

**PCA CASE NO. 2018-45**

**IN THE MATTER OF  
AN ARBITRATION PURSUANT TO  
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE CZECH REPUBLIC AND  
THE UNITED ARAB EMIRATES ON THE PROMOTION AND PROTECTION OF  
INVESTMENTS OF 23 NOVEMBER 1994**

**BEFORE  
A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH  
THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW, 1976 (THE “UNCITRAL RULES”)**

**- between -**

**ALCOR HOLDINGS LTD.**

**(the “Claimant”)**

**- and -**

**THE CZECH REPUBLIC**

**(the “Respondent”, and together with the Claimant, the “Parties”)**

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**AWARD**

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**The Arbitral Tribunal**

Sir Christopher Greenwood, GBE, CMG, QC (Presiding Arbitrator)  
Mr Richard Wilmot-Smith QC  
Professor Donald McRae CC, ONZM

**Registry**

The Permanent Court of Arbitration

2 March 2022

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## GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

<b>2014 Civil Code</b>	Civil code of the Czech Republic, in effect from 1 January 2014 to the present
<b>Alcor (or Claimant)</b>	Alcor Holdings Ltd., the claimant in this arbitration
<b>Alcor CZ</b>	Alcor Holdings CZ s.r.o.
<b>██████████ Expert Opinion</b>	Expert report of ██████████ dated 6 December 2019
<b>BIT</b>	Bilateral investment treaty
<b>City, Prague</b>	Capital City of Prague
<b>Claimant (or Alcor)</b>	Alcor Holdings Ltd., the claimant in this arbitration
<b>Constitutional Court Act</b>	Act No. 182/1993 Coll.
<b>District Court</b>	10 <sup>th</sup> District Court of the City of Prague
<b>First Instance Judgment</b>	Judgment of the District Court dated 27 September 2017
<b>First ██████████ Witness Statement</b>	First witness statement by ██████████ dated 29 March 2019
<b>██████████ Expert Opinion</b>	Expert report by Associate Professors ██████████ and ██████████ dated 23 August 2019
<b>Mizar</b>	Mizar Limited
<b>MoF Assessments</b>	Annual assessments prepared by the Ministry of Finance capping the prevailing rental price for land at a particular location and time
<b>Notice of Arbitration</b>	Claimant's Notice of Arbitration dated 17 April 2018
<b>Parties</b>	The Claimant and the Respondent
<b>PCA</b>	Permanent Court of Arbitration
<b>Plots</b>	Land plots in the Štěrboholy, Hostivař, Stodůlky, Ďáblice and Strašnice areas of Prague on which the City had built and operated roads and other utilities and which, according to the Claimant, were at all material times the property of Alcor CZ
<b>Respondent</b>	The Czech Republic
<b>Rejoinder</b>	Respondent's Rejoinder dated 6 December 2019
<b>Resolution No. 2141</b>	Resolution No. 2141 titled <i>Rules of Pricing Policy in the Lease or Letting of Roadways and Their Parts, Parts of Lands and Areas Owned by the City of Prague</i> promulgated by the Council of the Capital City of Prague on 14 December 2004

<b>██████████ Memo</b>	Legal memorandum prepared by Claimant's Czech lawyer ██████████ dated 27 May 2009
<b>Road Act</b>	Act. No. 13/1997 on Roadways
<b>Second Instance Judgment</b>	Judgment of Municipal Court of Prague dated 4 May 2018
<b>Second ██████████ Witness Statement</b>	Second witness statement by ██████████ dated 6 December 2019
<b>Share Transfer Agreement</b>	Agreement on transfer of shares between the Claimant and Mizar
<b>Statement of Claim</b>	Claimant's Statement of Claim dated 28 November 2018
<b>Statement of Defence</b>	Respondent's Statement of Defendants dated 29 March 2019
<b>Supplemental ██████████ Expert Opinion</b>	Supplemental expert report of ██████████ dated 9 November 2020
<b>Supplemental ██████████ Expert Opinion</b>	Supplemental expert report of Professors ██████████ and ██████████ dated 14 October 2020
<b>Treaty</b>	<i>Agreement Between the Government of the Czech Republic and the Government of the United Arab Emirates for the Promotion and Protection of Investments</i> dated 23 November 1994
<b>UAE</b>	United Arab Emirates
<b>UNCITRAL Rules or 1976 UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, 1976
<b>Vienna Convention</b>	Vienna Convention on the Law of Treaties, 1969

## I. INTRODUCTION

### A. THE PARTIES

1. The Claimant is Alcor Holdings Ltd. (“**Alcor**” or the “**Claimant**”), a company incorporated under the laws of the United Arab Emirates (the “**UAE**”) and registered at P.O. Box 186549, Dubai, UAE. The Claimant is represented in these proceedings by Mr [REDACTED] and Mr [REDACTED] of TAYLORWESSING LLP (Dubai Branch), 26<sup>th</sup> Floor, Rolex Tower Sheikh Zayed Road, P.O. Box 33675, Dubai, UAE; and [REDACTED], [REDACTED], and [REDACTED] of TAYLORWESSING E|N|W|C ADVOKÁTI V.O.S., U Prašné brány 1, 110 00 Prague 1, Czech Republic.
2. The Respondent is the Czech Republic, (the “**State**” or the “**Respondent**”, and together with the Claimant, the “**Parties**”). The Respondent is represented in these proceedings by Ms Martina Matejová, Mr Jaroslav Kudrna, and Mr Martin Nováček of the MINISTRY OF FINANCE, Letenská 15, 118 10 Prague 1, Czech Republic; and Mr [REDACTED] Ms [REDACTED] and Ms [REDACTED] of CHAFFETZ LINDSEY LLP, 1700 Broadway, 33<sup>rd</sup> Floor, New York, NY 10019, United States of America.

### B. BACKGROUND OF THE DISPUTE

3. This arbitration concerns the Czech Republic’s alleged breach of its obligations under Articles 2 and 3 of the *Agreement Between the Government of the Czech Republic and the Government of the United Arab Emirates for the Promotion and Protection of Investments* dated 23 November 1994 (the “**Treaty**”)<sup>1</sup> with respect to the Claimant’s alleged investment in a number of land plots upon which the City of Prague (the “**City**” or “**Prague**”) maintains public roads and auxiliary communications.<sup>2</sup>
4. At the heart of this dispute is a disagreement about the Claimant’s entitlement to, and the measure of compensation for, alleged unjust enrichment in respect of the City’s use of land owned by the Claimant’s former subsidiary, Alcor Holdings CZ. s.r.o. (“**Alcor CZ**”). The Claimant contends that the Treaty entitles it to compensation under a formula set out in a municipal regulation (“**Resolution No. 2141**”), adopted by the City, that determines how much rent the City can charge when leasing its own land for particular purposes to third parties. According to the Claimant, the

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<sup>1</sup> The Treaty entered into force on 25 December 1995.

<sup>2</sup> The term “communication” (*komunikace*) as used throughout the record appears to refer to structures such as local roads and ramps.

same formula must be applied to cases in which the City operates structures such as roads and utilities on land belonging to a private party. The Claimant maintains that Alcor CZ was at all material times the owner of various plots of land in the City (the “**Plots**”) on which the City had built and operated roads and other utilities.

5. The Respondent argues that this Tribunal lacks jurisdiction because the Claimant is not a covered “investor” and lacks a covered “investment” within the meaning of those terms in the Treaty. It also raises several other preliminary objections to the admissibility of the Claimant’s claims (namely, that the Claimant structured its investment specifically to invoke Treaty jurisdiction, that the Claimant seeks supranational review of Czech court judgments, and that the Claimant is pursuing multiple recovery). With regard to the merits, the Respondent submits that, pursuant to a judgment issued by a Czech court (and subsequently upheld upon appeal at all levels of the judicial system), the City has already paid compensation to Alcor CZ in the amount required under Czech law. It disputes the claim that the formula to be used in such a case is that contained in Resolution No. 2141 and maintains that its conduct has involved no breach of the Treaty.

**C. THE ARBITRATION AGREEMENT**

6. Article 9 of the Treaty sets out the the offer of each Contracting Party to arbitrate with investors of the other Contracting Party:

**ARTICLE 9**

**SETTLEMENT OF INVESTMENT DISPUTES BETWEEN  
A CONTRACTING STATE AND AN INVESTOR  
OF THE OTHER CONTRACTING STATE**

1. Any dispute which may arise between an investor of one Contracting State and the other Contracting State in connection with an investment on the territory of that other contracting State, shall be subject to negotiations between the parties in dispute.
2. If any dispute between an investor of one Contracting State and the other Contracting State can not be thus settled within a period of six months, the investor shall be entitled to submit the case either to:
  - a) the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention on the Settlements of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 13th March 1965; or
  - b) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these Rules. The arbitral awards shall be final and binding on both Parties to the dispute.

## II. PROCEDURAL HISTORY

### A. THE COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

7. On 30 June 2016, the Claimant notified the Respondent of a dispute under the Treaty.
8. Through subsequent correspondence, the Respondent informed the Claimant that it did not accept the Claimant's proposal for amicable settlement.
9. On 3 May 2018, the Claimant initiated these arbitration proceedings by serving a Notice of Arbitration dated 17 April 2018 (the "**Notice of Arbitration**") on the Respondent under Article 9(2)(b) of the Treaty. In its Notice of Arbitration, the Claimant relied on the UNCITRAL Arbitration Rules, 2013.
10. By letter dated 1 June 2018, the Respondent argued that, as the Treaty was concluded in 1995, the UNCITRAL Arbitration Rules, 1976 (the "**1976 UNCITRAL Rules**" or the "**UNCITRAL Rules**") apply to these proceedings, and proposed the Permanent Court of Arbitration (the "**PCA**") to administer the proceedings. The Claimant agreed to the Respondent's proposal for the PCA to administer the proceedings, but maintained its position on the applicability of the UNCITRAL Arbitration Rules, 2013.
11. On 12 July 2018, the Claimant appointed Mr Richard Wilmot-Smith QC as arbitrator. Mr Wilmot-Smith's address is 81 Chancery Lane, London WC2A 1DD, United Kingdom.
12. On 22 August 2018, the Respondent appointed Professor Donald McRae, CC, ONZM, as arbitrator. Professor McRae's address is the Faculty of Law, Common Law Section, University of Ottawa, 57 Louis Pasteur, Ottawa, Ontario K1N 6N5, Canada.
13. On 21 September 2018, the two co-arbitrators informed the Parties that they had appointed Sir Christopher Greenwood, GBE, CMG, QC as presiding arbitrator. Sir Christopher's address is Magdalene College, Cambridge, CB3 0LH, United Kingdom.
14. On 5 October 2018, the Tribunal wrote to the Parties, enclosing drafts of Procedural Order No. 1 and the Terms of Appointment and inviting the Parties to provide their comments on the enclosed drafts.
15. On 9 October 2018, the PCA transmitted to the Parties Declarations of Acceptance and Statements of Impartiality and Independence duly completed and signed by each member of the Tribunal.

16. On 22 October 2018, the Parties submitted a jointly agreed mark-up of the draft Terms of Appointment and Procedural Order No. 1.
17. On 12 November 2018, the Tribunal conducted a procedural conference call with the Parties to discuss their comments on the draft Terms of Appointment and Procedural Order No. 1.
18. Following the procedural conference, on 19 November 2018, the Tribunal issued **Procedural Order No. 1**, including a procedural calendar for the proceedings.
19. On 21 November 2018, the Tribunal issued its **Terms of Appointment**—as revised in consultation with the Parties—for signature by the Parties and each member of the Tribunal. The Terms of Appointment provided, *inter alia*:
  - (a) that the seat of arbitration would be The Hague, the Netherlands;
  - (b) that the language of the arbitration would be English;
  - (c) that the 1976 UNCITRAL Rules would apply to these proceedings,
  - (d) that the PCA would administer the proceedings, and
  - (e) that Mr ██████████ Senior Legal Counsel of the PCA would act as Tribunal Secretary.
20. On 3 December 2019, the Tribunal wrote to the Parties proposing the appointment of Ms ██████████ ██████████ as assistant to the Presiding Arbitrator. The Tribunal enclosed a copy of Ms E ██████████ *curriculum vitae* with its letter. On 10 and 11 December 2019, the Respondent and the Claimant confirmed that they had no objections to Ms ██████████ appointment. On 16 December 2019, the Presiding Arbitrator circulated Ms ██████████ declaration of confidentiality to the Parties, who confirmed the following day that they were satisfied with Ms ██████████ declaration.

**B. WRITTEN SUBMISSIONS AND DOCUMENT PRODUCTION**

21. On 28 November 2018, the Claimant submitted its **Statement of Claim**, together with, *inter alia*, a witness statement by Mr ██████████ (the ‘██████████ **Witness Statement**’).
22. On 14 December 2018, the Respondent sent a letter to the Claimant asserting that the Statement of Claim did not contain sufficient details on, *inter alia*, “the elements of treaty and international law allegedly breached by the Republic” and “the Claimant’s corporate structure and identity supporting the tribunal’s jurisdiction under the relevant treaty text”. The Respondent requested



that the Claimant either particularize its claim, or confirm that it would not subsequently submit additional evidence.

23. The Claimant rejected the Respondent's complaints in an e-mail of 18 December 2018, asserting that "[t]he Claimant's case in this matter is straightforward and has been clearly pleaded".
24. By letter dated 10 January 2019, the Respondent requested that the Tribunal order that the Claimant particularize its claims and provide all available evidence and authorities it intends to rely upon. By letter dated 17 January 2019, the Claimant asked the Tribunal to reject this request.
25. On 24 January 2019, the Tribunal issued **Procedural Order No. 2**, denying the Respondent's request and noting that it would consider document production requests in accordance with the provisions and timeline set out in Procedural Order No. 1.
26. On 29 March 2019, the Respondent submitted its **Statement of Defence**, together with, *inter alia*, a witness statement by [REDACTED] (the "**First [REDACTED] Witness Statement**").
27. On 9 and 10 May 2019, each Party produced to the other Party documents responsive to uncontested document requests exchanged between the Parties in accordance with Procedural Order No. 1.
28. On 27 May 2019, the Parties submitted their remaining contested documents requests to the Tribunal for its determination.
29. On 13 June 2019, the Tribunal issued **Procedural Order No. 3**, ordering the Parties to produce documents in accordance with the enclosed Annex A and Annex B, respectively setting out the Tribunal's decisions on the Claimant's and the Respondent's document requests.
30. On 26 June 2019, the Claimant produced documents responsive to the Tribunal's orders in Annex A to Procedural Order No. 3.
31. On 27 June 2019, the Respondent produced documents responsive to the Tribunal's order in Annex B to Procedural Order No. 3.
32. On 4 July 2019, the Tribunal wrote to the Parties, noting that the Parties' production of documents on 26 and 27 July 2019, as well as the Claimant's production of documents on 9 May 2019, had all copied the Tribunal. The Tribunal recalled that pursuant to Procedural Order No. 1 such correspondence should not be copied to the Tribunal, and advised the Parties that documents produced would form part of the record and be considered by the Tribunal only if submitted as

exhibits to the Parties' remaining written submissions (*i.e.*, the Claimant's Reply and the Respondent's Rejoinder).

33. On 26 August 2019, the Claimant submitted its **Reply**, together with, *inter alia*, an expert report by Associate Professors [REDACTED] and [REDACTED] dated 23 August 2019 (the '[REDACTED] & [REDACTED] **Expert Opinion**').
34. On 7 October 2019, with the Claimant's consent, the Respondent sought an extension of the deadline for submitting its Rejoinder from 31 October 2019 to 29 November 2019. The Tribunal granted the request on the same date.
35. On 26 November 2019, with the Claimant's consent, the Respondent sought a further extension of the deadline for submitting its Rejoinder from 29 November 2019 to 6 December 2019. The Tribunal granted the request the next day.
36. On 6 December 2019, the Respondent submitted its **Rejoinder**, together with, *inter alia*, an expert report by [REDACTED] (the '[REDACTED] **Expert Opinion**') and a second witness statement by [REDACTED] (the "**Second [REDACTED] Witness Statement**").
37. On 18 February 2020, the Respondent produced as an additional exhibit (R-134) a copy of a decision by the Czech Supreme Court in *Alcor Holdings CZ s.r.o. v. City of Prague*, dated 17 December 2019.
38. On 3 March 2020, the Tribunal issued **Procedural Order No. 4**, admitting the additional exhibit R-134 submitted by the Respondent to the record and ruling that no further documents might be submitted except in accordance with the rules set forth in the procedural order governing documents produced for the hearing or as otherwise permitted by the Tribunal.

### **C. HEARING PREPARATION AND POSTPONEMENT**

39. In March and April 2019, the Parties and the Tribunal confirmed their availability for a hearing to take place between 30 March and 2 April 2020 in The Hague in accordance with paragraph 9.1 of Procedural Order No. 1.
40. By e-mail dated 13 January 2020, the Parties notified the Tribunal that after conferring with each other, the Parties were agreed that they preferred to hold the hearing in Prague. On the same date, the Tribunal agreed with the Parties proposal to change the hearing location to Prague.
41. On 2 March 2020, the Tribunal and Parties held a Pre-Hearing Teleconference to discuss the protocol for the upcoming hearing in Prague.

42. On 4 March 2020, the Tribunal issued **Procedural Order No. 4** setting forth details of the hearing to take place in Prague on 30 and 31 March 2020 with 1 April 2020 held in reserve.
43. On 12 March 2020, the Parties contacted the Tribunal acknowledging the rapidly developing COVID-19 pandemic and seeking leave to discuss potential alternatives to a hearing in Prague on 30 and 31 March 2020. The Tribunal granted that leave on the same date.
44. On 13 March 2020, the Parties jointly notified the Tribunal that in light of the worsening COVID-19 situation, they considered it impossible to have an in-person hearing in Prague or in any other location on 30 and 31 March 2020. The Parties also notified the Tribunal that they considered it impractical to organize a hearing by video-conference to be conducted on the appointed dates. The Parties conveyed their agreement that the 30 and 31 March 2020 hearing should be vacated and postponed to a later date.
45. On 16 March 2020, the Presiding Arbitrator conducted a conference call with the Parties to discuss potential dates for a postponed hearing.
46. On 11 and 12 July 2020, after several rounds of correspondence, the Parties confirmed their availability for a hearing to be held on 14 and 15 December 2020. On 27 August 2020, the Tribunal invited the Parties to provide comments regarding the format of the hearing in light of the continuing public health and logistical difficulties posed by the COVID-19 pandemic. The Tribunal invited the Parties to confer and consider whether an in person hearing would be feasible or preferable, or whether the Parties would prefer to conduct a video hearing, building upon experience with video proceedings developed over the course of the COVID-19 pandemic.
47. On 11 September 2020, the Parties notified the Tribunal of their agreement, in light of the ongoing public health circumstances, to proceed by way of a video-conference hearing on 14 and 15 December 2020. The Parties noted that they were conferring on a remote hearing protocol.

**D. THE INTRODUCTION OF ADDITIONAL EVIDENCE**

48. On 8 September 2020, the Respondent wrote to the Tribunal seeking leave to introduce into the record a 2 June 2020 resolution of the Czech Constitutional Court in the litigation between Alcor Holdings CZ s.r.o. and the City of Prague. The Respondent reported that it had conferred with the Claimant, which had advised that it had no objection to introducing the 2 June 2020 resolution into the record, so long as the Claimant would be permitted to submit an addendum to the [REDACTED] [REDACTED] Expert Opinion addressing the 2 June 2020 resolution. The Respondent informed the Tribunal that it agreed with the Claimant's proposal, on the condition that the Respondent would have the opportunity to respond to any such addendum submitted by the Claimant.

49. On 9 September 2020, the Tribunal invited the Claimant to comment on the Respondent's request to introduce the Czech Constitutional Court's resolution as well as on a proposed page limit for any potential supplemental expert report.
50. On 22 September 2020, the Claimant wrote to the Tribunal on behalf of both Parties recording the Parties' agreement to a ten-page limit for further expert testimony on the 2 June 2020 resolution of the Czech Constitutional Court.
51. By an e-mail of 12 October 2020, following another round of correspondence between the Tribunal and the Parties regarding applicable deadlines, the Tribunal communicated to the Parties its decision: (a) admitting the 2 June 2020 Czech Constitutional Court resolution as an additional exhibit (R-135); (b) granting leave to the Claimant to file an addendum of no more than 10 pages to the [REDACTED] Expert Opinion by 19 October 2020; and (c) granting leave to the Respondent to file a reply of no more than 10 pages to the Claimant's addendum by 9 November 2020.
52. On 19 October 2020, the Claimant submitted a supplemental expert report of Professors [REDACTED] and [REDACTED] dated 14 October 2020 (the "**Supplemental [REDACTED] Expert Opinion**") addressing the legal significance of Constitutional Court decisions.
53. On 9 November 2020, the Respondent submitted the supplemental expert report of [REDACTED] [REDACTED] (the "**Supplemental [REDACTED] Expert Opinion**") in response to the Supplemental [REDACTED] [REDACTED] Expert Opinion.

**E. THE PARTIES' SKELETON ARGUMENTS AND THE HEARING**

54. On 26 October 2020, after conferring with each other and with the PCA, the Parties submitted a draft Agreed Protocol for a Remote Hearing for the Tribunal's consideration.
55. On 13 November 2020, the Tribunal issued **Procedural Order No. 5**, setting out the protocol for the December 2020 hearing based substantially on the draft protocol that the Parties had agreed. The Tribunal confirmed that the hearing would take place remotely between 14 and 16 December. At the Tribunal's invitation, the Claimant and Respondent indicated their agreement to the procedures set out in Procedural Order No. 5 by returning signed copies on 15 and 14 November 2020 respectively.
56. On 14 November 2020, the Claimant submitted its Skeleton Opening for Hearing (the "**Claimant's Skeleton**") and the Respondent submitted its Skeleton Argument (the "**Respondent's Skeleton**").

57. By letter to the Tribunal dated 20 November 2020, the Respondent contended that the Claimant's Skeleton asserted for the first time breaches of "Articles 2(12) [*sic*] ... 2(4)(i) and 2(4)(ii) and 2(10)" of the Treaty. According to the Respondent, these breaches had not previously been pleaded by the Claimant, and that permitting the Claimant to introduce them at that late stage would result in prejudice to the Respondent.
58. By letter to the Tribunal dated 23 November 2020, the Claimant replied to the Respondent's allegations with respect to the breaches asserted in the Claimant's Skeleton, and argued that the substance of its claims, especially with regard to Article 2(1) and 2(10), were not new.
59. By letter to the Tribunal dated 24 November 2020, the Respondent objected to the Claimant's failure to adhere to page limits in its Claimant's Skeleton and to the Claimant's attempts to introduce additional exhibits and appendices into the record. The Respondent also responded to the arguments in the Claimant's 23 November 2020 letter that its Articles 2(1) and 2(10) claims were not new, and registered its objections to what it characterized as the Claimant's attempts to introduce new evidentiary and substantive arguments under existing heads of claim.
60. By letter to the Parties dated 27 November 2020, the Tribunal notified the Parties of its decision, *inter alia*, (a) striking Annex A to the Claimant's Skeleton; (b) denying leave to the Claimant to submit two additional annexes to the Claimant's Skeleton; (c) denying the Respondent's request to strike out other parts of the Claimant's Skeleton; (d) granting the Respondent additional time at the Hearing to respond to arguments raised in the Claimant's Skeleton; (e) requesting the Claimant to submit a comprehensive list of Treaty provisions upon which it relied as forming the basis of its claim; and (f) requesting the Parties to submit agreed versions of the Treaty, a chronology, *dramatis personae*, and indices of legal authorities.
61. The hearing was held by video link on 14, 15 and 16 December 2020.
62. The Claimant was represented by Mr [REDACTED], [REDACTED] [REDACTED] Mr [REDACTED] and Ms [REDACTED], all of Taylor and Wessing LLP. Mr [REDACTED] attended as Party representative.
63. The Respondent was represented by Mr [REDACTED] Ms [REDACTED] Ms [REDACTED] and Ms [REDACTED], all of Chaffetz Lindsay LLP. Mr Ondrej Landa, Deputy Minister of Legal Affairs and Property of the State, Ms Martina Matejová, Ms Anna Bilanová, Mr Jaroslav Kudrna, Ms Lucie Ostrá, Mr Mr Martin Nováček, all of the Ministry of Finance, attended as Party representatives.

64. Mr [REDACTED] and [REDACTED] gave evidence as fact witnesses. [REDACTED] and [REDACTED] were cross-examined on the subject of their expert reports.
65. As well as the Members of the Tribunal, Mr [REDACTED] Mr [REDACTED] (Assistant Legal Counsel of the PCA), Ms [REDACTED] (PCA Case Manager) and Ms [REDACTED] attended the hearing. The Court Reporter was Ms [REDACTED]
66. In accordance with the directions of the Tribunal, on 29 January 2021 the Claimant submitted its Closing Submissions as a post-hearing brief (the “**Claimant’s PHB**”). On the same date the Respondent submitted its post-hearing brief (the “**Respondent’s PHB**”).
67. Further, on 11 February 2021 both Parties submitted their submissions on costs (the “**Claimant’s Costs Submission**” and the “**Respondent’s Costs Submission**”).

### III. FACTUAL BACKGROUND

#### A. THE LEGAL CONTEXT OF THE CLAIMANT'S INVESTMENT

68. Between 1948 and 1989 Czechoslovakia was under communist rule.<sup>3</sup> Throughout this period, Czechoslovakian law did not recognize unified title (or *superficies solo cedit*), the legal principle that structures built on land belonged to the owner of the land. From 1951 it was possible under the Communist-era civil code for structures built upon land to be owned and alienated by persons other than the owners of the underlying land.<sup>4</sup> Communist rule ended in November 1989. In 1993 Czechoslovakia was dissolved and the Czech Republic became a separate State.<sup>5</sup>

69. The rule that structures do not form part of the land remained in place until the present Czech Civil Code (the “**2014 Civil Code**”) entered into force on 1 January 2014, reintroducing the principle of *superficies solo cedit*:<sup>6</sup>

Section 506(1). Component parts of a plot of land include the space above and below the surface, structures erected on the plot of land and other facilities (hereinafter a ‘structure’), except for temporary structures, including what is embedded in the plot of land and attached to walls.<sup>7</sup>

70. Under the 2014 Civil Code, where land and any “linear structure” (such as the roads and auxiliary communications at issue in this dispute) built on the land are owned by two separate owners, the structure is treated as separate real property that can be owned and alienated independently of the land.<sup>8</sup> Where the land and any linear structure built upon it are both owned by the same person, the structure becomes part of the property and ceases to exist independently (that is, title to the land and structure is unified).<sup>9</sup>

71. In 1991, the Czech government transferred ownership of public roads to the municipalities served by the roads, along with a duty to unify title over the land and any structure thereon where a road or other utility had been built upon privately owned land (sometimes described as a duty to “quiet title”).<sup>10</sup> Following this transfer, owners of land upon which state-owned constructions had been

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<sup>3</sup> Statement of Claim, para. 2.1.

<sup>4</sup> ██████████ Expert Opinion, para. 7 (CEO-1); First ██████████ Witness Statement, para. 7 (RWS-1).

<sup>5</sup> Statement of Claim, para. 2.1.

<sup>6</sup> ██████████ Expert Opinion, para. 18 (CEO-1); *referring to referring to* Civil Code, Law No. 89/2012 Coll., in force since 1 January 2014 (Exhibit R-61).

<sup>7</sup> ██████████ Expert Opinion, para. 19 (CEO-1).

<sup>8</sup> ██████████ Expert Opinion, paras. 20–23 (CEO-1) *referring to* 2014 Civil Code, §§ 498(1), 506 (Exhibit R-61); Road Act, § 9(1) (Exhibit R-66).

<sup>9</sup> ██████████ Expert Opinion, para. 20 (CEO-1).

<sup>10</sup> First ██████████ Witness Statement, paras. 8–10 (RWS-1).

built and on which title had yet to be consolidated gained the right to enter into property settlements with municipalities.<sup>11</sup>

72. It is undisputed that the City owes compensation for unjust enrichment to owners of lands underlying public roads on account of its past use of their lands.<sup>12</sup> Claims for compensation are limited to the three years preceding the date of raising a claim to the City.<sup>13</sup> The exact basis on which the compensation payable is to be calculated is the subject of a disagreement between the Parties that is central to this arbitration.
73. According to the Respondent, although compensation for unjust enrichment generally corresponds to the prevailing rent for comparable land, it may be capped by applicable price regulations.<sup>14</sup> The Respondent maintains that Czech law in effect at the time the Claimant acquired the Plots specified that the amount which the City would pay as unjust enrichment is based on an appraisal of the prevailing rent for comparable land at a particular location and time and is capped by the Ministry of Finance in its annual assessments (the “**MoF Assessments**”).<sup>15</sup> Under the MoF Assessment, the cap on unjust enrichment was set at 85 CZK/m<sup>2</sup>/year for 2010 and 2011 and was raised to 120 CZK/m<sup>2</sup>/year from 2012 to 2017.<sup>16</sup>
74. The Claimant maintains that compensation had to follow the market price and that the best indication of the market price was the amount payable to the City where another party built on land owned by the City. The amount payable to the City was fixed by Resolution No. 2141.<sup>17</sup>

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<sup>11</sup> First [REDACTED] Witness Statement, paras. 9–10 (RWS-1). *See, however*, Reply, para. 18.

<sup>12</sup> First [REDACTED] Witness Statement, paras. 16, 23 (RWS-1); [REDACTED] Expert Opinion, para. 12 (REO-1); Judgment of the 10<sup>th</sup> District Court of Prague, 27 September 2017, p. 9 (Exhibit R-44); Judgment of the Supreme Court, 16 July 2018, file ref. 28 Cdo 430/2017 (Exhibit R-89); Statement of Defence, para. 12; Statement of Claim, paras. 2.8, 2.12; Tr., Day 1, p. 12/17-21.

<sup>13</sup> Second [REDACTED] Witness Statement, para. 12 (RWS-2); First [REDACTED] Witness Statement, para. 15 (RWS-1); Civil Code – Law No. 40/1964 Coll., in force 1 April 1964 to 1 January 2014, § 107(2) (Exhibit R-60); 2014 Civil Code, §§ 621, 629(1) (Exhibit R-61).

<sup>14</sup> [REDACTED] Expert Opinion, para. 13 (REO-1).

<sup>15</sup> Resolution of the Supreme Court of the Czech Republic, No. 28 Cdo 1537/2009, 2 December 2009 (Exhibit R-74); First [REDACTED] Witness Statement, paras. 15–16. (RWS-1); [REDACTED] Expert Opinion, paras. 72–109 (REO-1); *see also* MoF Assessments for years 2008-2017 (Exhibits R-2 to R-10).

<sup>16</sup> First [REDACTED] Witness Statement, para. 34 (RWS-1); Assessments of the Ministry of Finance for 2008-2017 (Exhibits R-2 to R-10).

<sup>17</sup> [REDACTED] Expert Opinion, para. 166 (CEO-1).



75. With respect to the area of land that is subject to compensation, [REDACTED] disagrees with the Claimant's experts in pointing out that no compensation is owed for parts of the land where the landowner's option to use the land is not excluded by a road or other restriction.<sup>18</sup>

**B. THE CLAIMANT AND ITS BUSINESS IN THE CZECH REPUBLIC**

76. The Claimant company, Alcor Holdings Ltd ("Alcor"), was established on 30 July 2009 under the law of the United Arab Emirates with its registered address located in Dubai.<sup>19</sup> The Claimant's founder, sole shareholder and CEO is Mr [REDACTED], a dual national of the Czech Republic and Switzerland.<sup>20</sup> Beginning in 2009, Mr [REDACTED] sought to invest in the Czech Republic by buying land plots occupied by roads and communications owned by the City.<sup>21</sup>

77. Mr [REDACTED] testified that he established Alcor as a holding company and that its purpose was to serve as a "vehicle for the investment" which he intended to make in the Czech Republic.<sup>22</sup> On a visit to Prague Mr [REDACTED] was made aware of an investment opportunity related to plots of land on which municipal roads owned by the City of Prague are located.<sup>23</sup> Mr [REDACTED] learned that the Prague City Administration, as landowner, imposed a charge for third-party use of its land while providing compensation for placing its own structures on the land of private landowners.<sup>24</sup> Based on what he described as the "principle of equality of legal subjects," Mr [REDACTED] concluded that the landowner was owed compensation for unjust enrichment at the rate stipulated by the City's own regulation governing leases of the City's land.<sup>25</sup> Mr [REDACTED] accordingly formulated a business plan to purchase built-up plots of land and to seek compensation for unjust enrichment from the City for the period of time during which the City's roads were located on the plots of land.<sup>26</sup>

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<sup>18</sup> [REDACTED] Expert Opinion, paras. 67–68 (REO-1).

<sup>19</sup> Certificate of Incorporation of Alcor Holdings Ltd. dated 30 July 2009 (Exhibit R-62); Notice of Arbitration, p. 2; [REDACTED] Witness Statement, para. 10 (CWS-1).

<sup>20</sup> [REDACTED] Witness Statement, paras. 1, 10 (CWS-1); Tr., Day 1, p. 10/12-14. In cross-examination, Mr [REDACTED] said that he had not been completely accurate in describing himself as the CEO but accepted that he was the sole shareholder; Tr. Day 1, p. 115/21-24.

<sup>21</sup> [REDACTED] Witness Statement, paras. 1, 2 and 10 (CWS-1).

<sup>22</sup> [REDACTED] Witness Statement, para. 10. (CWS-1); Tr., Day 1, p. 107/17-19, 116/6-9.

<sup>23</sup> [REDACTED] Witness Statement, para. 4 (CWS-1); Tr., Day 1, p. 102/7-10.

<sup>24</sup> [REDACTED] Witness Statement, para. 6 (CWS-1).

<sup>25</sup> [REDACTED] Witness Statement, para. 8 (CWS-1); Statement of Claim, para. 2.15.

<sup>26</sup> [REDACTED] Witness Statement, para. 9 (CWS-1).

78. On 27 May 2009, Mr [REDACTED] obtained a legal memorandum from Czech lawyer [REDACTED] [REDACTED] (the ‘[REDACTED] Memo’).<sup>27</sup> The [REDACTED] Memo described the Czech legal framework and potential risks associated with Mr [REDACTED] business plan. It determined that in the absence of legal title (such as a lease agreement) to use the land upon which its road is built, the City was subject to “a duty to pay the owner of the land for so-called ‘unjust enrichment’ which is equal to what would be otherwise paid in a commercial lease”.<sup>28</sup> Concerning the amount payable under either a lease contract concluded with the City or a compensation award sought against it, the memorandum refers to tariffs established by Resolution No. 2141, promulgated by the City in 2004.<sup>29</sup> According to the [REDACTED] Memo, Resolution No. 2141 establishes “the conditions under which it is possible to lease [City]’s plots built-up by the roads to a third person[s] [*sic.*]”.<sup>30</sup>
79. The capped rent amount prescribed under Resolution No. 2141 varies according to the use of the land and the tenure of the use of the land. It is set at either 5 CZK/m<sup>2</sup>/day (1825 CZK/m<sup>2</sup>/year) if the term of the original lease agreement between the City and third-party land user is not exceeded or 10 CZK/m<sup>2</sup>/day (3650 CZK/m<sup>2</sup>/year) if the term of the original lease is exceeded.<sup>31</sup>
80. The [REDACTED] Memo concluded with the caveat that “[f]ollowing the acquisition it would be useful to verifiably check with the [City] whether the recovery of the unjust enrichment sum is carried out by the assumed principles.”<sup>32</sup>
81. In his witness statement, Mr [REDACTED] testified that, based on the outcome of the [REDACTED] Memo and “several months spent by further analysing the applicable statutes and case law and after further field research,” including the advice of his personal connections in the Czech Republic, he decided that the investment opportunity was worth pursuing.<sup>33</sup> In cross-examination, however,

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<sup>27</sup> Due Diligence regarding the Claimant’s investment interest and its legal feasibility dated 27 May 2009 (Exhibit C-12).

<sup>28</sup> [REDACTED] Memo, p. 1 (Exhibit C-12).

<sup>29</sup> [REDACTED] Memo, p. 1 (Exhibit C-12); Resolution No. 2141 of the Council of the Capital City of Prague dated 14 December 2004 regarding the draft of the new Principles of Price Policies applied to leases and loans for use of roads and their parts, portions of plots of land, and sites owned by the Capital City of Prague (Exhibit C-1).

<sup>30</sup> [REDACTED] Memo, p. 1 (Exhibit C-12).

<sup>31</sup> Resolution No. 2141 of the Council of the Capital City of Prague dated 14 December 2004 regarding the draft of the new Principles of Price Policies applied to leases and loans for use of roads and their parts, portions of plots of land, and sites owned by the Capital City of Prague, p. 5 (Exhibit C-1).

<sup>32</sup> [REDACTED] Memo, p. 2 (Exhibit C-12).

<sup>33</sup> [REDACTED] Witness Statement, para. 10 (CWS-1); Tr., Day 1, p. 112/12-25, 127/5-14; Claimant’s PHB, para. 83.

Mr [REDACTED] admitted that he had not in fact read the case law to which the [REDACTED] Memo referred.<sup>34</sup> He testified that he expected that the purchase of these plots would generate both capital appreciation (on the value of the plots themselves) and a yield from the City for its use of the land (in the form of either rental payments or an award of compensation for unjust enrichment).<sup>35</sup> His understanding was that Resolution No. 2141 would apply to determine the amount of compensation payable for the total occupation of a plot of land by a road irrespective of whether the plot was owned by the City itself or by a third party.<sup>36</sup> As such, and assuming the City would eventually buy the plots of land “for the standard price”, Mr [REDACTED] was confident that his business plan was low-risk and was “bound to generate a profit”<sup>37</sup>. At the oral hearing Mr [REDACTED] added that, at the time that he conducted his due diligence study, he was aware that there were “several other” legal proceedings ongoing between the City and holders of land of ununified title.<sup>38</sup> He also confirmed that he had had no personal contact with the City prior to the purchase of the Plots, though he assumed that [REDACTED] had drafted her memorandum on the basis of her interactions with the City.<sup>39</sup>

82. On 18 November 2009, Alcor established a subsidiary, Alcor CZ, a limited liability company under Czech law.<sup>40</sup> Alcor was a 99% majority shareholder of Alcor CZ.<sup>41</sup> Mr [REDACTED] testified that Alcor CZ was established as a holding company for the plots that the Claimant company intended to acquire, and that it had no employees.<sup>42</sup> [REDACTED] was appointed as Alcor CZ’s executive director and legal counsel and held the remaining 1 % of the company’s equity.<sup>43</sup> She was instructed by Mr [REDACTED], acting through the Claimant.<sup>44</sup>

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<sup>34</sup> Tr. Day 1, p. 129/19-20.

<sup>35</sup> Tr., Day 1, p. 94/24 to 95/2; [REDACTED] Witness Statement, para. 9 (CWS-1).

<sup>36</sup> [REDACTED] Witness Statement, paras. 8, 13 (CWS-1); Statement of Claim, para. 2.10; Claimant’s Skeleton, para. 10.

<sup>37</sup> [REDACTED] Witness Statement, paras. 4, 9 (CWS-1); Tr., Day 1, p. 108/20, 111/14-18.

<sup>38</sup> Tr., Day 1, p. 121/4-8.

<sup>39</sup> Tr., Day 1, p. 128/18 to 129/13.

<sup>40</sup> Historical Extract from the Commercial Register of the Company Alcor Holdings CZ S.R.O. dated 18 November 2009 (Exhibit C-13)

<sup>41</sup> [REDACTED] Witness Statement, para. 10 (CWS-1).

<sup>42</sup> Tr., Day 1, p. 114/21-23; 115/25 to 116/3.

<sup>43</sup> Tr., Day 1, p. 117/1-8, 117/10-25.

<sup>44</sup> Tr., Day 1, p. 46/1-5, 115/1-8, 118/10-13.

83. In the time period between 28 January 2010 and 16 June 2011, Alcor CZ bought the 13 Plots<sup>45</sup> in five regions within the territory of the City:

Area of the Property (Number of Plots in Area)	Date of Acquisition	Total Area (m2)
Štěrboholy area (7 plots)	28 January 2010	16,467
Hostivař area (1 plot)	26 March 2010	964
Stodůlky area (2 plots)	27 July 2010	1324
Ďáblice area (1 plot)	24 November 2010	3731
Strašnice area (2 plots)	16 June 2011	173

84. The Claimant paid a total of CZK 25,702,310 (approximately US\$ 1,117,000) for the Plots.<sup>46</sup>
85. Throughout the period of the Claimant's ownership of the Plots and up to the present, the Plots have contained roads and auxiliary communications owned by the City.<sup>47</sup>

### C. COMMUNICATIONS WITH THE CITY OF PRAGUE AND SUBSEQUENT LITIGATION

86. Following the purchase of the Plots, the Claimant maintains that Alcor CZ contacted the City with a view to entering into a lease agreement.<sup>48</sup> According to Mr. [REDACTED] he chose to proceed "informally" preferring oral communication over written correspondence allegedly "to speed things up".<sup>49</sup> A letter to the City from [REDACTED] dated 19 December 2014 refers to Alcor CZ's failed attempts to resolve its claim for compensation stating that "this communication was informal".<sup>50</sup> This version of the events is not accepted by the Respondent. It insists that "Mr. [REDACTED] never approached the City to discuss the situation of the Plots."<sup>51</sup> [REDACTED] examined

<sup>45</sup> Extracts from the Deeds of Ownership Nos. 513, 8336, 759, 17987, 1499 (Exhibits C-14 to C-18).

<sup>46</sup> Second Instance Judgment, para. 22 (Exhibit R-53); Tr. Day 1, p. 10/16 to 11/19; Statement of Defence, para. 20.

<sup>47</sup> Statement of Claim, para. 3.5; Statement of Defence, para. 20 *referring to* Extracts from the Deeds of Ownership Nos. 513, 8336, 759, 17987, 1499 (Exhibits C-14 to C-18).

<sup>48</sup> [REDACTED] Witness Statement, para. 12 (CWS-1).

<sup>49</sup> [REDACTED] Witness Statement, para. 13 (CWS-1); Tr., Day 1, p. 120/23; Statement of Claim, para. 3.13 *referring to* Request for fulfilment addressed to Mrs. [REDACTED] (attorney of Prague) dated 19 December 2014 (Exhibit C-29); Reply, para. 33.

<sup>50</sup> Request for fulfilment addressed to the Mrs. [REDACTED] (attorney of Prague) dated 19 December 2014 (Exhibit C-29).

<sup>51</sup> Rejoinder, para. 27 *referring to* Second [REDACTED] Witness Statement, Section IV (RWS-2).

the City's records and states that she found no mention of any meetings, or requests for meetings, between Mr [REDACTED] and the City.<sup>52</sup> The Claimant states however that "it is common knowledge that no written records are made in relation to informal meetings and questions ... that are dealt with in person or via telephone."<sup>53</sup>

87. Mr [REDACTED] testified that when Alcor CZ's initial efforts at contact proved unsuccessful, he instructed [REDACTED] to send written enquiries to the City.<sup>54</sup> The City's responses to Alcor CZ demonstrate that from early 2011 Alcor CZ engaged in correspondence with the City seeking confirmation that roads and auxiliary communications owned by the City were built upon the Plots and that Resolution No. 2141 is applied by the City when determining rent for private parties' use of land owned by the City.<sup>55</sup>
88. In a letter dated 17 February 2011 the City responded to a letter from Alcor CZ to confirm that "the Prague City Hall proceeds with the lease and rent of the land" and that Resolution No. 2141 continued to apply.<sup>56</sup> Again in a letter dated 28 May 2013 the City wrote, in response to a letter from Alcor CZ, to confirm that the terms of Resolution No. 2141 were "fully respected".<sup>57</sup> In a further letter dated 28 February 2014, sent in response to a letter from Alcor CZ, the Director of the City's Department of Evidence, Administration and Use of Property wrote to state that the Claimant's specific enquiry should be directed to a separate department of the City's administration. The City did however state that

In general ... your assumption is correct. The Capital City of Prague proceeds under [Resolution No. 2141] when establishing the amount of unjust enrichment. However, it must be stated that in the case of unconditional or unauthorised use of the property of the Capital

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<sup>52</sup> First [REDACTED] Witness Statement, para. 25 (RWS-1); Second [REDACTED] Witness Statement, paras. 22–24 (RWS-2).

<sup>53</sup> Reply, para. 33 (further suggesting that "if Mr. [REDACTED] planned everything in advance, as the Respondent argues, he would have documented all of these meetings.").

<sup>54</sup> [REDACTED] Witness Statement, para. 14 (CWS-1); Letters from the Municipal Office of the City of Prague (Exhibits C-24 to C-28); Request for fulfilment addressed to Mrs. [REDACTED] (attorney of Prague) dated 19 December 2014 (Exhibit C-29).

<sup>55</sup> According to the Respondent, the Claimant has not provided these letters, but they are referenced in Exhibits C-19 through C-28. Letters from the Municipal Office of the City of Prague (Exhibits C-24 to C-28); Request for fulfilment addressed to Mrs. [REDACTED] (attorney of Prague) dated 19 December 2014 (Exhibit C-29); [REDACTED] Witness Statement, para. 14 (CWS-1).

<sup>56</sup> Letter from the Director of the Property Management of the Municipal Office dated 17 February 2011 (Exhibit C-24).

<sup>57</sup> Letter from the Director of the Property Management of the Municipal Office dated 28 May 2013 (Exhibit C-25).

City of Prague, the Capital City of Prague is obliged to resolve such matters through judicial proceedings.<sup>58</sup>

A similar confirmation was offered by the City in its letter dated 24 March 2014, responding to a further letter from [REDACTED]<sup>59</sup> The final letter from the City, also dated 24 March 2014, responds to a request from Alcor CZ for additional information “on the procedure of the Capital City of Prague in relation to third parties if those persons exceed the agreed lease period of the land or even use land without concluding a lease contract with the Capital City of Prague”. The City wrote to say that:

The Capital City of Prague assesses unjust enrichment as the amount of rent that the person would have been obliged to pay if he were a tenant. In such case that the rent at a given place and time would be determined according to the Price Policy Principles regarding the rent or loan for use of roads and their parts, part of land plots and areas owned by the City of Prague, leased by OOA Prague City Hall and TSK (Technical Management of Communications) of the City of Prague, which is the part of Annex 1 of [Resolution No. 2141], then the amount of the unjust enrichment would also be determined according these principles.<sup>60</sup>

89. The Respondent emphasizes in its submissions that “no City official ever indicated that Resolution 2141 applied to calculate leases or unjust enrichment for land owned by any party except the City.”<sup>61</sup>
90. Mr [REDACTED] testified that his efforts (through the Claimant company and Alcor CZ, in turn) to conclude a lease agreement with the City in a non-contentious manner ultimately failed, and that the reason for that failure was the latter’s “complete passivity”.<sup>62</sup> The Claimant suggests that, “as the reluctance of Prague to settle persisted,[it] had no other option than to proceed in accordance with the law.”<sup>63</sup> Consequently, Alcor instructed Alcor CZ to file a claim for unjust enrichment with the court of first instance.<sup>64</sup>
91. On 19 June 2011 Alcor CZ filed a complaint against the City before the 10<sup>th</sup> Prague District Court (the “**District Court**”), in which it requested that the Court determine that the City was the lessee

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<sup>58</sup> Letter from the Director of the Property Management of the Municipal Office dated 28 February 2014 (Exhibit C-26).

<sup>59</sup> Letter from the Director of the Property Management of the Municipal Office dated 24 March 2014 (Exhibit C-28).

<sup>60</sup> Letter from the Director of the Property Management of the Municipal Office dated 24 March 2014 (Exhibit C-27).

<sup>61</sup> Statement of Defence, para. 21.

<sup>62</sup> [REDACTED] Witness Statement, para. 13 (CWS-1); Claimant’s Skeleton, paras. 13-14.

<sup>63</sup> Reply, para. 33; [REDACTED] Witness Statement, para. 15 (CWS-1).

<sup>64</sup> [REDACTED] Witness Statement, para. 15 (CWS-1).

- of the Plots, or, alternatively that the City was obliged to compensate Alcor CZ on the basis of unjust enrichment.<sup>65</sup>
92. According to the Respondent, the City first learned of the “dispute” when Alcor CZ filed suit in the District Court.<sup>66</sup>
93. On 19 June 2013, Alcor CZ extended its claim and requested further compensation for the use of the Plots by the City for two additional years.<sup>67</sup>
94. On 6 March 2014, the District Court delivered its decision stating that it did not have competence to decide whether the City was the lessee of the Plots owned by Alcor CZ, which fell under the “local competence” of the 5<sup>th</sup> Prague District Court and the 8<sup>th</sup> Prague District Court, respectively.<sup>68</sup>
95. On 20 March 2014, Alcor CZ partially withdrew the portion of its claim seeking a declaratory judgment that the City was the lessee of the Plots, thus limiting its claim to one for unjust enrichment, and petitioned the District Court to hear this remaining claim, which Alcor CZ argued fell within the District Court’s local competence.<sup>69</sup>
96. While the litigation was ongoing, the parties exchanged a number of letters with the aim of settling their differences. However, these settlement attempts were unsuccessful. The City proposed to purchase the Plots for an amount determined by an expert body.<sup>70</sup> Alcor CZ, on the other hand, argued that such a purchase would only cover the disposition of the Plots *pro futuro*, and that Alcor CZ was entitled to additional compensation, as the past use of the Plots by the City qualified as an unjust enrichment.<sup>71</sup>

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<sup>65</sup> *Alcor CZ v. Capital City of Prague*, Complaint dated 19 June 2011 (Exhibit R-15). Alcor CZ’s claim originally did not cover 4307/81 in the Strašnice area; therefore, the claim was augmented on 19 June 2013 to cover this Plot as well.

<sup>66</sup> Statement of Defence, para. 22 referring to First [REDACTED] Witness Statement, paras. 25–26 (RWS-1).

<sup>67</sup> *Alcor CZ v. Prague*, Submission of Alcor CZ dated 19 June 2013 (Exhibit R-17).

<sup>68</sup> See Submission of Alcor CZ dated 20 March 2014, p. 3 (Exhibit R-26).

<sup>69</sup> Submission of Alcor CZ dated 20 March 2014, p. 3 (Exhibit R-26).

<sup>70</sup> Letters from the City to Alcor CZ dated 27 June 2013, 13 December 2013 and 24 March 2015 (Exhibits R-18, R-25, R-33).

<sup>71</sup> Letters from Alcor CZ to the City dated 27 June 2013, 28 July 2014 and 22 January 2015 (Exhibits R-19, R-28, R-32).

97. According to the Claimant, the City has not negotiated with Alcor CZ pending the outcome of the litigation in Czech courts.<sup>72</sup>
98. As will be explained below (paras. 113 to 115), on 24 February 2016, the Claimant sold its shareholding in Alcor CZ.
99. According to the Respondent, the City “repeatedly”<sup>73</sup> offered to purchase the Plots at a “sale price calculated on the basis of independent expert valuation reports,”<sup>74</sup> beginning immediately after the litigation was commenced in the District Court and extending to at least October 2017. The Respondent also purports to have followed up with further offers for both buyouts (most recently at CZK 32,288,000 or approximately US\$ 1.4 million) and easements over the Plots (most recently at CZK 8,070,980 or approximately US\$ 350,000).<sup>75</sup> The Respondent’s offers were allegedly rejected by Alcor CZ.<sup>76</sup> According to ██████████ Alcor CZ rejected the City’s offer to establish an easement over the Plots only in April 2019.<sup>77</sup>
100. Throughout the Czech court proceedings and in its correspondence with Alcor CZ, the City has refused to pay the market rent or unjust enrichment on the basis asserted by the Claimant.<sup>78</sup>
101. On 27 September 2017, the District Court delivered its judgment (the “**First In stance Judgment**”) in the case.<sup>79</sup> The District Court ruled that Alcor CZ was entitled to compensation

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<sup>72</sup> Statement of Claim, para. 3.12.

<sup>73</sup> Statement of Defence, para. 23 *referring to* First ██████████ Witness Statement, paras. 39–45 (RWS-1); *see also* Letter from Prague’s Director of the Department of Records, Administration and Asset Use to ██████████ ██████████ dated 28 December 2015 (Exhibit C-30) (reiterating the City’s “readiness ... to purchase the plots at the market rate ascertained by an expert’s report.”); Offers by Prague to Buy Plots (Exhibits R-16, R-18, R-25, R-27, R-38, R-39, R-42 and R-47); Land Pricing Reports (Exhibits R-20, R-21 and R-43).

<sup>74</sup> Rejoinder, para. 59 *referring to* First ██████████ Witness Statement, para. 40 (RWS-1); *see also* Second ██████████ Witness Statement, para. 20 (RWS-2).

<sup>75</sup> First ██████████ Witness Statement, para. 44 (RWS-1); *see also* Second ██████████ Witness Statement, para. 20 (RWS-2); Letter from the City of Prague to Alcor CZ dated 28 November 2016 (Exhibit R-42); Expert opinions of ██████████ Nos. 3225-122-2016, 3224-121-2016, 3223-120-2016, 3222-119-2016 dated 11 November 2016 (Exhibit R-43); Letter from the City of Prague to Alcor CZ of 18 October 2017, (Exhibit R-47); Draft purchase agreement between the City of Prague and Alcor CZ (Exhibit R-48); Draft agreement to create a servitude between the City of Prague and Alcor CZ, undated (Exhibit R-49); Expert Opinion of ██████████ dated 11 November 2016 (Exhibit-43).

<sup>76</sup> Statement of Defence, para. 23 *referring to* Correspondence between Prague and Alcor CZ (Exhibits R-16, R-18 to R-25, R-27 to R-43, R-47 to R-52, R-56 to R-57).

<sup>77</sup> Second ██████████ Witness Statement, para. 21 (RWS-2).

<sup>78</sup> Correspondence between Alcor and the City dated 7 December 2015 and 28 December 2015 (Exhibit C-30).

<sup>79</sup> Judgment of the 10<sup>th</sup> District Court of Prague dated 27 September 2017 (Exhibit R-44).



for the City's unjust enrichment, but at a rate significantly lower than the Resolution No. 2141 rate claimed by Alcor CZ.<sup>80</sup>

102. The District Court calculated the damages due for 2010 and 2011 in accordance with the MoF Assessments in force in those years, and, for the subsequent years, it based its calculation on an expert opinion submitted by the City.<sup>81</sup> The overall amount to be paid by the City was CZK 13,577,363.86 (approximately US\$ 589,900) plus interest accruing from 9 May 2012.<sup>82</sup>
103. In its reasoning, the District Court rejected Alcor CZ's request to calculate the damages in accordance with Resolution No. 2141, as Resolution No. 2141 "clearly refers to the land (after all, it is evident from the title of the Regulation) that is leased or borrowed for roads and their components, parts of plots of land and areas of land owned by the Capital City of Prague".<sup>83</sup>
104. Furthermore, the District Court underlined that, while the purchase of the Plots by Alcor CZ might have been of a speculative nature, the City was under an obligation to pay damages for unjust enrichment in any event. It also held that the City "would be liable to surrender unjust enrichment even if the plots of land remained the property of the former owners, and the fact that the former owners did not claim surrender of the unjust enrichment in the given case cannot be attributed to the detriment of the Plaintiff."<sup>84</sup> Both parties lodged appeals to challenge the First Instance Judgment. Alcor CZ's appeal was on the grounds that it should have been entitled to unjust enrichment at the Resolution No. 2141 rate.<sup>85</sup> The City's appeal alleged *inter alia* that Alcor CZ should not have been able to recover anything because its conduct was "speculative and abusive".<sup>86</sup>
105. Between October 2017 and February 2018, the City also approached Alcor CZ on a number of occasions with its offer to purchase the Plots or, alternatively, to create a servitude on the Plots.<sup>87</sup> Alcor CZ did not agree to these requests. The reason Alcor CZ gave in its correspondence was

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<sup>80</sup> First Instance Judgment, pp. 16-20 (Exhibit R-44).

<sup>81</sup> Expert opinions of Equity Solutions Appraisals dated 30 October 2015 and 11 August 2016 (Exhibits R-45 to R-46).

<sup>82</sup> First Instance Judgment, p. 11 (Exhibit R-44).

<sup>83</sup> First Instance Judgment, p. 10 (Exhibit R-44).

<sup>84</sup> First Instance Judgment, p. 9 (Exhibit R-44).

<sup>85</sup> Second Instance Judgment, paras. 12–19 (Exhibit R-53).

<sup>86</sup> Statement of Defence, para. 26 referring to Second Instance Judgment, paras. 20–24 (Exhibit R-53).

<sup>87</sup> Letters from the City of Prague to Alcor CZ dated 18 October 2017 and 14 February 2018 (Exhibits R-47, R-51).

that Alcor CZ needed additional time to evaluate the offer, as approval was subject to a decision in the general meeting of Alcor CZ.<sup>88</sup>

106. On 4 May 2018, the Municipal Court of Prague rejected the appeals of both sides and upheld the First Instance Judgment (the “**Second Instance Judgment**”).<sup>89</sup>
107. Addressing the First and Second Instance Judgments, the Respondent’s expert on Czech law, [REDACTED], notes, “[c]ase law demonstrate[s] that courts proceed in disputes between the owner of the land and the owner of the structure located on the land in a comparable manner to how they acted in the litigation between Alcor CZ and Prague.”<sup>90</sup>
108. On 10 May 2018, the City paid CZK 17,470,442.27 (approximately USD 803,640), the full amount under the Second Instance Judgment, to Alcor CZ.<sup>91</sup>
109. On 14 September 2018, Alcor CZ filed an extraordinary appeal with the Czech Supreme Court.<sup>92</sup> According to [REDACTED] appeal to the Czech Supreme Court is an “extraordinary remedy admissible only if certain defined conditions are met, such as an evident excess in the decision of the lower courts.”<sup>93</sup>
110. On 17 December 2019, the Czech Supreme Court issued its decision dismissing Alcor CZ’s extraordinary appeal and thus upholding the Second Instance Judgment (and, in consequence, the First Instance Judgment).<sup>94</sup>
111. On 18 March 2020, Alcor CZ filed a constitutional complaint challenging the decision of the Czech Supreme Court.<sup>95</sup> Alcor CZ alleged breaches of Article 90 of the Czech Constitution and Article 36(1) of the Czech Republic’s Charter of Fundamental Rights and Freedoms, and as it is entitled to do under Section 74 of Act No. 182/1993 Coll. (the “**Constitutional Court Act**”), sought the repeal of portions of the MoF Assessments for 2010–2016 as being contrary to the

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<sup>88</sup> Letters from Alcor CZ to the City of Prague dated 20 December 2017 and 12 March 2018 (Exhibits R-50, R-52).

<sup>89</sup> Judgment of the Prague Municipal Court dated 4 May 2018 (Exhibit R-53).

<sup>90</sup> [REDACTED] Expert Opinion, paras. 11, 58–63 (REO-1).

<sup>91</sup> Record of Payment of Judgment of 10 May 2018 (Exhibit R-54).

<sup>92</sup> Extraordinary Appeal of Alcor CZ to the Supreme Court of 14 September 2018 (Exhibit R-58); Submission to the Supreme Court of 23 October 2018 (Exhibit R-59).

<sup>93</sup> [REDACTED] Expert Opinion, para. 16 (REO-1).

<sup>94</sup> Resolution of the Czech Supreme Court, 28 Cdo 4380/2018-984 dated 17 December 2019 (Exhibit R-134).

<sup>95</sup> Resolution of the Czech Constitutional Court III. ÚS 814/20 dated 2 June 2020 (Exhibit R-135).

Charter of Fundamental Rights and Freedoms, public international law and Act No. 526/1990 Coll.

112. On 2 June 2020, the Constitutional Court found that none of Alcor CZ's constitutionally guaranteed rights had been breached, rendering Alcor CZ's constitutional complaint "manifestly unsubstantiated" pursuant to Section 43, paragraph 2(a) of the Constitutional Court Act.<sup>96</sup> Reasoning that "[d]enial of a constitutional complaint due to manifest unsubstantiality negates the fundamental condition for considering a proposal to repeal another legal regulation or its part," the Constitutional Court also rejected Alcor CZ's request to repeal portions of the MoF Assessments for 2010-2016.<sup>97</sup> The Constitutional Court noted in closing that "[n]o appeal may be filed against the decision of [the] Constitutional Court."<sup>98</sup>

#### **D. ALCOR'S SALE OF ALCOR CZ**

113. On 24 February 2016, the Claimant sold its share in Alcor CZ to Mizar Limited ("**Mizar**") for USD 1,000,000 (approx.: CZK 24,566,297).<sup>99</sup> According to the Respondent, the Claimant also appears to have been compensated by Mizar for money loaned to Alcor CZ for the acquisition of the Plots.<sup>100</sup>
114. According to the Claimant, the reason for its divestment was that it "no longer intend[ed] to do business in the Czech Republic in any shape or form".<sup>101</sup> At the hearing, Mr. [REDACTED] testified that "I was tired of the process, it was much more challenging than I thought it would be, and I did not necessarily have either the time or the financial resources to keep on going *ad aeternum*, so it was smarter to exit, recoup some of the funding, and allocate my time to other ventures like growing the firm."<sup>102</sup>
115. The Agreement on transfer of shares between the Claimant and Mizar<sup>103</sup> (the "**Share Transfer Agreement**") provides, in Section II paragraphs (2) and (3), that:

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<sup>96</sup> Resolution of the Czech Constitutional Court III. ÚS 814/20, 2 June 2020, para. 19 (Exhibit R-135).

<sup>97</sup> Constitutional Court Resolution, para. 20 (Exhibit R-135).

<sup>98</sup> Constitutional Court Resolution, closing (Exhibit R-135).

<sup>99</sup> Share Transfer Agreement, § III(2) (Exhibit C-31); Statement of Defence, para. 31.

<sup>100</sup> The Respondent notes that the Share Transfer Agreement "references the separate transfer of various loan agreements to which Claimant was a party." Statement of Defence, para. 31, n. 82 *referring to* Share Transfer Agreement, § IV(2) (Exhibit C-31).

<sup>101</sup> Notice of Arbitration, para. 20.

<sup>102</sup> Tr. Day 1, p. 164/25 to 165/5.

<sup>103</sup> Agreement on transfer of shares in business corporation dated 24 February 2016 (Exhibit C-31).

- (2) The parties explicitly confirm that the subject of the transfer does not include any right for compensation of the harm caused by the breach of the Deed on support and protection of the investments, declared in the Collection of Acts of the Czech republic under the No. 69/1996 Coll.; these claims cover the period from the establishment of the company up to the day of the transfer of the share of the company according to this agreement and represent 99% share of the transferor in the company. The acquirer hereby confirms that the transferor is entitled to these claims against the Czech Republic by the means of international arbitration, on his own account and at his own expense.
- (3) The parties also explicitly confirm that the transferor does not have any claim to any share of the amount of unjust enrichment that may eventually be adjudicated and paid by the Capital City of Prague to the company in the ongoing court proceedings in the Czech Republic, not even for the period when the transferor was a member of the partnership of the company.

#### **IV. THE POSITIONS OF THE PARTIES**

##### **A. JURISDICTION AND ADMISSIBILITY**

116. The Respondent raises five preliminary objections to the jurisdiction of this Tribunal and to the admissibility of the Claimant's claims, as follows:

- (a) that having sold its stake in its former Czech subsidiary Alcor CZ in February 2016, the Claimant was no longer an "investor" within the meaning of Article 1(2) of the Treaty when it purported to accept the offer of arbitration under Article 9 of the Treaty;
- (b) that the Claimant's stake in Alcor CZ lacked the indicia —specifically, contribution of economic value over time, and risk—of an "investment" within the meaning of Article 1(1) of the Treaty;
- (c) that the Claimant structured its investment through a holding company in Dubai with the express aim of establishing jurisdiction under the Treaty;
- (d) that the Claimant seeks to use this arbitration to conduct a "supranational" review of the judgments of the Respondent's courts;
- (e) that the Claimant is seeking duplicative recovery through this arbitration, since its former subsidiary Alcor CZ has already received compensation from Prague in the Czech domestic litigation.

##### **1. Whether the Claimant was an "Investor" at the Relevant Time**

117. Article 1(2)(b) of the Treaty, in relevant part, defines an "investor" in the following terms:

The term "investor" shall mean the Government of a Contracting State or any of its natural or juridical persons who invest in the territory of the other Contracting State:

...

- (b) The term "juridical person" shall mean with respect to either Contracting State, any entity established and recognized as juridical person by the law of that Contracting State, such as public and private companies, corporations, business associations, authorities, partnerships, foundations, firms, institutions, establishments, agencies, development funds, enterprises, cooperatives and organizations or other similar entities irrespective of whether their liabilities are limited or otherwise.

118. Investment is defined in Article 1(1) of the Treaty, the relevant part of which reads as follows:

The term "investment" shall comprise every kind of asset invested by ...a ... juridical person of one Contracting State in the territory of the other Contracting State in accordance with the laws, regulations and administrative practices of that State and shall include in a particular, though not exclusively:

- (a) movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, usufruct and other similar rights;
- (b) shares, stocks and debentures of companies or other rights or interests in such companies ...

*The Respondent's Position*<sup>104</sup>

119. The Respondent objects to the Tribunal's jurisdiction on the grounds that the Claimant was not an "investor" within the meaning of Article 1(2) of the Treaty. The Respondent does not contest that the Claimant is a juridical person recognized as such under the law of the UAE. According to the Respondent, however, the Claimant had relinquished any standing it might have had as an investor by voluntarily disposing of its shares in Alcor CZ in the sale to Mizar on 24 February 2016, well before serving its Notice of Arbitration on the Respondent in 2018.<sup>105</sup>
120. Relying on the decision of the arbitral tribunal in *CSOB v. Slovakia*, the Respondent asserts that the critical date to determine the Tribunal's jurisdiction is the date of commencement of the arbitral proceedings (the date when the Respondent receives the Notice of Arbitration under the UNCITRAL Rules).<sup>106</sup> The Respondent further notes that the determination of whether a party has standing is similarly made by reference to the date of the start of the proceedings.<sup>107</sup>
121. The Respondent submits that there are only "narrow exceptions" to the rule that the Claimant must have been an investor at the commencement of the arbitration.<sup>108</sup> The Respondent cites *Aven v. Costa Rica*, in which the arbitral tribunal held that it lacked jurisdiction under circumstances which the Respondent describes as being similar to the present case. The *Aven* tribunal stated that "an investor who disposes of ownership of the investment in question before arbitral proceedings should not be eligible to seek the Treaty's protection, unless special circumstances are present".<sup>109</sup> According to the Respondent, the special circumstances contemplated by the *Aven* tribunal are limited to the involuntary loss of control over the

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<sup>104</sup> Statement of Defence, Section III.A; Rejoinder, Section II.B; Respondent's Skeleton, para. 34; Tr. Day 1, p. 52/9 to 54/24; Respondent's PHB, paras. 10-13.

<sup>105</sup> Statement of Defence, para. 36; Rejoinder, para. 17; Tr. Day 1, p. 52/22-2.

<sup>106</sup> Statement of Defence, para. 37 referring to 1976 UNCITRAL Rules, Art. 3(2), *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 14 May 1999, para. 31 ("*CSOB*") (RLA-12); Rejoinder, para. 19. The Respondent also invokes the Award in *Loewen Group Inc. and Raymond Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003, paras. 233-234 ("*Loewen*") (RLA-21).

<sup>107</sup> Rejoinder, para. 10.

<sup>108</sup> Rejoinder, paras. 3, 23.

<sup>109</sup> Statement of Defence, para. 39 referring to *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award of 18 September 2008, para. 301 ("*Aven*") (RLA-8); see also Tr. Day 1, p. 52/14-24.

investment through the actions of a party (such as the respondent State) other than the claimant, for example where the investment has been expropriated or the investor has been coerced into a forced sale.<sup>110</sup>

122. The Respondent asserts that here, by contrast, the Claimant voluntarily sold its shares in Alcor CZ, its indirect investment in the Plots, on 24 February 2016, more than two years prior to filing the Notice of Arbitration.<sup>111</sup>
123. The Respondent acknowledges<sup>112</sup> that the position might be different if the Claimant had already suffered harm as a result of a violation of the Treaty prior to its divestment but maintains that since “no actionable claim ... had arisen at the time of sale, none was carved out to be retained by Claimant.”<sup>113</sup>
124. The Respondent concludes that, as the Claimant sold its Plots prior to initiating this arbitration, voluntarily and without any sign of duress, this Tribunal should reject the claim for lack of jurisdiction.<sup>114</sup>
125. With respect to the Claimant’s intention to “sell the investment ... while preserving claims against the [Respondent],” the Respondent objects that the Claimant’s subjective intent to preserve its Treaty claims is irrelevant.<sup>115</sup> The alleged harm underlying the Claimant’s Treaty claims is the City’s failure to enter into a lease with Alcor CZ and to pay compensation for unjust enrichment at the Resolution No. 2141 rate. According to the Respondent, “the ‘harm’ of which Claimant complains—and that is asserted as a supposed breach of the Republic’s ‘fair and equitable treatment’ duties—is being (and has been) addressed in the Czech courts,” while the Claimant “voluntarily divested its shares *before* the District Court ruled in Alcor CZ’s favor.”<sup>116</sup>

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<sup>110</sup> Statement of Defence, para. 38.

<sup>111</sup> Statement of Defence, para. 38.

<sup>112</sup> Rejoinder, paras. 23-24, citing *Daimler Financial Services Ltd. v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, para. 145 (“*Daimler*”) (RLA-42), and *EnCana Corp. v. The Republic of Ecuador* (LCIA Case No. UN3481), Award of 3 February 2006, para. 131.

<sup>113</sup> Rejoinder, para. 25; Tr. Day 1, p. 53/25 to 54/24; Respondent’s PHB, paras. 11-12, referring to Tr., Day 1, p. 164/25 to 165/5.

<sup>114</sup> Statement of Defence, paras. 41–42; Rejoinder, para. 21; Respondent’s PHB, para. 13.

<sup>115</sup> Rejoinder, para. 21.

<sup>116</sup> Rejoinder, para. 22 (emphasis in original).

*The Claimant's Position*<sup>117</sup>

126. As a threshold matter, the Claimant argues that the jurisdictional objections raised by the Respondent in the Statement of Defence were brought belatedly, and that they “should have been made prior to service of the Statement of Defence.”<sup>118</sup>
127. The Claimant argues that it qualified as an investor under the Treaty when it established Alcor CZ, and that the Treaty neither implicitly nor explicitly suggests that by selling its assets, the Claimant would lose its position as an investor.<sup>119</sup> According to the Claimant, “[b]y virtue of the sale of the plots the present right of action vests in the Claimant as the former owner of 99% of the shares in Alcor Holdings CZ.”<sup>120</sup>
128. The Claimant argues that Article 9(1) of the Treaty “does not link the possibility of dispute resolution to title to the investment.”<sup>121</sup> In the Claimant’s view, “an investment dispute may arise when an investor no longer has title to an investment itself.<sup>122</sup> It maintains that there is no requirement in Article 9 of the Treaty that a party initiating arbitration must be an investor at the time of the Notice of Arbitration and contends:

... It would be illogical to impose a condition of continuing ownership of the investment. The Respondent presupposes without explaining or justifying that an investor loses his right once he has disposed of the investment. That assertion is illogical to the point of absurdity, in particular where there is litigation with the contracting state. In this situation, the investor is no longer interested in being present in the given contracting state and is trying to sell the investment (or its remaining part) while preserving claims against the given contracting state.<sup>123</sup>

129. The Claimant denies that the authorities invoked by the Respondent support the conclusion that a claimant must be an investor at the time that it commences arbitration proceedings.<sup>124</sup> According to the Claimant, the passage which the Respondent quoted from *Aven* was taken out of context and the real issue in that case was whether the property in question had ever been owned by the claimant.<sup>125</sup> *Loewen* was a difficult case which turned on diversity of nationality rather than a

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<sup>117</sup> Reply, paras. 39-42; Claimant’s Skeleton, paras. 25-27; Claimant’s PHB, paras. 66-79; Tr. Day 1, p. 32/18 to 33/2.

<sup>118</sup> Reply, para. 42.

<sup>119</sup> Reply, paras. 39-40.

<sup>120</sup> Statement of Claim, para. 5.3.

<sup>121</sup> Reply, para. 40(iii).

<sup>122</sup> Reply, para. 41.

<sup>123</sup> Reply, para. 41.

<sup>124</sup> Claimant’s Skeleton, para. 27.

<sup>125</sup> Claimant’s Skeleton, para. 27(a).



change in title.<sup>126</sup> The material part of the *Daimler* award, according to the Claimant, makes clear that “there is no connection between the continued ownership of the asset and the right to bring proceedings”.<sup>127</sup>

130. The Claimant denies that there have to be “special reasons” for a divestment prior to the bringing of arbitration proceedings but contends that, even if that were the case, that requirement is satisfied because, based on the testimony of Mr [REDACTED],<sup>128</sup> “by virtue of the length of time that had been taken, the Claimant was pushed into a position where liquidation of the asset was necessary”.<sup>129</sup>
131. The Claimant contends that it had already suffered harm at the time that it sold its holding in Alcor CZ, because the treatment by the City of Alcor CZ’s claim to compensation for unjust enrichment amounted to a violation of the legitimate expectations which the Claimant had possessed at the time it acquired its investment and was thus a denial of the duty to accord fair and equitable treatment. As the point is put in the Claimant’s PHB, “[t]he damage suffered by the Claimant occurred over an ongoing period commencing at or about the time the Claimant attempted to get representatives of Prague to engage with him in negotiation”.<sup>130</sup>
132. Finally, the Claimant points to the fact that it had reserved ownership of any Treaty claim in the sale to Mizar (see para. II.2 of the Sale Agreement, quoted above at para. 115).<sup>131</sup>

## 2. Whether the Claimant made an Investment

### *The Respondent’s Position*<sup>132</sup>

133. The Respondent objects to the jurisdiction of the Tribunal on the grounds that the Claimant has not made an “investment” in the Czech Republic within the meaning of Article 1(1) of the Treaty.<sup>133</sup>

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<sup>126</sup> Claimant’s Skeleton, para. 27(b).

<sup>127</sup> Claimant’s Skeleton, para. 27(c).

<sup>128</sup> Tr. Day 1, p. 64/25 to 65/5, *quoted* above at para. 114.

<sup>129</sup> Claimant’s PHB, para. 70.

<sup>130</sup> Claimant’s Skeleton, para. 67.

<sup>131</sup> Tr. Day 1, p. 35/11-14.

<sup>132</sup> Statement of Defence, Section III.B; Rejoinder, Section II.C; Respondent’s Skeleton, para. 36; Respondent’s PHB, paras. 15-22; Tr. Day 1, p. 47/7-14, 55/2 to 59/4.

<sup>133</sup> Statement of Defence, para. 43; Rejoinder, para. 26.

134. The Respondent asserts that the Claimant's sole purpose in establishing Alcor CZ was to "purchase the Plots at a below-market rate and then sue the City."<sup>134</sup> The Respondent contends that the Claimant and Mr. [REDACTED] have admitted to having this motivation in mind when establishing Alcor CZ.<sup>135</sup>
135. Relying on the decision in *Romak v. Uzbekistan*, the Respondent contends that the term "investment" should be interpreted in light of the object and purpose of the Treaty, which is the "stimulation of business initiative" and to "increase prosperity in both Contracting States."<sup>136</sup> Relying on the *Romak* judgment, the Respondent argues that a covered investment requires a "contribution" of resources to a host State's economy over a period of time as well as risk.<sup>137</sup>
136. The Respondent argues that the Claimant's investment carried no element of risk.<sup>138</sup> At best, the Plots "were purchased at a below market rate in an attempt to extort money from the City, and in the worst case scenario, Mr. [REDACTED] planned to sell the [P]lots back to the City for market rate and make profit on the original purchase price."<sup>139</sup>
137. The Respondent asserts that neither the Claimant nor Alcor CZ had any employees, business plans, or financial statements at the relevant time, and that the two companies did not conduct any economic activity.<sup>140</sup> The Respondent suggests that "no genuine enterprise operates without financial statements."<sup>141</sup> The Respondent further asserts that Alcor CZ had no local operations,

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<sup>134</sup> Statement of Defence, para. 44; Tr. Day 1, p. 58/14-19.

<sup>135</sup> Statement of Defence, para. 44 referring to Statement of Claim, 2.8, 2.11; [REDACTED] Witness Statement, paras. 4, 6, and 9 (CWS-1).

<sup>136</sup> Statement of Defence, paras. 45-46 referring to Treaty, Recitals (Exhibit R-1); *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. 2007-07, Award of 26 November 2009, para. 189 (RLA-36) ("**Romak**"); Rejoinder, para. 34; Tr. Day 1, p. 55/3-10.

<sup>137</sup> Statement of Defence, para. 47 referring to *Romak*, Award of 26 November 2009, paras. 185, 207 (RLA-36); Rejoinder, para. 26 referring to *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, para. 52 (RLA-43).

<sup>138</sup> Statement of Defence, para. 50; Tr. Day 1, p. 56/2-3.

<sup>139</sup> Statement of Defence, para. 48; see also Rejoinder, para. 27.

<sup>140</sup> Rejoinder, paras. 4, 31 (noting that "Claimant produced not a single document in response to the Tribunal's order to produce 'documents in its possession sufficient to establish *the number of its employees* and the *nature and scope of the business and economic activities* in which it was engaged in the Czech Republic during the period from 18 November 2009 to 24 February 2016") (emphases in original); see also Tr. Day 1, p. 56/19-2.

<sup>141</sup> Rejoinder, para. 32. The Respondent also calls attention to Claimant's comments in its Redfern schedule that it did not maintain financial statements because they were not required to be kept under UAE law. See Procedural Order No. 3, Annex B: Respondent's Request, Respondent's Request No. 14.

made no tax filings in the Czech Republic, and had no record of written communications with the Claimant.<sup>142</sup>

138. Given the stated purpose of the Treaty to “increase prosperity in both Contracting States,” the Respondent points to Mr. [REDACTED] allegedly “express admission [that] he had no intention of developing business in the Czech Republic.”<sup>143</sup> Furthermore, the Respondent contends that “[a]ny attempt to obtain compensation from the host state in excess of the monies invested therein cannot by definition constitute contribution to that state’s economy.”<sup>144</sup>
139. In reply to the Claimant’s assertion that it had not intended to initiate proceedings until it was forced to do so by Prague’s “inaction”, the Respondent alleges that before buying the Plots, the Claimant had already learned about the need to bring court proceedings in order to be awarded unjust enrichment compensation.<sup>145</sup>
140. The Respondent argues that in *Phoenix Action v. Czech Republic*, the tribunal relied on even fewer indicia than are present here to conclude that the alleged investment was not *bona fide*.<sup>146</sup> In that case, the tribunal found that “no economic activity in the market was either performed or even intended by [the claimant]. No business plan, no program of re-financing, no economic objectives were ever presented, no real valuation of the economic transactions were ever attempted ... giv[ing] strong credit to the understanding of the [t]ribunal, according to which the whole operation was not an economic investment.”<sup>147</sup>
141. In the present case, according to the Respondent, Alcor CZ was nothing but a “conduit by which Mr. [REDACTED] instructed counsel to manage his claims against the City,” with an eye towards earning a “windfall return”.<sup>148</sup> As a result, the Claimant’s establishment of Alcor CZ does not qualify as an investment, and the Tribunal should dismiss the claim for lack of jurisdiction.<sup>149</sup>

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<sup>142</sup> Rejoinder, para. 33; Tr. Day 1, p. 56/19-2.

<sup>143</sup> Statement of Defence, para. 49; Tr. Day 1, p. 55/18.

<sup>144</sup> Rejoinder, para. 27.

<sup>145</sup> Rejoinder, para. 28 referring to [REDACTED] Memo, p. 1 (Exhibit C-12); Statement of Defence, para. 81.

<sup>146</sup> Rejoinder, para. 32 referring to *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 140 (RLA-29) (“*Phoenix Action*”).

<sup>147</sup> *Phoenix Action*, Award, 15 April 2009, para. 140 (RLA-29).

<sup>148</sup> Rejoinder, paras. 4, 33–34.

<sup>149</sup> Statement of Defence, paras. 48–50.

*The Claimant's Position*<sup>150</sup>

142. The Claimant submits that its investment in the Plots is protected within the meaning of Article 1(1)(b) of the Treaty, reasoning that “[s]elf-evidently [the] purchase of a share in a company established under the laws of one of the contracting parties to a bilateral investment treaty is an ‘Investment’ pursuant to such a treaty.”<sup>151</sup>
143. The Claimant urges the Tribunal to dismiss the Respondent’s submissions about the motives underlying its acquisition of the Plots as “tendentious and fanciful speculation.”<sup>152</sup>
144. The Claimant denies the assertion that its land purchases were made at a “below-market rate”.<sup>153</sup> Instead, it characterizes the purchase as being driven by “standard, rational economic reasoning covering the wish of the landowner not to suffer losses from the future sale of the Plots.”<sup>154</sup>
145. In respect of the Respondent’s emphasis on the object and purpose of the Treaty, the Claimant contends that the preamble of the Treaty includes additional provisions concerning the “desir[e] to create favourable conditions ... particularly for investments by investors of one Contracting State in the territory of the other Contracting State.”<sup>155</sup> Only if such conditions protective to investors were in place, would the Treaty “be conducive to the stimulation of business initiative and increase prosperity in both Contracting States.”<sup>156</sup> According to the Claimant, the Respondent did not fulfil this requirement.<sup>157</sup>
146. The Claimant argues that this Tribunal should only consider the Treaty’s definition of investment, and disregard decisions of other tribunals quoted out of context or involving unrelated facts, such as the *Romak* award cited by the Respondent. The Claimant submits that the factual background in *Romak* involved a different industry (grain) and a different substantive dispute (payment problems), and that the Respondent quoted parts of the decision out of context.<sup>158</sup> Nevertheless, the Claimant implies that the *Romak* criteria (of a contribution over a period of time and risk) were satisfied by its putative investment. By the purchase of the Plots, the Claimant asserts, it

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<sup>150</sup> Reply, paras. 43-49; Claimant’s PHB, paras. 74-79.

<sup>151</sup> Statement of Claim, para. 3.3; Reply, para. 39.

<sup>152</sup> Reply, para. 30.

<sup>153</sup> Reply, paras. 43–44.

<sup>154</sup> Reply, para. 44.

<sup>155</sup> Reply, para. 46.

<sup>156</sup> Reply, para. 46.

<sup>157</sup> Reply, para. 46.

<sup>158</sup> Reply, para. 48.

made an “injection” of some USD 1.1 million.<sup>159</sup> The Claimant argues that the Respondent was mischaracterizing Mr [REDACTED] witness statement in “suggesting that the project entailed absolutely no risk and that [Mr] [REDACTED] admitted that he did not intend to develop his business activities in the Czech Republic at all.”<sup>160</sup> In clarification the Claimant refers to Mr [REDACTED] oral evidence that he considered the Plots to be significantly undervalued, presenting a “very low risk of decreasing in value, and with a substantial value over time opportunity” independent of the expected rental yield.<sup>161</sup>

147. The Claimant also rejects the allegation that its investment was no more than an “acquisition of a lawsuit.”<sup>162</sup> The Claimant argues that when it acquired its investment, it never planned to initiate proceedings either under the Treaty against the Czech Republic or in Czech Courts against the City, and that the present arbitration is only a result of the City’s unlawful conduct.<sup>163</sup>

### **3. Whether the Claimant Structured Its Investment to Create Treaty Jurisdiction over a Foreseeable Dispute**

#### *The Respondent’s Position*<sup>164</sup>

148. The Respondent objects to the admissibility of the Claimant’s claims on the grounds that they constitute an abuse of process.<sup>165</sup>

149. The Respondent submits that the “entire rationale” behind Mr [REDACTED] structuring his acquisitions of the Plots in 2010 and 2011 through the Claimant, a UAE-incorporated entity, was to create jurisdiction over a dispute under the Treaty that was not only foreseeable, but the “entire business plan” at the time of the acquisitions.<sup>166</sup> In response to the Claimant’s contention that “the center of [Mr [REDACTED]] economic activity is based in Dubai,” the Respondent objects that, “by his own admission, Mr. [REDACTED] was based in Geneva, not Dubai, at the time of the investment in the Plots

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<sup>159</sup> Claimant’s PHB, para. 77.

<sup>160</sup> Reply, para. 49.

<sup>161</sup> Claimant’s PHB, para. 78 referring to Tr. Day 1, p. 108/20.

<sup>162</sup> Reply, para. 49 quoting Statement of Defence, para. 49. See also Claimant’s PHB, para. 75.

<sup>163</sup> Reply, paras. 32, 49; Claimant’s PHB, para. 76.

<sup>164</sup> Statement of Defence, Section IV.A; Rejoinder Section III.A; Respondent’s Skeleton, para. 38; Tr. Day 1, p. 59/15 to 62/1; Respondent’s PHB, paras. 27-37.

<sup>165</sup> Statement of Defence, paras. 53–54, 59.

<sup>166</sup> Statement of Defence, para. 53.

and remained there until 2013,” leaving “no valid reason for Claimant to invest through the UAE.”<sup>167</sup>

150. In particular, the Respondent submits that “the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable.”<sup>168</sup> A dispute is “foreseeable” if the Claimant “can see an actual dispute or can foresee a specific future dispute as a very high probability.”<sup>169</sup>
151. The Respondent relies on the *Phoenix Action* case, in which a Czech national incorporated an Israeli holding company that then purchased two Czech companies previously owned directly by the Czech national.<sup>170</sup> The Tribunal in that case found the Israeli claimant’s claims under the Czech Republic–Israel BIT inadmissible as an abuse of right because “Claimant made an ‘investment’ not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic.”<sup>171</sup>
152. By analogy to *Phoenix Action*, the Respondent suggests that Mr [REDACTED] structured his purchase of the Plots through the Claimant to avail himself of an international forum for claims he sought to bring against the Respondent and that would not otherwise have been available to Mr [REDACTED] as a Czech citizen.<sup>172</sup> The Respondent therefore urges this Tribunal to rule that Mr [REDACTED]

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<sup>167</sup> Rejoinder, para. 37–38.

<sup>168</sup> Statement of Defence, para. 54 referring to *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015, para. 554 (RLA-28) (“*Philip Morris*”); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections of 1 June 2012, para. 2.96 (RLA-26) (“*Pac Rim*”).

<sup>169</sup> Statement of Defence, para. 54 referring to *Pac Rim*, Decision on the Respondent’s Jurisdictional Objections of 1 June 2012, para. 2.99 (RLA-26) (“the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal’s view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be.”); see also Rejoinder, para. 40 referring to *Philip Morris*, Award on Jurisdiction and Admissibility of 17 December 2015, para. 585 (RLA-28) (noting that a dispute is “foreseeable” if there is a “reasonable prospect that a measure that may give rise to a treaty claim will materialise”).

<sup>170</sup> Statement of Defence, para. 55 referring to *Phoenix Action*, Award of 15 April 2009, para. 93 (RLA-29).

<sup>171</sup> Statement of Defence, para. 55 referring to *Phoenix Action*, Award of 15 April 2009, para. 142 (RLA-29).

<sup>172</sup> Statement of Defence, paras. 56–57.

acquisition of the Plots through the Claimant was a “domestic investment disguised as an international investment for the sole purpose of access to” investment treaty arbitration.<sup>173</sup>

*The Claimant’s Position*<sup>174</sup>

153. The Claimant suggests that Mr ██████ “evaluated the planned investment opportunity as low-risk” and “did not assume that Prague would act in breach of the law” by failing to pay compensation for unjust enrichment in accordance with the Resolution No. 2141 rate.<sup>175</sup>
154. The Claimant dismisses the Respondent’s reliance on *Phoenix Action* as mistaken; the Claimant suggests that it is “particularly obvious” that the Respondent “misinterprets certain conclusions of [the *Phoenix Action* tribunal]”.<sup>176</sup> While the Claimant does not explain which conclusions are misinterpreted by the Respondent, it suggests that the facts are inapposite.<sup>177</sup> The *Phoenix Action* case involved a Czech citizen, Mr ██████, whose Czech companies had been parties to proceedings before Czech courts. Mr ██████ allegedly escaped from custody in the Czech Republic and founded the claimant company Phoenix Action Ltd in Israel. *Phoenix Action* then acquired stakes in the Mr ██████ Czech companies—which had been held by Mr ██████ wife in the interim—three months before notifying the Czech Republic of an investment dispute. By contrast, according to the Claimant, Mr ██████ has resided and worked in Dubai since 2006 and only obtained a Czech passport in 2018 on account of being the child of Czechoslovakian parents who had emigrated in 1969. The Claimant submits that it is therefore “logical” to have undertaken the acquisition of the Plots through a UAE-incorporated entity.<sup>178</sup>
155. The Claimant also refutes the application of *Philip Morris* as inapposite to the facts of its claim. Whereas the claimant in *Philip Morris* undertook a corporate restructure in order to gain treaty protection after its cause of action had accrued, in the present case there was no corporate restructuring after the acts on which the claim is based.<sup>179</sup> The Claimant refers in this regard to the fact that Alcor CZ commenced the domestic proceedings against the City shortly after acquisition of the last of the plots.<sup>180</sup>

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<sup>173</sup> Statement of Defence, para. 59 quoting *Phoenix Action*, Award of 15 April 2009, para. 142 (RLA-29).

<sup>174</sup> Reply, paras. 50-53; Claimant’s Skeleton, paras. 28-34; Tr. Day 1, p. 33/12-23; Claimant’s PHB, para. 80.

<sup>175</sup> Reply, para. 50; Claimant’s PHB, para. 81(a).

<sup>176</sup> Reply, paras. 13, 51.

<sup>177</sup> Reply, para. 51.

<sup>178</sup> Reply, para. 51.

<sup>179</sup> Claimant’s PHB, para. 81(e).

<sup>180</sup> Claimant’s PHB, para. 81(d).

156. The Claimant also rejects the Respondent’s contention that at the time Mr ██████ conducted due diligence prior to acquiring the Plots, he must have foreseen that he would have to bring a claim in court to recover compensation for unjust enrichment. The Claimant notes that although the due diligence “includes a description of a situation in which such a landowner initiated court proceedings, ... [i]t was not possible to foresee that Prague would act in the same way” in the instant case. Rather, the Claimant argues, its “reasonable expectation” was that the City would “enter negotiations [leading to] a satisfactory outcome”.<sup>181</sup>

#### **4. Whether the Claimant Seeks “Supranational” Review of the Judgments of Czech Courts**

##### *The Respondent’s Position*<sup>182</sup>

157. The Respondent characterizes the Claimant’s Treaty claims as a “supranational” avenue for appealing the decisions of the Czech courts.<sup>183</sup> The Respondent alleges that this is an “abuse of process” that justifies ruling the Claimants’ claim inadmissible.

158. The Respondent relies on the *Apotex* tribunal’s explanation that “it is not the proper role of an international tribunal ... to substitute itself for the [host state’s] Supreme Court, or to act as a supranational appellate court,” to make its case that such a “supranational” appeal constitutes an abuse of process.<sup>184</sup>

159. Notwithstanding the Claimant’s assertion that its claims under the Treaty are “different” from Alcor CZ’s claims in the Czech courts, the Respondent objects that the “Claimant’s alleged harm that is integral to each of the three Treaty breaches is the same purported harm asserted by Alcor CZ in the [Czech domestic litigation].”<sup>185</sup> Specifically, the harm asserted by the Claimant is that it “expected payment of rent (after entering into a lease agreement) and/or compensation for unjust enrichment in the statutory amount [*i.e.*, the Resolution No. 2141 rate]” but did not receive

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<sup>181</sup> Claimant’s PHB, para. 81(a).

<sup>182</sup> Statement of Defence, Section IV.B; Rejoinder Section II.B; Respondent’s Skeleton, para. 55; Tr. Day 1, p. 62/2 to 63/2; Respondent’s PHB, para. paras. 38-44.

<sup>183</sup> Statement of Defence, para. 60; Rejoinder, para. 41.

<sup>184</sup> Statement of Defence, para. 62; Rejoinder, para. 41 *referring to Apotex Inc v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility of 14 June 2013, para. 278 (RLA-6) (“*Apotex*”).

<sup>185</sup> Rejoinder, para. 42.



it.<sup>186</sup> According to the Respondent, the same harm “was addressed, and rejected by ... Czech courts” in the domestic litigation brought by Alcor CZ.<sup>187</sup>

*The Claimant’s Position*<sup>188</sup>

160. The Claimant draws a distinction in legal personality between itself and Alcor CZ and highlights the distinct legal grounds for the claims brought by each company.<sup>189</sup> The Claimant’s position is that it could not be seeking to review decisions of the Czech courts since “the Claimant has never been a party to a dispute before Czech courts.”<sup>190</sup> The Claimant submits that all its claims arise under the Treaty, unlike the Czech law claims of Alcor CZ that were litigated in Czech courts.<sup>191</sup>

161. At the same time, the Claimant submits that “[s]ince Prague has consistently rejected and continues to reject the claim of Alcor Holdings CZ, contrary to the provisions of Czech law, and insists that Alcor Holdings CZ is not entitled to anything, which fact leads to the Claimant’s Investment not being protected by the law and the inability of the Claimant to collect its entitlement, the Claimant now makes *the corresponding claim* under international law for an unprotected investment directly against the Respondent pursuant to the Treaty.”<sup>192</sup>

**5. Whether the Claimant is Pursuing Double Recovery**

*The Respondent’s Position*<sup>193</sup>

162. The Respondent objects to the admissibility of the Claimant’s claims on the grounds that “Czech courts have already ruled twice that Alcor CZ is entitled to damages, and those damages *have been paid to Alcor CZ.*”<sup>194</sup>

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<sup>186</sup> Rejoinder, para. 42.

<sup>187</sup> Rejoinder, para. 42.

<sup>188</sup> Reply, para. 54; Claimant’s Skeleton, para. 86; Tr. Day 1, p. 23/8-16; Claimant’s PHB, paras. 56, 63, 80-81.

<sup>189</sup> Reply, paras. 6–10, 55; Claimant’s PHB, para 63.

<sup>190</sup> Reply, para. 9; *see also* Reply, para. 54 (“[T]he Claimant did not claim anything before the Czech courts as pursuant to the Treaty, the Czech courts have no jurisdiction over enforcement of claims by the Claimant.”).

<sup>191</sup> Reply, paras. 74–75.

<sup>192</sup> Statement of Claim, para. 4.3 (emphasis added).

<sup>193</sup> Statement of Defence, Section IV.C; Rejoinder Section III.C; Respondent’s Skeleton, para. 40; Tr. Day 1, p. 48/23 to 49/2; Respondent’s PHB, paras. 45-54.

<sup>194</sup> Statement of Defence, para. 64 (emphasis in original).

163. While recognizing that the same underlying harm can entitle a claimant to claims under both domestic law and the Treaty, the Respondent emphasizes that this should not entitle the Claimant to double recovery for the same harm.<sup>195</sup>
164. The Respondent draws attention to the fact that the Claimant retained the right to bring the instant Treaty claims while selling the right to recovery from the Czech courts to Mizar (which the Respondent alleges is “closely related” to the Claimant and Mr. [REDACTED]), and invites the Tribunal to make the “adverse inference that the sale was a transfer of convenience intended to enable Claimant or Mr. [REDACTED] to keep an interest in the monies Alcor CZ would receive from the City ..., while simultaneously pursuing this arbitration.”<sup>196</sup> In support, the Respondent adduces several observations:
- (a) that the Claimant sold its shares in Alcor CZ at a lower price than it had been offered by Prague or the original purchase price of the Plots, contrary to “business sense”;
  - (b) that the Claimant did not produce documentation attesting to the reasons for its sale of shares in Alcor CZ, in spite of the Tribunal’s request that it do so; and
  - (c) the absence of any testimony or documents disclaiming the Respondent’s assertion of a “likely identity of interest” between the Claimant and Mizar, and the resulting implication that the sale of its Alcor CZ shareholding was not an arms-length transaction.<sup>197</sup>
165. The Respondent suggests that the Claimant has therefore not produced evidence rebutting Respondent’s *prima facie* showing that the transaction with Mizar was not a *bona fide* transaction, which in the Respondent’s submission places a heretofore unmet burden upon the Claimant to show that the transaction was *bona fide*.<sup>198</sup>

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<sup>195</sup> Statement of Defence, para. 66 referring to *Orascom TMT Investments S.a.r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, paras. 544–45 (RLA-25).

<sup>196</sup> Rejoinder, para. 43.

<sup>197</sup> Rejoinder, paras. 45–48 referring to LinkedIn profile of a Mizar executive, Mr. [REDACTED], who was a director of a wealth management firm founded by Mr. [REDACTED] undated (Exhibit R-63); Web page of “Key People” at Mr. [REDACTED] wealth management firm, undated (Exhibit R-64); OpenCorporates.com page for Fleet Estates Corp., an entity listing both Mr. [REDACTED] and Mr. [REDACTED] as joint officers, undated (Exhibit R-65).

<sup>198</sup> Rejoinder, para. 49.

166. According to the Respondent, the Claimant's downplaying of its initial recovery through litigation in the Czech courts "demonstrates bad faith that necessitates dismissal of all claims as inadmissible."<sup>199</sup>

*The Claimant's Position*<sup>200</sup>

167. The Claimant accuses the Respondent of failing to distinguish between the subject matter of the Czech civil law litigation involving Alcor CZ and the Treaty claims raised by the Claimant, Alcor CZ's former parent, in the instant arbitration.<sup>201</sup> The Claimant underscores that the City's settlement with Alcor CZ is "different from the present claim" because the former claim arose under Czech civil law and in favour of Alcor CZ against Prague rather than under the Treaty in favour of the Claimant against the Respondent. The Claimant also recalls that it ceased to be a shareholder of Alcor CZ as a result of the share transfer agreement signed in November 2015 and delivered to Alcor CZ in February 2016.<sup>202</sup> As a result, the Claimant argues that it "did not receive any compensation from [the City] in the form of compensation for unjust enrichment or any other monetary benefit,"<sup>203</sup> leaving "arbitration on the basis of the Treaty [as] the only way in which the Claimant might have claimed its rights and protected its investment."<sup>204</sup>

168. The Claimant asserts that the sale of its shares in Alcor CZ was a genuine transaction.<sup>205</sup> It refers in this regard to the oral testimony of Mr. [REDACTED] in evidence that the Director of Mizar was a colleague of his.<sup>206</sup>

## **B. THE MERITS**

### **1. Summary of the Claims**

169. The Claimant maintains that, by denying it compensation for unjust enrichment based upon the formula in Resolution No. 2141, the Czech Republic has violated numerous provisions of the

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<sup>199</sup> Statement of Defence, para. 66.

<sup>200</sup> Reply, paras. 55-56; Claimant's Skeleton, paras. 46-50; Tr. Day 1, p. 25/15-18, p. 32/12-17; Claimant's PHB, paras. 80-81.

<sup>201</sup> Reply, para. 55; Tr. Day 1, p. 23/8-16.

<sup>202</sup> Reply, para. 55.

<sup>203</sup> Reply, para. 7.

<sup>204</sup> Reply, para. 56.

<sup>205</sup> Tr. Day 1, p. 23/21.

<sup>206</sup> Claimant's PHB, para. 73, referring to Tr. Day 1, p. 164/4-22.

Treaty. The Claimant chiefly relies upon Articles 2(1), 2(2), 2(3), 2(4)(i) and (ii), and 2(10), which provide as follows:

- (1) Each Contracting State shall encourage and create favourable conditions for investors of the other Contracting state to make investments in its territory and, in exercise of powers conferred by its laws, regulations and administrative practices shall admit such investments and their associated activities.
  - (2) Investments shall at all times enjoy full protection and security in a manner consistent with international law.
  - (3) Each Contracting State shall at all times ensure fair and equitable treatment to the investments of investors of the other Contracting State. Each Contracting State shall ensure that the management, maintenance, use, enjoyment, acquisition or disposal of investments or rights related to investment and its associated activities in its territory of investors of the other Contracting State shall not in any way be subjected to or impaired by arbitrary, unreasonable or discriminatory measures.
  - (4) (i) Each Contracting State shall endeavour to take the necessary measures in accordance with its legislation for granting of appropriate facilities, incentives and other forms of encouragement for investments made by investors of the other Contracting State.  
  
(ii) investors of either Contracting State shall be entitled to apply to the competent authorities in the host State for the appropriate facilities, incentives and other forms of encouragement and the host State shall grant them all assistance, consents, approvals, licences and authorizations to such an extent and on such terms and conditions as shall, from time to time, be determined by the laws and regulations of the host State.
- ...
- (10) Each Contracting State shall undertake to provide effective means of asserting claims and enforcing rights with respect to investment agreement, investment authorizations and properties. Each Contracting State shall not impair the right of the investors of the other Contracting State to have access to its courts of justice, administrative tribunals and agencies and all other bodies exercising adjudicatory authority.

170. At the hearing, counsel for the Claimant clarified the relationship between the claims advanced under these provisions in the following exchange:

THE PRESIDENT: Right. Can you just briefly explain to me how - suppose you were unsuccessful on the fair and equitable treatment claim, and I'm not saying you will be, but suppose you were. How would you then be able to succeed under full protection and security?

MR [REDACTED] I think it would be fair to say, sir, that if I don't succeed - essentially these are claims which are two sides of the same coin.

THE PRESIDENT: Thank you. Is the same true of your claim under Article 2(1) ?

MR [REDACTED] I think they must all be regarded as part of a wider whole, yes. As you will have seen, sir, the facts in and of themselves are not complex.

THE PRESIDENT: Is the essence of your claim then fair and equitable treatment and essentially you stand or fall on that?

MR [REDACTED] I think that must be right, sir, yes.<sup>207</sup>

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<sup>207</sup> Tr. Day 1, p. 38/18 to p. 39/9.

171. At the heart of the Claimant’s case, as set out in its Statement of Claim, lies the theory that Resolution No. 2141, although directly concerned with the compensation to be paid *to* the City by any third party which had erected or maintained a structure on land owned by the City, was also determinative of the amount of compensation to be paid *from* the City in a case in which the City erected or maintained structures such as roads or other utilities on land owned by a private party. That conclusion is set to follow from the fact that Resolution No. 2141 should be taken as setting the “market rate”. As the Claimant puts it in the Statement of Claim:

According to the principles of equality and justice Regulation 2141 (as it creates the market price customary in place and time) is also directly applicable to the compensation for total occupation of land by building, communications and infrastructure. Any other interpretation would be contradictory to the principles of the Treaty (particularly Article 3 of the treaty – National and Most-Favoured-Nation Treatment).<sup>208</sup>

## 2. Fair and Equitable Treatment and Legitimate Expectations

### *The Claimant’s Position*<sup>209</sup>

172. The Claimant argues that it had a legitimate expectation that Prague would enter into a lease with the Claimant and pay “an adequate price (rent) for the use of its property” or, in the alternative, that the City would compensate Alcor CZ for unjust enrichment in an amount consistent with Resolution No. 2141.<sup>210</sup> The Claimant submits that the “correctness of [its] conclusions” was “reaffirmed” when

negotiations/correspondence with Prague revealed that ... (i) Prague itself enters into lease agreements in similar situations, (ii) where no lease agreement is concluded, Prague brings an action for the recovery of unjust enrichment, and (iii) proceeds in both cases according to its own regulation, whereas the price is always the same regardless of whether it is a rent or an unjust enrichment.<sup>211</sup>

173. The Claimant argues that its legitimate expectations were frustrated when it received neither “rent (after entering into a lease agreement) and/or compensation for unjust enrichment in the statutory amount ... to be determined by Prague pursuant to Resolution 2141.”<sup>212</sup> Instead, “contrary to the

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<sup>208</sup> Statement of Claim, para. 2.7. *See also* Claimant’s PHB, paras. 11, 90 and 102.

<sup>209</sup> Reply, paras. 58-68; Claimant’s Skeleton, Section B, paras. 35-41 and 51-73; Tr. Day 1, p. 23/25 to 24/4, 25/19 to 28/22; Claimant’s PHB, Section IV.

<sup>210</sup> Statement of Claim, para 3.6-3.7, 4.4; *see also* Statement of Claim, para. 3.6 (noting that at the time of its acquisition of Alcor Holdings CZ, the Claimant “reasonably assumed that [it] would receive the proceeds from the [Plots] due to their use by Prague.”).

<sup>211</sup> Statement of Claim, paras. 3.9–3.10.

<sup>212</sup> Reply, para. 58; *see also* Statement of Claim, para. 4.4.

Claimant's legitimate expectation ... the revenue of the Claimant was zero by reason of Prague's breach of its obligations."<sup>213</sup>

174. The Claimant alleges that its legitimate expectations were first frustrated when a lease was not concluded "due to the failure or refusal of Prague to comply with its obligations."<sup>214</sup> The Claimant challenges the Respondent's assertions that Prague does not routinely enter into lease agreements for land underlying public roads, and that Resolution No. 2141 is related to short-term leases.<sup>215</sup> The Claimant points to the absence of any mention of the short-term nature of leases in Resolution No. 2141 and the accompanying legislative decision; on the contrary, the Claimant asserts, the clear wording of Resolution No. 2141 "presumes long-term leases that in total covers the time period of the investment."<sup>216</sup>
175. The Claimant then argues that its legitimate expectations were further violated when it was not paid compensation for unjust enrichment at the Resolution No. 2141 rate, which according to the Claimant, establishes the market rental rate that would have been applicable to the Claimant's lands. The Claimant submits that because the City has title to almost 99% of the land on which its roads are built, the City has a *de facto* monopoly in the relevant market and that consequently Resolution No. 2141 sets the market price "for which similar lands are to be leased."<sup>217</sup> The Claimant further submits that under Czech law, the amount of lost income for purposes of calculating unjust enrichment is pegged to the rent that is customary at a given time and place.<sup>218</sup> The Claimant therefore contends that it is entitled to the Resolution No. 2141 rate as the rent "common at the place and at the time given."<sup>219</sup>

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<sup>213</sup> Statement of Claim, para. 3.13.

<sup>214</sup> Statement of Claim, para. 3.8.

<sup>215</sup> Reply, para. 19 *referring to* Notarial Deed NZ 179/2014 dated 18 February 2014 (Exhibit C-34); Notarial Deed NZ 463/2014 dated 2 May 2014 (Exhibit C-35); Notarial Deed NZ 1608/2014 dated 21 October 2014 (Exhibit C-36); Notarial Deed NZ 910/2015 dated 15 September 2015 (Exhibit C-37); Notarial Deed NZ 616/2006 dated 25 April 2016 (Exhibit C-38); *see also* Reply, paras. 58–59 (asserting that "Prague was entering into lease agreements in similar cases") *referring to* Resolution No. 0608/2000 of the Council of the Capital City of Prague dated 30 May 2000, para. 6 of Annex I (Exhibit C-60); *see also* Tr., Day 1, p. 12/6-8; Claimant's PHB, para. 42(d)-(f).

<sup>216</sup> Reply, para. 66; *see also* Claimant's PHB, para. 89.

<sup>217</sup> Reply, paras. 22, 63, 66–67 *referring to* Notarial Deed NZ 179/2014 dated 18 February 2014 (Exhibit C-34); Notarial Deed NZ 463/2014 dated 2 May 2014 (Exhibit C-35); Notarial Deed NZ 1608/2014 dated 21 October 2014 (Exhibit C-36); Notarial Deed NZ 910/2015 dated 15 September 2015 (Exhibit C-37); Notarial Deed NZ 616/2006 dated 25 April 2016 (Exhibit C-38); *see also* Statement of Claim, paras. 2.7, 2.8, 2.13, 4.5, 4.7; Claimant's PHB, paras. 11, 90(b); *see also* Tr., Day 1, p. 12/12-16, 16/9-13.

<sup>218</sup> Statement of Claim, para. 4.5.

<sup>219</sup> Reply, para. 58.

176. Indeed, the Claimant contends that as a landowner “it is in an identical position to that of Prague and therefore has an identical entitlement to that provided to Prague by virtue of Resolution No. 2141.”<sup>220</sup> Further or alternatively, the Claimant submits that the wording of Resolution No. 2141 is imprecise such that, at least “as a matter of construction, it does not exclude the application of the Resolution to the present circumstances.”<sup>221</sup> The Claimant therefore suggests that the Resolution No. 2141 rate is applicable not only to land owned by the City, but also to its lands.<sup>222</sup> The Claimant calculates “the amount of the requested lost income (unjust enrichment) owed to it” under the Resolution No. 2141 rate.<sup>223</sup> In particular, the Claimant relies on the rate of CZK 10/m<sup>2</sup>/day set forth in section 2.F of Resolution No. 2141 for “the rent of land for the purposes of construction activities with or without impact on the communications”.<sup>224</sup> The Claimant asserts that this rate is applicable regardless of whether a lease contract was concluded between the Claimant and the City.<sup>225</sup> Further, the Claimant notes by reference to a number of notarial deeds that “Prague itself considers the [Resolution No. 2141 rate] as usual”.<sup>226</sup>
177. The Claimant argues that “the [MoF Assessment] would never have applied in the case of the Plots.”<sup>227</sup> According to the Claimant, the MoF Assessment “does not determine a maximum amount of compensation for unjust enrichment as this does not apply in the case of use of the [Plots]. The [MoF Assessments] are not applicable to commercial leases. It is indisputable that for citizens of the Czech Republic ... [the communications infrastructure upon the Plots] are used consistently ... in high volume for business purposes. In addition this confers a benefit to the public.”<sup>228</sup>
178. The [REDACTED] Expert Opinion submitted by the Claimant with its Reply does not directly address whether the Resolution No. 2141 rate applies to the Claimant’s situation, but observes that “where the Capital City of Prague rents out *its land* to third parties in a situation where it

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<sup>220</sup> Statement of Claim, para. 2.6.

<sup>221</sup> Claimant’s PHB, para. 12.

<sup>222</sup> Claimant’s PHB, para. 90(a).

<sup>223</sup> Statement of Claim, para. 4.4.

<sup>224</sup> Statement of Claim, para 4.6(a).

<sup>225</sup> Statement of Claim, para. 4.6(c).

<sup>226</sup> Statement of Claim, para 4.7 *referring to* Notarial Deed NZ 179/2014 dated 18 February 2014 (Exhibit C-34); Notarial Deed NZ 463/2014 dated 2 May 2014 (Exhibit C-35); Notarial Deed NZ 1608/2014 dated 21 October 2014 (Exhibit C-36); Notarial Deed NZ 910/2015 dated 15 September 2015 (Exhibit C-37); Notarial Deed NZ 616/2006 dated 25 April 2016 (Exhibit C-38); *see also* Claimant’s PHB, para. 67.

<sup>227</sup> Reply, para. 63; Tr., Day 1, p. 16/19-20; Claimant’s PHB, para. 7.

<sup>228</sup> Reply para. 21.

believes price regulation [set by the MoF Assessments] does not apply, it determines the amount of rent completely differently, based on rates laid down in [Resolution No. 2141].”<sup>229</sup>

179. The Claimant maintains that it was entitled to “equal treatment” and contends that the City “while in the position of landlord leases the lands for a high rent but ... while in the position of user does not want to pay anything.”<sup>230</sup>
180. To the Respondent’s contention that the Claimant failed to conduct “the most basic due diligence,”<sup>231</sup> the Claimant objects that the Respondent does not mention “what it is that the Claimant ought to have done but did not do.”<sup>232</sup> The Claimant insists that it “undertook legal due diligence confirming that the intended revenues were ... due and confirmed by the applicable laws, case-law and legal practice ... [and] therefore proceeded with the care of a prudent investor.”<sup>233</sup> The Claimant refers to the oral testimony of Mr [REDACTED] in evidence that he sought legal input from [REDACTED] but “he also took soundings from colleagues, relatives and business contacts”.<sup>234</sup> The Claimant also contends that “the fact that recovery of an amount of unjust enrichment was governed by principles anticipated in the due diligence of [REDACTED] was verified by Prague.”<sup>235</sup> In particular, the Claimant refers to Prague’s letter of 28 February 2014<sup>236</sup> amidst a chain of correspondence between the Claimant’s then-lawyer and Prague.<sup>237</sup> The Claimant asserts that “the Prague officials to whom the Claimant wrote either agreed with the Claimant’s interpretation or at any rate failed to gainsay the Claimant” and seeks that adverse inferences be drawn against the Respondent’s interpretation.<sup>238</sup>
181. The Claimant refutes the relevance of the Czech case law cited by the Respondent, which it considers has no bearing on the Claimant’s legitimate expectations, asserting that these related to

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<sup>229</sup> [REDACTED] Expert Opinion, para. 166 (CEO-1) (emphasis added).

<sup>230</sup> Reply, para. 22; *see also* Statement of Claim, paras. 2.7–2.10 (appealing to “principles of equality and justice”).

<sup>231</sup> Statement of Defence, para. 91.

<sup>232</sup> Reply, para. 68.

<sup>233</sup> Statement of Claim, para. 2.15.

<sup>234</sup> Claimant’s PHB, para. 83, referring to Tr. Day 1, p.113/20-25.

<sup>235</sup> Reply, para. 31 *referring to* Letter from the Director of the Property Department of the Municipal Office dated 28 February 2014 (Exhibit C-26). *See also* Claimant’s PHB, para. 84.

<sup>236</sup> Letter from the Director of the Property Department of the Municipal Office dated 28 February 2014 (Exhibit C-26).

<sup>237</sup> Claimant’s Skeleton, paras. 37, 84(c), *referring to* Letters from the Municipal Office of the City of Prague (Exhibits C-24 to C-28).

<sup>238</sup> Claimant’s Skeleton, para. 84(c); Claimant’s PHB, para. 84.



inapposite factual scenarios, did not address the merits or post-dated the Claimant's investment.<sup>239</sup> In particular the Claimant dismisses the Respondent's reliance on the Czech Supreme Court's decision in Case No. 28 Cdo 2056/2009<sup>240</sup> to uphold the payment of compensation for unjust enrichment at the MoF Assessment rate to owners of land on which the City had built roads.<sup>241</sup> The Claimant argues that the cited case is inapposite because it "concerned plots not used for business purposes, and the Czech Supreme Court did not deal with matters of unjust enrichment."<sup>242</sup> According to the Claimant, "[i]t can be concluded that the expectations of the Claimant were not affected by this judgment."<sup>243</sup>

182. The Claimant also minimizes the significance of the judgments handed down against Alcor CZ at all levels of the Czech courts. In the Claimant's Skeleton, it argues in its December 2019 judgment on Alcor CZ's appeal from the Second Instance Judgment, the Czech Supreme Court "declined on procedural grounds to reopen the matter. It was not a decision on the merits."<sup>244</sup> The Claimant<sup>245</sup> and its legal experts<sup>246</sup> have similarly argued that the 2 June 2020 resolution of the Czech Constitutional Court had no bearing on the merits of the conduct by Prague of which the Claimant complains. Drawing on the distinction between unlawful and unconstitutional decisions by general courts, Professors ██████████ submit that the Czech Constitutional Court had only held that Alcor CZ's petition did not raise questions of a constitutional magnitude, not that the underlying December 2019 Supreme Court Judgment had correctly decided the merits of Alcor CZ's Czech law claims.<sup>247</sup>

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<sup>239</sup> Claimant's PHB, para. 65, *referring to* Judgment of the Supreme Court of the Czech Republic, 25 Cdo 2905/2005 dated 31 January 2008 (Exhibit R-11); Judgment of the Supreme Court of the Czech Republic, 28 Cdo 3507/2013 dated 17 September 2014 (Exhibit R-12); Judgment of the Supreme Court of the Czech Republic, 28 Cdo 327/2014 dated 10 June 2014 (Exhibit R-13); *Alcor CZ v. Capital City of Prague*, Complaint dated 19 June 2011 (Exhibit R-15); Resolution of the Supreme Court of the Czech Republic, No. 28 Cdo 1537/2009 dated 2 December 2009 (Exhibit C-8; R-74).

<sup>240</sup> Judgment of the Supreme Court of the Czech Republic, No. 28 Cdo 2056/2009 dated 11 November 2009 (Exhibit C-4, additional translation submitted as R-73).

<sup>241</sup> Reply, paras. 61–62 *referring to* Statement of Defence, paras. 83–84.

<sup>242</sup> Reply, paras. 61–62.

<sup>243</sup> Reply, para. 62.

<sup>244</sup> Claimant's Skeleton, para. 54.

<sup>245</sup> Claimant's Skeleton, para. 71.

<sup>246</sup> Supplemental ██████████ Expert Opinion (CEO-2).

<sup>247</sup> Supplemental ██████████ Expert Opinion, pp. 2–4, 6 and 8 (CEO-2).

*The Respondent's Position*<sup>248</sup>

183. The Respondent relies on the standard set out in *Tecmed v. Mexico* as to when the frustration of legitimate expectations rises to the level of a breach of a fair and equitable treatment obligation:

[t]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparent in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.<sup>249</sup>

184. According to the Respondent, to prevail on its legitimate expectations claim, the Claimant would have to show that:

(a) the Republic specifically represented that Claimant would get unjust enrichment compensation or a lease at the Resolution 2141 Rate; (b) it was reasonable for Claimant to rely on that representation; (c) Claimant actually relied on that representation; and (d) the Republic violated that expectation resulting in damage to Claimant.<sup>250</sup>

185. According to the Respondent's fact witness, [REDACTED], the Head of Legal Activities at the City's Department of Property Management, Prague has "continuously made diligent efforts" to make such property settlements, subject to the paucity and inaccuracy of records identifying which plots of land still present issues of un-unified title.<sup>251</sup> Dr [REDACTED] suggests that "when it had sufficient information, the [City] was proactively seeking out property settlements on its own initiative, although its progress was dictated by the City's finite financial and human resources. Over time, the number of requests for property settlements rose to such an extent that there was almost no space for pro-active approach of the [City]."<sup>252</sup>

186. The Respondent asserts that there is no statutory procedure for the consolidation of title.<sup>253</sup> The City performs this duty primarily through buyouts or, where this is not possible, through the purchase of a permanent easement.<sup>254</sup> Failing these options, the City can also exercise eminent domain and take ownership of public roads, in exchange for compensation under Section 17(2)

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<sup>248</sup> Statement of Defence, Section V.B.1; Rejoinder, Section II.B; Tr. Day 1, p. 43/22 to 46/17, p. 48/12-16; Respondent's PHB, paras. 65-76.

<sup>249</sup> Statement of Defence, para. 76 quoting *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 154 (RLA-32) ("*Tecmed*").

<sup>250</sup> Statement of Defence, para. 79 referring to *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 668 (RLA-20); Rejoinder, para. 79.

<sup>251</sup> Second [REDACTED] Witness Statement, paras. 4-7 (RWS-2).

<sup>252</sup> Second [REDACTED] Witness Statement, paras. 9-10 (RWS-2).

<sup>253</sup> First [REDACTED] Witness Statement, para. 10 (RWS-1).

<sup>254</sup> [REDACTED] Expert Opinion, paras. 35, 39 (REO-1); First [REDACTED] Witness Statement, paras. 11-14 (RWS-1); Resolution of the Council of the Capital City of Prague No. 486 dated 24 April 2012 (Exhibit R-75).

of the Road Act.<sup>255</sup> Dr [REDACTED] emphasizes that an “acquiror of land has no reason to expect that he will obtain a regular income from the ownership of the land under the road related to the use of the land by the owner of the road ... without any time limitation.”<sup>256</sup>

187. The Respondent contends that there was no basis—much less a representation or undertaking on the City’s part—for the Claimant’s purported expectation at the time of its investment that the City would enter into leases with the Claimant.<sup>257</sup> According to both [REDACTED] and [REDACTED], the City does not have a legal obligation or policy of entering into lease agreements in this or comparable sectors.<sup>258</sup> [REDACTED] does acknowledge, however, that in “rare cases,” the City deviates from its general practice to enter into lease agreements.<sup>259</sup> [REDACTED] offers the example of a case in which the City tried and failed to purchase a plot on which a subway line was planned; the City therefore leased the plot “until such time as the City gains legal ownership of these plots” and paid rent amounting to the MoF Assessment cap.<sup>260</sup> Emphasizing that such leases are not entered into “routinely,” [REDACTED] notes that the explanatory notes describe such leases as an “extraordinary, exceptional, specific and above all a temporary solution.”<sup>261</sup>
188. According to the Respondent, rather than relying on representations made by the Respondent, the Claimant relied solely on “Mr. [REDACTED] own self-serving and incorrect interpretation of Czech law.”<sup>262</sup> The Respondent asserts that “any serious due diligence” would have revealed the Claimants’ expectations to be baseless in law and fact and “patently *unreasonable*” in light of Czech case law.<sup>263</sup> The Respondent suggests that “the City would never enter a lease on the terms Alcor CZ sought ... because it would contravene its duty to act in the public interest and find a permanent solution to unify title.”<sup>264</sup> The Respondent emphasizes that “the City has deviated

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<sup>255</sup> First [REDACTED] Witness Statement, paras. 9–10, 17 (RWS-1); [REDACTED] Expert Opinion, para. 31 (REO-1); Road Act, § 17(2) (Exhibit R-66).

<sup>256</sup> [REDACTED] Expert Opinion, para. 71 (REO-1).

<sup>257</sup> Statement of Defence, paras. 11, 80–85 *referring to* First [REDACTED] Witness Statement, para. 12 (RWS-1); Rejoinder, para. 81-82.

<sup>258</sup> First [REDACTED] Witness Statement, para. 12 (RWS-1); Second [REDACTED] Witness Statement, para. 14 (RWS-2); [REDACTED] Expert Opinion, paras. 10, 37–57 (REO-1) (“The applicable laws in these sectors do not impose (and never imposed in the past) an obligation on the municipality (or any other owner of a structure) to enter into a lease with the owner of the land.”).

<sup>259</sup> Second [REDACTED] Witness Statement, para. 15 (RWS-2).

<sup>260</sup> Second [REDACTED] Witness Statement, para. 15 (RWS-2).

<sup>261</sup> Second [REDACTED] Witness Statement, paras. 16–17 (RWS-2).

<sup>262</sup> Statement of Defence, para. 80 (emphasis in original).

<sup>263</sup> Rejoinder, para. 9 (emphasis in original); Respondent’s PHB, para. 91.

<sup>264</sup> Statement of Defence, para. 96; *see also* Rejoinder, para. 60.

from [the] policy [of not entering into leases for the use of public roads] very rarely, when circumstances warranted it, and always making it clear that such deviations are exceptional.”<sup>265</sup>

189. ██████ submits that where a public road owned by the City is located upon land owned by a private entity, the City “always [makes] efforts for property settlement through a permanent legal solution.”<sup>266</sup> Because the possibility of lease termination may reinstate the need to compensate landowners, ██████ suggests that a policy of entering leases “contradicts both the character of roadway constructions and public interest.”<sup>267</sup>

190. According to the Respondent, at the time the Claimant acquired the Plots, the City would have either agreed to a “permanent solution” (buyout or creation of an easement) or invoked section 17(2) of the Road Act, under which the City could request a public administrative body to order the creation of an easement with commensurate compensation.<sup>268</sup> Although the Respondent does not contest that unjust enrichment is owed and routinely paid to owners of land occupied by public roads,<sup>269</sup> the Respondent emphasizes that

Claimant’s own legal authorities show that in 2009, that is *before Claimant’s purchases of Plots* commenced in January 2010, *the Czech Supreme Court had upheld the City’s refusal to enforce leases* for the construction of roads on plots with un-unified title, and instead ruled that the City’s use of land was subject to compensation for unjust enrichment at the MoF Assessment.<sup>270</sup>

191. The Respondent similarly contends that there was no reason for the Claimant to expect that the Resolution No. 2141 rate would apply to any compensation paid to the Claimant.<sup>271</sup> According to the Respondent, Czech law has consistently held that compensation for unjust enrichment is based on an appraisal of prevailing rent for comparable land, capped by the applicable MoF Assessment rate.<sup>272</sup>

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<sup>265</sup> Rejoinder, para. 60 *referring to* Claimant’s Reply, para. 66; Second ██████ Witness Statement, para. 15 (RWS-2).

<sup>266</sup> First ██████ Witness Statement, para. 11 (RWS-1).

<sup>267</sup> First ██████ Witness Statement, para. 12 (RWS-1).

<sup>268</sup> Statement of Defence, para. 11 *referring to* Road Act, § 17(2) (Exhibit R-66); *see also* Rejoinder, para. 82 *referring to* ██████ Expert Opinion, para. 138 (REO-1) (characterizing “the likelihood of an amicable resolution with the City, the creation of an easement, or outright expropriation” as the “only reasonable expectations”).

<sup>269</sup> Statement of Defence, para. 12.

<sup>270</sup> Statement of Defence, paras. 83–84 (emphasis in original) *referring to* Case No. 28 Cdo 2056/2009 dated 11 November 2009 (Exhibit C-4); Rejoinder, para. 81.

<sup>271</sup> Statement of Defence, para. 86; Rejoinder, para. 81.

<sup>272</sup> Rejoinder, para. 63.

192. Relying on the witness statements of fact witness [REDACTED] and its expert witness [REDACTED] the Respondent emphasizes that Resolution No. 2141 only applies to “rental by the City of Prague of public roads for temporary purposes,” and that it only applies to employees and subsidiary organizations of the City, but does not create “third-party rights.”<sup>273</sup> The Respondent alleges that the Claimant should have known at the time of its acquisition of the Plots that compensation was governed by the MoF Assessment and not Resolution No. 2141, which “on its face ... solely applies to short term leases for property *owned by the City*, when the *lessee uses the City’s land* for construction purposes.”<sup>274</sup>
193. [REDACTED] submits that Section 2.F of Resolution No. 2141, upon which the Claimant relies, applies to the short-term lease of roadways and only where: (a) the roadway is owned by the City; (b) the underlying land is also owned by the City; (c) the lease is temporary.<sup>275</sup> [REDACTED] also comes to the same conclusion that Resolution No. 2141 “governs an entirely distinct set of circumstances, namely the rental by Prague of public roads (or parts of them) for temporary purposes”.<sup>276</sup> The Czech Municipal Court also took a similar position distinguishing the Plots, as “plots of land built up with roads”, from the leases to which Resolution No. 2141 applies, namely “short-term leases for building activity on the road or loans of roads for purposes.”<sup>277</sup>
194. According to [REDACTED] no private party has ever asserted a claim in a Czech court for unjust enrichment at the rate laid out in Resolution No. 2141.<sup>278</sup>
195. The Respondent also submits that the District Court, Municipal Court, and Czech Supreme Court have all held that Resolution No. 2141 only sets out Prague’s “pricing policy for plots of land that are owned by it and are leased to a particular entity for a particular purpose of use” and is therefore inapplicable to the calculation of compensation for unjust enrichment owed to the Claimant, which “must be determined by an expert opinion as a price of the rent common in a given locality and at the given time.”<sup>279</sup> In contrast to the Claimant’s argument that the 2 June 2020 resolution

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<sup>273</sup> Rejoinder, para. 69 referring to [REDACTED] Expert Opinion, paras. 15, 57, 130–160 (REO-1); First [REDACTED] Witness Statement, para. 22 (RWS-1). See also Tr., Day 3, p. 11/20-22.

<sup>274</sup> Statement of Defence, para. 87 (emphases in original); Respondent’s Skeleton, Section I.A; Tr. Day 1, p. 44/8-18.

<sup>275</sup> First [REDACTED] Witness Statement, para. 22 (RWS-1); see also Tr. Day 1, p. 65/24-66/2.

<sup>276</sup> [REDACTED] Expert Opinion, para. 15 (REO-1).

<sup>277</sup> Second Instance Judgment, paras. 34–38 (Exhibit R-53).

<sup>278</sup> First [REDACTED] Witness Statement, para. 23 (RWS-1); Tr. Day 1, p. 48/12-16.

<sup>279</sup> Statement of Defence, paras. 93–94; Rejoinder, paras. 72-73; Respondent’s Skeleton, para. 27 referring to First Instance Judgment, pp. 10-11 (Exhibit R-44); Second Instance Judgment, paras. 7, 17, 34–38 (Exhibit R-53); Tr. Day 1, p. 48/4-11.

of the Czech Constitutional Court does not speak to the merits of Alcor CZ's claim, the Respondent<sup>280</sup> and its expert witness ██████████<sup>281</sup> argue that the Constitutional Court "reviewed the merits of, and rejected, Alcor CZ's constitutional complaint in its entirety."

196. Furthermore, the Respondent argues, the case law cited by the Claimant does not support the application of the Resolution No. 2141 rate to determine unjust enrichment compensation, while Czech Supreme Court precedent supports the application of the MoF Assessment cap instead.<sup>282</sup> The Respondent also rejects the notarial deeds upon which the Claimant purports to have based its expectation that the Resolution No. 2141 rate would apply by pointing out that the deeds "all *postdate* the investment ... [and] all describe property *owned, not leased, by the City.*"<sup>283</sup>
197. The Respondent adds that at the time of the Claimant's acquisition of the Plots, there was ongoing litigation in Czech courts over whether "speculators" were entitled to any compensation.<sup>284</sup> Although ultimately those claims have been resolved against the state, with the courts finding that the alleged "speculators" might be entitled to compensation, the Respondent takes the position that the Claimant should have inferred from the litigation ongoing at the time of its alleged investment that it "could not have had a reasonable expectation of an entitlement to any compensation, let alone the exaggerated compensation" pursuant to the Resolution No. 2141 rate sought by the Claimant.<sup>285</sup>
198. The Respondent asserts that had the Claimant undertaken due diligence that was more than "perfunctory", it would have known that its interpretation of Czech law was untenable.<sup>286</sup> The Respondent criticizes the Claimant's "reckless reliance" on this allegedly inadequate due diligence, the "entire universe" of which allegedly consisted of the "two-and-a-half-page

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<sup>280</sup> Respondent's Skeleton, paras. 28–29.

<sup>281</sup> Supplemental ██████████ Expert Opinion, paras. 13-15 (REO-2).

<sup>282</sup> Statement of Defence, para. 88–89 *referring to* Resolution of the Supreme Court of the Czech Republic No. 28 Cdo 3138/2012 dated 2 April 2013 (Exhibit C-6); Resolution of the Supreme Court of the Czech Republic, No. 28 Cdo 1537/2009 dated 2 December 2009 (Exhibit C-8; R-74); *see also* Rejoinder, paras. 66, 81.

<sup>283</sup> Statement of Defence, para. 90 (emphases in original).

<sup>284</sup> Rejoinder, para. 83; *see also* Statement of Defence, para. 14 (describing an "underground market for speculative buyers [who] purchase land subject to un-unified title at a discount ... and sue the City for compensation"); ██████████ Expert Opinion, para. 14 (REO-1) (noting that "[w]hether speculation is a bar to recovery of unjust enrichment is determined by courts on a case-by-case basis; the legality of such bar is confirmed by both the Supreme Court and Constitutional Court").

<sup>285</sup> Rejoinder, para. 83; *see also* Statement of Defence, para. 92; Rejoinder, para. 67; Tr. Day 1, p. 44/19 to 45/2.

<sup>286</sup> Statement of Defence, paras. 17, 91; Rejoinder, para. 84.

██████████ Memo,” and submits that it “fails any version of the ‘prudent investor’ test.”<sup>287</sup> The Respondent emphasizes that the duty to investigate all material factors, including the applicable requirements of Czech local law, was incumbent upon the Claimant and that the Treaty does not insure against bad business judgments undertaken without meeting that duty.<sup>288</sup> Foreign investors are bound to take the law in the host state as they find it at the time of the investment, and investment tribunals have either refused to exercise jurisdiction or denied claims premised on interpretations of host state law contrary to the applicable law.<sup>289</sup> The Respondent also submits that ignorance of the law, or acting on the basis of “deficient” legal advice provided by ██████████ ██████████ does not provide a basis for legitimate expectations. In particular, the Respondent relies on the following holding of the tribunal in *Invesmart v. Czech Republic*:

[T]he test of whether such an expectation can give rise to a successful claim at international law is an objective one. It is not enough that a claimant have seriously held an expectation; the expectation must be reasonable and the Tribunal must make the determination of reasonableness in all of the circumstances. *If the expectation was unreasonable (for example, ill-informed or overly optimistic), it matters not that the investor held it and it will not form the basis for a successful claim.*<sup>290</sup>

199. The Respondent also observes that the ██████████ Memo itself fails to cite any instances in which the City entered into a lease with a private party at the Resolution No. 2141 rate.<sup>291</sup> Moreover, the ██████████ Memo counselled that it would be “useful to verifiably check” the applicability of the Resolution No. 2141 rate for unjust enrichment compensation, which Mr ██████████ allegedly ignored by proceeding to acquire the Plots based on “assumed principles”.<sup>292</sup>

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<sup>287</sup> Rejoinder, para. 2, 9; Tr. Day 1, p. 45/11 to 46/17.

<sup>288</sup> Statement of Defence, para. 91 referring to *Charanne and Construction Investments v. Kingdom of Spain*, SCC Case No. V 062/2012, Award of 21 January 2016, para. 505 (RLA-13); *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of 13 November 2000, para. 64 (RLA-22); Rejoinder, para. 84.

<sup>289</sup> Statement of Defence, para. 92; Tr. Day 1, p. 44/5-7.

<sup>290</sup> Rejoinder, para. 85 quoting *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award of 26 June 2009, para. 250 (emphasis added by Respondent) (RLA-48) (“*Invesmart*”).

<sup>291</sup> Statement of Defence, para. 18.

<sup>292</sup> Statement of Defence, paras. 18–19, referring to ██████████ Memo, p. 2 (Exhibit C-12); ██████████ Witness Statement, para. 9 (CWS-1).

### 3. Arbitrary or Bad Faith Conduct

#### *The Claimant's Position*<sup>293</sup>

200. The Claimant submits that the City has acted “in bad faith and in an arbitrary way” in breach of Article 2(3) of the Treaty because it “refused and still refuses to pay compensation for unjust enrichment on a consistent basis.”<sup>294</sup>
201. The Claimant suggests that Alcor CZ sought to negotiate with the City (admittedly, “in [an] informal way”) but that such negotiations “did not lead to any outcome during the five years while the Claimant’s Investment Protection lasted.”<sup>295</sup> The Claimant adds that “Prague failed or refused to pay the owed rent or unjust enrichment either on the basis asserted by the Claimant or at all.”<sup>296</sup> According to the Claimant, the “stance of Prague ... can be characterized as lacking good faith and arbitrary.”<sup>297</sup> The Claimant explains that this is “obvious, in particular considering the fact that Prague refused and still refuses to pay compensation for unjust enrichment on a consistent basis.”<sup>298</sup>
202. According to the Claimant:

Prague waited until individual landowners brought their claims and let them sue without paying them at least unjust enrichment in the amount that was determined by it as undisputable. Therefore, it is not surprising that some landowners, including Alcor Holdings CZ, did not want to undergo lengthy negotiations with Prague and advanced their valid claims before the courts.<sup>299</sup>

203. Additionally the Claimant asserts that the way in which it has been treated by the Czech authorities, including by the courts, has been “inherently unfair and unreasonable”.<sup>300</sup>

#### *The Respondent's Position*<sup>301</sup>

204. The Respondent rejects this claim concerning “unspecified conduct by the City” as “unparticularized” and as lacking any “basis in law or fact.”<sup>302</sup> The Respondent submits that this

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<sup>293</sup> Reply, para. 69; Tr. Day 1, p. 28/18-22, p. 37/23 to 38/6; Claimant’s PHB, para. 57.

<sup>294</sup> Reply, para. 69; *see also* Statement of Claim, para. 4.4.

<sup>295</sup> Statement of Claim, para. 3.11.

<sup>296</sup> Statement of Claim, para. 3.11.

<sup>297</sup> Statement of Claim, para. 4.4; *see also* Reply, para. 69.

<sup>298</sup> Reply, para. 69.

<sup>299</sup> Reply, para. 64.

<sup>300</sup> Tr. Day 1, p. 37/23 to 38/6.

<sup>301</sup> Statement of Defence, Section V.B.2; Rejoinder Section IV.A; Respondent’s Skeleton, Section C.

<sup>302</sup> Statement of Defence, paras. 95, 97.



issue is “obviously tied to the larger issue of whether Prague acted in accordance with the Czech law applicable to owners of Plots such as the Claimant.”<sup>303</sup> Any charge of arbitrariness is qualified by the fact that the “the City did not diverge in any way from the law or its standard policy and practice when interacting with [the] Claimant.”<sup>304</sup>

205. The Respondent disputes the Claimant’s contention that the City refused to negotiate, pointing to evidence that “Alcor CZ sued the City without having even approached the City to find an out-of-court resolution of its claim.”<sup>305</sup> The Respondent submits that the Claimant’s intent never to hold meaningful negotiations is evidenced by the fact that only ten days after completing its acquisition of the Plots the Claimant brought suit in the District Court.<sup>306</sup>
206. Moreover, the Respondent argues that the Claimant’s former subsidiary Alcor CZ “fully participated” in the Czech domestic litigation, that Czech courts found that Alcor CZ was entitled to compensation from the City consistent with the MoF Assessments, and that such compensation was duly paid.<sup>307</sup> According to the Respondent, “the Czech courts have applied Czech law consistently and predictably”, making any allegation of a lack of due process unsustainable.<sup>308</sup>

#### 4. Full Protection and Security

##### *The Claimant’s Position*<sup>309</sup>

207. The Claimant submits that its investments did not enjoy “protection to a degree consistent with international law,” as required under Article 2(2) of the Treaty.<sup>310</sup> The Claimant argues that the Respondent’s obligation to protect investments under Article 2(2) covers the “possibility to realise returns,” which the Claimant was not allowed to realise.<sup>311</sup> The Claimant has accepted that its

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<sup>303</sup> Rejoinder, para. 86.

<sup>304</sup> Statement of Defence, para. 96 referring to *Case Concerning Elettronica Sicula Spa (Elsi) (United States of America v. Italy)*, Judgment of 20 July 1989, para. 128 (RLA-16) (“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... It is a wilful disregard of due process of law[.]”); see also Statement of Defence, para. 112 (“the Republic did nothing but correctly apply Czech law, when its judiciary upheld Alcor CZ’s action for unjust enrichment (at a legally justifiable rate) and ordered the City to pay Claimant compensation at the MoF Assessment”).

<sup>305</sup> Statement of Defence, para. 96 referring to First [REDACTED] Witness Statement, paras. 25–26 (RWS-1).

<sup>306</sup> Rejoinder, para. 30.

<sup>307</sup> Tr. Day 1, p. 49/3-19.

<sup>308</sup> Statement of Defence, paras. 100–101; Tr. Day 1, p. 49/3-19.

<sup>309</sup> Reply, para. 71; Claimant’s Skeleton, para. 44 ; Tr. Day 1, p. 38/16-17.

<sup>310</sup> Statement of Claim, para. 4.4; see also Reply, para. 71.

<sup>311</sup> Reply, para. 71. The Claimant also recalls in the Reply that returns are defined in the Treaty as “amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains,

full protection and security claim is inextricably linked with its claim to fair and equitable treatment, as “two sides of the same coin”.<sup>312</sup> As such, it concedes the success of its fair and equitable treatment claim would necessarily determine its full protection and security claim.<sup>313</sup>

*The Respondent’s Position*<sup>314</sup>

208. The Respondent interprets Article 2(2) to be a full protection and security obligation.<sup>315</sup>
209. The Respondent submits that a full protection and security obligation is generally only breached when a state “fails to protect an investor’s property from actual, physical, damage,” which the Claimant has not alleged in this case.<sup>316</sup>
210. To the extent the Claimant invokes an obligation under Article 2(2) to protect “the possibility to realise returns,” the Respondent concedes that such an obligation exists, but stresses that “the Treaty does not guarantee returns or profitability”<sup>317</sup> and objects to the Claimant’s suggestion that the Respondent “should be put to strict proof that Claimant made a return of its investment.”<sup>318</sup> According to the Respondent, it is sufficient that “there is no evidence of any interference with the Claimant’s enjoyment of its investment, including its returns.”<sup>319</sup>

**5. Discrimination**

211. Article 3 of the Treaty provides as follows:

*Article 3*

*National and Most-Favoured-Nation Treatment*

1. In its territory each Contracting State shall accord to investments and returns of investors of the other Contracting State treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State.

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share dividends, royalties, management, technical assistance or other fees irrespective of the form in which the return is paid.” Reply, para. 71 *referring to* Treaty, Article 1(3).

<sup>312</sup> Tr. Day 1, p. 38/23-25.

<sup>313</sup> Tr. Day 1, p. 38/18-25.

<sup>314</sup> Rejoinder, para. 92; Respondent’s Skeleton, Section D; Tr. Day 1, p. 69/20-22.

<sup>315</sup> Statement of Defence, paras. 106–107.

<sup>316</sup> Statement of Defence, paras. 107 *referring to* *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990 (RLA-7); *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award of 21 February 1997 (RLA-5).

<sup>317</sup> Rejoinder, para. 92 *referring to* *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award of 16 January 2013, para. 222 (RLA-54).

<sup>318</sup> Rejoinder, para. 92 n. 154.

<sup>319</sup> Rejoinder, para. 92.

2. Each Contracting State shall in its territory accord to investors of the other Contracting State, as regards management, maintenance, use, enjoyment, acquisition or disposal of their investments, or any other associated activities therewith treatment not less favourable than that which it accords to its own investors or to investors of any third State.

*The Claimant's Position*<sup>320</sup>

212. The Claimant alleges that the Respondent breached its obligation to accord investors national and most-favoured nation treatment under Article 3 of the Treaty because the City “did not pay any compensation for unjust enrichment (of any amount) for using of the Plots as it was obliged to do so by law.”<sup>321</sup> In the Claimant’s Skeleton, the Claimant clarifies that under its interpretation of Article 3, “all that this provision does is require that the Respondent should conduct its dealings with parties in the position of the Claimant in accordance with the law prevailing in the Contracting State at the relevant time.”<sup>322</sup> According to the Claimant, to demonstrate a breach of Article 3, “[t]here is no obligation on the Claimant to show that its treatment was less favourable than any third party.”<sup>323</sup> Even if, *arguendo*, such an obligation were incumbent upon it, the Claimant argues that the Respondent would be “obliged to treat the Claimant no less favourably than its own investors ... include[ing] the Respondent itself .... The Claimant should therefore be treated in the same manner as the Respondent would treat itself.”<sup>324</sup>
213. The Claimant submits further that, *vis-à-vis* the City (“a Czech state agency”), it has been treated in a way which was “significantly less favourable”.<sup>325</sup> According to the Claimant, it is unfair and discriminatory for the City to “charge rent to somebody else for using its land at one rate but pay another much lower rent when it has used the land of a private owner (in this case a foreign investor)”.<sup>326</sup> According to the Claimant, no compensation awarded to its former subsidiary Alcor CZ in Czech courts “is applicable in the present case” given that the Claimant’s asserted entitlement in this case arises under international law pursuant to the Treaty and that the Czech Supreme Court “has determined the amount of unjust enrichment as the common price at the given place and time.”<sup>327</sup>

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<sup>320</sup> Reply, para. 72; Claimant’s Skeleton, paras. 41-42, and 44; Tr. Day 1, p. 24/9-18, p. 33/3-10; Claimant’s PHB, paras. 58-65.

<sup>321</sup> Reply, para. 72.

<sup>322</sup> Claimant’s Skeleton, para. 41.

<sup>323</sup> Claimant’s Skeleton, para. 41.

<sup>324</sup> Claimant’s Skeleton, para. 41.

<sup>325</sup> Claimant’s PHB, para. 59.

<sup>326</sup> Claimant’s PHB, para. 59; Tr. Day 1, p. 19/12-25.

<sup>327</sup> Reply, para. 75 referring to [REDACTED] Expert Opinion, paras. 71–77 (CEO-1).

214. The Claimant asserts additionally that it was treated unfairly by the Czech courts pursuant to the decisions of the District and Municipal Courts, which went uncorrected on appeal. According to the Claimant, the Czech Courts failed to administer justice in their treatment of the claims raised by Alcor CZ insofar as they uncritically accepted the outcome of the Equity Solutions report (establishing the market price for the rent of the Plots).<sup>328</sup>

*The Respondent's Position*<sup>329</sup>

215. The Respondent submits that the Claimant “misapprehends the scope of the [Article 3] duty,” which is breached only if the Claimant establishes “it received less favourable treatment as compared to another investor (whether foreign or national) and that there are no reasons that could justify any proven disparate treatment.”<sup>330</sup>

216. The Respondent highlights that the “Claimant has not identified any other analogous investor who received any different, let alone less favourable treatment.”<sup>331</sup>

217. For that reason, the Respondent characterizes the Claimant’s Article 3 claim as “indecipherable”, and baseless to the extent it is premised on the Claimant seeking compensation at the Resolution No. 2141 rate.<sup>332</sup> In any event, the Respondent adds that “only Alcor CZ ... is eligible for compensation” and that if the Claimant had retained ownership of its Alcor CZ shares, “it would have indirectly made a healthy profit.”

**C. QUANTUM**

*The Claimant's Positions*<sup>333</sup>

218. In reliance on Resolution No. 2141, the Claimant contends that it is entitled to CZK 482,703,229.80 (approximately US\$ 20,971,000).<sup>334</sup> The Claimant also claims interest and costs.

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<sup>328</sup> Claimant’s PHB, para. 65. The Claimant distinguishes this submission from its earlier assertion that it makes no claim on the basis of a “denial of justice”; see Reply, para. 70.

<sup>329</sup> Statement of Defence, Section V.C.; Rejoinder, paras. 89-91; Respondent’s Skeleton, para. 54.

<sup>330</sup> Rejoinder, para. 89.

<sup>331</sup> Rejoinder, para. 90; see also Statement of Defence, para. 105 (pointing out that “Claimant has not shown, nor can it show, that it was treated differently to a similarly-situated investor”) referring to *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability of 27 December 2010, para. 210 (RLA-34).

<sup>332</sup> Statement of Defence, para. 108.

<sup>333</sup> Statement of Claim, para. 5.1; Reply, paras. 75-77; Claimant’s Skeleton, Section VII; Tr. Day 1, p. 30/24 to 31/25; Claimant’s PHB, paras. 93-94.

<sup>334</sup> Statement of Claim, paras. 4.8, 5.1; Reply, paras. 75–77.

The Claimant has indicated, however, that it would “give credit against sums which Alcor CZ has recovered in proceedings before the Czech Courts.”<sup>335</sup>

219. The Claimant suggests that the City was unjustly enriched in the amount of the “usual rent collected by Prague for leasing its own plots of land [i.e., the Resolution No. 2141 rate].”<sup>336</sup>
220. In response to the Respondent’s argument that the Claimant had profited instead of suffering actual damages, the Claimant also denies that it “gained a return from the sale of its share” in Alcor CZ.<sup>337</sup>

*The Respondent’s Position*<sup>338</sup>

221. The Respondent argues that the Claimant has “failed to satisfy its burden of proving its purported damages”<sup>339</sup> and has “shown no entitlement to any damages at all.”<sup>340</sup>
222. First, the Respondent argues that the Claimant did not suffer any actual damages, as it actually made a profit from the sale of the Plots. The Claimant purchased the Plots for CZK 25,702,310 (US\$ 1,117,000), but when it sold the Plots, it received US\$ 1,000,000 (approximately CZK 24,566,297), transferred loan obligations related to the purchase of the Plots in the sale of its shares in Alcor CZ, and received CZK 13,577,363.86 (approximately US\$ 450,000) in unjust enrichment payments from the City.<sup>341</sup>
223. Secondly, the Respondent argues that, to the extent that the Claimant suffered any harm (*quod non*), the Claimant has failed to demonstrate that any damages suffered were caused by a breach of the Treaty. The Respondent takes the position that even if the Claimant could show that it has suffered damages, it has not shown that those damages were caused by an alleged breach of the Treaty.<sup>342</sup> Instead, the Respondent submits that any such damages relate to alleged breaches of

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<sup>335</sup> Claimant’s Skeleton, para. 76.

<sup>336</sup> Statement of Claim, para. 3.8.

<sup>337</sup> Reply, para. 76.

<sup>338</sup> Statement of Defence, Section VI; Rejoinder Section V; Respondent’s Skeleton, Section V; Tr. Day 1, p. 50/15-25.

<sup>339</sup> Rejoinder, para. 93.

<sup>340</sup> Statement of Defence, para. 113.

<sup>341</sup> Statement of Defence, para. 114.

<sup>342</sup> Statement of Defence, para. 115.

Czech law, and are therefore compensable before Czech courts, as evidenced by the domestic litigation being pursued by Alcor CZ.<sup>343</sup>

224. Thirdly, the Respondent argues that the Claimant has not met its duty to mitigate damages. Specifically, the Respondent asserts that the Claimant aggravated the alleged harm by selling its shares in Alcor CZ before the District Court had rendered judgment. The Respondent contends that “[h]ad [the] Claimant retained its shares, [the] Claimant would have received, through Alcor CZ, not only the CZK 13,577,363 (approximately US\$ 450,000) that the District Court awarded for historical unjust enrichment, but also the possibility to accept the City’s offer of CZK 32,288,000 (approximately US\$ 1.4 million) to buy the plots or CZK 8,070,980 (approximately US\$ 350,000) for an easement.”<sup>344</sup>
225. Fourthly, the Respondent raises concerns about a potential double recovery, as it does in its jurisdictional objections. The Respondent argues that any award for damages in the instant arbitration “would either be duplicative of, or must be offset by, the judgment already paid by the City” in accordance with the Second Instance Judgment.<sup>345</sup>
226. Finally, if this Tribunal were to award damages, the Respondent submits that even if the appropriate measure of compensation for unjust enrichment *under Czech law* is the Resolution No. 2141 rate, this would have “no bearing on calculation of damages for a Treaty breach.”<sup>346</sup> In particular, the lost value of the Claimant’s alleged investment is different from the compensation for unjust enrichment Alcor CZ claims under Czech law.<sup>347</sup> For the purposes of this argument, the Respondent characterizes the relevant investment as “the acquisition of a lawsuit against the City,” meaning that any lost value [under the Claimant’s damages theory, the difference between the Resolution No. 2141 rate and the compensation paid pursuant to the Second Instance Judgment] would have to be discounted for the costs of litigation and the risk of losing the Czech domestic litigation.<sup>348</sup>

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<sup>343</sup> Statement of Defence, para. 115.

<sup>344</sup> Rejoinder, paras. 2, 96 referring to Second [REDACTED] Witness Statement, para. 20 (RWS-2).

<sup>345</sup> Statement of Defence, para. 116; Rejoinder, para. 94.

<sup>346</sup> Statement of Defence, para. 117.

<sup>347</sup> Statement of Defence, para. 117.

<sup>348</sup> Statement of Defence, para. 117.

**D. RELIEF REQUESTED**

227. In its Reply, the Claimant requests that the Tribunal issue an award providing for the following relief:

- I. The Czech Republic – Ministry of Finance of the Czech Republic, IC 00006947, with its registered seat at Letenská 15, 118 10 Prague, Czech Republic, is required to pay to the company Alcor Holdings Ltd., company registration number A310/07/09/1365, with its registered seat at Dubai, P.O. Box 186549, United Arab Emirates, the amount of 482,703,230 CZK [approximately USD 21 million].
- II. The Czech Republic – Ministry of Finance of the Czech Republic, IC 00006947, with its registered seat at Letenská 15, 118 10 Prague, Czech Republic, is required to pay to the company Alcor Holdings Ltd., company registration number A310/07/09/1365, with its registered seat at Dubai, P.O. Box 186549, United Arab Emirates, all legal and other costs of this arbitration.
- III. Interest at such rate and for such period as the Tribunal shall consider appropriate.
- IV. Such orders or directions as are necessary to give effect to the above directions.<sup>349</sup>

228. The Respondent requests the Tribunal issue an Award:

- a. dismissing Claimant's claims on the basis that the Tribunal lacks jurisdiction to hear the claims;
- b. Dismissing Claimant's claims on the basis that the claims are inadmissible;
- c. Dismissing Claimant's claims on the basis that Claimant has failed to bear its burden of proof or persuasion on any claim under the Treaty;
- d. Dismissing each of Claimant's claims on the merits;
- e. Requiring Claimant to pay all the costs of arbitration, including Respondent's costs for legal representation and assistance; and
- f. Awarding such other relief as the Tribunal deems appropriate.<sup>350</sup>

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<sup>349</sup> Reply, para. 79.

<sup>350</sup> Rejoinder, para. 97.

## V. THE DECISION OF THE TRIBUNAL

### A. INTRODUCTION

229. The Respondent having challenged the jurisdiction of the Tribunal, it is necessary to begin by addressing that challenge. Article 21(1) of the 1976 UNCITRAL Rules provides that “[t]he arbitral tribunal shall have the power to rule on a plea concerning its jurisdiction”. That provision states the general principle of “compétence de la compétence” or “kompetenz-kompetenz” which is applicable before international arbitral tribunals.
230. Although Article 21(4) of the UNCITRAL Rules provides that “[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question”, it goes on to provide that “the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award”. That was the course followed, with the agreement of both Parties, in the present case.
231. Nevertheless, it is both logical and necessary that the Tribunal addresses the question of its jurisdiction at the outset of the Award since, if it upholds a complete challenge, then it follows that it has no jurisdiction to consider the merits of the case.
232. The Respondent first advanced its objections to the jurisdiction of the Tribunal in its Statement of Defence filed on 29 March 2019.<sup>351</sup> In the Reply, the Claimant maintains that these objections were advanced too late and should have been put forward at an earlier stage of the proceedings.<sup>352</sup>
233. The Tribunal does not agree with the Claimant’s argument that the objections were not advanced in a sufficiently timely fashion. Article 21(3) of the 1976 UNCITRAL Rules provides:
- A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.
234. The Tribunal considers this provision to be completely clear. A respondent is obliged to raise its jurisdictional objections no later than the statement of defence. That is perfectly logical since it may not be until the respondent has seen the claimant’s statement of claim that it will be in a position to formulate its jurisdictional objections. There is nothing in the rule to suggest any requirement that a respondent should submit its jurisdictional objections in advance of the statement of defence.
235. The Tribunal also notes that, in the present case, Annex 1 to Procedural Order No. 1, which set out the pleading schedule and was adopted with the consent of both Parties, expressly provided

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<sup>351</sup> Statement of Defence, Section III.

<sup>352</sup> Reply, para. 42.



for the submission on 29 March 2019 of “Respondent’s Statement of Defence/Counter-Memorial, *including any objections to the Tribunal’s jurisdiction and/or counterclaim*” (emphasis added). The Claimant was therefore on notice from a very early stage that jurisdictional objections might be made in the Statement of Defence.

236. The Claimant’s objection that the Respondent did not raise its jurisdictional challenge at an early enough date is therefore rejected.
237. One other preliminary matter needs to be considered. The Claimant in the present case is Alcor Holdings Limited of the UAE (referred to throughout this Award as “Alcor”). On several occasions,<sup>353</sup> counsel for Alcor suggests, in connection with the jurisdiction arguments, that the Respondent ignores the distinction between Alcor, Alcor CZ (the Czech company which was, until February 2016, owned by Alcor) and Mr ██████ who was the owner and, for all practical purposes, the directing mind of Alcor.<sup>354</sup>
238. The Claimant is, of course, quite right to highlight the difference between the three actors. It is indeed Alcor which is the Claimant and whose rights under the Treaty are said to have been violated. Alcor CZ, on the other hand, was the owner of the Plots and the party to the litigation in the Czech courts. Nevertheless, it is important to keep in mind the reality of the corporate arrangements. Mr ██████ owned 99% of the shares in Alcor and directed its activities. He was clear in his testimony that he had created Alcor as a special purpose vehicle solely for the investment in the Czech Republic which was to be held by Alcor CZ, 99% of whose shares were held (until the sale to Mizar) by Alcor.<sup>355</sup> He also testified that it was he who directed Alcor CZ to commence the proceedings in the Czech courts,<sup>356</sup> that it was he who decided to sell Alcor’s shareholding in Alcor CZ because he needed the cash,<sup>357</sup> and that he could not remember whether the payments made (after the sale of the shares in Alcor CZ) as a percentage of the amount recovered in the Czech court proceedings were made to Alcor or directly to himself.<sup>358</sup>
239. Given the nature of this relationship between Mr ██████ and the two companies, the Tribunal does not accept that the Respondent has erred in its treatment of the three actors. It is Mr ██████ state of mind that is relevant to questions such as the expectations which existed at the time that

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<sup>353</sup> Tr. Day 1, p. 22/24 to 23/1; Claimant’s PHB, para. 63.

<sup>354</sup> In the Claimant’s PHB, at para. 21, Mr ██████ is described as “the moving force behind the Claimant”.

<sup>355</sup> ██████ Witness Statement, para. 10 (CWS-1).

<sup>356</sup> ██████ Witness Statement, para. 15 (CWS-1); Tr. Day 1, p. 144/1-14.

<sup>357</sup> Tr. Day 1, p. 164/25 to 166/19.

<sup>358</sup> Tr. Day 1, p. 160/4-12.

the investment was made and it is his reasons for the sale of the shares in Alcor CZ to Mizar which have to be taken into account when considering the effects of that sale.

240. Moreover, the Tribunal feels compelled to point out that the Claimant has not always been consistent in respecting the differences between the three actors. In particular, when accusing the courts of the Czech Republic of unfairness in the way in which they dealt with the proceedings before them, the Claimant refers almost entirely to decisions taken by the Czech courts after the Claimant had sold its shareholding in Alcor CZ.<sup>359</sup>

## **B. APPLICABLE LAW**

241. It is common ground between the Parties that any jurisdiction which the Tribunal might possess must ultimately be derived from Article 9 of the Treaty. As with any treaty, the law applicable to the interpretation and application of the Treaty is public international law and it is that law which the Tribunal is called upon to apply.

242. In particular, the Tribunal will look to the principles of treaty interpretation enshrined in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, 1969 (the “**Vienna Convention**”). These Articles provide:

### *ARTICLE 31. GENERAL RULE OF INTERPRETATION*

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

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<sup>359</sup> See, e.g., Claimant’s PHB, para. 65. For a summary of the judgments, see paras. 101-112, above.

*ARTICLE 32. SUPPLEMENTARY MEANS OF INTERPRETATION*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

*ARTICLE 33. INTERPRETATION OF TREATIES  
AUTHENTICATED IN TWO OR MORE LANGUAGES*

- 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

...

- 243. The Czech Republic became a party to the Vienna Convention by succession on 22 February 1993, more than a year before the conclusion of the Treaty with the UAE. The UAE is not a party to the Vienna Convention. Nevertheless, the principles stated in the three Articles just quoted are generally accepted as an authoritative statement of the customary international law regarding treaty interpretation.
- 244. With regard to Article 33, the Tribunal notes that the final clause of the Treaty provides that it has been made in “Czech, the Arabic and English languages, all texts being equally authentic. In case of divergence, the English text shall prevail”. In view of that provision and the fact that the Parties have referred throughout the proceedings to the English text with no suggestion that any relevant provision might bear a different meaning in either of the other authentic languages, the Tribunal will apply the English text.
- 245. In approaching the question whether or not the Tribunal possesses jurisdiction under the Treaty, the Tribunal does not consider that the reference to the object and purpose of a treaty in Article 31(1) of the Vienna Convention requires it to apply a presumption in favour of jurisdiction. The fact that one object of the Treaty, as laid down in its preamble, is to “create favourable conditions for ... investments by investors of one Contracting State in the territory of another Contracting State” does not, in the view of the Tribunal, justify any such presumption. Nor is the fact that a State is not required to submit to the jurisdiction of international tribunals unless it has given its consent to do so sufficient to justify a presumption that Article 9 should be interpreted restrictively. Instead, the Tribunal approaches the interpretation of Article 9, and of the other pertinent provisions of the Treaty, without any prior presumptions as to their meaning and effect.

**C. WHETHER THE CLAIMANT WAS AN INVESTOR AT THE RELEVANT TIME**

246. As set out above (see paragraphs 117-132), the Respondent's first objection to the jurisdiction of the Tribunal is that, at the date of the commencement of the proceedings, the Claimant no longer owned Alcor CZ and therefore was no longer an "investor" within the meaning of the Treaty. If upheld, this objection would amount to a complete bar to jurisdiction and preclude consideration of the merits of the case while rendering consideration of the other jurisdictional and admissibility objections unnecessary.

247. The basic facts (see paragraphs 76-115, above) are not in dispute.

- (a) Alcor created Alcor CZ in 2009;
- (b) between 28 January 2010 and 16 June 2011 Alcor CZ purchased the Plots;
- (c) on 19 June 2011 Alcor CZ commenced legal proceedings in the Czech courts;<sup>360</sup>
- (d) on 20 March 2014 Alcor CZ significantly modified its claim;<sup>361</sup>
- (e) on 24 February 2016 Alcor sold its shareholding in Alcor CZ;<sup>362</sup>
- (f) on 30 June 2016 Alcor notified the Respondent of a claim under the BIT;
- (g) on 27 September 2017 the District Court issued its judgment in the proceedings brought by Alcor CZ;<sup>363</sup>
- (h) on 17 April 2018 Alcor submitted its Notice of Arbitration;
- (i) proceedings in the Czech courts between Alcor CZ and the City of Prague continued until 2 June 2020.<sup>364</sup>

**1. The Date of Commencement of the Arbitration Proceedings**

248. According to Article 3(2) of the 1976 UNCITRAL Rules:

Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

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<sup>360</sup> *Alcor CZ v. Capital City of Prague*, Complaint dated 19 June 2011 (Exhibit R-15).

<sup>361</sup> Submission of Alcor CZ dated 20 March 2014 (Exhibit R-26).

<sup>362</sup> See paras. 113-115, above.

<sup>363</sup> First Instance Judgment (Exhibit R-44); see para. 101, above.

<sup>364</sup> See paras. 106-112, above.

249. It now appears that the Notice of Arbitration may not have been received by the Respondent until 3 May 2018. On the other hand, the Terms of Appointment of the Tribunal, which were approved by both Parties, state, in para. 2.4, that:

In accordance with the UNCITRAL Rules, these arbitration proceedings are deemed to have commenced on 17 April 2018, the date on which the Respondent received the Notice of Arbitration.

250. Since, however, it is common ground that the sale of the Claimant's 99% shareholding in Alcor CZ took place on 24 February 2016, more than two years before either of the possible dates of commencement of the proceedings, the Tribunal considers it unnecessary to determine which of those dates should be treated as the actual date of commencement.

## 2. The Date at which Jurisdiction must Exist

251. The Tribunal considers that it is a general principle of international law that the date at which the requirements for the jurisdiction of an international court or tribunal must be established is the date at which proceedings are commenced. As a leading commentator puts it:

It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met. It also means that events taking place after that date will not affect jurisdiction.<sup>365</sup>

252. That approach has been confirmed by other investment arbitration tribunals, whose decisions – though not binding upon the present Tribunal – are nonetheless entitled to respect insofar as their reasoning is persuasive. The Tribunal finds the reasoning of the tribunal in *CSOB* persuasive, when that tribunal said:

... it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case.<sup>366</sup>

253. In the case of arbitration under a bilateral investment treaty, there is an added reason why the requirements for jurisdiction must exist at the date that the case is commenced. The essence of arbitration is the agreement of the parties to arbitrate. In the case of investor-State arbitration, that agreement is derived from the treaty but the treaty itself cannot be the agreement because the

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<sup>365</sup> C. Schreuer and Others, *The ICSID Convention: A Commentary* (2<sup>nd</sup> ed, 2009), p. 92; quoted in *Daimler*, Award of 22 August 2012, n. 248 (RLA-42), note 112, above.

<sup>366</sup> *CSOB*, Decision of the Tribunal on Objections to Jurisdiction of 14 May 1999, para. 31 (RLA-12), note 106, above.

investor is not a party to the treaty; the parties to the treaty are the States which concluded it. Instead, the investor-State arbitration provision of the treaty operates as an offer by each of the contracting States to investors of the other contracting State. That offer is accepted when the investor commences arbitration proceedings. In short, it is the act of commencing the arbitration which creates the agreement to arbitrate between the investor and the contracting State. The offer in the treaty is made to a defined class. It follows, therefore, that the offer can be accepted only by a person or entity who, at the moment of acceptance, falls within that defined class.

254. In the present case, Article 9 of the Treaty requires the Czech Republic to submit to arbitration only where the case is brought by a person or corporation which is an “investor” of the UAE in connection with an “investment” on the territory of the Czech Republic. A claimant must therefore satisfy the requirements of Article 1(2), which defines the term “investor”, at the date of the notice of arbitration. Article 1(2) provides that “[t]erm ‘investor’ shall mean the Government of a Contracting State or any of its natural or juridical persons who invest in the territory of the other Contracting State”.

### **3. The Effect of Sale of the Investment**

255. That leads to the question which lies at the heart of the present case, namely whether a claimant which had made a qualifying investment can bring itself within the jurisdiction of a tribunal under Article 9 of the BIT if it no longer owns that investment at the date of commencing proceedings. Since the critical date is the date of the commencement of the arbitration proceedings, it follows, as the *CSOB* tribunal held, that sale or other divestment of an investment after the date of commencement of the arbitration is irrelevant for the purposes of determining jurisdiction.<sup>367</sup> What matters for the present case is the effect of sale or other divestment prior to the date of commencing the proceedings.
256. The Claimant argues that Article 9 contains no requirement that a claimant must be an investor at the time that it commences arbitration proceedings. Article 9 must, however, be read together with the definitions in Article 1(1) and 1(2). Article 1(2), as quoted in paragraph 117 above, merely provides that an investor is any of a State’s natural or juridical persons “who invests in the territory of the other Contracting State”. There is no express provision about when that investment must be made, or about whether a person who has made an investment but no longer owns it continues to qualify as an investor. However, in contrast to the provisions of the North

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<sup>367</sup> *CSOB*, Decision of the Tribunal on Objections to Jurisdiction of 14 May 1999, para. 31 (RLA-12), note 106, above. A sale after the date on which proceedings are commenced may, of course, be relevant to questions of quantum.

America Free Trade Agreement (“NAFTA”), which were at issue in *Mondev v. United States*,<sup>368</sup> the definition of an investor is not so drafted as to include someone who “seeks to make, is making or *has made* an investment” (emphasis added). At most, therefore, Article 9 could be said to be neutral on this question. Nevertheless, the Tribunal considers that the more natural reading of the relevant provisions of the Treaty is that it is not enough that a person made an investment at some point in the past; to qualify as an investor, that person must ordinarily continue to hold that investment at the time that it seeks to take advantage of Article 9.

257. The Tribunal does not accept the Claimant’s contention that “it would be illogical to the point of absurdity”<sup>369</sup> to hold that jurisdiction did not exist if a party which had made a qualifying investment had ceased to own it before that party commenced arbitration proceedings. On the contrary, the Tribunal considers that in such a case the party in question would normally no longer be an “investor” at the date when it commenced arbitration proceedings and would therefore be incapable of accepting the offer to arbitrate made in the investment treaty. What would be illogical, in the Tribunal’s view, would be to read Article 9 as though it treated a person as an investor even if that person had long since ceased to hold the investment in question.
258. That is implicit in the passage just quoted from the *CSOB* case. It is made explicit in *Aven*.<sup>370</sup> In that case, the claimants brought proceedings against Costa Rica regarding a range of properties which they had at one time owned in Costa Rica. Seventy-eight of those properties had been sold by the claimants by the time of the hearing. The Tribunal found that sixty-seven of them had been sold before the commencement of the arbitration proceedings and that it therefore lacked jurisdiction with regard to the claims concerning those properties. Contrary to what is suggested by the Claimant in the present case, in reaching that decision, the *Aven* tribunal was concerned not with whether the claimants had ever owned the properties but whether, and when, they had ceased to own them.<sup>371</sup>
259. After quoting with approval the passage cited above from the *CSOB* decision, the *Aven* tribunal continued:

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<sup>368</sup> *Mondev International v. United States of America* (ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, para. 80 (RLA-23).

<sup>369</sup> See para. 129, above.

<sup>370</sup> *Aven*, Final Award of 18 September 2008 (RLA-8), note 107, above.

<sup>371</sup> At para. 289 of the Award, the *Aven* tribunal states that “the central dispute between the Parties is whether the properties sold before and during this arbitration should be included in the Claimants’ investment”. That presupposes that the properties were at one point owned by the claimants and the tribunal plainly proceeded on that basis.

... the relevant precedent articulates that investments liquidated or transferred after the initiation of arbitral proceedings are covered investments in DR-CAFTA proceedings. In line with Article 3(2) of the UNCITRAL which states that “arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent”, the Tribunal determines that the date of the Notice of Arbitration – in this case, January 20, 2014 – is the date which should delineate which properties were sold after the initiation of this arbitration and thereby, which have the character of a covered investment under Article 10.28 of DR-CAFTA. Accordingly, the Tribunal expressly rejects Claimants’ assertion that all lots sold after May 2011 are covered investments. Instead, the threshold date of sale stands as January 20, 2014.<sup>372</sup>

260. The *Aven* tribunal concluded:

... the relevant case law instructs that in general terms, an investment sold after the date of Notice of Arbitration meets the criteria for an “investment” in terms of DR-CAFTA [the Dominican Republic – Central America Free Trade Agreement]. On the other hand, an investor who disposes of ownership of the investment in question before arbitral proceedings should not be eligible to seek the Treaty’s protection, unless special circumstances are present. Such circumstances include, *inter alia*, the loss of the investment by actions of a third party or the retroactive application of a treaty, neither of which are applicable to the matter at hand.<sup>373</sup>

261. The Claimant urges the Tribunal to prefer the analysis in the *Daimler* Award, paragraph 145 of which states:

The better view would seem to be that ICSID claims are at least in principle separable from their underlying investments. The Tribunal therefore rejects the Respondent’s contention that the Claimant’s ICSID claims (or at least those connected with the shareholding) were necessarily and automatically transferred along with the shares by operation of law. Rather, the Tribunal finds that it should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken – provided that the investor did not otherwise relinquish its right to bring an ICSID claim.<sup>374</sup>

262. The Claimant points out that, far from relinquishing any claim for breach of the Treaty when it sold its shareholding in Alcor CZ to Mizar, it expressly reserved its right to claim for any breach of the Treaty which had taken place prior to the date of the transfer to Mizar.<sup>375</sup> The Claimant therefore maintains that, even if the sale were a purely voluntary one, it would not affect the jurisdiction of the Tribunal in respect of a claim brought by Alcor for a breach of the Treaty which had occurred before the sale took place in February 2016.

263. The Tribunal is not persuaded that it should follow *Daimler*. First, it sees no reason of logic or policy for divorcing the right to claim from the ownership of the investment with regard to which the claim is made. Moreover, it appears to the Tribunal that to do so risks confusing questions of

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<sup>372</sup> *Aven*, Final Award of 18 September 2008, para. 296 (RLA-8), note 107, above.

<sup>373</sup> *Aven*, Final Award of 18 September 2008, para. 301 (RLA-8), note 107, above.

<sup>374</sup> *Daimler*, Award of 22 August 2012, para. 145 (RLA-42), note 112, above.

<sup>375</sup> Section II.2 of the Share Transfer Agreement, *quoted* at para. 115, above.



jurisdiction and questions of merits. If jurisdiction is made to depend upon a claimant establishing that it suffered a treaty breach before the sale of its investment, then in order to decide whether or not it has jurisdiction to determine the case on its merits, a tribunal would first have to rule on the merits of the case. That puts the cart before the horse and cannot be right. On the other hand, if it is sufficient that a claimant merely advances a claim for a breach which it says occurred before the sale of its investment, that would negate the principle that the Tribunal has just accepted and would make the existence or not of jurisdiction dependent upon the way in which the claimant formulates its case.

264. Secondly, the Tribunal considers that the circumstances of the present case differ from those of the *Daimler* case in a number of important ways. The assignment of the investment in *Daimler* was from the claimant company to its own parent company (both being German corporations) and was a response to the unprofitability of the subsidiary following the measures taken by Argentina. The precise relationship between the Claimant and Mizar is unclear.<sup>376</sup> It was not, however, a relationship of parent and subsidiary within a corporate group undergoing restructuring.
265. Moreover, in *Daimler*, the nature and content of the dispute under the BIT was already clear before the sale occurred. The *Daimler* case concerned measures taken by Argentina in 2001-02 to “pesify” debts owed to the Claimant’s Argentine subsidiary, as part of the measures taken by Argentina in response to the currency crisis in that country.<sup>377</sup> The effect of these provisions was to abrogate the assurances of a right of currency conversion on the basis of which *Daimler* maintained it had made its investment in its Argentine subsidiary.
266. The facts of the present case are very different. Alcor CZ acquired the Plots between January 2010 and June 2011. Mr [REDACTED] testified that he had identified the purchase of these Plots as a good investment likely to secure a substantial return because the existing owners lacked the knowledge and resources to pursue claims against the City which would be likely to take time.<sup>378</sup> In other words, not only did the Claimant know that it was likely to take some time to realise any gains but that time factor was a central element in its investment planning – Mr [REDACTED] considered that he could devote to the claims the time and resources which the previous owners could not and that was why the Claimant could purchase the Plots at a favourable price.

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<sup>376</sup> See above, para. 164.

<sup>377</sup> *Daimler*, Award of 22 August 2012, paras. 41-42 (RLA-42), note 112, above.

<sup>378</sup> Tr. Day 1, p. 106/5-10.

267. It was also central to the Claimant's strategy that the City could be persuaded, or compelled, to pay compensation based on the formula used in Resolution No. 2141. But the Claimant has not produced any evidence to suggest that the City had ever paid compensation *to* another landowner on the basis of the formula which that Resolution had laid down for payments to be made *from* private parties to the City, or that it had ever made any representation that it would do so. That is confirmed by the evidence of [REDACTED] Mr [REDACTED], who controlled the affairs of the Claimant, must, therefore, have been aware that the process would not be straightforward and might well involve court proceedings. Yet the Claimant sold its shareholding in Alcor CZ before Alcor CZ had received any substantive judgment from the District Court in which it had commenced proceedings.

268. It is difficult to see, therefore, that any dispute regarding the application of the BIT existed between the Claimant and the Respondent before the sale of Alcor's shares in Alcor CZ. Neither the correspondence between Alcor (or Alcor CZ) and the Czech Republic, nor what the Tribunal has seen of the pleadings in the cases before the Czech courts contains any suggestion of such a dispute. The BIT appears never to have been mentioned.

269. A further distinction is that, in *Daimler*, the measures taken by Argentina in 2001-02 had been unexpected and had already taken effect by the time of the sale. By contrast, in the present case, as the tribunal has already found, the Claimant had invested in the expectation that it might have to resort to the local courts and it chose to sell the investment before it had received even a single substantive judgment from those courts. Yet the Claimant makes much in its pleadings of the alleged failures of the Czech courts which, if they took place at all, did so only *after* the sale to Mizar.

270. In its Post-Hearing Brief, the Claimant states:

64. The Claimant's position is that the Courts failed to administer justice (ie, failed to create circumstances to enable claims to be properly dealt with), as opposed to denying justice to the Claimant. The failure of the Court is that it has not established an effective means for asserting claims for foreign investors. That is the purpose of these proceedings. The simple logic is that the Claimant invested money in a series of transactions into the state with the expectation that its investment would be protected by the BIT. Prague breached its obligations under the BIT and the Claimant raises unfair treatment because the Courts failed to have regard to the generally accepted standard of the administration of justice.
65. It follows from the judgment of the Czech Courts that they did not carefully examine the content of the Equity Solutions report, by which the authors of this report determined the usual market rent price of the land. This should have been done by the District Court for Prague 10 (Court of the First Instance), which instead uncritically accepted the conclusion of Equity Solutions, or by the Municipal court in Prague (Appeal Court). In compliance with Czech law, neither the Supreme Court nor the

Constitutional Court reviewed the Equity Solutions report as none of them were competent to do so.

271. Yet this allegation refers to events which took place after the Claimant sold its interest in Alcor CZ to Mizar and thus could not give rise to a claim by Alcor.
272. In these circumstances, even if the Tribunal had preferred the analysis in *Daimler* to that in *Aven*, it would have found that the *Daimler* analysis was not applicable to the present case.
273. The Tribunal, however, prefers the analysis in *Aven*, which confirms the conclusion at which the Tribunal had already arrived, namely that, unless there are special circumstances, or the treaty otherwise provides, it is a requirement of jurisdiction that the claimant still hold the investment at the date of commencing proceedings. In the *Aven* case, the claimants had divested themselves of only some of their investments, so that the ruling of the tribunal did not preclude jurisdiction over the entire case. It merely limited the scope of the claim to those properties still owned by the claimants at the time that they commenced proceedings. In the present case, however, the Claimant had sold the entirety of its shareholding in Alcor CZ more than two years before the commencement of arbitration proceedings. In principle, therefore, the Claimant had ceased to be an investor in 2016 and thus could not, in 2018, accept the offer of arbitration contained in Article 9 of the Treaty. The Tribunal does not consider that “ownership” of a right to bring a claim is itself an investment.
274. The Tribunal accepts that there are cases in which an investor has ceased to own the investment before the commencement of arbitration proceedings but nevertheless retains the capacity to accept the offer of arbitration in an investment treaty – these are the “special circumstances” to which the *Aven* tribunal referred.
275. That raises the question what are “special circumstances” for these purposes. The Tribunal considers that these are necessarily fact specific and that it is neither possible nor desirable to attempt to create a comprehensive list of what might constitute special circumstances. It is, however, appropriate to look to what has been regarded as special circumstances in other awards.
276. Leaving aside the reference in *Aven* to the retroactive application of a treaty, which is not in issue here, the most obvious example is where the investment has been expropriated. In such a case, the loss of ownership is not voluntary but is the effect of the very breach of treaty which the claimant seeks to challenge. To prevent a claimant from bringing a case in such circumstances would be to allow the defendant State to profit from its own wrong and frustrate a core object of the treaty.

277. The same logic applies where an investor is forced to sell the investment – as, for example, many Jewish owners were forced to sell their property by Nazi authorities between 1933 and 1945. The Tribunal accepts that the sale would not preclude the investor from pursuing a claim.<sup>379</sup>

278. The present case does not fall into either of these categories. Counsel for the Claimant made clear at the hearing that this was not an expropriation case.<sup>380</sup> Nor is there any evidence that there was a forced sale. The nearest that the Claimant comes to alleging a degree of coercion is in a passage in its Post-Hearing Brief, in which it states that:

The Tribunal does not need to be reminded of the length of time this matter has been ongoing. It would be an over-statement to say that the Respondent had starved the Claimant into submission, but what can be said is that by virtue of the length of time that had been taken, the Claimant was pushed into a position where the liquidation of the asset was necessary.<sup>381</sup>

279. The Tribunal agrees that it would be an “over-statement” to suggest that the Claimant was “starved into submission”. But nor does it accept that the Claimant was pushed into the position where it had to liquidate the asset because of the length of time that had been taken over Alcor CZ’s claims to compensation for unjust enrichment or payment by way of a lease or other arrangement with the City.

280. The Tribunal agrees with the Claimant that the explanation given in evidence by Mr [REDACTED] namely that he had tired of the process and needed cash, is an accurate description of why the shareholding in Alcor CZ was sold. However, the inference which the Tribunal draws from what Mr [REDACTED] said is rather different from that suggested by the Claimant. The Tribunal does not read his evidence as in any way suggesting that this was a fire sale or that it had been compelled by misconduct on the part of the Respondent.<sup>382</sup> Rather, Mr [REDACTED] wished to invest elsewhere. The fact that the price paid by Mizar for the shares in Alcor CZ appears to have been determined not by a calculation of the value of the shares (and thus of the Plots which were Alcor CZ’s main asset) but by reference to the amount of money that Mr [REDACTED] needed to pursue other investment opportunities also confirms that this is not a case of a forced sale.<sup>383</sup>

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<sup>379</sup> See also *Mondev*, Award of 11 October 2002, note 369, above, cited by the *Aven* tribunal at paras. 297-298, note 107, above, for the proposition that a claimant may retain the status of an investor if it has lost ownership of the investment because of a third party foreclosing on a mortgage.

<sup>380</sup> Tr. Day 1, p. 25/12-14. That point is repeated in the Claimant’s PHB, para. 71.

<sup>381</sup> Claimant’s PHB, para. 70.

<sup>382</sup> It is noticeable that there is no allegation of a denial of justice in relation to the court proceedings in the Czech Republic.

<sup>383</sup> Tr. Day 1, p. 166/15-18.

281. The present case thus fits into neither of the recognized cases of “special circumstances”. As the Tribunal has already made clear, it does not consider that the categories of special circumstances are closed but it does not see anything else about the present case which could constitute such circumstances. The fact that the Claimant sought to reserve, in its sale to Mizar, a supposed right to claim under the BIT (the first mention of the BIT in any of the documents in the record) cannot in itself amount to a special circumstance. To hold otherwise would be to drive a coach and four through the principle in *Aven*. Nor is there any evidence that the sale was a necessary attempt to mitigate loss, something which would also be undermined by the fact that the sale price seems to have been determined by the amount needed for Mr [REDACTED] other investment plans, rather than an estimate of the likely present or future value of the shares.
282. In view of the reasoning set out above, the Tribunal does not consider it necessary to examine the Respondent’s allegation that the sale to Mizar of the shares in Alcor CZ was not a genuine arms-length transaction.
283. The Tribunal therefore upholds the Respondent’s first jurisdictional objection. Since that is sufficient to dispose of the case, it is unnecessary to consider the other objections or to enter into questions of the merits or quantum.

## VI. COSTS

284. Article 38 of the 1976 UNCITRAL Rules provides that:

The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

285. The BIT contains no provisions relating to costs and there is no special agreement between the Parties on that subject beyond the provisions of the Terms of Appointment which stipulate the hourly rate for the fees of the members of the Tribunal and the reimbursement of their expenses (para. 11) and that the PCA will charge for its services in accordance with its normal schedule of fees (para. 8). Costs are therefore governed by Article 40 of the 1976 UNCITRAL Rules, the relevant part of which provides that:

- (1) Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
- (2) With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

286. Article 40 thus distinguishes between two categories of costs: those covered by Article 38, paragraphs (a) to (d) and paragraph (f) (“**the Tribunal costs**”), and those covered by Article 38, paragraph (e) (“**the costs of representation**”). As both Parties accept in their submissions on costs, Article 40(1) starts with a presumption that the Tribunal costs are to be borne by the unsuccessful Party, although the second sentence gives the Tribunal a discretion to depart from that principle by apportioning the Tribunal costs between the Parties “*if it d etermines th at apportionment is reasonable, taking into account the circumstances of the case*”. With regard to the costs of representation, there is no such presumption<sup>384</sup> and it is left to the Tribunal to

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<sup>384</sup> In contrast to the position under Article 42(1) of the 2010 UNCITRAL Rules.

apportion such costs if it considers apportionment to be reasonable in the circumstances of the case. In addition, Article 38, paragraph (e) provides that each Party's costs of representation are to be treated as costs of the arbitration only to the extent that the Tribunal determines those costs to be reasonable.

287. While the starting point for the Tribunal is therefore different for the Tribunal costs from the starting point in respect of costs of representation, in each case the Tribunal has a discretion to apportion the costs on the basis of what is reasonable, taking account of the circumstances of the case. This discretion is a broad one.
288. In the present case, the Respondent has been completely successful on a jurisdictional objection. Both Parties have litigated in good faith and there is nothing about either Party's conduct of the case which was unreasonable.
289. In these circumstances, the Tribunal sees no reason to depart from the principle that, with regard to Tribunal costs, costs follow the event. The Claimant will therefore bear the entirety of the Tribunal costs, which consist of:
- (a) The fees and expenses of Mr Richard Wilmot-Smith, QC, which come to EUR [REDACTED] and EUR [REDACTED], respectively.
  - (b) The fees of Professor Donald McRae, including HST, which come to EUR [REDACTED].
  - (c) The fees and expenses of Sir Christopher Greenwood, which come to EUR [REDACTED] and EUR [REDACTED] respectively
  - (d) The fees of Ms [REDACTED], the Assistant to the President, which come to EUR [REDACTED]
  - (e) The fees of the PCA, which acts as Registry in accordance with the Terms of Appointment, which come to EUR 49,147.00
  - (f) All other Tribunal costs in this arbitration, including court reporting, interpretation, printing, telecommunications, courier charges, bank charges, and all other expenses relating to the arbitration proceedings paid from the deposit established by the Parties, which come to EUR 17,303.04.
290. The Claimant is therefore required to pay to the Respondent the amount of EUR 146,267.97, corresponding to the Respondent's portion of the Tribunal costs borne by the deposit.

291. So far as the costs of legal representation are concerned, the Parties assess their costs as follows:

- (a) The Claimant: AED 979,475.63 (fees of Taylor Wessing LLP Dubai Branch) (equating to approximately EUR 234,000), plus EUR 353,687.43 (fees of Taylor and Wessing LLP Prague Branch and the Claimant's expert), a total of approximately EUR 587,687;
- (b) The Respondent: CZK 16,392,148.69 equating to approximately EUR 637,225 for counsel's fees and costs.

292. In view of the Respondent's success in its jurisdictional challenge, the Tribunal considers that costs should follow the event. Since the Respondent's costs of legal representation are only slightly higher than those of the Claimant, the Tribunal considers them reasonable and directs that the Claimant shall reimburse the Respondent for the entirety of those costs.



**VII. DISPOSITIF**

293. For the reasons given above the Tribunal DECIDES:

- (a) That it has no jurisdiction to entertain the Claimant's claim;
- (b) That the Claimant shall bear the costs of the Tribunal and the PCA and shall therefore pay to the Respondent the sum of EUR 146,267.97;
- (c) That the Claimant shall pay to the Respondent the sum of EUR 637,225 in respect of the latter's costs of legal representation;
- (d) That the Claimant shall make the payments required in sub-paragraphs (2) and (3) within sixty days of the date of this Award, after which any amount outstanding will incur interest at the rate of 6% per annum compounded twice yearly until full payment has been made.

Place of Arbitration: The Hague, the Netherlands  
Date: 2 March 2022



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Richard Wilmot-Smith QC



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Donald McRae, CC, ONZM



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Sir Christopher Greenwood, GBE, CMG, QC