The grounds on which the Czech Courts based their decisions to annul the respective zoning plan changes are different: Projekt Sever's Zoning Plan Change (Z-1294/07) was annulled because it had been approved in contravention of the law and lacked proper reasoning, while Central Group's zoning change Z-1424/07 was annulled only for formal reasons (deficit of substantiation);[518]

- The reaction of the two developers was also different: upon annulment of its zoning change, Central Group voluntarily withdrew its prior request to increase the density coefficient and applied for re-procurement, while Claimants never changed the scope of the Residential Complex and never formally applied for the initiation of a new procurement procedure.[519]

546. But even assuming *arguendo* that Central Group was a suitable comparator, Claimants' allegation of discrimination would still fail, because there may be valid reasons which justify the difference in treatment. Investment tribunals have consistently held that reasonable distinctions between domestic and foreign investors do not imply discrimination.[520] Furthermore, the threshold applied to establish whether a State's conduct was justified has been low.[521]

547. In establishing and amending zoning rules, municipal authorities take into consideration a variety of geographical, environmental and social reasons, and in weighing these factors they must enjoy a certain margin of discretion. The authorisation granted to develop a certain plot of agricultural land situated in Prague Komorany, does not of itself imply discrimination

[513] [redacted] ER II, para. 159.
[514] [redacted] ER II, para. 160.
[515] [redacted] ER II, para. 161.
[516] Prague City Assembly Resolution 9/11, 19 September 2019, **C-213**.
[517] [redacted] ER II, para. 162; HT 909:24-910:3.
[518] HT 910:7-911:3 ([redacted] Presentation).
[519] [redacted] ER II, para. 165.
[520] *Parkerings,* **CL-8**, para. 375; *Marvin Feldman*, **RL-108**, para. 170; *S.D. Myers*, **RL-98**, para. 246.
[521] *Parkerings*, **CL-8**, para. 371; *Gami,* **RL-47**, para. 114.

against Projekt Sever if its agricultural land in Benice is denied similar treatment; each project has its own characteristics, each project is situated in another environment and these differences can legitimately influence the authorities' decision.

548. In the present case, the Czech Courts found that Claimants' Project in Benice was contrary to the law, because it

- affected the Botič-Milíčov nature park and was located in a "construction freeze" area;
- was located in a zone of supra-local significance and required amendment of the Spatial Development Principles;
- was situated on, or close to, the Prague-Budějoviceu Benešova railway corridor.

There is no evidence that Central Group's development was confronted with similar obstacles and constraints.

549. In sum: Claimants have failed to prove that the City of Prague's decision to treat the two investments differently, accepting the re-procurement of Central Group's project but denying that of Claimants', was not based on the existence of disparities between both developments, which justified such difference in treatment.

550. The Tribunal concludes that the evidence marshalled by Claimants is insufficient to prove their case: Claimants have been unable to identify a comparator in a similar situation, which received a more favourable treatment. And even if Central Group were to be considered an appropriate comparator (*quod non*), Claimants have not shown that the disparities between the two projects did not justify the difference in treatment in any event.

VII.1.4. FET: LEGITIMATE EXPECTATIONS

551. Claimants argue that their legitimate expectations were frustrated by the Czech Republic's conduct – an allegation which is rejected by Respondent.

552. The Tribunal will first summarise the Parties' positions [**1.** and **2.**], and then provide its decision [**3.**].

1. POSITION OF CLAIMANTS

553. Claimants note that transparency is "closely related to protection of the investor's legitimate expectations" and requires that the legal framework for the investor's operations is readily apparent and that decisions which affect the investor can be traced back to that legal framework.[522]

554. According to Claimants, in this case, there was a clear legal framework for approving changes to the Prague zoning plan, which the authorities followed during the early stages and up to the approval of the Zoning Plan Change in 2010. Thereafter, instead of following the standard process, officials reversed course and failed to uphold the Zoning Plan Change, which had been implemented in order to attract the investment of a developer such as Projekt Sever.[523]

Legitimate expectations

555. As regards the applicable standard for legitimate expectations, Claimants argue that explicit promises (on the part of the host state) are not actually necessary in order to create legitimate expectations. Claimants refer to case law in support of the proposition that legitimate expectations may also arise through implicit assurances or representations upon which an investor reasonably relies.[524]

556. Ultimately, according to Claimants, legitimate expectations may arise as a result of explicit or implicit representations of the State – representations which can themselves be based on statements or conduct. Importantly, such expectations may arise irrespective of whether the state actually intended to create reasonable expectations. The important question, argue Claimants, is whether, from the perspective of a reasonable investor, the conduct could be understood as a representation, by the state, on which the investor could rely.[525]

557. Claimants specifically assert that at the time they invested in the land they had a legitimate and reasonable expectation that they would be able successfully to develop the Residential Complex Benice [**1.1**], and at the time they invested in the design and planning of the Project,

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[522] C-I, para. 286, quoting C. Schreuer and R. Dolzer, *Principles of International Investment Law*, Oxford University Press 2012, **CL-23**, p. 149.
[523] C-I, para. 287.
[524] C-II, paras. 407-410; C-PHB, paras. 24-26, referring to *Micula I,* **CL-26**, paras. 667-669; *Frontier Petroleum,* **CL-21**, para. 224; *United Utilities*, **RL-183**, para. 576; *Saluka,* **RL-84**, para. 301.
[525] C-II, paras. 409-410, referring to *Saluka,* **RL-84,** para. 329; *JSW Solar* (dissenting opinion), **CL-53**, para. 12.

that the development would be successfully realised [**1.2**]. Finally, Claimants explain how they say the Czech Republic's actions violated said expectations [**1.3**].

1.1 CLAIMANTS LEGITIMATELY EXPECTED TO DEVELOP A RESIDENTIAL COMPLEX

558. Claimants elaborate on several facts and circumstances which, they argue, constitute implicit assurances by Respondent that the Project would be permitted to proceed to fruition:

559. First, the timing of the Project.

560. Claimants argue that when Projekt Sever purchased the land for the Project in 2007,[526] it was reasonable to expect that it would be able successfully to complete the development of the Residential Complex Benice. Claimants note that the two City Districts in which the land was located – Uhříněves and Benice – had resolved to seek the Zoning Change in 2002 and had then applied for the Zoning Change in 2003 and 2004, respectively.[527]

561. Second, the Districts marketed the investment idea to Claimants.

562. Claimants assert that, after the districts of Benice and Uhříněves initiated the Zoning Change, they actively marketed the idea of developing a residential complex to potential developers. As such, in late 2006 and early 2007, Mayor Coller and Deputy Mayor Langmajer of Uhříněves encouraged Mr. Pawlowski to purchase the land for the development of a residential complex.[528]

563. Claimants maintain that the several months of time which they dedicated to due diligence efforts was more than adequate. They note that it is typical for real estate developers to conduct due diligence quickly. Claimants emphasise that this is especially true in light of the fact that Mr. Pawlowski was an experienced developer, who had already successfully realised numerous development projects in Prague.[529]

564. Claimants refer to the recent decision in *SolEs Badajoz v. Spain*, wherein the tribunal held that legitimate expectations are to be determined with reference to the knowledge that a hypothetical prudent investor is deemed to have had as of the date of the investment, and also that the extent of inquiry that it is incumbent on a prudent investor to undertake depends on the particular circumstances of the case at hand.[530]

565. Third, the purchase price paid for the plots of land for the Project.

566. Claimants highlight the fact that Projekt Sever purchased land from citizens of Benice and Uhříněves in 2007 for the price of CZK 1250 per square meter, a price some 25 times higher

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[526] C-I, para. 55.
[527] C-PHB, para. 28, referring to Resolution of the Benice District Assembly, 13 March 2002, **C-19**; Resolution of the Uhříněves District Assembly, 10 July 2002, **C-20**; Application for zoning plan change by Prague-Uhříněves, 2 October 2003, **C-21**; Application for zoning plan change by Prague-Benice, 26 April 2004, **C-22**.
[528] C-PHB, para 29.
[529] C-PHB, para. 33.
[530] C-PHB, para. 32, referring to *SolEs Badajoz,* **CL-114**, para. 331.

than the price of agricultural land. According to Claimants, this reflected the common understanding and expectation that the land would be developed for residential housing.[531]

567. Fourth, the authorities' assistance in the execution of the purchase agreements.

568. Claimants emphasize Mayor Coller's and Deputy Mayor Langmajer's roles in coordinating the private land sales, and their hosting of a signing ceremony in the municipal office of Uhříněves. Claimants note that the signing ceremony was also attended by representatives of Benice, including former Mayor Miroslav Cubr, under whose leadership the rezoning and development project had been launched.[532]

569. Fifth, the authorities' continued support from 2007 to 2012.

570. Claimants explain that their expectations were not based on a single representation or a few individual representations, but on the fact that representatives of both Uhříněves and Benice continued to act in accordance with the perceived assurances throughout the period from 2007 to 2012.[533]

571. For these reasons, while Claimants acknowledge that the Project Area had not yet been zoned for residential development when Projekt Sever purchased the land, they assert that they legitimately and reasonably expected that the Zoning Plan Change would be approved, and that Claimants would be able to carry out the development of a housing project of the scale of Residential Complex Benice.[534]

572. Claimants point to the fact that the Prague City Assembly voted in March 2010 to approve the zoning plan change as further evidence confirming the reasonableness of their expectations in 2007 and 2008 that such approval would be granted.[535]

1.2 CLAIMANTS LEGITIMATELY EXPECTED THE PROJECT WOULD BE SUCCESSFULLY REALISED

573. Claimants assert that their legitimate expectations were maintained and even bolstered in the years following the land purchases, which led them to continue investing in the realisation of the Residential Complex Benice for five years, until Benice filed its annulment lawsuit in 2012. Thus, Claimants argue that the Tribunal must also assess Claimants' legitimate expectations throughout this period.[536]

574. Claimants maintain that their expectations were legitimate, because:

575. First, following the land purchases, Claimants hired the Prague architect [redacted] (and his firm TaK) and paid for the design and planning of Residential Complex Benice. Claimants explain that TaK's work included designing the Project, drafting the Project

[531] C-PHB, paras. 37-38.
[532] C-PHB, para. 37.
[533] C-PHB, para. 30.
[534] C-PHB, para. 41.
[535] C-PHB, para. 43.
[536] C-PHB, para. 48, referring to *Frontier Petroleum,* **CL-21,** para. 287; *Crystallex,* **CL-12**, para. 557.

documentation, preparing the numerous studies required to assess infrastructure requirements and environmental impacts and meeting with City and District officials regarding these issues.[537] Claimants explain that they were presented with no obstacles during this period, and they note that, following its approval in March 2010, the Zoning Plan Change was not challenged until June 2012, when Benice filed its annulment lawsuit.[538]

576. Second, although Benice filed a lawsuit in 2009 challenging Projekt Sever's title to the land it had purchased from the City, Claimants considered that the lawsuit had no chance of success. Claimants note that the only communication received from Benice at the time was a proposal that Projekt Sever pay to settle the lawsuit, not an objection to construction of a large residential complex on the land.[539]

577. Third, Benice's May 2011 approval of the increase in density from level "B" to level "C" confirmed that it supported the development of a large residential complex and, along with prior approvals by various authorities, further confirmed that there were no substantive reasons why a residential complex of that density could not be realised in the Project Area.[540]

578. Claimants explain that the OB-C zoning designation allowed for construction on the scale of 823 housing units in buildings as high as four floors. According to Claimants, TaK worked to refine the design of the project well within the limits of density coefficient OB-C, underscoring the fact that, at the time that work was stopped due to Benice's annulment lawsuit, the plans called for only 796 units.[541]

579. Claimants additionally argue that during this period in which they continued to invest in the project, they had no reason to anticipate[542]:

- that Benice would file a lawsuit in June 2012, seeking annulment of the Zoning Plan Change;
- much less, that such a lawsuit would be successful; or
- that the City of Prague would fail to remedy any defects found by the Court in the City's procurement process.

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Claimants' due diligence efforts

580. Claimants reject Respondent's argument[543] that their alleged expectations were objectively unreasonable, given the insufficiency of their due diligence efforts prior to investing.

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[537] C-PHB, para. 52.
[538] C-PHB, para. 49.
[539] C-PHB, para. 56.
[540] C-PHB, paras. 57-58.
[541] C-PHB, paras. 59-60.
[542] C-PHB, para. 61.
[543] R-I, para. 298; R-PHB, para. 176, referring to *Gavrilovic,* **RL-81**, para. 986.

581. According to Claimants, who rely on *SolEs Badajoz*, legitimate expectations are determined with reference to the knowledge that a hypothetical prudent investor is deemed to have had as of the date of the investment, and that the extent of inquiry that is incumbent on a prudent investor depends on the particular circumstances of the case.[544]

582. Claimants assert that it is typical for real estate developers, especially those working in booming markets, to conduct due diligence quickly. Claimants note that Mr. Pawlowski was an experienced developer who had already successfully realized numerous development projects in Prague, and they argue that the several months of time taken by Claimants was more than adequate to conduct thorough due diligence.[545]

1.3 RESPONDENT'S ACTIONS VIOLATED CLAIMANTS' LEGITIMATE EXPECTATIONS

583. Claimants consider that their legitimate expectations were violated by Benice, when it filed a lawsuit in 2012, seeking to annul the Zoning Plan Change [**A.**] and by the City of Prague's termination of the procurement of the Zoning Plan Change following its annulment [**B.**].

A. Benice's 2012 Annulment Request

584. According to Claimants, Benice's officials actively supported the development of a large residential complex in the Project Area for a decade, through the sale of the land at residential prices, which included "an element of inducement", thus requiring the state to stand by its statements and its conduct.[546] By filing the Annulment Request, Benice failed to stand by its statements and conduct, reversed course and actively set out to destroy the Zoning Plan Change and prevent the realisation of the Project. Claimants thus argue that Benice's filing of the Annulment Request was a violation of the FET standard in Article 4 of the BIT.[547]

B. The City of Prague's new administration remained obligated by the previous administration's assurances

585. In response to the Respondent's contention that, in 2014, the new Government had complete discretion to reverse the City's 2010 position that the Zoning Plan Change should be approved,[548] Claimants argue that the principle of estoppel applies in international law, and that the new administration of the City of Prague was thus bound by the assurances made to Claimants by the previous administration.[549]

586. Claimants explain that in this case, they were encouraged to purchase plots of land for the Project – and to pay a price for the land that far exceeded the market prices for agricultural

[544] C-PHB, para. 32, referring to *SolEs Badajoz*, **CL-114**, para. 331.
[545] C-PHB, paras. 32-33.
[546] C-II, paras. 441-451; C-PHB, para. 70, referring to *Micula I,* **CL-26**, para. 686. See also *Glencore*, **CL-113**, para. 1310 (finding that a State may violate the FET standard by making specific representations to the investor before the investment was made and then acting contrary to such representations).
[547] C-PHB, para. 72.
[548] HT 119:5-9, 147:3-6, 799:1-11.
[549] C-PHB, para. 156, referring to *Mauritius*, **CL-120**, paras. 435-437.

land – because City of Prague officials had provided assurances that the zoning plan change was expected to be approved and that they would assist Claimants in realising the Project.[550]

587. Claimants allege that both Mayor Hudeček and Deputy Mayor Stropnický seized on the opportunity provided by the Annulment of the Zoning Plan Change to reverse the prior approval by a previous municipal administration. According to Claimants, this reversal of position violated Article 4 of the BIT[551].

2. POSITION OF RESPONDENT

588. Respondent asserts that the Republic's conduct did not frustrate Claimants' legitimate expectations, because under international law an investor's expectations are protected only when they satisfy very specific requirements, which Claimants do not satisfy.[552] In particular, Claimants could not have held any legitimate expectations of developing a huge residential complex, since their land purchases for the Project involved non-residential lands [**2.1**]. Thus, Respondent argues that the actions of the Czech Republic did not, and could not, frustrate Claimants' alleged expectations [**2.2**].

2.1 CLAIMANTS COULD NOT HAVE HELD ANY LEGITIMATE EXPECTATIONS OF DEVELOPING THE BENICE RESIDENTIAL COMPLEX

589. Respondent rejects Claimants' position and argues that Claimants could not have held any legitimate expectations, because:

- Respondent did not make any specific and unambiguous representations [**A.**];
- Claimants base their alleged expectations on promises that were not made by a competent person [**B.**]; and
- Claimants' alleged expectations were unreasonable in light of the Czech legal framework [**C.**] and the insufficiency of Claimants' due diligence efforts [**D.**].

A. No specific and unambiguous representations

590. According to Respondent, an investor cannot legitimately expect that a State's regulatory framework will not change, unless there has been a specific and unambiguous commitment by the State on which the investor reasonably relied at the time of investing.[553]

591. Respondent argues that legitimate expectations can only exist within limited circumstances, which it explains as follows:

[550] C-PHB, para. 156-157.
[551] C-PHB, para. 167.
[552] R-I, paras. 292-313.
[553] R-II, paras. 345-346, referring to *Micula I*, **CL-26**, para. 666.

- First, legitimate expectations can only arise from specific promises or representations from the State to an individual investor, on which the investor has relied in making its investment[554];

- Second, the existence of legitimate expectations must be assessed at the time of the investment – and cannot be founded on subsequent actions[555];

- Third, an investor's expectations must have been legitimate and reasonable in light of the circumstances, and not based on the investor's subjective motivations and considerations.[556]

592. Respondent argues that there is no evidence in this case of any sufficiently specific and unambiguous representation made by the Czech Republic. According to Respondent, any representations invoked by Claimants, whether explicit or implicit, must be "precise as to [their] content and clear as to [their] form", in order to amount to the type of identifiable quasi-contractual commitment capable of giving rise to legitimate expectations.[557]

593. Respondent asserts that the alleged representations on its part and upon which Claimants purport to rely were all vague, ambiguous, or not even specifically addressed to them. Additionally, Respondent argues that Claimants have failed to provide evidence which supports their claim that they were encouraged to invest.[558]

B. **The alleged promises were not made by competent persons**

594. According to Respondent, for an investor's expectations to be objectively reasonable – and thus legitimate – they must arise out of representations made by a competent organ of the State.[559]

595. The final decision regarding the Zoning Plan Change came from the Prague City Assembly, and Claimants have neither claimed, nor demonstrated that the Assembly ever made any promise or representation to them that their lands would be rezoned.[560]

[554] R-I, para. 296, referring to *Rusoro,* **RL-79**, para. 524; *White Industries*, **RL-80**, para. 10.3.7 (citing Newcombe and Paradell, Law and Practice of Investment Treaties, Standards of Treatment (2009) pp. 281-282); *Gavrilovic*, **RL-81**, para. 984; *Crystallex,* **CL-12**, para. 547.
[555] R-I, para. 297, referring to *Lemire*, **RL-83**, para. 264; *Gavrilovic*, **RL-81**, para. 984; *Micula I*, **CL-26**, paras. 672-673; *Tecmed*, **CL-17**, para. 154.
[556] R-I, para. 298, referring to *Jan de Nul*, **RL-70**, para. 186; *Rumeli*, **CL-15**, para. 609; *Saluka*, **RL-84**, para. 304.
[557] R-PHB, para. 169, referring to *Crystallex,* **CL-12**, para. 547; *Mamidoil*, **RL-49**, para. 643; *Glamis Gold*, **RL-95**, paras. 766, 799.
[558] R-PHB, para. 170, referring to C-II, paras. 414-415.
[559] R-II, para. 353; R-PHB, para. 172, referring to *Micula I*, **CL-26**, para. 669.
[560] R-PHB, para. 173.

C. Claimants' alleged expectations were unreasonable in light of the Czech legal framework pertaining to zoning changes

596. Respondent asserts that for an investor's expectations to be "legitimate", they must also be objectively reasonable in light of the surrounding legal and factual circumstances.[561]

597. According to Respondent, when Mr. Pawlowski purchased the land before it was zoned as residential, he chose to speculate on the outcome of the zoning process. Respondent argues that Mr. Pawlowski may have hoped, but could not have reasonably expected, to develop his residential complex there.[562]

598. Respondent explains that when Claimants purchased the land for the Project, they acquired the rights to agricultural land – the fact that the Zoning Change was initially approved by the Prague City Assembly before being annulled did not create an acquired right or a legitimate expectation.[563]

599. Furthermore, Respondent avers that at all stages, the actions taken by Benice and the City of Prague were within the legal framework pertaining to zoning changes. Respondent notes that Czech law provides for a two-year period during which any change to the zoning plan can be challenged before the Czech courts.[564]

D. Claimants' alleged expectations were unreasonable given the insufficiency of their prior due diligence

600. Respondent argues that Claimants' due diligence was inadequate and contends that, in general, investors' prior due diligence plays a central role in evaluating the reasonableness of their expectations.[565]

601. Respondent argues that had Claimants conducted proper due diligence, they would have easily uncovered multiple important facts including:

- that a zoning change (Zoning Change Z-592/04) covering Mr. Pawlowski's land plots had already been rejected by the Prague City Assembly, despite having the support of Benice and Uhříněves[566]; and
- that some authorities had already voiced concern as to the environmental impact of a residential development in the area.[567]

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[561] R-II, paras. 352-359; R-PHB, para. 175, referring to *Total*, **RL-85**, paras. 149, 178.
[562] R-PHB, para. 175.
[563] R-PHB, para. 89.
[564] R-PHB, para. 91.
[565] R-PHB, para. 176, referring to *Gavrilovic*, **RL-81**, para. 986. R-I, para. 307.
[566] R-PHB, para. 21, referring to Area affected by proposed zoning change Z 0592/04, Annex to Draft Zoning Change Z 0592/04, **R-37**, p. 1; Area affected by Zoning Change Z 1294/07, Graphic description of the history of zoning change Z 1294, **C-48**.
[567] R-I, para. 303, referring to position statement on round 06 zoning plan changes by the Environmental Division of the Municipal Office of the City of Prague, 17 March 2005, **C-35**.

602. Additionally, Respondent argues that Mr. Pawlowski never seriously investigated the expectations of the Benice Assembly for the development of the land. Respondent notes that Benice originally conceived of residential expansion in the area which would raise the population by approximately 600 people from among citizens living in the area.[568] Thus, Mr. Pawlowski should have expected that developing a residential complex which would bring 4,000 new people into a borough with a population of 465 inhabitants, would likely lead the local population to oppose the project.[569]

603. It is Respondent's view that, for the reasons stated above, Claimants' expectations that they would be able to develop a large residential complex were not objectively reasonable or legitimate. Respondent adds that the Claimants cannot use the BIT's FET clause as an insurance policy for risky business decisions.[570]

2.2 THE CZECH REPUBLIC DID NOT FRUSTRATE CLAIMANTS' ALLEGED EXPECTATIONS

604. Respondent maintains that the Czech Republic did not frustrate Claimants' alleged expectations because: Benice was entitled to pursue the Annulment Decision [**A.**], and the City of Prague's actions were not outside of the norm [**B.**].

A. <u>Benice was entitled to seek the Annulment Decision</u>

605. Respondent asserts that no treaty protection could prevent Benice from exercising its right to request the annulment of a zoning plan change that might affect it. According to Respondent, the exercise of that right was appropriately enforced under Czech law by the Czech Courts and it did not violate Claimants' legitimate expectations.[571]

606. Respondent acknowledges Claimants' explanation that FET requires a balancing between the investors' legitimate expectations on one hand and the host State's legitimate regulatory interests on the other.[572] According to Respondent, however, Benice had legitimate concerns after becoming aware of the scale of the Project. Additionally, Respondent argues that Benice's challenge to the Zoning Plan Change was within its legal rights and was exercised as part of its prerogatives.[573]

B. <u>The City of Prague did not behave unexpectedly</u>

607. Respondent argues that, even if Claimants' expectations were somehow considered legitimate (*quod non*), the facts demonstrate that the City of Prague did nothing to frustrate them.[574]

608. Respondent notes that Claimants' case relies on the standard set by the *Foresight* tribunal, which found that the frustration of legitimate expectations requires "an unprecedented and

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[568] R-I, para. 307, referring to "Benice is expanding", Euro.cz, 28 June 2004, **C-17**.
[569] R-PHB, para. 24.
[570] R-PHB, para. 177, referring to *MTD*, **CL-9**, para. 178.
[571] R-PHB, para. 7.
[572] R-II, para. 384, referring to C-II, para. 453 (itself referring to *Saluka*, **RL-84**, paras. 297, 306).
[573] R-I, para. 309.
[574] R-II, paras. 402-404; R-PHB, para. 178.

wholly different regulatory approach, based on wholly different premises that amounted to a total and unreasonable change" of the regulatory regime surrounding an investment.[575]

609. According to Respondent, however, this case is not *Foresight*. There is nothing unprecedented about the Prague City Assembly's decision not to re-procure an annulled zoning plan change. Respondent points out that there are still at least twice as many annulled zoning changes that the Assembly did not re-procure (at least six) than changes that it has re-procured (three).[576]

610. Ultimately, according to Respondent, the Prague City Assembly's regulatory approach in deciding not to re-procure the Zoning Change was neither unprecedented, nor out of the norm. Rather, it was made in accordance with Czech law and in line with its standard procedures.[577]

3. DECISION OF THE ARBITRAL TRIBUNAL

611. Claimants allege that the Czech Republic breached its duty to guarantee FET as required by Article 4(2) of the BIT by violating Claimants' legitimate expectations. Article 4(2) reads as follows:

> "Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party."[578]

612. It is uncontentious that the obligation to accord FET to investments encompasses the protection of an investor's legitimate expectations. Such expectations arise when a State (or its agencies) makes representations or commitments or gives assurances, upon which the foreign investor (in the exercise of an objectively reasonable business judgment) relies, and the frustration occurs when the State thereafter changes its position as against those expectations in a way that causes injury to the investor.[579] The protection of legitimate expectations is closely connected with the principles of good faith,[580] estoppel and the prohibition encapsulated in the maxim *venire contra factum proprium.*

613. A State can create legitimate expectations *vis-à-vis* a foreign investor in two different contexts:

- In the first context, the State makes specific representations, assurances, or commitments directly to the investor (or to a narrow class of investors or potential investors) ("direct legitimate expectations");

- but legal expectations can also be created in some cases by the State's general legislative and regulatory framework: an investor may make an investment in reasonable reliance

[575] R-PHB, para. 180, referring to *Foresight Luxembourg*, **CL-52**, para. 397. See also *Eiser*, **CL-56**, para. 365.
[576] R-PHB, para. 181 and fn. 239, referring to: HT, 1015:6-1017:6; "Changes affected by a court decision", **R-60**.
[577] R-PHB, para. 183, R-I, para. 312.
[578] BIT, **C-1**, Article 4(2).
[579] *Tecmed*, **CL-17**, para. 154; *Cervin*, **RL-97**, para. 509; *ECE*, **RL-55**, para. 4-762; *Parkerings*, **RL-66**, para. 331.
[580] *Thunderbird*, **RL-48**, para. 147.

upon the stability of that framework, so that in certain circumstances a reform of the framework may breach the investor's regulatory legitimate expectations.

614. In this case, Claimants submit that the Czech Republic gave implicit assurances and thus created a direct legitimate expectation that the Zoning Plan Change would be approved, and that the investor would be able successfully to develop the Residential Complex; after having created this legitimate expectation, and induced Claimants to purchase land and to continue investing in the Project, the Czech Republic, without justification, changed its position and withdrew the Zoning Plan Change, causing injury to the investor and breaching the FET standard.

615. The Arbitral Tribunal must determine whether Claimants indeed had a direct legitimate expectation that the Project would materialise and whether this expectation was unlawfully breached by the Czech Republic. The Arbitral Tribunal will briefly recall the relevant facts concerning this issue [**A.**] and will then issue its decision [**B.**].

A. **Proven facts**

616. In 2007 (*i.e.*, three years before the City Assembly's approval of the zoning change) Mr. Pawlowski was introduced to the Mayor of Uhříněves, Mr. Coller and to the Deputy Mayor, Mr. Langmajer. Mr. Pawlowski was actively looking for investment opportunities. In the course of their discussion Mr. Coller and Mr. Langmajer informed him of the ongoing efforts by the district of Uhříněves to find a developer to construct a residential complex in Benice.

617. The Mayor and Deputy Mayor informed Mr. Pawlowski that the Project Area was in the process of being re-zoned to allow residential construction. Mr. Pawlowski was also informed that the Concept for the re-zoning had already been approved and that private citizens as well as the City of Prague wanted to sell their plots of land to a developer who would pursue the development of the Project.[581] Mr. Pawlowski met with the leadership of the local governments of Benice and Uhříněves, including the head of the construction division of the Prague 22 Administrative District (which covered both Uhříněves and Benice).

Claimants' purchase of land

618. Projekt Sever eventually concluded all of the relevant land purchases between June 2007 and December 2008 at a time when the re-zoning was still underway (a Concept had been approved by the City Assembly, but the Assembly's final approval would only come two years later in 2010).

619. Projekt Sever acquired the Project Area from different owners: private citizens, the City of Prague, and the Ministry of Defense of the Czech Republic.

620. The majority of the Project Area involved land previously owned by private landowners. The purchase process went smoothly, because from the outset, Uhříněves' Mayor Coller and

[581] Pawlowski WS I, paras. 11-12; [redacted] WS, paras. 6, 9; Coller WS I, paras. 13-14.

Deputy Mayor Langmajer offered the District's assistance in coordinating the transactions.[582]

621. On 28 June 2007, the district of Uhříněves organised and hosted a signing ceremony in the Uhříněves town hall for the private property owners, with a scheduled time slot for each family. Among the officials present were Uhříněves' Mayor Coller, Deputy Mayor Langmajer and the former mayor of the district of Benice, Mr. Cubr, under whose leadership the re-zoning and development project had been launched.[583]

Projekt Sever's purchase of land from the City of Prague

622. Claimants also pursued the purchase of certain plots of land owned by the City of Prague and located within the District of Benice.[584] The Benice District Assembly had since June 2000 delegated the administration of these plots to the neighboring District of Uhříněves,[585] and Claimants therefore negotiated directly with officials from Uhříněves.

623. A tender was launched, and the only bidder was Projekt Sever. Its "envelope" was opened on 23 May 2007 before the Council of Uhříněves, and Mr. Langmajer, the Deputy Mayor, explained to the Council the buyer's intention, which was "to build a residential complex on an extensive area."[586] The Council agreed to the sale, and three weeks thereafter, on 16 June 2007, the Assembly of Uhříněves formally approved the sale of the land, which was described as "arable land" and "forest land." The Assembly's Resolution made no reference to the zoning situation of the land plots, nor to the investor's intention.[587]

624. On 20 June 2007, Projekt Sever and Prague 22 District signed the Prague Purchase Contract, which simply described the asset as "arable land"; the buyer paid CZK 43,820,000 for the 43,784 m^2 of land owned by the City of Prague. There is no reference to the pending Zoning Plan Change, nor any representation or warranty regarding the possibility to develop a housing complex on the land. [588]

Purchase of military owned land

625. In addition, Projekt Sever also purchased a small portion of land (about 8% of the total) from the Czech Ministry of Defense, which owned several small plots of land in the Project Area as well as old buildings that had once served as housing for military personnel, and included structures such as workshops, fencing, and outdoor lighting.[589] By 1992 the military had

[582] [redacted] WS, paras. 6, 10.
[583] Pawlowski WS I, para. 25; Coller WS I, para. 16; [redacted] WS, paras. 12-13.
[584] [redacted] WS, paras. 15-16.
[585] Resolution by the Benice District Assembly, 28 June 2000, **C-25**.
[586] Uhříněves Council Resolution regarding sale to Projekt Sever, 11 June 2007, **C-66**, p. 1/7.
[587] Uhříněves Assembly Resolution regarding approval of sale to Projekt Sever, 13 June 2007, **C-67**, p. 1/3.
[588] Purchase Agreement between Prague 22 district Uhříněves and Projekt Sever, 20 June 2007, **C-26**.
[589] Pawlowski WS I, para. 27; Cadastral map illustrating ownership of plots of land prior to the acquisitions by Projekt Sever, **C-24**; Appraisal for the Department of Defense, 19 May 2008, **C-29**.

mostly abandoned the complex, but the buildings and related structures remained. As of 2007 the majority of the military owned buildings and fixtures were in a state of disrepair.[590]

626. On 8 December 2008 Projekt Sever signed the Defense Purchase Contract with the Ministry of Defense. The buyer paid CZK 10,854,281 to the Ministry for 1,135 m^2 of land, and for the right to tear down the structures and dispose of the spoil.[591] The Defense Purchase Contract describes the object of the sale as "structures" and "miscellaneous" and "unfertile" land. Again, there is no reference to the pending Zoning Plan Change, nor any representation or warranty regarding the possibility to develop a housing complex on the land.[592]

B. **Decision**

627. The Tribunal has already determined[593] that direct legitimate expectations – the type of expectations allegedly violated by Respondent in this case[594] – can only result in the breach of the FET standard if the following criteria are met:

- The host State must have made specific and unambiguous representations, assurances or promises,
- These declarations must have been made to an investor prior to, or at the time of, the investment; and
- the expectations must be reasonable and legitimate in light of the circumstances.

628. A careful review of the facts shows that neither the Czech Republic, nor any of its territorial divisions (including the Districts of Uhříněves and Benice and the City of Prague) made any specific and unambiguous representations, assurances, or promises to Claimants that the procurement of the Zoning Plan Change would be authorised or that the development of the Project would be successful:

629. First, Projekt Sever signed two contracts with the Czech Republic for the purchase of land for the development of the Project:

- the Prague Purchase Contract with the City of Prague and
- the Defense Purchase Contract with the Ministry of Defense.

630. The object of both Contracts was "agricultural land", "forest land", "miscellaneous land", "unfertile land" and "structures." There is no reference to the pending Zoning Plan Change – let alone a specific and unambiguous representation or assurance that the Zoning Plan

[590] [redacted] WS, para. 19; Appraisal for the Department of Defense, 19 May 2008, **C-29**.
[591] [redacted] WS, para. 21; Appraisal for the Department of Defense, 19 May 2008, **C-29**; Email communication between [redacted] and [redacted] 24 and 25 November 2008, **C-30**; Purchase Agreement between the Czech Republic – Czech Ministry of Defense and Projekt Sever, 8 December 2008, **C-31**.
[592] Purchase Agreement between the Czech Republic – Czech Ministry of Defense and Projekt Sever, 8 December 2008, C-31, p. 2/12.
[593] See para. 612 *supra*.
[594] See para. 614 *supra*.

Change would be successfully procured and that the terrain would become suitable for the development of a housing complex.

631. The absence of a specific representation in both Contracts is specially telling, because in the meeting of the Council of Uhříněves, which declared that Projekt Sever had won the tender to purchase the land, Mr. Langmajer, the Deputy Mayor, explained to the Council that the buyer had the intention to build a residential complex.[595] The subsequent resolution of the Assembly of Uhříněves, however, lacks any reference to the residential complex and simply authorises the sale of parcels of "arable land." And the same language is then used in the Prague Purchase Contract.

632. Claimants were perfectly aware that they were buying land zoned as "arable" and "forest", and that while the Zoning Plan Change was being procured, it had not yet been authorised. It would be remarkable if Mr. Pawlowski, a seasoned real estate developer, had not sought contractual assurances from the City of Prague and from the Ministry of Defense, guaranteeing that the Zoning Plan Change would be procured; the absence of any such assurance in either the Prague and the Defense Purchase Contracts would suggest that if any such request was made, it had been turned down. Yet, notwithstanding the absence of any express commitment, Claimants were prepared to proceed with the purchase and to assume the contractual risk that, if the Zoning Plan Change was dismissed, Project Sever would remain the owner of agricultural and forest land, without any recourse against the public sector sellers.

633. It lies ill in Claimants' mouths now to protest the explicit distribution of risks agreed in the Contracts, and to claim that the Czech Republic, through an alleged breach of the FET standard, should assume a risk which, by agreement, fell to be borne by Claimants themselves.

634. Second, the facts show that, although the municipal authorities of both Benice and Uhříněves supported the investment, they were careful never to make a specific and unambiguous declaration binding either of the Municipalities.

635. Mr. Coller – Mayor of Uhříněves – had the following recollection:

> "The investor asked for assurance that the boroughs' support would not cease if he became involved in the project. The two boroughs constantly expressed support for the project they themselves had initiated." [596] [Emphasis added]

636. At the Hearing, the Tribunal asked Mr. Coller, who was called as a witness by the Claimants, what he had promised Mr. Pawlowski in exchange for payment of a higher price for the land. Mr. Coller replied:

> "[…] I cannot say that I promised anything because I was in an office; I wasn't running a company. This wasn't my promise. These were negotiations and discussions with the heads of departments and construction departments, et cetera. There were some

[595] Uhříněves Council Resolution regarding sale to Projekt Sever, 11 June 2007, p. 1/7, **C-66**.
[596] Coller WS II, para 14.

> materials about our agreement with starting the process of the required change. It was more or less an assurance that both boroughs desired the change, and, as I said, it had never happened that a change approved by both boroughs would not get through the Prague City Assembly, so we could as it were promise that the path we started on would be successful and it was inconceivable that this wouldn't be so." [597] [Emphasis added]

637. The words of the Mayor show that the District "supported" the Zoning Plan Change and the development, that the two boroughs "desired" the Zoning Plan Change to be successful and that previous experience showed that procurement in general was successful. General assurances of this type, made orally by politicians at the municipal level, and not reflected in the contractual documents signed with the very Municipality, are incapable of creating legitimate expectations on which an investor is entitled to rely, and even less of engaging the international responsibility of the Czech Republic.

638. Third, even if it is assumed *arguendo* that the Mayor of Uhříněves made specific promises to the protected investor that the Zoning Plan Change would be procured (*quod non*), such conduct would still not give rise to a legitimate expectation, because it would have been rendered by an authority incompetent to make such a commitment.

639. Under Czech Law, zoning changes entail a long and democratic administrative process, which at its conclusion requires the approval by a body politic, the Prague City Assembly. Although the Benice and Uhříněves Districts initiated and supported the Zoning Plan Change, the Mayor of Uhříněves had no competence over the approval. As for the City of Prague Assembly, Claimants are not claiming that the Assembly ever made any promise or representation that the Zoning Plan Change would be procured or re-procured.[598]

640. Fourth, for an investor's expectations to be "legitimate", they must also be reasonable in light of the surrounding legal and factual circumstances.

641. When Mr. Pawlowski purchased the Project Area, he made a business decision to invest in agricultural land, without requesting the City of Prague and the Ministry of Defense to provide contractual commitments or representations and warranties to the effect that the use of the land would be amended to his benefit. At that time there already existed reasonable doubts regarding the success of the Zoning Plan Change: a previous zoning change (Zoning Change Z-592/04) affecting the same area had already been rejected by the Prague City Assembly, despite having the support of Benice and Uhříněves[599] and some authorities had already voiced concern as to the environmental impact of a residential development in the area.[600]

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[597] HT 313:15-314:3.
[598] R-PHB, para. 173.
[599] R-PHB, para. 21, referring to Area affected by proposed zoning change Z 0592/04, Annex to Draft Zoning Change Z 0592/04, **R-37**, p. 1; Area affected by Zoning Change Z 1294/07, Graphic description of the history of zoning change Z 1294, **C-48**.
[600] R-I, para. 303, referring to Position Statement on round 06 zoning plan changes by the Environmental Division of the Municipal Office of the City of Prague, 17 March 2005, **C-35**.

642. Mr. Pawlowski was perfectly aware, when he bought the real estate, that the Zoning Plan Change had not been authorised, and that there was a chance – even if then thought remote – that successful procurement would be thwarted by unforeseeable future developments.

643. This uncertainty was reflected in the purchase price which Claimants paid. Claimants bought the land for an average price of CZK 1,253 per sqm, which, while higher than that of agricultural land, was well below the maximum prices paid for developed land, which could reach CZK 2,900 per m^2, as confirmed by Claimants' valuation expert, Mr. [redacted] of AlixPartners.[601]

644. Fifth, the fact that the Zoning Plan Change was initially approved by the Prague City Assembly did not create an acquired right. Czech law provides for a two-year period during which any change to the zoning plan can be challenged before the Courts.[602] Claimants could have had no legitimate expectation that those with legal standing (the Districts or associations, or particular interested parties affected by the measure, *etc.*) would not exercise their legal right to challenge the procurement.

* * *

645. In summary, the conduct of the Districts of Uhříněves and Benice, and of the Municipal authorities of Prague, did not generate a legitimate expectation, to the benefit of Claimants, that the Zoning Plan Change would be authorised by the Prague Assembly and that the Residential Complex could be successfully promoted.

[601] [redacted] ER I, para 127, internal footnotes omitted.
[602] HT 961:9-20.

VII.2. BREACH OF ARTICLE 3(2) OF THE BIT

646. Claimants allege that the City of Prague violated the obligation to "grant the necessary permits" under Article 3(2) of the BIT, by failing to cure the defects in the substantiation for the Zoning Plan Change.[603]

647. The Tribunal will summarize the Parties' positions [**1.** and **2.**] and then render its decision [**3.**].

1. POSITION OF CLAIMANTS

648. Claimants assert that Article 3 of the BIT must be interpreted in accordance with the BIT's object and purpose of promoting investments.[604] According to Claimants, the City's failure to re-procure the Zoning Plan Change blocked them from making the additional investments they would have made in order to complete the construction and sale of the Project. Thus, Claimants argue that this constituted a failure by the City to "promote investments by investors of the other Contracting Party and admit such investments."[605]

649. Additionally, according to Claimants, the reference in Article 4 of the BIT to the Article 3 obligation "to issue the necessary authorizations" confirms that the Contracting Parties did not intend to limit the scope of Article 3 to the issuance of "permits" as defined at the local level. Instead, Claimants argue that the approval of the Zoning Plan Change through the re-procurement process was itself a "necessary authorization" that was required to be granted in order for Claimants to proceed with the realisation of their Project.[606]

650. Claimants aver that because there were no legal obstacles standing in the way of the re-procurement of the Zoning Plan Change, Respondent was required by Article 3 of the BIT to pursue said re-procurement. Claimants emphasize that re-procuring and approving the Zoning Plan Change in this case required no changes to the current laws and regulations and was therefore an obligation under Article 3 of the BIT.[607]

2. POSITION OF RESPONDENT

651. Respondent rejects Claimants' allegations.[608]

652. First, Respondent argues that the allegations made by Claimants do not relate to "permits", but to a zoning plan change, and that the claim is therefore outside the scope of Article 3(2)

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[603] C-I, paras. 265-272; C-II, paras. 546-557; C-PHB, para. 186, referring to BIT, Article 3(2).
[604] C-II, paras. 548-554; C-PHB, para. 189, referring to VCLT, Article 31, **CL-72**; *Philip Morris*, **CL-10**, para. 168 (when a state enters into a treaty requiring it to create favorable conditions for and foster investments, this includes the obligation to grant "the necessary permits and authorizations concerning the activities to be carried out by investors").
[605] C-I, paras. 269-272; C-PHB, para. 187, referring to BIT, Article 3(1).
[606] C- II, paras. 550-554; C-PHB, para. 190.
[607] C -II, paras. 555-557; C-PHB, para. 192.
[608] R-I, paras. 267-276; R-II, paras. 300-334; R-PHB, para. 155.

of the BIT.[609] Respondent emphasises that Article 3(2) applies to "permits", and in this case the Claimants did not reach the permitting stage, such that this provision of the BIT became relevant.[610]

653. Second, Respondent argues that even if permits and zoning changes could be equated (*quod non*), Claimants' claim would nevertheless fail, because there has been no violation of Article 3(2).[611]

654. According to Respondent, Article 3(2) requires that permits be granted "in accordance with the host state's laws and regulations", which places an obligation of conduct on the Contracting Parties – and not an obligation of result.[612] Respondent explains that, in the present case, such obligations as it might have pursuant to Article 3(2) were honoured: the issuance, challenge and annulment of the Zoning Plan Change and the termination of its procurement all occurred in full conformity with Czech law.[613]

3. DECISION OF THE ARBITRAL TRIBUNAL

655. Claimants allege that the City of Prague violated the obligations under Article 3 of the BIT by failing to re-procure the Zoning Plan Change, which would have permitted the land purchased by Claimants to be used for residential purposes.

656. Respondent rejects Claimants' arguments. According to Respondent, Article 3 refers specifically to the issuance of permits, not the approval of zoning plan changes, and even if Article 3 were applicable to zoning changes, there still would be no violation, since at all times, Respondent acted in conformity with Czech law.

657. Article 3(1) of the BIT addresses the promotion and admission of investments:

> "(1) Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations."

658. Article 3(2) of the BIT specifies one of the ways in which the host State can guarantee the promotion and admission of investments. In particular, the host State shall grant the necessary "permits" and "authorizations" in connection with investments, in accordance with its laws and regulations:

> "(2) When a Contracting Party shall have admitted an investment on its territory, it shall, in accordance with its laws and regulations, grant the necessary permits in connection with such an investment and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance. Each Contracting Party shall,

[609] R-PHB, para. 158.
[610] R-PHB, para. 162, referring to *MTD,* **CL-9**, paras. 205-206.
[611] R-II, paras. 324-334.
[612] R-PHB, para. 164, referring to *MTD*, **CL-9**, para. 206 ("Article 3(2) of the Croatia BIT [...] is an assurance to the investor that the laws will be applied, and to the state a confirmation that its obligation under that article is confined to grant the permits in accordance with its own laws.").
[613] R-PHB, para. 164.

> whenever needed, endeavour to issue the necessary authorizations concerning the activities of consultants and other qualified persons of foreign nationality." [Emphasis added]

659. Article 4(1) of the BIT (already referred to in previous sections) prohibits the impairment of investments through unreasonable or discriminatory measures. In particular, Article 4(1) requires that the host State issue the necessary "authorizations" mentioned in Article 3(2):

> "Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and liquidation of such investments. In particular, each Contracting Party shall issue the necessary authorizations mentioned in Article 3, paragraph (2) of this Agreement." [Emphasis added]

660. Thus, the BIT contains a double mandate regarding the issuance of the necessary permits and authorisations:

- A positive obligation under Article 3(2): the host State shall grant "permits" in connection with the investment, subject to its laws and regulations; additionally, the host State shall "endeavour" to issue the "authorizations" required by consultants and other qualified persons; and

- A negative obligation under Article 4(1) in relation to Article 3(2): the host State shall not impair investments by refusing to issue the necessary "authorizations" – an obligation which (at least in a literal interpretation) seems to refer to those authorizations required by consultants and other qualified persons to carry out their profession.

661. According to Claimants, Respondent should have applied its existing procedures to re-procure and approve the Zoning Plan Change.[614] Claimants emphasise that re-procuring and approving the Zoning Plan Change in this case required no changes to the current laws and regulations and was therefore an obligation under Article 3 of the BIT.[615]

662. Respondent, on the other hand, argues that Article 3(2) of the BIT applies only to "permits", but not to "zoning changes", which are rules of general application.

Discussion

663. The Tribunal agrees with Respondent.

664. First, the approval by the Prague Assembly of a Zoning Plan Change does not fit within the ordinary definition of "permit" or "authorization."

665. A "permit" or "authorization" is an administrative act, issued by an administrative authority, granting the beneficiary the right to perform a certain regulated activity.

[614] C-PHB, para. 185.
[615] C -II, paras. 555-557; C-PHB, para. 192.

666. A zoning plan is a rule of general application approved by the Municipal Assembly (a democratically elected political body), establishing the rules (binding on all citizens) for the proper use of land. Zoning plan changes are, from a legal point of view, amendments to rules of general application, which also require approval by the Municipal Assembly.

667. The Tribunal notes that the distinction between rules pertaining to land use planning and the issuance of permits has been discussed by prior ICSID tribunals. In *UAB E Energija*, for example, the tribunal explained:

> "it is doubtful that the concept of a 'necessary permit' or 'necessary authorisation' 'in connection with the investment' is to be interpreted and construed so as to include the heat supply development plan for the City of Rēzekne, which is part of the management and planning duties of the Municipality; this document was not, in any event, issued by the Municipality as a permit and does not represent an authorisation allowing any particular action on the part of the Operator."[616]

668. Second, even if it is accepted *arguendo* that the re-procurement of a zoning plan change can be equated with the issuance of a permit (*quod non*), the only obligation which Article 3(2) puts on the shoulders of the host State is to grant such permits "in accordance with its laws and regulations." If, in accordance with municipal law, the investor is not entitled to the permit, no breach of the BIT obligation is committed. Article 3(2) thus creates a simple obligation of conduct on the Contracting Parties – and is not a guarantee of any particular outcome.[617]

669. In the present case, the Czech Republic did adhere to the obligations imposed by Article 3(2): the issuance, challenge and annulment of the Zoning Plan Change, and the termination of its procurement, all occurred in full conformity with Czech law.[618]

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670. In view of the above, the Tribunal dismisses Claimants' claim that the Respondent violated the obligation to "grant the necessary permits" under Article 3(2) of the BIT.

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[616] *UAB,* **RL-72**, para. 1107; See also *MTD*, **CL-9**, para. 205.
[617] R-PHB, para. 164, referring to *MTD*, **CL-9**, para. 206 ("Article 3(2) of the Croatia BIT [...] is an assurance to the investor that the laws will be applied, and to the State a confirmation that its obligation under that article is confined to grant the permits in accordance with its own laws.").
[618] R-PHB, para. 164.

VII.3. BREACH OF ARTICLE 6 OF THE BIT

671. Claimants argue that the City of Prague's termination of the re-procurement of the Zoning Plan Change amounted to an indirect expropriation in violation of Article 6(1) of the BIT.[619]

672. The Tribunal will summarise the Parties' positions [**1.** and **2.**] and then set out its decision [**3.**].

1. POSITION OF CLAIMANTS

673. According to Claimants, it is common ground that the BIT's protections extend to indirect expropriation – which includes the taking of the commercial value of an investment by measures that "neutralize the benefit of the property of the foreign owner."[620] Claimants refer to case law in support of the view that a deprivation or taking of property may occur through interference by a State with the use of the property or with the enjoyment of the benefits of the property.[621]

674. Claimants argue that if Benice had not filed the Annulment Request, and if the City of Prague had not terminated the re-procurement of the Zoning Plan Change, then the Project Area would have remained zoned for residential development and Claimants would have realized their investments.[622]

675. Claimants argue that this is enough to establish expropriation, which only requires that an investor show "that the rights that it would otherwise enjoy have been substantially impacted or that it has been deprived of control over or access to the economic use of its investment."[623]

676. Claimants allege that the Annulment Decision resulted in the loss of almost all of the value of Projekt Sever's and Pawlowski AG's investment.[624]

677. Claimants argue that by actively seeking the annulment of the residential zoning designation for the Project Area and failing to re-procure it, Respondent fatally interfered with Claimants' investment and destroyed nearly all of the value of Claimants' property.[625]

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[619] C-I, paras. 306-322; C-II, paras. 133-142; C-PHB, para. 168.
[620] C-PHB, para. 169, referring to *CME,* **CL-25**, paras. 591, 604. Also referencing *Goetz*, **CL-67**, para. 124 (measures depriving investors of the benefit which they could have expected from their investments qualify as measures "having the same effect" as an expropriation).
[621] C-PHB, para. 169, referring to *Wena Hotels,* **CL-64**, para. 98; *Tippets*, **CL-65**, para. 225.
[622] C-PHB, para. 169.
[623] C-PHB, para. 172, referring to *Standard Chartered,* **CL-111**, para. 277. See also *Metalclad*, **CL-33**, para. 103 (indirect expropriation includes "interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property") [emphasis added]; *Middle East Cement*, **CL-66**, para. 107; C. Scheurer, Rapport: "Concept of Expropriation under the ECT and other Investment Protection Treaties" in: C. Ribeiro (ed.), *Investment Arbitration and the Energy Charter Treaty*, New York 2006, **CL-30**, p. 115 *et seq*.
[624] C-PHB, para. 173, referring to [redacted] ER I; [redacted] ER II.
[625] C-PHB, para. 173, 179, referring to [redacted] ER I; [redacted] ER II.

678. Claimants also note that a hypothetical future scenario in which both the District of Benice and the City of Prague might someday change their positions and support the development of the Project, is not enough to cure the impact of the City of Prague's and Benice's actions on Claimants and their investments.[626]

2. POSITION OF RESPONDENT

679. Respondent rejects Claimants' allegations and argues that the Czech Republic did not expropriate Claimants' alleged investments in violation of Article 6 of the BIT.

680. Respondent emphasises the fact that Claimants' purchase of land took place before the land was zoned for residential development. This is critical, argues Respondent, because it means that Claimants allege the expropriation of rights that they had never actually acquired.[627]

681. According to Respondent, the creation and acquisition of rights (which are later protected by the BIT) is a matter of Czech law. Respondent notes that Czech Courts have consistently confirmed that there is no subjective right of an owner to have its property included within a certain zoning category.[628] Claimants' expropriation claims must be dismissed, since the only rights acquired by Claimants were property rights over agricultural lands and brownfield sites.[629]

682. Respondent adds that, even assuming Claimants held vested rights capable of being expropriated (*quod non*), Claimants have still failed to prove any interference with their property rights of a sufficiently restrictive, permanent, and irreversible nature to justify a finding of indirect expropriation.[630]

683. Furthermore, even if there had been a restrictive interference with Claimants' alleged property rights, this was neither permanent nor irreversible, as would be required to establish expropriation.[631] Moreover, Respondent notes that Claimants have acknowledged that they consider that the development of the Project is still possible.[632]

684. Finally, Respondent notes that Claimants remain the owners of the exact same agricultural land and brownfield sites that they purchased in 2007, and that they remain entitled to initiate a procedure that could lead to a future zoning change.[633]

685. Respondent argues that, in any event, the police powers doctrine – which stipulates that regulatory activity of a State is not compensable – would further prevent any finding of a compensable expropriation.[634]

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[626] C-PHB, para. 182, referring to *Olin Holdings*, **CL-61**, para. 165; *S.D. Myers,* **CL-49,** para. 283.
[627] R-PHB, para. 223; R-II, paras. 442.
[628] R-PHB, para. 225, referring to *Vestey Group*, **RL- 16**, para. 194; *Emmis*, **RL-109**, para. 162.
[629] R-PHB, para. 224.
[630] R-II, paras. 443-476; R-PHB, para. 227
[631] R-PHB, para. 229, referring to *Tza Yap Shum*, **CL-69**, para. 163.
[632] R-PHB, para. 124-127, referring to HT 222:2-8.
[633] R-PHB, para. 231.
[634] R-II, paras. 477-492; R-PHB, paras. 234-235, quoting *Quiborax*, **RL-110**, para. 202.

686. According to Respondent, the Prague City Assembly's decision to terminate the procurement was a legitimate exercise of its democratic mandate and was taken as part of the State's regulatory powers over land use and development. Thus, according to Respondent, the police powers doctrine prevents any finding of a compensable expropriation in this case.[635]

3. DECISION OF THE ARBITRAL TRIBUNAL

687. Claimants submit that if Benice had not filed the Annulment Request, and if the City of Prague had not terminated the re-procurement of the Zoning Plan Change, then, first, the Project Area would have remained zoned for residential development and Claimants' property would not have lost almost all of its value, and, second, that these developments constitute an indirect expropriation of Claimants' investment in violation of Article 6 of the BIT.

688. Respondent disagrees. It alleges that Claimants never acquired rights capable of being expropriated, and even if they had, they never suffered a substantial or permanent or irreversible deprivation of their assets sufficiently serious to constitute an indirect expropriation.

689. The Tribunal will begin by establishing the proper interpretation of Article 6(1) [**A.**] and will thereafter provide its reasoning for dismissing Claimants' claims of expropriation [**B.**].

A. Interpretation of Article 6(1)

690. Article 6(1) of the BIT records the guarantee provided to investors against unlawful expropriation in the following terms:

> "Neither Contracting Party shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto without regard to its residence or domicile." [Emphasis added]

691. Article 6(1) of the BIT contains a general prohibition against three types of taking by the host State:

- expropriation,
- nationalisation, and
- other measures having the same nature or the same effect.

[635] R-PHB, para. 237.

692. The term "measures" is not defined in the BIT, but it is generally accepted that it encompasses all

- administrative acts taken by the Czech State, including its agencies and territorial bodies; and
- legislative acts of general application formalised as laws approved by Parliament or as decrees or other regulations authorised by the Government, and
- judicial decisions.

Expropriation and nationalisation

693. The BIT does not provide a definition of "expropriation" or "nationalisation", but the terms are well established international law concepts.

694. In an "expropriation" a State, exercising its sovereign powers, dispossesses an investor of a protected investment, depriving the investor of the use and benefit (but not necessarily of the ownership or title) of the investment. The definition of expropriation is centered on the taking suffered by the investor: there is no requirement that the investor's loss should translate into enrichment of the State (or of the State's designee) – although typically expropriations will result in wealth passing from the investor to the State, to a public entity, or to a private beneficiary favored by the State.

695. "Nationalisation" is a concept analogous to expropriation, whereby control of the expropriated assets, usually entire industrial sectors of the economy, or covering certain types of natural resources, is taken over by the State or by a State-controlled entity.[636]

Indirect expropriation or equivalent measures

696. In the past, takings of alien property usually took the form of direct expropriations, *i.e.*, by overt administrative or legislative measures declaring the State's decision to dispossess the foreign investor. Such direct expropriations have, however, become less frequent,[637] while the number of so-called "indirect expropriations" has increased.[638] These "indirect expropriations" are characterized by State interferences – sometimes formalised as legislative acts of general application, other times as administrative or tax measures – which result in the destruction or significant erosion of the value of the investor's assets, without the outright taking of the property.[639]

697. Article 6(1) of the BIT acknowledges this shift and (like most bilateral and multilateral investment treaties) extends the scope of protection to cover indirect expropriations, defined as "measure[s] having the same nature or the same effect" as an expropriation or

[636] *OI European,* **RL-64**, para. 328, referring to I. Brownlie, *Principles of Public International Law*, 7th Ed., 2008, p. 532.
[637] B. Stern, "In Search of the Frontiers of Indirect Expropriation" in A.W. Rovine, *Contemporary Issues in International Arbitration and Mediation*, Fordham Paper 2007, pp. 31-53.
[638] A.K. Hoffmann, "Indirect Expropriation" in A Reinisch, *Standards of Investment Protection*, 2008, p. 151.
[639] UNCTAD, *Taking of Property*, Series on Issues in International Investment Agreements, 2000, p. 20.

nationalisation. Other treaties use similar definitions, referring to "measures equivalent to" or "tantamount to" expropriation.[640] Whatever the precise wording, when treaties use these terms, they refer to measures which substantially deprive the investor of the fundamental attributes of property, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.[641]

B. **Discussion**

698. The Tribunal agrees with Respondent.

699. Neither the decision of Benice to request the annulment of the Zoning Plan Change, nor the decision of the Assembly to terminate the procurement provoked an indirect expropriation of Claimants' protected investments. The Tribunal grounds its decision on the following reasons:

700. First, the Tribunal notes that Claimants purchased the land before it was re-zoned for residential use. The land the subject of the purchases was land designated as agricultural, forest and for recreational use.

701. The Zoning Plan Change, which would have authorised residential development, was approved in 2010, two years after the purchases, but the decision of the Assembly never became final and definitive, there being a two-year statute of limitations for annulment requests. Within that period of limitations, Benice and two affected neighbours filed the Request for Annulment, and the Courts eventually decided that the Zoning Plan Change was contrary to Czech law and it had to be annulled. The Assembly then decided not to re-procure the Zoning Plan Change, leaving the land with the same zoning designation which it had at the time of the purchase.

702. The summary of the facts shows that Projekt Sever never had an acquired right that the Project Area be considered as residential. At best, after the initial approval of the Zoning Plan Change by the Assembly, it had an expectation that, if the period of limitation lapsed and no annulment request was filed (or the request was filed but rejected), the approval would become final, and the land would then definitively be considered as zoned for residential use.

703. But that expectation did not materialize.

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[640] There is widespread inconsistency in the terms used to describe these legal concepts; but it is commonly held that "indirect", "creeping", "*de facto*", "disguised", and "regulatory" expropriation are used interchangeably. See P Muchlinski, F Ortino and C Schreuer, *The Oxford Handbook of International Investment Law*, 2008, p. 422; C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles*, Oxford 2007, CL-1, p. 292.

[641] See *e.g.*, the definition contained in the Comprehensive Economic and Trade Agreement (CETA) between Canada, and the European Union and its Member States, 30 October 2016, Annex 8-A, 1(b).

704. Thus, the Tribunal agrees with Respondent, and finds that the only rights acquired by Claimants through their land purchases were property rights over agricultural, forest and recreational land.[642]

705. Second, even if Claimants had acquired a specific right for the Project Area to be zoned for residential use (*quod non*), Claimants have still failed to prove any interference with their property rights that would be sufficiently restrictive, permanent and irreversible to justify a finding of indirect expropriation.

706. As noted by Respondent, Claimants remain the owners of the same land that they purchased in 2007 and they remain entitled to initiate a procedure that could lead to a future zoning change.[643] Although the short-term political climate may have worked against Claimants, there is still a possibility that the land may eventually be designated as residential.[644] The Tribunal notes that Claimants themselves acknowledge that the new draft Metropolitan Plan designates at least 10% of the Project Area as susceptible to development.[645]

* * *

707. In view of the above, the Tribunal dismisses Claimants' claims of indirect expropriation under Article 6 of the BIT.

708. In summary, the Arbitral Tribunal has only found one violation of the BIT attributable to the Czech Republic: the payment requests made to Projekt Sever on behalf of Benice District were unreasonable pursuant to Article 4(1) of the BIT. They also fall short of the standard of Fair and Equitable Treatment that Article 4(2) requires the Respondent to ensure.

[642] R-PHB, para. 224.
[643] R-PHB, para. 231.
[644] R-PHB, para. 124-127, referring to HT 222:2-8.
[645] C-PHB para. 180.

VIII. REPARATION

709. In this section the Tribunal will discuss the reparation due to Claimants as a consequence of the breach committed by the Czech Republic in violation of its Treaty obligations.

1. POSITION OF CLAIMANTS

710. According to Claimants, a State must make full reparation if it commits an international wrong. Reparations must wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[646]

711. Claimants argue that Respondent must pay monetary compensation sufficient to compensate them in full for the loss caused by the Respondent's violations of the BIT, including compensation for lost profits.[647]

712. Claimants rely on their economic expert, Mr. [redacted] of AlixPartners, for their assessment of the quantum of the damages caused by their inability to realise the development of the Residential Complex Benice.[648]

713. Mr. [redacted] s analysis concluded that the Claimants' total damages amount to CZK 4,950,382,717 as of the valuation date specified in the report (31 July 2020).[649]

714. According to Claimants, these damages represent the lost profits that Claimants would have received, had the Residential Complex Benice been successfully developed, as well as damages suffered by the Claimants due to the loss in the value of the land acquired for the development.[650]

715. In their Post Hearing Brief, Claimants updated the quantum of their claim for damages, requesting that the Tribunal award compensation, including pre-award interest as of 31 July 2020, in the amount of CZK 5,266,622,342.[651]

2. POSITION OF RESPONDENT

716. According to the Czech Republic, the damages alleged by Claimants are not recoverable under the settled principle of international law that hypothetical or speculative damages are not recoverable.[652]

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[646] C-I, paras. 323-335; C-II, para. 560, referring to *Chorzów*, **CL-73**, para. 124.
[647] C-II, para. 560, citing to *Flemingo DutyFree*, **CL-37**, para. 865.
[648] C-I, para. 356.
[649] C-I, para. 357; [redacted] ER I, pp. 1-2.
[650] C-I, para. 356 *et seq.*; C-III, paras. 575 *et seq.*
[651] C-PHB, p. 2.
[652] R-I, paras. 397-399; R-II, para. 493.

717. Respondent argues that Claimants' claims for loss of profit are purely speculative, noting that those claims are dependent on at least six successive steps and that Claimants have not proven that those steps would have more likely than not been fulfilled.[653]

718. According to Respondent, Claimants' arguments on damages skip over two critical steps:

- that losses must be proven with "sufficient certainty to be compensable,"[654] and
- that the harm must be caused by the respondent State.[655]

719. Thus, according to Respondent, Claimants have failed to prove that they actually suffered any loss, because the Project and its realisation remained nothing more than a concept.[656]

720. With respect to Claimants' claims for loss of land value, Respondent argues that these claims must also fail, because there has been no actual loss: Claimants purchased agricultural land in 2007-2008 and they still own that agricultural land today. While it is true that Claimants paid a higher price for that land as prospective building land, it still may be considered as prospective building land.[657]

3. DECISION OF THE ARBITRAL TRIBUNAL

721. The Tribunal has accepted one of Claimants' claims, while it has dismissed the remainder.

722. The claim accepted by the Tribunal relates to Mayor Topičová's requests, on behalf of the District of Benice, demanding significant payments from Projekt Sever as *quid pro quo* for the withdrawal of the Benice Lawsuit filed by the District against Projekt Sever, and for the District's change of position regarding the increase in the density coefficient. In the opinion of the Tribunal, this conduct resulted in the breach of the specific prohibition of unreasonable measures established in Article 4(1) and of the general FET standard guaranteed in Article 4(2) of the BIT.

The consequences of internationally wrongful acts

723. Article 30 of the ILC defines the first obligation arising from internationally wrongful acts:

- the State is obliged to cease that act, if it is ongoing, and

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[653] R-PHB, para. 243.
[654] R-II, para. 496, referring to International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, **CL-5,** Article 36, comment 27 ("In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable"); M. Whiteman, Damages in International Law, Vol. III, Government Printing Office Washington (excerpts), 1943, **RL-120**, p. 1837; UNIDROIT Principles of International Commercial Contracts, 2010, **RL-121**, Article 7.4.3(1); United Nations Compensation Commission, "Governing Council Decision 9", 6 March 1992, **RL-122**, paras. 8, 19.
[655] R-II, para. 496.
[656] R-II, paras. 497-529.
[657] R-II, para. 532.

- the State must offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

724. The Tribunal notes that the wrongful act is not ongoing, and that Claimants do not seek assurances or guarantees that it will not be repeated.

725. As a second consequence, Article 31 of the ILC Articles requires that the delinquent State make "full reparation" for the "injury caused":

> "Article 31 Reparation
>
> 1. The responsible State is under an obligation to make full reparation for the injury caused by the international wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State"

726. Article 36 of the ILC Articles then establishes that full reparation may take three forms:

- Restitution, which in accordance with Article 35 requires the situation which existed before the wrongful act was committed to be re-established;

- Compensation for the damages caused, which under Article 36, include loss of profits insofar as they are established; and

- Satisfaction, which may consist in an acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate modality, as established in Article 37.

727. In the present case, Claimants are requesting full reparation in two forms:[658]

- First, Claimants are requesting compensation for the damages caused, including the loss in the value of the land acquired for the development and loss of profits and interest, in an amount of CZK 5,266,622,342 (**A.**), and

- Second, Claimants also seek a declaration by the Tribunal that "the Czech Republic's actions and omissions at issue, including those of its instrumentalities for which it is internationally responsible" violated Article 4 of the BIT by "failing to treat Claimants' investments fairly and equitably" and by "impairing Claimants' investments through unreasonable and discriminatory measures" (**B.**).

A. **Compensation**

728. The duty to make reparation extends only to those damages which have been proven by the injured party and which are legally regarded as the consequence of the wrongful act. It is a general principle of international law that injured claimants bear the burden of demonstrating:

[658] C-PHB, p. 2/76.

- That the claimed *quantum* of damage was actually suffered, and

- that such damages flowed from the host State's conduct, and that the causal relationship was sufficiently close (*i.e.,* not "too remote").[659]

729. Article 36.1 of the ILC Articles reflects this general principle:

> "The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby […]" [Emphasis added]

730. Claimants fail on both counts:

731. First, Claimants have failed to prove that the wrongful acts of the Czech Republic caused any damage at all.

732. The wrongful conduct attributable to the Czech Republic consists in the Mayor of Benice's irregular and improper requests demanding that Claimants make significant payments in return for the withdrawal of the Benice Lawsuit filed by the District against Projekt Sever, and for the District's change of position with respect to the increase in the density coefficient. Claimants (to their credit) refused to make the wrongful payments.

733. There is no evidence that the internationally wrongful conduct attributable to the Czech Republic caused any harm to Claimants:

- Mayor Topičová did not withdraw the Benice Lawsuit, but the action was dismissed on 8 March 2012 by the District Court, and Benice's subsequent appeal was also dismissed; [660] Projekt Sever does not allege that it has suffered any harm due to the filing and subsequent dismissal of the Benice Lawsuit, nor is there any evidence in the file to suggest that it did;

- Mayor Topičová voluntarily changed her position regarding the density coefficients, and Benice finally supported Projekt Sever's request for an increase in May 2011– preempting any claim for damages.[661]

734. Second, Claimants seek compensation for the damages allegedly caused, including loss of profits and interest, in an amount of CZK 5,266,622,342 – a *quantum* established with the support of their expert, AlixPartners.

735. Claimant's alleged damages are based on the premise that the Annulment Decision adopted by the Czech Courts, and the subsequent decision by the Prague City Assembly to terminate the re-procurement of the Zoning Change, destroyed the value of Claimants' investment and left Projekt Sever with agricultural and forest land and land for recreational use that could not be used for the development of the Benice Housing Complex.[662]

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[659] *Lemire,* **RL-83**, para. 155.
[660] See paras. 118-120 *supra.*
[661] See paras. 110-112 *supra.*
[662] See paras. 713-715 *supra.*

736. The problem with this quantification is that it assumes that the damage was caused by two events, which the Tribunal has found do not constitute internationally wrongful acts attributable to the Czech Republic:

- The filing by the District of Benice of the Annulment Request, and the subsequent adoption of the Annulment Decision by the Czech Courts, which annulled the Zoning Plan Change,[663]

- And the decision by the Prague City Assembly not to re-procure the annulled Zoning Plan Change, with the consequence that the Project Area would continue to be zoned for agricultural, forest and recreational use.[664]

737. Thus, the Tribunal does not find any causal link between the internationally wrongful conduct attributable to Respondent and the damages claimed by Claimants.

B. **Satisfaction**

738. A State which is responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused, if requested by the injured, and insofar as the injury cannot be remedied by restitution or compensation. The only limitation (identified in Article 37(3) of the ILC Articles) is that the satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

739. The Tribunal has already dismissed Claimants' request for compensation, and notes that restitution has not been requested (and is not feasible, given the nature of the wrongful act). Claimants do request a form of satisfaction, a declaration by the Tribunal that the Czech Republic has committed a violation of Article 4 of the BIT.

740. The Tribunal finds that such a declaration is proportionate to the injury caused, is not humiliating for the responsible State, and consequently agrees to give satisfaction to Claimants, by making the appropriate declaration in the *dispositif* of this Award (excluding any reference to discriminatory conduct, since the Tribunal has dismissed Claimants' claims regarding discrimination).

* * *

741. Summing up, the Tribunal dismisses Claimants' claim for compensation, due to a lack of substantiation and the absence of causation. Conversely, the Tribunal accepts Claimants' claim for satisfaction in the form of a declaration by the Tribunal, to be inserted in the *dispositif* of this Award, that the Czech Republic has committed an internationally wrongful act consisting of a violation of Article 4 of the BIT.

[663] See paras. 385-391 *supra*.
[664] See paras. 478-488 *supra*.

IX. COSTS

742. Rule 47(1)(j) of the Arbitration Rules establishes that:

> "The award shall be in writing and shall contain [...] (j) any decision of the Tribunal regarding the cost of the proceeding."

743. The Parties submitted their statements of cost on 6 August 2020. None of the Parties challenged the items or the amounts claimed by the counterparty. On 24 February 2021, the Czech Republic submitted a statement containing an updated certification of costs.

744. The Parties have incurred two main categories of costs:

- the lodging fee and advance on costs paid to ICSID (the "**Costs of the Proceeding**"; and
- the expenses incurred by the Parties to further their position in the arbitration (the "**Legal Fees and Expenses**").

1. COSTS OF THE PROCEEDING

745. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Juan Fernández-Armesto	$[redacted]
John Beechey	$[redacted]
Vaughan Lowe	$[redacted]
Assistant's expenses	$[redacted]
ICSID's administrative fees	$200,000.00
Direct expenses	$84,608.12
Total	**$617,413.86**

746. The above costs have been paid out of the advances made by the Parties in equal parts. As a result, each Party's share of the costs of arbitration amounts to USD 308,706.93.[665]

[665] The ICSID Secretariat has advised that the remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

2. POSITION OF CLAIMANTS

747. Claimants have requested reimbursement of their costs associated with these proceedings, including the costs and expenses of ICSID and of the arbitrators, as well as the fees and disbursements of Claimants' attorneys and experts.[666]

748. Claimants request the following amounts:

Costs of the Proceeding

- ICSID administrative costs (by the date of this Award, the Claimants had advanced USD 310,000 to ICSID to cover the costs of the proceeding, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, and had paid a USD 25,000 lodging fee at the commencement of the case).

Legal Fees and Expenses

- Legal fees: CHF 2,846,700 and CZK 9,743,826 and EUR 30,485.
- Expert fees and expenses: EUR 379,284 and CHF 45,988 and CZK 1,844,750.
- Reasonable travel costs and other expenses incurred by Claimants' witnesses and representatives: CZK 100,189.
- Miscellaneous costs: CZK 138,070.

749. Claimants' Legal Fees and Expenses amount to CHF 2,892,100 and CZK 11,798,365 and EUR 409,769.

750. Claimants request that the Tribunal order Respondent to pay all these amounts, including interest from the date at which such costs were incurred until the date of payment.

3. POSITION OF RESPONDENT

751. The Czech Republic requests that Claimants be ordered to cover the full cost of the arbitration proceedings and the Czech Republic's legal fees and costs (plus interest). [667]

752. Respondent requests the following amounts:

Costs of the Proceeding

- ICSID administrative costs (by the date of this Award, the Respondent had advanced USD 310,000 to ICSID to cover the costs of the proceeding, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses).

[666] C-I, para. 359; C-II, para. 610; C-PHB, p. 2.
[667] R-I, para. 475; R-II, para. 604; R-PHB, para. 286.

Legal Fees and Expenses

- Legal fees: EUR 1,610,876 and CZK 684,000.
- Expert fees and expenses: EUR 237,503 and CZK 1,101,010.
- Reasonable travel costs and other expenses incurred by Respondent's witnesses and representatives: EUR 58,151 and CZK 126,096.

753. Respondent's Legal Fees and Expenses total EUR 1,906,530 and CZK 1,911,106.

4. DECISION OF THE ARBITRAL TRIBUNAL

754. Article 9(2)(d) of the BIT provides that:

> "Each party to the dispute shall bear the costs of its own member of the tribunal and of its representation in the arbitral proceedings; the costs of the chairman and the remaining cost shall be borne in equal parts by both parties to the dispute. The tribunal may, however, in its award decide on a different proportion of costs to be borne by the parties and this award shall be binding on both parties."

755. Additionally, Article 61(2) of the ICSID Convention provides as follows:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid."

756. Both Parties have requested that the other bear the costs of the proceedings based on the principle that "costs follow the event."

757. However, the Tribunal finds that it is more appropriate, given the circumstances of this case, to apply the default rule provided in Article 9(2)(d) of the BIT.

758. As regards the outcome of this procedure, the Tribunal finds that each Party has succeeded in part:

- The Respondent has succeeded, because the Tribunal dismissed two of Claimants' three claims under Article 4 and dismissed Claimants' two additional claims under Article 3 and Article 6.
- But Claimants have also succeeded, to the extent that the Tribunal dismissed all of Respondent's jurisdictional objections, and partially accepted their claim that the Czech Republic had committed an internationally wrongful act.

759. While Article 9(2)(d) grants the Tribunal the discretion to "decide on a different proportion of costs to be borne by the parties", in this arbitration the Tribunal finds that both Parties

have conducted themselves appropriately, with neither side raising the costs of the proceeding disproportionately.

* * *

760. In view of the above, the Tribunal determines that:

- each Party shall bear, in equal parts, the Costs of the Proceeding; and
- each Party shall be responsible for its own Legal Fees and Expenses.

X. AWARD

761. For the foregoing reasons, the Tribunal unanimously decides as follows:

1. DISMISSES the jurisdictional objections submitted by the Czech Republic and declares that the present dispute falls within the jurisdiction of the Centre and the competence of the Tribunal.

2. DECLARES that the Czech Republic has violated Article 4 of the BIT by failing to treat Claimants' investments fairly and equitably and by impairing Claimants' investments through unreasonable measures.

3. DECLARES that each Party shall bear, in equal parts, the Costs of the Proceeding and that each Party shall be responsible for its own Legal Fees and Expenses.

4. DISMISSES all other claims and requests.

Mr. John Beechey, CBE
Arbitrator

Date: **27 October 2021**

Prof. Vaughan Lowe, QC
Arbitrator

Date:

Prof. Juan Fernández-Armesto
President of the Tribunal

Date:

Mr. John Beechey, CBE
Arbitrator

Date:

Prof. Vaughan Lowe, QC
Arbitrator

Date: **29 October 2021**

Prof. Juan Fernández-Armesto
President of the Tribunal

Date:

Mr. John Beechey, CBE
Arbitrator

Date:

Prof. Vaughan Lowe, QC
Arbitrator

Date:

Prof. Juan Fernández-Armesto
President of the Tribunal

Date: 29 October 2021