

**UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW AND THE AGREEMENT BETWEEN THE  
GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE CZECH AND  
SLOVAK FEDERAL REPUBLIC FOR THE PROMOTION AND PROTECTION OF  
INVESTMENTS**

**- between -**

**FRONTIER PETROLEUM SERVICES LTD.  
(the “Claimant”)**

**- and -**

**THE CZECH REPUBLIC  
(the “Respondent”)**

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**FINAL AWARD**

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12 November 2010

**Tribunal:**

David A.R. Williams QC, Presiding Arbitrator

Henri Alvarez QC

Christoph Schreuer

**Registry:**

Permanent Court of Arbitration

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## 1. LIST OF DEFINED TERMS

Appellate Division	Appellate Division of the Regional Court in Brno
Ayres	Ayres Corporation
<i>Arbitration Act</i>	<i>Act No. 216/1994 Coll, on Arbitral Proceedings and Execution of Arbitral Awards (Czech Republic)</i>
<i>Bankruptcy Act</i>	<i>Act No. 328/1991 Sb. Coll, on Bankruptcy and Composition (Czech Republic)</i>
BIT or Treaty	<i>Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments</i>
CC	Creditor's Committee for Moravan a.s. bankruptcy
CDN	Canadian Dollars
CKA	Czech Consolidation Agency
<i>Code of Civil Procedure</i>	<i>Code of Civil Procedure, Act No. 99/1963 Coll.,</i>
<i>Commercial Code</i>	<i>Czech Commercial Code, Act No. 513/1991 Coll.</i>
Commercial Register	Commercial Register of the Regional Court in Brno
<i>Court Fees Act</i>	<i>Act No. 549/1991 Sb. Coll., on Court Fees</i>
CSOB	Československá obchodní banka, a.s.
CZK	Czech Crowns
Draft Cooperation Agreement	Draft agreement prepared by Mr. Jaroslav Sup allegedly for execution by Claimant and Orbes representing LEGES, bankruptcy trustee for Moravan
<i>ECHR</i>	<i>European Convention on Human Rights and Fundamental Freedoms</i>
<i>EC Regulation</i>	<i>Council regulation (European Communities) No. 1346/2000 of 29 May 2000 on insolvency proceedings</i>
Final Award	Final Award in the Stockholm Arbitration
FPS	Frontier Petroleum Services Ltd., also referred to as "Frontier", "Claimant", or "Investor"
ICCPR	<i>International Covenant on Civil and Political Rights</i>
Injunctions Claim	Claimant's application to the Regional Court in Brno for an interim injunction to prevent entry in the Commercial Register of the resolution to increase the basic capital adopted at the 13 September 2002 LZ General Meeting
Interim Award	Interim Award on Claimant's Motion for Interim Measures in the Stockholm Arbitration
ICJ	International Court of Justice

LZ	Letecké Závody, a.s.
LZ General Meeting	13 September 2002 LZ general meeting of shareholders
LEGES	LEGES v.o.s.
LET	LET, a.s.
LET Assets	Former assets of LET, a.s.
MA	Moravan-Aeroplanes, a.s.
MFN	Most-favoured nation
Midland Facility	Proposed support and service facility for L-410 aircraft in Midland, Texas
MMT	MMT Plus s.r.o.
Moravan	Moravan a.s.
<i>New York Convention</i>	<i>United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards</i>
Order on Security	Paragraph 2 of the <i>dispositif</i> of the Final Award, which orders the bankruptcy trustees for MA and LZ to grant Claimant first secured charges against the LET Assets and all of the property of MA (in accordance with the terms of the USA)
PCA	Permanent Court of Arbitration
Promissory Note	Promissory Note annexed to the Unanimous Shareholder Agreement which allegedly secured the loan of CZK 203,000,000 from FPS to MA
Regional Court	Regional Court in Brno
Resolutions	Resolutions taken at the 13 September 2002 LZ General Meeting
Resolutions Claim	Claimant's application to the Regional Court in Brno for a declaration of invalidity of two resolutions adopted at the 13 September 2002 LZ General Meeting
Stockholm Arbitration	Private arbitration between FPS and MA and LZ in Stockholm
Stockholm Tribunal	Arbitral tribunal appointed to determine the Stockholm Arbitration
Tora Group Petition	Petition for the bankruptcy of MA filed by the Tora Group on 14 August 2001
Transfin	Transfin International s.r.o.
UCL	Civil aviation office of the Czech Republic (Úřad pro civilní letectví Česká Republika)
UNCITRAL Rules	UNCITRAL Arbitration Rules
<i>US-Czech Republic BIT</i>	<i>Treaty Between the Czech Republic and the United States of America for the Reciprocal Encouragement and Protection of Investment</i>

USA	Unanimous Shareholder Agreement entered into between FPS and MA effective on 31 July 2001
USD	United States Dollars
Vala Opinion	25 May 2005 legal opinion of Mgr. Vladan Vala, legal counsel of bankruptcy trustee of MA
VCLT	<i>Vienna Convention on the Law of Treaties</i>
WIMCO	West Indies Mercantile Corporation

## 2. DRAMATIS PERSONAE

(All descriptions listed in the right-hand column apply to the relevant time periods addressed in this Award)

Vladimir Bartl	Head of the Commercial and Economic Division of the Czech Embassy in Ottawa
Stanislav Benes	Commercial Counselor at Czech Embassy in Ottawa
Marie Benešová	Supreme State Prosecutor of the Czech Republic
Martin Boháček	Judge overseeing the bankruptcy proceedings of LZ, Regional Court in Brno
Karel Cermak	Minister of Justice of the Czech Republic
Lenka Chmelová	Prosecutor, Supreme Prosecutor's office
Zlatava Davidová	Trustee in bankruptcy for LET
Vojtech Filip	Vice-President of the Czech Republic Parliament
Miroslav Gregr	Previous Deputy Prime Minister and Minister of Industry and Trade of the Czech Republic
Zlata Gröningerová	Director in Chief of the CKA (Czech Consolidation Agency) and Chair of the Creditor's Committee for Moravan
Petr Hajtmar	Trustee in bankruptcy for MA
Ludmila Hanzlikova	Judge overseeing the bankruptcy proceedings of MA, Regional Court in Brno
Thomas Heath	Consultant hired to assist management of LZ with negotiations with Rolls Royce and BAE Systems
Josef Jarabica	Senior Director of Ministry of Industry and Trade of the Czech Republic
Jerry Jelenik	Chairman of the Czech Business Association of Canada and Honorary Consul of the Czech Republic in Calgary
Donald Jewitt	President of FPS
Patrik Joachimczyk	Vice-President and director of MA and LZ
Luis Konski	Counsel for MA and LZ in Stockholm Arbitration (Becker & Poliakoff)
Petr Kovanič	Vice-Chairman of the Regional Court in Brno
Ronald Kovar	Prosecutor, High Prosecutor's Office (Olomouc)

Yvona Legierska	Deputy Finance Minister of the Czech Republic
Curtis Leonard	General Counsel and Land Manager for ICA Energy Inc., engaged in joint venture with LZ and FPS to create and operate an LET aircraft support and service facility in Midland, Texas
Milan Matušik	Vice-President and aviation consultant to FPS
Petr Olbort	Lawyer for MA who participated in the drafting of the USA
Brett Olsen	Counsel for FPS in Canada (Ogilvie LLP, Olsen Law Office)
Josef Orbes	Representative of LEGES v.o.s., trustee in bankruptcy for Moravan
Bronislava Orbesová	Representative of LEGES v.o.s., trustee in bankruptcy for Moravan
Jirí Parkmann	Consul General for the Czech Republic in Canada
Jirí Poroubek	Prime Minister of the Czech Republic
Petr Petržilek	Representative of the Office of the Czech Government, Prime Minister's Expert Department
Jirí Rusnok	Minister of Industry and Trade of the Czech Republic
Vlasta Ruzickova	Notary who recorded the minutes of LZ General Meeting of 13 September 2002
Pavel Rychetsky	Vice-Secretary of the Czech Republic Government, Minister of Justice, and Chairperson of the Legislature
Adam Sanford	Former President of Omnivus International
Miroslav Sládek	Trustee in bankruptcy for LZ
Libor Soska	President and Chairman of the Board of Directors of MA and LZ
Václav Srba	Deputy Minister of Industry and Trade of the Czech Republic
Tomáš Štefánek	Vice-President of LZ and director of MA and LZ
Jaroslav Sup	Agent for FPS in the Czech Republic (Transfin International)
Pavel Svaty	Representative of the Ministry of Finance of the Czech Republic
Jitka Tutterova	Counsel for FPS in the Czech Republic
Vladan Vala	Legal advisor to Petr Hajtmar
Pavel Vosalik	Ambassador of the Czech Republic in Ottawa

### 3. PROCEDURAL HISTORY

1. Claimant in this arbitration is Frontier Petroleum Services Ltd. (hereinafter “Frontier”, “FPS”, “Claimant”, or “Investor”), a corporation incorporated under the laws of the Province of Alberta, Canada, with its place of business at 523-10333 Southport Road, S.W., Calgary, Alberta, T2W 3X6. Claimant is represented in this matter by Mr. David R. Haigh, QC and Ms. Louise Novinger Grant of Burnet, Duckworth & Palmer LLP, Barristers and Solicitors, 1400, 350-7<sup>th</sup> Avenue SW, Calgary, AB, T2P 3N9, Canada, and Mr. Todd Weiler, Barrister & Solicitor, #19 – 2014 Valleyrun Boulevard, London, ON, N6G 5N8, Canada.
2. Respondent in this arbitration is the Government of the Czech Republic (hereinafter “the Czech Republic” or “Respondent”). Respondent is represented in these proceedings by Ms. Karolína Horáková of Weil, Gotshal & Manges s.r.o., Charles Bridge Center, Křižovnické nám. 193/2, 110 00 Prague 1, Czech Republic (since 1 June 2009), and Mr. Zachary Douglas, Matrix Chambers, Gray’s Inn, 400 Chancery Lane, London, WC1R 5LN, United Kingdom. From at least 14 January 2008 until 4 May 2009, Respondent was represented by JUDr. Vladimír Balaš, CSc. of Rowan Legal s.r.o., GEMINI Center, Na Pankráci 1683/127, 140 00 Prague 4, Czech Republic. Mr. Radek Šnábel, Director of the International Law Department of the Ministry of Finance of the Czech Republic, Letenská 15, Prague 1, 118 10, Czech Republic was authorised to act on behalf of Respondent from February 2008 onwards, and did so in May 2009 as Respondent changed counsel.
3. By Notice of Arbitration dated 3 December 2007, Claimant commenced arbitration against Respondent pursuant to Article IX of the *Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments* dated 15 November 1990 (“BIT”)<sup>1</sup> which provides for arbitration under the UNCITRAL Arbitration Rules (“UNCITRAL Rules”).

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<sup>1</sup> *Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments*, dated 15 November 1990 (Exhibit R-0006).

4. In its Notice of Arbitration, Claimant appointed Henri C. Alvarez QC (of Fasken Martineau DuMoulin LLP, 2900-550 Burrard Street, Vancouver, BC, V6C 0A3) as the first arbitrator. By Notice of Appointment of Arbitrator: Communication of Other Important Facts Relating to Notice of Arbitration (“Notice of Appointment of Arbitrator”) dated 14 January 2008, Respondent appointed Professor Dr. Christoph H. Schreuer (of the University of Vienna and of Wolf Theiss, Schubertring 6, 1010, Vienna, Austria) as the second arbitrator. On 11 March 2008, the co-arbitrators appointed David A.R. Williams QC (of Bankside Chambers, Level 22, 88 Shortland Street, Auckland, New Zealand) as the Presiding Arbitrator of the Tribunal. On 26 September 2008, the Parties confirmed that the Tribunal had been validly constituted in accordance with the UNCITRAL Rules.
5. On 16 July 2008 and 1 August 2008, Claimant and Respondent respectively filed with the Tribunal lists of records on which they intended to rely. Respondent and Claimant respectively requested production of those records on 1 August 2008 and 6 August 2008.
6. On 22 July 2008, the Tribunal informed the Parties that Claimant’s Notice of Arbitration and Respondent’s Notice of Appointment of Arbitrator were sufficiently detailed as to obviate the need for a separate statement of claim and statement of defence.
7. On 14 August 2008, the Tribunal issued Procedural Order No. 1, in which it provided an initial procedural timetable for the arbitration, including a schedule for document production.
8. Between 22 August 2008 and 31 March 2009, the Parties engaged in document production. Disputes arose regarding the production of certain documents, which were determined by the Tribunal in Procedural Orders Nos. 2, 3, and 4 dated 16 October 2008, 16 December 2008, and 4 February 2009, respectively.
9. The Parties and the Tribunal executed Terms of Appointment dated 26 September 2008 in which they agreed that the Permanent Court of Arbitration (“PCA”) would be the administering institution for the arbitration. The Tribunal appointed Ms. Sarah Grimmer to act as Administrative Secretary, who was assisted by Ms. Heather Clark.

10. Between 18 December 2008 and 27 January 2009, the Parties and the Tribunal corresponded with respect to a revised procedural timetable.
11. On 13 May 2009, Respondent notified the Tribunal of the revocation of the power of attorney of JUDr. Vladimír Balaš, CSc. of Rowan Legal s.r.o. On 25 May 2009, Respondent provided a power of attorney in favour of Mr. Radek Šnáběl of the Ministry of Finance that was effective as of 7 February 2008.
12. On 16 May 2009, Claimant submitted its Memorial.
13. By letter dated 1 June 2009, Respondent filed notice of the appointment of new counsel and proposed modifications to the procedural timetable. By letter dated 5 June 2009, the Tribunal indicated that the scheduled hearing dates would be maintained. In response, Claimant proposed a procedural timetable which was accepted by Respondent on 10 June 2009.
14. On 20 July 2009, Respondent submitted its Counter-Memorial, in which it raised objections to the jurisdiction of the Tribunal.
15. On 7 August 2009, the Tribunal issued Procedural Order No. 5 in which it joined Respondent's jurisdictional objection to the merits, to be determined in the Tribunal's final award, and requested that Claimant address Respondent's jurisdictional objections in its Reply Memorial.
16. On 14 August 2009, Claimant submitted its Reply Memorial.
17. On 8 September 2009, Respondent submitted its Rejoinder Memorial.
18. By letters dated 14 September 2009, the Parties exchanged lists of witnesses.
19. By letters dated 18 September 2009, each Party notified the Tribunal of the witnesses and experts it requested to attend the hearing for cross-examination.
20. On 25 September 2009, the Parties filed Pre-Hearing Memorials.

21. From 5 to 8 October 2009, the hearing was held at the Peace Palace in The Hague. Claimant cross-examined Ms. Zlata Gröningerová, Mr. Milan Hulmák, and Mr. Joseph Kotrba. Respondent cross-examined Mr. Donald Jewitt and Mr. Adam Sanford. Respondent had indicated that it wished to cross-examine Mr. Jaroslav Sup but he was unable to attend the hearings for medical reasons. Claimant provided a medical certificate to the Tribunal.
22. On 11 November 2009 and 8 December 2009, Claimant and Respondent submitted their respective Post-Hearing Memorials, including their submissions on costs.
23. On 23 December 2009, Claimant submitted its Reply to Respondent's Post-Hearing Memorial.
24. On 2 March 2010, Respondent supplemented its submissions on costs to include costs incurred after 30 October 2007.
25. The Tribunal held in-person deliberations on 14 and 15 March 2010 and thereafter deliberated in writing.

#### **4. INTRODUCTION TO THE DISPUTE**

26. According to Claimant, it made a significant investment in the aviation industry in the Czech Republic in 2000 through a joint venture to manufacture aircraft with Moravan-Aeroplanes, a.s. ("MA"), a corporation incorporated under the laws of the Czech Republic. On 8 August 2001, Claimant and MA entered into the "Unanimous Shareholder Agreement" ("USA"), under which Claimant financed the purchase by MA of the assets of LET, a.s. ("LET"), a recently bankrupt state-owned Czech aircraft manufacturing company. Under the USA, MA was to acquire the LET Assets and then transfer them, along with other assets of MA, to Letecké Závody a.s. ("LZ"), a company formed for the purpose of the joint venture project. LZ would then issue 49% of its shares to Claimant and assume MA's debt to Claimant.
27. Following alleged breaches of the USA by MA, Claimant sought the assistance of various officials in the Czech government and initiated criminal proceedings against members of

the board of directors of MA and LZ in November 2002. Claimant also initiated civil proceedings to intervene with certain corporate acts by LZ and MA and to protect its investment in ongoing bankruptcy proceedings in respect to MA and LZ in late 2002. In 2003, Claimant commenced arbitration in Stockholm against LZ and MA, obtaining an interim and final award in its favour. According to Claimant, the Czech courts wrongfully failed to recognise and enforce either award. Meanwhile, the LET Assets were sold off under bankruptcy proceedings with respect to MA and LZ.

28. Claimant asserts that its investment in the Czech Republic was mistreated as a result of inaction of the Czech courts and officials, malfeasance by Czech bankruptcy trustees, and through the manifest inadequacy of the legal system of the Czech Republic with respect to the recognition of arbitral awards. For these reasons, Claimant argues that the Czech Republic is in breach of its obligations under the BIT to “encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory” (Article II(1) BIT), and accord fair and equitable treatment and provide full protection and security to Claimant’s investment (Article III(1) BIT). Claimant argues that even if its transaction was flawed, it was nonetheless entitled to call upon the Czech state to protect its investment and access the remedies available under domestic law, the BIT, and customary international law.
29. Respondent disputes Claimant’s claims and emphasises that Claimant voluntarily entered into the risky joint venture project without performing proper due diligence on MA, its parent company Moravan, or its owner (all of which Respondent asserts were already technically insolvent), or securing operational capital that was necessary to run the business. In addition, under the USA, Respondent observes that Claimant was only ever to acquire a minority stake in LZ, and thus Claimant would never have enjoyed control over LZ or MA, and as an unsecured creditor, it was always exposed to the risk of their insolvencies. As it so happened, although Claimant obtained favourable awards in the Stockholm Arbitration, it was not able to enforce them against MA and LZ because the two companies were placed into bankruptcy. Respondent argues that the Czech courts were justified in refusing to enforce the Final Award of the Stockholm Arbitration because LZ and MA had been declared bankrupt before the Stockholm Tribunal rendered the Final Award, and that no state would allow a creditor to register a security interest over the assets of a debtor once it is the subject of bankruptcy proceedings.

30. Respondent submits that Claimant cannot now seek to have the Czech Republic indemnify the consequences of Claimant's poor business decisions. Respondent argues that Claimant negligently assumed extreme financial risks in relation to its decision to attempt to produce aircraft at the LET factory and in the structuring of its investment, including by recklessly failing to secure for itself any standard legal protections in the joint venture agreement as a result of which it lost that investment. Respondent asserts that the obligations of the Czech Republic under the BIT do not include guaranteeing the contractual obligations or financial viability of private parties.
31. Finally, Respondent insists that Claimant cannot show loss as a result of the Czech Republic's acts or omissions.

## **5. FACTUAL BACKGROUND TO THE DISPUTE**

32. What follows is a chronological summary of certain facts, some of which are disputed, that are relevant to this dispute without prejudice to the full factual record in this case that the Tribunal has considered.
33. LET and Moravan a.s. ("Moravan") were both state-owned companies involved in the manufacture of aircraft in the Czech Republic.<sup>2</sup> Moravan was the parent company of MA.<sup>3</sup>
34. In 1994, LET produced 40 L-410 aircraft for delivery to a customer in the former USSR. The customer never paid for 35 of the 40 aircraft and as the production of these aircraft had been financed with bank loans, LET went into bankruptcy and was eventually privatised. Several successive managements of LET were unable to find customers for the unsold stock during the ensuing seven years.<sup>4</sup>

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<sup>2</sup> Claimant's Memorial, ¶5; Claimant's Pre-Hearing Memorial, ¶16; Claimant's Post-Hearing Memorial, ¶16.

<sup>3</sup> Claimant's Post-Hearing Memorial, ¶14. Claimant asserts that, subject to certain possible fraudulent filings with the Commercial Register in 2003, Moravan was the sole shareholder of MA. *Infra*, ¶103.

<sup>4</sup> Respondent's Counter-Memorial, ¶¶38-39; Respondent's Post-Hearing Memorial, ¶16; Prime Minister's response to questions in parliament of the Czech Republic, dated 6 January 1994 (Exhibit R-0004), p. 3; Extract from LET, a.s. entry in Commercial Register (Exhibit R-0005).

35. On 16 July 1996, LET agreed with its creditors on a bankruptcy settlement. This settlement was guaranteed by Komerční banka, a then state-owned bank and large creditor of LET. LET emerged from its first bankruptcy partially financially restructured, with its debt reduced from more than CZK 5.4 billion to some CZK 2 billion.<sup>5</sup>
36. On 17 March 1998, LET entered into an agreement with a strategic investor, Ayres Corporation (“Ayres”), a small US corporation, for the production of a small cargo aircraft.<sup>6</sup> Claimant alleges that under this agreement, Ayres had to assume significant debt encumbering the LET Assets.<sup>7</sup>
37. According to Respondent, the aircraft was ultimately never manufactured and the business relationship between LET and Ayres never produced the results intended by their agreement. LET was declared bankrupt for a second time on 24 October 2000. The investment by Ayres represented the only strategic investment in LET between its privatisation and bankruptcy.<sup>8</sup>
38. On 25 May 2000, Donald Jewitt (“Jewitt”), President of FPS,<sup>9</sup> entered into a Memorandum of Understanding with MA, regarding the possible commercialisation of the Finist aircraft, a Russian-designed utility aircraft. At that time, Mr. Libor Soska (“Soska”) was the President and Chairman of the Board of Directors of MA. In its first year of operation, Claimant asserts that this project appeared to proceed well. A formal partnership agreement

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<sup>5</sup> Respondent’s Counter-Memorial, ¶40; Extract from LET, a.s. entry in Commercial Register (Exhibit R-0005).

<sup>6</sup> Respondent’s Counter-Memorial, ¶¶41-43; Extract from Ayres Corporation Entry in Commercial Register (Exhibit R-0007); Description of Ayres Corporation at [www.wikipedia.org](http://www.wikipedia.org) (Exhibit R-0008); Description of Ayres Loadmaster 200 at [www.forecastinternational.com](http://www.forecastinternational.com) (Exhibit R-0009); Article on sale of state share of LET Kunovice to Ayres Corporation at <http://carolina.cuni.cz> (Exhibit R-0010); Description of LET and LZ at <http://svici.sweb.cz> (Exhibit R-0011); Agreement entered into between Komerční banka a.s. and LET a.s., dated 28 May 1998 (Exhibit R-0012).

<sup>7</sup> Claimant’s Post-Hearing Memorial, ¶17; Article on sale of state share of LET Kunovice to Ayres Corporation at <http://carolina.cuni.cz> (Exhibit R-0010).

<sup>8</sup> Respondent’s Counter-Memorial, ¶¶44-45.

<sup>9</sup> Jewitt founded FPS in 1974 as an oilfield services company. Over the last 20 years or so, FPS served as an investment vehicle for Jewitt’s business interests. Claimant’s Post-Hearing Memorial, ¶12; Jewitt Witness Statement, ¶10.

was executed between FPS, Milan Matušik (“Matušik”) and MA on 9 February 2001.<sup>10</sup> Matušik is the Vice-President of and aviation consultant to FPS.<sup>11</sup>

39. On 20 July 2000, pursuant to a written agreement dated 18 July 2000, Claimant advanced USD 200,000 to MA for the purchase of an SM-92 Finist aircraft and to partially fund design royalties to be paid to TechnoAvia, a Russian company that owned the rights to the SM-92 Finist Aircraft.<sup>12</sup> A license agreement effective 28 September 2000 for the manufacture of Finist aircraft was executed between MA, as agent and trustee for Claimant, and TechnoAvia.<sup>13</sup>
40. On 4 December 2000, Claimant advanced a further USD 100,000 to MA.<sup>14</sup>
41. It was against this background that Claimant and Matušik considered expanding their business relationship with Soska, specifically by purchasing the LET Assets.<sup>15</sup>
42. Claimant asserts that as part of its due diligence, it considered the legal and political context of investing in the Czech Republic through attendance at meetings with representatives of the Czech government, and reviews of websites and materials directly and indirectly maintained by the Czech Republic, noting that the Czech government was boasting a safe, modern, transparent, and predictable investment climate including a robust arbitration regime.<sup>16</sup> Claimant also asserts that it analysed all available information about the LET

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<sup>10</sup> Notice of Arbitration, ¶4; Claimant’s Memorial, ¶5; Claimant’s Post-Hearing Memorial, ¶16; Jewitt Witness Statement, ¶¶18-22; Memorandum of Understanding between MA and Jewitt, dated 25 May 2000 (Exhibit C-0003); Letter agreement between MA and FPS, dated 18 July 2000 (Exhibit C-0004); License agreement between MA and TechnoAvia, dated 28 September 2000 (Exhibit C-0005); Joint Venture Agreement between MA, FPS and Milan Aviation, dated 9 February 2001 (Exhibit C-0008). This joint venture was referred to as the “Rhino Project”.

<sup>11</sup> Affidavit of Matušik for Stockholm Arbitration, dated 27 October 2003 (Exhibit C-0192), ¶1.

<sup>12</sup> Letter agreement between MA and FPS, dated 18 July 2000 (Exhibit C-0004); Letter from TD Private Client Group to FPS confirming wire transfers, dated 23 October 2002 (Exhibit C-0039).

<sup>13</sup> Jewitt Witness Statement, ¶19; License agreement between MA and TechnoAvia, dated 28 September 2000 (Exhibit C-0005).

<sup>14</sup> Letter from TD Private Client Group to FPS confirming wire transfers, dated 23 October 2002 (Exhibit C-0039).

<sup>15</sup> Jewitt Witness Statement, ¶22.

<sup>16</sup> Claimant’s Memorial, ¶¶4, 21-22; Claimant’s Pre-Hearing Memorial, ¶¶15, 56-57; Description of CzechInvest Investment and Business Development Agency (Exhibit C-0001); Document entitled “Doing Business in the Czech Republic” (Exhibit C-0049).

Assets, publicly available studies of the utility aircraft market, and income projections for what was to become LZ.<sup>17</sup>

43. In late 2000, LET was declared bankrupt.<sup>18</sup>
44. According to Claimant, in early 2001, Soska indicated to Claimant that MA had the opportunity to get involved in other projects with leading European aircraft manufacturers and suggested the acquisition of the LET facility by MA and Claimant in a joint venture to operate as LZ in order to expand the manufacturing capacity of MA.<sup>19</sup>
45. On 21 May 2001, Jewitt and Matušik visited LET and viewed the unsold stock of the L-410 aircraft. At that time, new aircraft production at LET had been practically non-existent for seven years.<sup>20</sup>
46. A Memorandum of Information dated March 2001 prepared by the bankruptcy trustee of LET in connection with the sale of LET identified the risk of inadequate operating capital.<sup>21</sup>
47. While investigating the potential purchase of the LET Assets, Claimant was allegedly informed that, in the course of Soska's negotiations with JUDr. Zlatava Davidová ("Davidová"), the bankruptcy trustee of LET, she had indicated that a much reduced price for the LET Assets was available on the understanding that LET would be dedicated to the revival of the Czech aircraft manufacturing industry, and on the condition that those assets would be controlled at least 51% by Czech nationals or a Czech entity because of the political importance of the aircraft industry. This reduced price would be the result of the

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<sup>17</sup> Jewitt Witness Statement, ¶30; Affidavit of Matušik for Stockholm Arbitration, dated 30 August 2004 (Exhibit C-0226), ¶15.

<sup>18</sup> Notice of Arbitration, ¶5.

<sup>19</sup> Notice of Arbitration, ¶¶5-6.

<sup>20</sup> Respondent's Counter-Memorial, ¶45; Jewitt Witness Statement, ¶26; Affidavit of Matušik for Stockholm Arbitration, dated 30 August 2004 (Exhibit C-0226); Transcript of hearing held on 30 and 31 August 2004 in Stockholm Arbitration (Exhibit C-0228), pp. 104, 107.

<sup>21</sup> Respondent's Counter-Memorial, ¶47. "Necessity of securing greater working capital: To set sales in motion, the company must resolve not only the lack of working capital but propose an offer of financial services to customers [...]. Financial capital is required for continuous deliveries of spare parts to customers and to service centers". Affidavit of Davidová for Stockholm Arbitration, dated 27 August 2004, (Exhibit C-0225), p. 57.

Czech Consolidation Agency (“CKA”) writing off the significant debt encumbering the LET Assets.<sup>22</sup> The CKA is a state-run agency whose mandate is to acquire and dispose of the assets of failed companies in which the state had a significant interest.<sup>23</sup>

48. On 18 April 2001, Claimant made the first of four payments for the financing of the purchase of the LET Assets, to MA, in the amount of USD 1,000,000.<sup>24</sup>
49. On 18 June 2001, Claimant made the second of four payments for the financing of the purchase of the LET Assets, to MA, in the amount of CDN 2,000,000.<sup>25</sup>
50. On 9 and 28 July 2001, several creditors filed petitions for the bankruptcy of Moravan. Moravan had defaulted on bank debt in excess of CZK 1 billion. The group behind MA had also allegedly been involved in a long dispute over unpaid debts with its financing banks.<sup>26</sup>
51. On 25 July 2001, a creditor of MA, Tora Group, filed a petition for the bankruptcy of MA (“Tora Group Petition”).<sup>27</sup> On 14 August 2002, the Regional Court rejected the Tora Group Petition. Following an appeal, the rejection of the Tora Group Petition was repealed on 5

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<sup>22</sup> Claimant’s Pre-Hearing Memorial, ¶¶17, 55; Claimant’s Post-Hearing Memorial, ¶17; Jewitt Witness Statement, ¶29.

<sup>23</sup> Jewitt Witness Statement, ¶29. Jewitt notes that the CKA had a similar mandate to the Consolidation Bank (KOB), which was a state-run agency that acquired and then disposed of assets of failed companies in which the state had a significant interest.

<sup>24</sup> Claimant’s Pre-Hearing Memorial, ¶33; Letter from TD Private Client Group to FPS confirming wire transfers, dated 23 October 2002 (Exhibit C-0039).

<sup>25</sup> Claimant’s Pre-Hearing Memorial, ¶33; Letter from TD Private Client Group to FPS confirming wire transfers, dated 23 October 2002 (Exhibit C-0039).

<sup>26</sup> Claimant’s Pre-Hearing Memorial, ¶93; Claimant’s Post-Hearing Memorial, ¶43; Respondent’s Counter-Memorial, ¶¶48, 56; Letter from MA’s Lawyer to Matušík, dated 5 August 2001 (Exhibit C-0016); Article on dispute between Moravan Otrokovice and IPB in *Hospodařské noviny*, dated 30 September 1999 (Exhibit R-0022); Resolution of Regional Court in Brno, dated 21 August 2002 (Exhibit R-0023), p. 2; Article in *Idnes* on Moravan Bankruptcy and Relation to CSOB, dated 14 August 2001 (Exhibit R-0024); Article in *Radiožurnál* on litigation between Moravan and CSOB, dated 16 August 2001 (Exhibit R-0134); Table outlining key events in adjudication of bankruptcies of Moravan, MA and LZ (Exhibit R-0159). Claimant notes that the first petition for the declaration of bankruptcy against Moravan was brought by the CSOB on 9 July 2001.

<sup>27</sup> Petition for bankruptcy of MA filed by Tora Group, dated 14 August 2001 (Exhibit R-0026).

February 2004 because multiple creditors had filed for the bankruptcy of MA in the interim and the evidence indicated that MA was bankrupt.<sup>28</sup>

52. On 1 August 2001, LZ was registered with the Commercial Register of the Regional Court in Brno (“Commercial Register”, “Regional Court”)<sup>29</sup> as a wholly owned subsidiary of MA.<sup>30</sup>
53. On 8 August 2001, Claimant and MA entered into the USA<sup>31</sup> under which, Claimant states, MA agreed to acquire the LET Assets and transfer them, along with other assets of MA, to LZ, and LZ would then issue 49% of its shares to Claimant and assume MA’s debt to Claimant. The loan from Claimant to LZ of CZK 203,000,000 was secured by a promissory note annexed to the USA (“Promissory Note”) and a covenant that the loan was to be a first secured charge against the assets of MA and LZ.<sup>32</sup> Claimant asserts that it was induced to enter into the USA on the basis of the success of its original engagement with MA.<sup>33</sup> Prior to 8 August 2001, a representative of MA allegedly advised Claimant that Moravan was unable to repay its bank debt and was involved in a dispute with its financing banks.<sup>34</sup>
54. On 9 August 2001, Claimant made the third of four payments for the financing of the purchase of the LET Assets, to MA, in the amount of CZK 35,000,000.<sup>35</sup>

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<sup>28</sup> Claimant’s Reply Memorial, ¶85; Claimant’s Pre-Hearing Memorial, ¶¶8, 93; Respondent’s Counter-Memorial, ¶¶58-59, 104; Respondent’s Pre-Hearing Memorial, ¶24; Decision of Regional Court declaring bankruptcy of MA, dated 18 June 2004 (Exhibit C-0089); Petition for bankruptcy of MA filed by Tora Group, dated 14 August 2001 (Exhibit R-0026).

<sup>29</sup> The Commercial Register has also been referred to as the “Corporate Registry” (e.g. Claimant’s Notice of Arbitration, ¶16) and “Commercial Registry” (e.g. Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶8).

<sup>30</sup> Notice of Arbitration, ¶16.

<sup>31</sup> Unanimous Shareholder Agreement between FPS and MA, dated 31 July 2001 (Exhibit C-0015).

<sup>32</sup> Notice of Arbitration, ¶16; Claimant’s Memorial, ¶¶5-6; Claimant’s Pre-Hearing Memorial, ¶18.

<sup>33</sup> Claimant’s Post-Hearing Memorial, ¶16.

<sup>34</sup> Respondent’s Counter-Memorial, ¶56; Respondent’s Pre-Hearing Memorial, ¶19; Letter from MA’s Lawyer to Matušik, dated 5 August 2001 (Exhibit C-0016).

<sup>35</sup> Claimant’s Pre-Hearing Memorial, ¶33; Letter from TD Private Client Group to FPS confirming wire transfers, dated 23 October 2002 (Exhibit C-0039).

55. Claimant and Soska also agreed, aside from the USA, that Moravan would secure the payment of taxes and other expenses incurred in the transfer of the LET Assets, which were expected to exceed CZK 100,000,000 and potentially reach an amount equivalent to the selling price of the LET Assets.<sup>36</sup> The amount of transfer tax due on the real property was assessed at CZK 61,000,000, which was approximately 2.5 times MA's profit in 2000.<sup>37</sup>
56. On 14 August 2001, Claimant made the fourth and final payment for the financing of the purchase of the LET Assets, to Davidová, in the amount of CZK 80,000,000.<sup>38</sup>
57. On 15 August 2001, MA and Davidová entered into two purchase and sale contracts for the production assets of LET and the tangible assets of Turbolet, s.r.o. (a LET subsidiary), and a contract for the transfer of aircraft type certificates.<sup>39</sup>
58. It is uncontested that at the time the loan was disbursed by Claimant, its security interest over the movable and immovable assets of MA and over the LET Assets (after they were acquired) was not perfected.<sup>40</sup> According to Claimant, between mid-2001 (prior to execution of the USA) and early 2002, it made repeated requests to MA for a listing of the LET Assets in order to register its security interest, all of which were deflected by representatives of MA.<sup>41</sup> Mrs. Zlata Gröningerová ("Gröningerová"), Director in Chief of

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<sup>36</sup> Letter from Štefánek to Matušík regarding delivery of funds for acquisition of LET Assets, dated 17 July 2001 (Exhibit C-0014).

<sup>37</sup> Respondent's Counter-Memorial, ¶57; 1999 and 2000 economic results for companies in Moravan Group (Exhibit R-0025), p. 3. Respondent notes that in 2000, MA's best year on record, its profit was CZK 25,000,000. Respondent also notes that the basis for the tax was 5% of the higher of the transfer price or the value as appraised pursuant to Czech law. *See Act No. 357/1992 Coll. on Inheritance Tax, Gift Tax and Real Estate Transfer Tax* (Exhibit R-0135), s. 10, 15.

<sup>38</sup> Claimant's Pre-Hearing Memorial, ¶33.

<sup>39</sup> Notice of Arbitration, ¶19; Letter from Davidová to MA regarding tender for sale of LET Assets, dated 17 July 2001 (Exhibit C-0013); Contract between Davidová and MA for sale of LET Assets, dated 15 August 2001 (Exhibit C-0021); Agreement between Turbolet s.r.o. and MA for sale of assets of Turbolet, s.r.o. (in liquidation), dated 15 August 2001 (Exhibit C-0022); Contract between Davidová and MA for sale of aircraft type certificates, dated 15 August 2001 (Exhibit C-0023).

<sup>40</sup> Respondent's Counter-Memorial, ¶53; Final Award, dated 30 December 2004 (Exhibit C-0094), ¶5.7.7.; Affidavit of Matušík for Stockholm Arbitration, dated 27 October 2003 (Exhibit C-0192), p. 3 (¶¶12, 13), p. 78.

<sup>41</sup> Jewitt Witness Statement, ¶41.

the CKA, acknowledged that the problems associated with gaining control of the LET Assets were anticipated.<sup>42</sup>

59. After acquiring the LET Assets, MA failed to transfer all of the LET Assets to LZ, failed to transfer 49% of the shares of LZ to Claimant, and failed to provide a listing of the LET Assets and where they were located. Claimant alleges that both MA and LZ, controlled by Soska, immediately commenced a covert and unauthorised liquidation of the LET Assets.<sup>43</sup>
60. Soon after the closing of the purchase of the LET Assets, Claimant began to have concerns about the intentions of MA and its principals to fulfil the obligations to FPS under the USA because MA began sending allegedly nonsensical financial and technical data to Claimant.<sup>44</sup>
61. In mid-October 2001 at a Czech government-sponsored reception in Calgary, Claimant met with Mr. Jirí Parkmann (“Parkmann”), Consul General for the Czech Republic in Canada, and Mr. Jerry Jelinek (“Jelinek”), Czech Honorary Consul in Calgary, Alberta. Parkmann and Claimant discussed Claimant’s project and Parkmann provided information on the Czech government, business environment, and tax system.<sup>45</sup>
62. On 22 October 2001, a general meeting of LZ was held. At this meeting, Soska was declared president of the LZ Board of Directors and authorised the issuance of 309 new shares at a value of CZK 1,000,000 each. Claimant learned of this meeting in September 2002.<sup>46</sup>

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<sup>42</sup> Claimant’s Post-Hearing Memorial, ¶38, Transcript of Hearing on the Merits (7 October 2009), 325:21-326:8.

<sup>43</sup> Claimant’s Memorial, ¶7; Claimant’s Pre-Hearing Memorial, ¶19; Claimant’s Post-Hearing Memorial, ¶20.

<sup>44</sup> Notice of Arbitration, ¶20.

<sup>45</sup> Notice of Arbitration, ¶11(b); Jewitt Witness Statement, ¶45.

<sup>46</sup> Notice of Arbitration, ¶26.

63. Respondent alleges that the bankruptcy trustee of MA later invalidated the October 2001 contribution of assets by MA into the capital of LZ pursuant to the USA on the basis of the effective date of bankruptcy of MA of 14 August 2001.<sup>47</sup>
64. On 6 December 2001, Claimant made a further payment to MA, in the amount of CZK 3,712,296.<sup>48</sup>
65. From late 2001 to June 2002, Claimant developed plans for the establishment of a support and service facility for L-410 aircraft in Midland, Texas (the “Midland Facility”).<sup>49</sup>
66. In January 2002, Claimant developed further concerns when it was informed by Thomas Heath (“Heath”), a pilot and marketing consultant that had been hired to assist the management of LZ with negotiations with Rolls Royce and BAE Systems, that discussions between LZ and prospective customers had only been at a high level of abstraction without any discussion of the manufacturing and financial specifics necessary to conclude a contract for work.<sup>50</sup>
67. On 25 February 2002, Claimant conducted meetings with representatives of Rolls Royce and BAE Systems to discuss business opportunities, such as the manufacture of engine parts for Rolls Royce by LZ.<sup>51</sup>
68. On 27 February 2002, Soska was declared personally bankrupt by Resolution of the Regional Court in Brno. He appealed the declaration on 14 March 2002 and it was annulled by the High Court in Olomouc on 24 May 2004.<sup>52</sup> Claimant learned of Soska’s

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<sup>47</sup> Respondent’s Counter-Memorial, ¶¶59, 104; Respondent’s Rejoinder, ¶118.

<sup>48</sup> Letter from TD Private Client Group to FPS confirming wire transfers, dated 23 October 2002 (Exhibit C-0039).

<sup>49</sup> Jewitt Witness Statement, ¶¶49-55. Claimant notes that these arrangements called for the delivery of USD 1,500,000 worth of spare parts, and use of those parts to service an estimated 200 L-410s, which had not been properly serviced or certified for airworthiness in over 10 years due to the lack of access to qualified service centers in the Americas. Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶29.

<sup>50</sup> Jewitt Witness Statement, ¶46.

<sup>51</sup> Jewitt Witness Statement, ¶47.

<sup>52</sup> Respondent’s Counter-Memorial, ¶144; Resolution of High Court in Olomouc, dated 24 May 2004 (Exhibit R-0082)

bankruptcy in March 2002 and alleges that Soska informed Claimant in June 2002 that the bankruptcy proceedings had been nullified.<sup>53</sup>

69. In April 2002, Soska sent certificates for purported post-dated non-registered bearer shares for 49% of LZ's issued shares for a total face value of CZK 151,000,000 to Claimant.<sup>54</sup>
70. On 12 June 2002, Soska refused to sign agreements with North American partners that would permit the plans for the Midland Facility to proceed. Claimant asserts that the plans thereby came to a halt.<sup>55</sup>
71. In July 2002, Jewitt discovered that the share certificates he received from Soska were not authentic.<sup>56</sup>
72. By July 2002, the relationship between Soska and Jewitt had broken down completely.<sup>57</sup> Respondent contends that following the end of this relationship, LZ did not have a source of funding for its business.<sup>58</sup>
73. In July 2002, Matušík travelled to the Czech Republic with a representative of a financing company to introduce him to LZ's business and to continue discussions regarding the Midland Facility.<sup>59</sup>
74. Also in July 2002, Mr. Brett Olsen ("Olsen"), counsel for Claimant in Canada, contacted Parkmann to relay concerns Claimant held with respect to Soska and LZ. Parkmann agreed

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<sup>53</sup> Jewitt Witness Statement, ¶48; Notice of Arbitration, ¶21.

<sup>54</sup> Jewitt Witness Statement, ¶43; Notice of Arbitration, ¶20; Claimant's Reply Memorial, ¶97; Claimant's Reply to Respondent's Post-Hearing Memorial, ¶42; Copies of post-dated Letecké Závody a.s. bearer share certificates, dated 18 December 2002 (Exhibit C-0047).

<sup>55</sup> Jewitt Witness Statement, ¶54.

<sup>56</sup> Respondent's Post-Hearing Memorial, ¶44; Transcript of Hearing on the Merits (6 October 2009), 196:20-21.

<sup>57</sup> Respondent's Post-Hearing Memorial, ¶¶4-5; Transcript of Hearing on the Merits (6 October 2009), 232:6-19; Transcript of hearing held on 8 and 9 January 2004 in Stockholm Arbitration (Exhibit C-0207), p. 283.

<sup>58</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶29; Respondent's Post-Hearing Memorial, ¶7.

<sup>59</sup> Notice of Arbitration, ¶21; Jewitt Witness Statement, ¶61.

to report those concerns to the Minister of Industry and Trade of the Czech Republic.<sup>60</sup> Claimant asserts that it had been assured by Parkmann and Jelinek that the aviation industry was very important to the Czech Republic and therefore that government officials were likely to assist Claimant to protect its investments.<sup>61</sup>

75. On 9 July 2002, Claimant also wrote directly to Doc. Ing. Miroslav Gregr, Deputy Prime Minister and Minister of Industry and Trade to request a personal meeting. Following a change in government, on 26 July 2002, Claimant wrote to Mr. Jiří Rusnok (“Rusnok”), the new Minister of Industry and Trade to again request a personal meeting.<sup>62</sup>
76. By letters dated 26 July 2002 and 8 August 2002, the Deputy Minister of Industry and Trade, Václav Srba (“Srba”), indicated to Claimant that while the Czech government was not a party to the dispute between Soska (as owner of Moravan) and Československá obchodní banka, a.s. (“CSOB”), a transfer of receivables related to Moravan was currently in progress from CSOB to the [CKA] and, once that transfer was complete, the state “will have a possibility to enter into negotiations with [Soska] from its position as creditor”.<sup>63</sup>

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<sup>60</sup> Notice of Arbitration ¶21; Claimant’s Post-Hearing Memorial, ¶21; Jewitt Witness Statement, ¶57.

<sup>61</sup> Claimant’s Post-Hearing Memorial, ¶21; Jewitt Witness Statement, ¶56.

<sup>62</sup> Notice of Arbitration ¶21; Claimant’s Post-Hearing Memorial, ¶22; Jewitt Witness Statement, ¶57; Letter from Olsen to Doc. Ing. Miroslav Gregr, Minister for Industry and Trade, dated 9 July 2002 (Exhibit C-0029); Letter from Olsen to Rusnok, dated 26 July 2002 (Exhibit C-0030).

<sup>63</sup> Claimant’s Post-Hearing Memorial, ¶23; Letter from Srba to Olsen, dated 26 July 2002 (Exhibit C-0031), which provides in relevant part:

Referring to your request concerning a personal discussion with the Ministry of Industry and Trade about the situation of your clients from the company FPS Ltd. in the Czech companies Moravan, a.s., and Letecké závody, I let you know the following:

The Ministry of Industry and Trade is not a party in the dispute that exists between the principal owner of Moravan Ing. Soska and the Czechoslovak Commercial Bank, and in view of the fact that it is a case of private subjects, the Ministry has no possibility to intervene in it. At present, a transfer of receivables related to the company Moravan a.s., from the Czechoslovak Commercial Bank to the Czech Consolidation Agency takes place, and this transfer having been finished, the State will have a possibility to enter into negotiations with Ing. Soska from its position of a creditor. We suppose that the solutions will be found allowing investments of your clients to serve further on the original purpose, as mentioned in your letter. (emphasis added)

Letter from Srba to Olsen, dated 8 August 2002 (Exhibit C-0032), which provides in relevant part::

in addition to my letter of July 24, 2002 I informed you about the present relation of the Ministry of Industry and Trade to the points at issue regarding the Moravan a.s. and Letecké závody a.s. companies described in your above mentioned letter. From your letter of July 26, 2002 I learned that you have not received it yet.

The CKA acquired the receivable against Moravan from CSOB in July 2002. Srba also informed Claimant that he had been entrusted by Rusnok to arrange for the direct negotiation of the transfer of the debt to the CKA and had charged the Senior Director of the Ministry Ing. Josef Jarabica (“Jarabica”) to meet with Claimant.<sup>64</sup>

77. From approximately the second half of 2002 onwards, LZ began to default on its debts and its creditors began to file court enforcement orders; thirteen orders for attachment between 26 August 2002 and 23 November 2003, ranging in value from CZK 14,490 to CZK 3,600,000 were issued.<sup>65</sup>
78. On 21 August 2002, Moravan was declared bankrupt and the CKA was identified as its largest creditor.<sup>66</sup>

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With respect to the new facts concerning the debts transfer to the Czech Consolidation Agency and in order to meet your request I was entrusted by the Minister for Industry and Trade Mr. Jiří Rusnok to arrange their direct negotiation. Consequently, I would like to inform you that I have charged the Senior Director of our Ministry Ing. Josef Jarabica to meet your clients in this matter.

<sup>64</sup> Respondent’s Rejoinder Memorial, ¶¶128-130; Gröningerová Witness Statement, ¶4; Letter from Srba to Olsen, dated 8 August 2002 (Exhibit C-0032).

<sup>65</sup> Respondent’s Counter-Memorial, ¶63; Resolution of Regional Court, dated 30 March 2004 (Exhibit R-0027); Resolution of the District Court in Uherské Hradiště, dated 26 August 2002 (Exhibit R-0028); Resolution of the District Court in Uherské Hradiště, dated 10 December 2002 (Exhibit R-0029); Resolution of the District Court in Uherské Hradiště, dated 11 December 2002 (Exhibit R-0030); Resolution of the District Court in Uherské Hradiště, dated 13 November 2002 (Exhibit R-0031); Resolution of the District Court in Uherské Hradiště, dated 14 May 2003 (Exhibit R-0032); Resolution of the District Court in Uherské Hradiště, dated 27 May 2003 (Exhibit R-0033); Resolution of the District Court in Uherské Hradiště, dated 11 June 2003 (Exhibit R-0034); Resolution of the District Court in Uherské Hradiště, dated 11 July 2003 (Exhibit R-0035); Resolution of the District Court in Uherské Hradiště, dated 7 August 2003 (Exhibit R-0036); Resolution of the District Court in Uherské Hradiště, dated 10 October 2003 (Exhibit R-0037); Resolution of the District Court in Uherské Hradiště, dated 14 October 2003 (Exhibit R-0038); Resolution of the District Court in Uherské Hradiště, dated 18 November 2003 (Exhibit R-0039); Resolution of the District Court in Uherské Hradiště, dated 25 November 2003 (Exhibit R-0040).

<sup>66</sup> Claimant’s Memorial, ¶25; Claimant’s Pre-Hearing Memorial, ¶93; Claimant’s Post-Hearing Memorial, ¶43; Notice of Appointment of Arbitrator, Ad. 29. Claimant notes that the appeal of this decision was not determined until 8 March 2005. The CKA was the largest single creditor of Moravan because it had, acting on behalf of the Ministry of Finance, taken over certain receivables against Moravan from the CSOB under the Agreement and State Guarantee concluded between the Czech Republic and CSOB on 19 June 2000 and on the basis of certain assignment agreements. Claimant’s Post-Hearing Memorial, ¶27; Gröningerová Witness Statement, ¶¶4-5; Jewitt Witness Statement, ¶8.

79. On 21 August 2002, Claimant had its first of several meetings with Jarabica.<sup>67</sup> At this meeting, Claimant informed Jarabica of the events to date, including the fact that Soska had been petitioned into personal bankruptcy on 27 February 2002 and was therefore not entitled, as Claimant understood it, to hold office or be a director of any company in the Czech Republic. Jarabica allegedly (i) assured Claimant that he would speak to the Minister of Industry and Trade and the Minister of Justice with a view to finding a solution to Claimant's problems and that the Czech government would do all that it could to support Claimant in its future business activities; and (ii) expressed the importance of Claimant having met with him, and the ongoing interest of the Czech government in encouraging Claimant in the revival of the Czech aircraft industry.<sup>68</sup>
80. In late August 2002, Claimant met again with Jarabica to urge him to take steps to ensure that the CKA together with the bankruptcy trustee take immediate control of the assets of Moravan.<sup>69</sup> Between 2002 and 2004, Claimant alleges that it had three additional meetings with Jarabica seeking assistance from the Czech government to recover the LET Assets.<sup>70</sup>
81. In September 2002, Claimant retained JUDr. Jaroslav Sup ("Sup") of Transfin International s.r.o. ("Transfin") to act as agent for Claimant in the Czech Republic.<sup>71</sup>
82. Also in September 2002, Claimant met with Josef Orbes ("Orbes") of LEGES v.o.s. ("LEGES"), the bankruptcy trustee for Moravan, to ask him to use Moravan's ownership of MA and MA's control of LZ to preserve the LET Assets. Orbes allegedly advised Claimant that he did not have control of any of the assets, nor did he have access to the Moravan premises without Soska's permission.<sup>72</sup>
83. Claimant also met with Gröningerová in September 2002, at which time Claimant asserts that it urged the CKA to take steps to ensure that Orbes assume control of Moravan and its

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<sup>67</sup> Notice of Arbitration, ¶22; Claimant's Pre-Hearing Memorial, ¶59; Claimant's Post-Hearing Memorial, ¶¶24, 26; Jewitt Witness Statement, ¶¶58-63.

<sup>68</sup> Claimant's Post-Hearing Memorial, ¶26; Jewitt Witness Statement, ¶¶61-63.

<sup>69</sup> Claimant's Memorial, ¶25; Jewitt Witness Statement, ¶¶61-63.

<sup>70</sup> Notice of Arbitration, ¶23.

<sup>71</sup> Respondent's Counter-Memorial, ¶60; Jewitt Witness Statement, ¶¶4, 65.

<sup>72</sup> Claimant's Post-Hearing Memorial, ¶28; Jewitt Witness Statement, ¶69.

subsidiary companies to preserve the value of Moravan's assets. As MA and LZ were subsidiaries of Moravan, Claimant alleges that Moravan's assets indirectly included the LET Assets.<sup>73</sup>

84. Approximately one week after Claimant met with Gröningerová, she met with Orbes and at that meeting, Orbes explained to her that he had reason to be concerned that improper transfers of property out of Moravan into other companies had taken place. He had been barred from Moravan's premises, and he had requested police assistance in an effort to gain access to the premises.<sup>74</sup>
85. On 13 September 2002, a general meeting of shareholders of LZ was held ("LZ General Meeting"). Claimant was denied entry to the meeting. Consequently, Claimant filed a shareholders' protest with the official notary recording the minutes of the meeting, noting that it was denied entry to the meeting and that LZ had failed to provide notice of the LZ General Meeting to Claimant. On 9 October 2002, Claimant filed a second protest.<sup>75</sup> The minutes of the LZ General Meeting showed MMT Plus, s.r.o. ("MMT") as 51% shareholder and MA as 49% shareholder in LZ. Soska was recorded as the principal and ZLIN-LET America, Inc. was recorded as the 100% shareholder of MMT.<sup>76</sup> An application for entry of changes in the Commercial Register was delivered on the same day.<sup>77</sup>
86. On 31 October 2002, Claimant wrote to the CKA requesting again that it take control of the assets of MA and the LET Assets.<sup>78</sup> Claimant did not receive a response to this letter.<sup>79</sup>

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<sup>73</sup> Claimant's Memorial, ¶26; Jewitt Witness Statement, ¶70.

<sup>74</sup> Claimant's Post-Hearing Memorial, ¶30; Transcript of Hearing on the Merits (7 October 2009), 323:22-325:4.

<sup>75</sup> Claimant's Memorial, ¶27; Claimant's Pre-Hearing Memorial, ¶63; Jewitt Witness Statement, ¶¶78-79; Transcript of minutes of LZ General Meeting, dated 9 October 2002 (Exhibit C-0038, Exhibit R-0085).

<sup>76</sup> Notice of Arbitration, ¶25.

<sup>77</sup> Notice of Appointment of Arbitrator, Ad. 29. The record does not show who made this application.

<sup>78</sup> Notice of Arbitration, ¶27.

<sup>79</sup> Claimant's Post-Hearing Memorial, ¶32; Transcript of Hearing on the Merits (7 October 2009), 327:17-328:7; Jewitt Witness Statement, ¶71.

87. In late 2002, Claimant applied to the Regional Court for a declaration of invalidity of two resolutions adopted at the LZ General Meeting: (i) changing the Articles of Association of LZ to increase the number of members of the board of directors of LZ from three to five; and (ii) increasing the basic capital of LZ by CZK 298,000,000 through a monetary contribution from Claimant (“Resolutions Claim”). Claimant also applied for an interim injunction to prevent entry in the Commercial Register of the resolution increasing the basic capital (“Injunctions Claim”).<sup>80</sup>
88. On 4 December 2002, Claimant’s Injunctions Claim was denied on the grounds that Claimant had applied to enjoin a third party, the Commercial Register, and only an obligation relating to cooperation with the courts can be imposed on a third party.<sup>81</sup>
89. On 20 November 2002, JUDr. Jitka Tutterova (“Tutterova”), counsel for Claimant in the Czech Republic, filed a criminal complaint with the Supreme Public Prosecutor in Brno against Soska, and his fellow LZ board members, Messrs. Tomáš Štefánek and Patrik Joachimczyk (“Štefánek” and “Joachimczyk”).<sup>82</sup>
90. On 10 December 2002, Sup delivered a motion to initiate the criminal prosecution of Soska and Joachimczyk to the Police Presidium of the Czech Republic, Office for the Detection of Corruption and Serious Economic Crime in Prague, with a copy to the Office of the Municipal Prosecutor in Brno. The complaint alleged the crimes of fraud, breach of obligations in the administration of property of others, breach of mandatory rules

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<sup>80</sup> Notice of Arbitration, ¶28; Claimant’s Memorial, ¶27; Annex A to Respondent’s Counter-Memorial, ¶¶1, 2, 7; Jewitt Witness Statement, ¶85; Resolutions Claim, dated 16 November 2002 (Exhibit C-0111). Claimant asserts a filing date of 22 November 2002 but Respondent asserts a filing date of 3 December 2002. The Regional Court’s decision of 4 December 2002 (Exhibit C-0112) records that the proceedings were opened on 3 December 2002.

<sup>81</sup> Jewitt Witness Statement, ¶85; Resolution of Regional Court, dated 4 December 2002 (Exhibit C-0112).

<sup>82</sup> Notice of Arbitration, ¶40; Jewitt Witness Statement, ¶89; Motion to Highest Public Prosecutor to initiate criminal proceedings, dated 18 November 2002 (Exhibit C-0041). Claimant notes that at various times, Joachimczyk was a Vice-President of both MA and LZ, and Štefánek was a Vice-President of LZ. Claimant’s Post-Hearing Memorial, ¶14; Jewitt Witness Statement, ¶6.

of commercial conduct, and forging and altering of monetary instruments. On 20 March 2003, the crime of misappropriation of assets was added to the complaint.<sup>83</sup>

91. By inventory report dated 10 December 2002, Orbes included the entirety of the businesses of MA and LZ (including all of the LET Assets) in the bankruptcy estate of Moravan. Claimant received notification of this inclusion by letter from Orbes dated 12 December 2002.<sup>84</sup> In this report, Orbes recognised the economic potential of Moravan's assets, but noted that certain assets had been withdrawn from Moravan illegally, leaving significant liabilities in the company.<sup>85</sup>
92. On 11 December 2002, Claimant sent a letter to the Zlín Financial Authority (copied to the Brno Tax Directorate and the Ministry of Finance) to request supervisory activity to protect the investment of FPS due to possible tax evasion by MA. The Ministry of Finance confirmed that it had received Claimant's letter on 10 February 2003.<sup>86</sup>
93. On 12 December 2002, Orbes sent a notice to subsidiary companies of Moravan (including MA), the Regional Court, and Moravan's largest creditors,<sup>87</sup> indicating that certain assets owned by subsidiary companies were included in the bankruptcy estate of Moravan and that the subsidiary companies "did not have a right to do anything with the assets of the bankrupt Moravan corporation enlisted in a bankruptcy list without the trustee's approval."<sup>88</sup>

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<sup>83</sup> Respondent's Counter-Memorial, ¶118; Jewitt Witness Statement, ¶90; Letter from Transfin to Police Presidium, dated 10 December 2002 (Exhibit C-0042); Amendment to motion to initiate criminal proceedings, dated 20 March 2003 (Exhibit C-0285).

<sup>84</sup> Respondent's Rejoinder Memorial, ¶88; Claimant's Post-Hearing Memorial, ¶43; Bankruptcy inventory of Moravan, dated 10 December 2002 (Exhibit C-0043); Letter from Orbes to FPS, dated 12 December 2002 (Exhibit C-0046).

<sup>85</sup> Claimant's Post-Hearing Memorial, ¶32; Bankruptcy inventory of Moravan, dated 10 December 2002 (Exhibit C-0043).

<sup>86</sup> Notice of Arbitration, ¶¶30-31.

<sup>87</sup> This notice was sent to the following of Moravan's creditors: UCL (the civil aviation office), CSOB and CKA. Claimant's Post-Hearing Memorial, ¶¶33, 43.

<sup>88</sup> Claimant's Post-Hearing Memorial, ¶33, Letter from Orbes to FPS, dated 12 December 2002 (Exhibit C-0046).

94. On 14 January 2003, Claimant met again with Orbes to discuss the status of the bankruptcy proceedings of Moravan and the fact that Orbes had included the LET Assets in the bankruptcy estate of Moravan.<sup>89</sup> According to Claimant, at this meeting, Orbes indicated that he wanted to help but that he could not get control of the situation – apparently the local police would not help him get through the plant gates and the local courts were of no assistance.<sup>90</sup> Orbes accepted documents presented by Claimant evidencing its ownership of 49% of the shares of LZ and accepted that Claimant would be the negotiating partner for future acts taken by Orbes as bankruptcy trustee for Moravan. Orbes indicated that within approximately one month, he expected to have assumed shareholder rights in the subsidiaries of Moravan and that the Regional Court will have issued an interim injunction, which would allow him to take steps with respect to the Moravan group of companies.<sup>91</sup>
95. Following this meeting, Sup prepared a draft agreement for execution by Claimant and LEGES which documented Orbes’ commitment on behalf of LEGES as bankruptcy trustee for Moravan to honour the USA, and the contemplated cooperation between LEGES and Claimant (“Draft Cooperation Agreement”).<sup>92</sup> Claimant alleges that before Orbes could execute the Draft Cooperation Agreement, he was removed from his position representing LEGES as bankruptcy trustee for Moravan and was replaced by his estranged wife, JUDr. Bronislava Orbesová (“Orbesová”), also of LEGES.<sup>93</sup>
96. By letter dated 24 January 2003, Claimant submitted information to the Regional Court with regard to the entries in the Commercial Register pertaining to the legal status of MA and LZ and requested that the Commercial Register correct the entries to comply with the *Commercial Code*.<sup>94</sup>

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<sup>89</sup> Claimant notes that it met with Orbes several times between the initial meeting in September 2002 and January 2003 to address the status of the bankruptcy proceedings of Moravan. Claimant’s Post-Hearing Memorial, ¶34.

<sup>90</sup> Jewitt Witness Statement, ¶74.

<sup>91</sup> Claimant’s Post-Hearing Memorial, ¶34; Minutes of meeting between LEGES and FPS, dated 14 January 2003 (Exhibit C-0050).

<sup>92</sup> Claimant’s Reply Memorial, ¶60; Claimant’s Post-Hearing Memorial, ¶35; Jewitt Witness Statement ¶¶74-75; Draft Agreement between LEGES and FPS, dated January 2003 (Exhibit C-0295).

<sup>93</sup> Claimant’s Post-Hearing Memorial, ¶36; Jewitt Witness Statement, ¶76.

<sup>94</sup> Notice of Arbitration, ¶29; Letter from Regional Court to MA, dated 5 March 2003 (Exhibit R-0088).

97. On 5 March 2003, the Commercial Register requested that MA provide within 30 days information to show that Soska and Joachimczyk were executing their positions as directors as prudent managers pursuant to Section 31(a)(4)(d) of the *Commercial Code*. MA did not reply to this request. Claimant was not informed of this request.<sup>95</sup>
98. On 20 March 2003, Claimant sent a letter to the Supreme Public Prosecutor to follow up with respect to the complaint it had filed on 20 November 2002.<sup>96</sup> On 1 April 2003, the Supreme Public Prosecutor appeared to treat the 20 March 2003 letter as a motion for supervision of the Regional Public Prosecutor's Office in Brno and submitted Claimant's letter to the High Public Prosecutor's Office in Olomouc.<sup>97</sup>
99. On 2 April 2003, the Commercial Register requested that MA submit within 30 days the decision of the relevant body of the company confirming the election or appointment of Soska and Joachimczyk as board members pursuant to Section 31(a)(6) of the *Commercial Code* ("2 April 2003 Request").<sup>98</sup>
100. On 15 April 2003, Claimant met with JUDr. Vojtech Filip ("Filip"), Vice-President of the Czech Republic parliament to complain about the alleged delays by the courts and law enforcement authorities. On 16 April 2003, Sup sent to Filip further information regarding their discussions about the USA and the *Commercial Code*.<sup>99</sup>
101. On 16 April 2003, the Ministry of Justice wrote to the Regional Court requesting a report on its procedure on the basis of a request submitted by Claimant on 24 January 2003 to the

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<sup>95</sup> Claimant's Post-Hearing Memorial, ¶42(a); Letter from Regional Court to MA, dated 5 March 2003 (Exhibit R-0088).

<sup>96</sup> Notice of Arbitration, ¶43; Letter from Transfin to Supreme Prosecutor, dated 20 March 2003 (Exhibit C-0053).

<sup>97</sup> Notice of Arbitration, ¶43; Letter from Supreme Prosecutor to Transfin, dated 1 April 2003 (Exhibit C-0054).

<sup>98</sup> Claimant's Post-Hearing Memorial, ¶42(b); Letter from Regional Court to MA, dated 2 April 2003 (Exhibit R-0087).

<sup>99</sup> Claimant's Reply Memorial, ¶59; Jewitt Witness Statement, ¶¶106-107; Letter from Transfin to Filip, dated 16 April 2003 (Exhibit C-0057); Summary by Transfin of civil and criminal proceedings relating to dispute with MA and LZ, dated 13 February 2006 (Exhibit C-0325), 7, Article IX.

Regional Court for deletion of Soska, Joachimczyk, and Štefánek from the Commercial Register as members of the board of directors of MA and LZ.<sup>100</sup>

102. On 23 April 2003, JUDr. Petr Kovanič (“Kovanič”), Vice-Chairman of the Regional Court, in response to the 16 April 2003 request from the Ministry of Justice, reported on the steps that had been taken pursuant to Claimant’s request, namely that a request had been sent to MA “to document to the court that [Soska, Joachimczyk, and Štefánek] fulfil the mandatory conditions for execution of their posts pursuant to Section 31(a) of the Commercial Code” within 30 days, which the Regional Court reported had not elapsed at that time. Kovanič noted that it took no action with respect to Claimant’s request regarding LZ because it was satisfied by the minutes of the LZ General Meeting.<sup>101</sup> Kovanič explained that the effects of the declaration of bankruptcy of Moravan on 21 August 2002 would not extend to “other entities not affected by the bankruptcy”, that a resolution on the Moravan bankruptcy was not yet enforceable because an appeal to the declaration of bankruptcy had been filed, and that without an enforceable resolution, the termination of the posts described in Section 31(a) of the Commercial Code could not take place.<sup>102</sup> Kovanič noted that Sup had visited the Regional Court on 1 April 2003 to make the same request in person and that the above-described position of the court had been explained to him at that time.<sup>103</sup>

103. By letter dated 7 May 2003, Soska responded to the 2 April 2003 Request, informing the Regional Court that there was “disagreement between registrations in the Commercial Register and reality” as Moravan was no longer the sole shareholder of MA. Soska enclosed two resolutions adopted by the West Indies Mercantile Corporation (“WIMCO”), a Panamanian corporate body, purporting to act as the sole shareholder of MA and confirming the appointments of Soska, Joachimczyk, and Štefánek as members of the

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<sup>100</sup> Respondent’s Post-Hearing Memorial, ¶¶79-80; Letter from Regional Court to Ministry of Justice, dated 23 April 2003 (Exhibit R-0086).

<sup>101</sup> Respondent’s Post-Hearing Memorial, ¶¶79-80; Letter from Regional Court to Ministry of Justice, dated 23 April 2003 (Exhibit R-0086).

<sup>102</sup> Letter from Regional Court to Ministry of Justice, dated 23 April 2003 (Exhibit R-0086).

<sup>103</sup> Respondent’s Post-Hearing Memorial, ¶81; Letter from Regional Court to Ministry of Justice, dated 23 April 2003 (Exhibit R-0086).

statutory body (“WIMCO Resolutions”). Claimant was not informed of this correspondence.<sup>104</sup>

104. Claimant also communicated its complaint to JUDr. Pavel Rychetsky (“Rychetsky”), Vice-Secretary of the Czech Republic Government, Minister of Justice and Chairperson of the Legislature. By letter dated 14 May 2003, Rychetsky responded to questions raised during the 15 April 2003 meeting between Claimant and Filip.<sup>105</sup>
105. On 15 May 2003, Claimant received a letter from the High Public Prosecutor’s office in Olomouc confirming that it had initiated supervision of the Regional Public Prosecutor’s investigation.<sup>106</sup>
106. On 4 June 2003, the Commercial Register requested that MA submit within 15 days documents showing that it did not have a sole shareholder named Moravan. MA did not respond. Claimant was not informed of this correspondence.<sup>107</sup>
107. On 23 July 2003, Claimant initiated private arbitration proceedings in Stockholm against MA and LZ for alleged breaches of the USA including (i) failure to deliver 49% of the LZ shares to Claimant; (ii) failure to make payments on the loan; and (iii) the improper and fraudulent disposition of the LET Assets (“Stockholm Arbitration”).<sup>108</sup>
108. On 18 September 2003, the Czech Republic Police dismissed Claimant’s 10 December 2002 motion for criminal prosecution of Soska and Joachimczyk, concluding that there was no suspicion that a crime had been perpetrated.<sup>109</sup>

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<sup>104</sup> Claimant’s Post-Hearing Memorial, ¶42(c); Letter from MA to Regional Court, dated 7 May 2003 (Exhibit R-0089).

<sup>105</sup> Claimant’s Reply Memorial, ¶59(b)(ii); Jewitt Witness Statement, ¶109; Letter from Rychetsky to Filip, dated 14 May 2003 (Exhibit C-0058).

<sup>106</sup> Notice of Arbitration, ¶44; Letter from High Prosecutor’s Office in Olomouc to Transfin, dated 15 May 2003.

<sup>107</sup> Claimant’s Post-Hearing Memorial, ¶42(d); Letter from Regional Court to MA, dated 4 June 2003 (Exhibit R-0090).

<sup>108</sup> Notice of Arbitration, ¶48; Claimant’s Memorial, ¶10.

<sup>109</sup> The dismissal was issued by the “Division of the corruption detection and The Criminal Police and Investigation Group Brno (Unit Zlín). Claimant’s Memorial, ¶28; Respondent’s Counter-Memorial,

109. On 30 September 2003, Claimant filed a complaint against the 18 September 2003 dismissal of its motion for criminal prosecution with the Police Force of the Czech Republic, Corruption and Economic Crime Unit.<sup>110</sup>
110. On 8 October 2003, the Czech Social Security Administration filed a petition for the declaration of bankruptcy of LZ. At that point, it was owed over CZK 55,000,000 in unpaid social security tax by LZ.<sup>111</sup>
111. By letter dated 14 November 2003, Claimant inquired about the status of its application at the Regional Court with respect to MA and LZ.<sup>112</sup> On 25 November 2003, the Regional Court responded that MA “produced the required evidence but had not produced other necessary documents”. Claimant notes that the Regional Court did not mention LZ, the purported shareholding of WIMCO, or that the deadline for MA to produce “other necessary documents” had passed some five months earlier.<sup>113</sup>
112. As of November 2003, LZ had outstanding (unaudited) short-term obligations of CZK 266,000,000, excluding the loan from Claimant, and had stopped paying salaries to its employees.<sup>114</sup>

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¶128; Jewitt Witness Statement, ¶¶89, 97-98, 103; Resolution of the Czech Republic Police, dated 18 September 2003 (Exhibit C-0066).

<sup>110</sup> Notice of Arbitration, ¶45; Respondent’s Counter-Memorial, ¶129; Letter from Transfin to Police Force of the Czech Republic, dated 26 September 2003 (Exhibit C-0067).

<sup>111</sup> Respondent’s Counter-Memorial, ¶64; Claimant’s Pre-Hearing Memorial, ¶93; Press release from Social Security Administration, dated 16 March 2004 (Exhibit R-0041); Resolution of Regional Court, dated 30 March 2004 (Exhibit R-0027).

<sup>112</sup> Claimant’s Post-Hearing Memorial, ¶42(e); Letter from Tutterova to Commercial Register, dated 14 November 2003 (Exhibit C-0177). It is noted that Exhibit C-0177 refers to a motion filed 24 January 2003, rather than the Resolutions Claim or the claim for an injunction filed in late 2002.

<sup>113</sup> Claimant’s Post-Hearing Memorial, ¶42(e); Letter from Tutterova to Commercial Register, dated 14 November 2003 (Exhibit C-0177); Letter from Commercial Register to Tutterova, dated 25 November 2003 (Exhibit C-0178).

<sup>114</sup> Respondent’s Counter-Memorial, ¶66; Resolution of Regional Court, dated 30 March 2004 (Exhibit R-0027).

113. On 1 December 2003, the Office of the Regional Prosecutor rejected Claimant's 30 September 2003 complaint against the dismissal of its motion for criminal prosecution.<sup>115</sup>
114. On 8 and 9 January 2004, the tribunal in the Stockholm Arbitration heard Claimant's motion for interim relief and the MA and LZ motions on jurisdiction.<sup>116</sup>
115. On 9 January 2004, Miroslav Sládek ("Sládek") was appointed as preliminary bankruptcy trustee for LZ.<sup>117</sup>
116. On 30 January 2004, the tribunal in the Stockholm Arbitration issued an Interim Award on Claimant's Motion for Interim Measures ("Interim Award") enjoining LZ and MA from improperly selling and disposing of the LET Assets acquired with Claimant's funds. The *dispositif* of the Interim Award provided:

IT IS HEREBY ORDERED AS FOLLOWS:

1. Subject only to the provisions of paragraph 2 of this Order and to transfers to sales entirely within the ordinary course and present scope of their business, [MA] and [LZ] are hereby enjoined from breaching the [USA] dated July 31, 2001, and the Promissory Note dated August 8, 2001, and in particular, [MA] and LZ are hereby enjoined from any further selling, trading, pledging, encumbering, or otherwise disposing of the LET ASSETS, as defined in paragraph 11, Exhibit "3" of the Affidavit of Milan Matušik, sworn October 27, 2003, whether in the possession or control of either [MA] or LZ; pending conclusion of the Final Hearing of this arbitration, or further leave of the Arbitral Tribunal.
2. Notwithstanding paragraph 1 hereof, [MA] is permitted at any time to transfer to LZ any or all of the LET ASSETS held by [MA].
3. LZ is hereby enjoined from making any distributions, declaring any dividends or issuing any further shares pending the

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<sup>115</sup> Claimant's Memorial, ¶28; Respondent's Counter-Memorial, ¶131; Jewitt Witness Statement, ¶100; Resolution of the Office of the Regional Prosecutor, dated 1 December 2003 (Exhibit C-0072).

<sup>116</sup> Notice of Arbitration, ¶49.

<sup>117</sup> Respondent's Counter-Memorial, ¶67; Resolution of Regional Court, dated 9 January 2004 (Exhibit R-0042); *Act No. 328/1991 Sb. Coll. on Bankruptcy and Composition* (Czech Republic) (Exhibit R-0127) ["*Bankruptcy Act*"], Sections 9a-9c. Respondent notes that the role of the preliminary bankruptcy trustee is to conserve the assets of a potentially bankrupt company once there is a *prima facie* bankruptcy case.

conclusion of the hearing in this arbitration or further leave of the Arbitral Tribunal.

4. Counsel to [MA] and LZ shall continue to hold the certificates for 49% of the issued and outstanding shares of LZ of any and all kind whatsoever pending the Final Award on the Merits of the Arbitral Tribunal.
5. [MA] is directed so to exercise its control of LZ, which exists by reason of its share ownership and control of the management and the Board of Directors of LZ, to cause LZ to comply fully with the provisions of this Interim Award.
6. Should the Arbitral Tribunal determine in the Final Award on the Merits that the Claimant ought not to have been granted the Interim Relief provided for in this Interim Award, and that [MA] and LZ, or either of them, have suffered damages as a result thereof, IT IS HEREBY DIRECTED that the said shares of LZ described in paragraph 4 hereof, shall stand as security for any such damages to [MA] and LZ, or either of them, which this Tribunal may determine have been suffered and for which Claimant ought to provide compensation.
7. The relief hereby granted in respect to Claimant's motion is interim only, and:
  - (a) such interim relief shall be without prejudice to any final determination of any and all matters in dispute in this arbitration in the Final Award; and
  - (b) such interim relief shall remain in force and effect until either:
    - (i) the release of the Final Award on the Merits by the Arbitral Tribunal; or
    - (ii) further Order of this Tribunal on motion brought by any of the Parties hereto.
8. This Interim Arbitral Award replaces the Interim, Interim Procedural Order issued by the Arbitral Tribunal on 11 December 2003.<sup>118</sup>

117. By letter dated 9 February 2004, Claimant contacted JUDr. Karel Cermak ("Cermak"), then Minister of Justice, and conveyed the history of the matter and noted that the Czech Republic could potentially be held liable for damages caused by private businesses. Specifically, Claimant asserted that owing to the inactivity or slow response of the judiciary, a foreign investor may be successful in foreign courts in potential proceedings

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<sup>118</sup> Claimant's Memorial, ¶11; Jewitt Witness Statement, ¶¶120-121; Interim Arbitral Award on Claimant's Motion for Interim Measures, dated 30 January 2004 (Exhibit C-0075, Exhibit C-0212).

regarding the failure to protect its investment.<sup>119</sup> A copy of the Interim Award was enclosed with the letter. By letter dated 20 May 2004, Cermak noted that bankruptcy proceedings related to the assets of Moravan and Soska were ongoing, as were the proceedings related to the Resolutions Claim. He indicated, *inter alia*, that the Ministry of Justice would monitor the proceedings regarding the Resolutions Claim for speed and fluency.<sup>120</sup>

118. In 2004, Claimant met with Pavel Vosalik, Ambassador of the Czech Republic to Canada, who allegedly indicated to Claimant that he would look into Claimant's case, but never provided any information thereafter. Claimant also sought the assistance of other diplomatic staff at the Czech Embassy in Ottawa and met with Stanislav Benes, Commercial Counsellor, and Vladimir Bartl, Head of the Commercial and Economic division (of the Embassy).<sup>121</sup>
119. Claimant wrote letters dated 27 February 2004 to the District Courts in Uherské Hradiště and Zlín. These letters contained requests that, pursuant to the Interim Award, the District Courts terminate or interrupt all enforcements of judgments of third party creditors against LZ and MA on the grounds that Claimant had an ongoing security interest and a first secured charge on the assets of LZ and MA. The letters also enclosed a copy of the Interim Award and the Promissory Note.<sup>122</sup>
120. On 27 February 2004, Claimant also wrote to Mgr. Martin Boháček ("Boháček") the judge overseeing the bankruptcy proceedings of LZ at the Regional Court,<sup>123</sup> enclosing the Interim Award and the USA. Claimant requested that Boháček (i) issue an interim

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<sup>119</sup> Notice of Arbitration, ¶¶35, 52; Claimant's Memorial, ¶12; Jewitt Witness Statement, ¶123; Letter from Transfin to Cermak, dated 9 February 2004 (Exhibit C-0076).

<sup>120</sup> Notice of Arbitration, ¶36; Claimant's Memorial, ¶12; Notice of Appointment of Arbitrator, Ad. 52; Jewitt Witness Statement, ¶124; Letter from Cermak to Transfin, dated 20 May 2004 (Exhibit C-0087).

<sup>121</sup> Notice of Arbitration, ¶¶37-38.

<sup>122</sup> Notice of Arbitration, ¶41; Claimant's Memorial, ¶11; Annex B to Respondent's Counter-Memorial, ¶9; Jewitt Witness Statement, ¶122; Letter from Transfin to District Court in Uherské Hradiště, dated 27 February 2004 (Exhibit C-0078); Letter from Transfin to District Court in Zlín, dated 27 February 2004 (Exhibit C-0081).

<sup>123</sup> Respondent's Counter-Memorial, ¶¶100-101; Letter from Transfin to Regional Court, dated 27 February 2004 (Exhibit C-0079).

injunction requesting that Sládek prevent disposition of any assets of LZ; (ii) open proceedings on the nullity of sale contracts for line assets of LZ which were disposed of in the previous 6 months; and (iii) open proceedings on the nullity of any other acts that might encumber the assets of LZ.

121. Also on 27 February 2004, Claimant filed a motion at the Regional Court for appointment of an interim receiver in respect of MA enclosing the Interim Award. Claimant also requested that the Regional Court (i) enjoin all parties from any disposition of the assets of MA; (ii) open proceedings on the nullity of sale contracts for assets of MA alienated in the previous 6 months; and (iii) open proceedings on the nullity of any other acts that might encumber the assets of MA.<sup>124</sup>
122. On 1 March 2004, Claimant delivered the Interim Award to the Cadastral Office in Uherské Hradiště with a request that the Cadastral Office “imprint a seal” in the real estate records maintained by it in respect of LZ and MA so that all sale, mortgaging or encumbering of the real property of the debtor would be banned. The Cadastral Office wrote to Claimant on 11 March 2004 and 14 May 2004 to request additional specifications of the real property in respect of which the registration was requested, and evidence that the Interim Award had become final and enforceable. The Cadastral Office never received a response and so returned the request to Claimant on 11 October 2004.<sup>125</sup>

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<sup>124</sup> Respondent’s Counter-Memorial, ¶¶100-101; Letter from Transfin to Regional Court, dated 27 February 2004 (Exhibit C-0080).

<sup>125</sup> Claimant’s Memorial, ¶11; Jewitt Witness Statement, ¶122; Annex B to Respondent’s Counter-Memorial, ¶¶3, 7-9; Letter from Transfin to Cadastral Office in Uherské Hradiště, dated 27 February 2004 (Exhibit C-0077); Letter from Transfin to District Court in Uherské Hradiště, dated 27 February 2004 (Exhibit C-0078); Letter from Transfin to District Court in Zlín, dated 27 February 2004 (Exhibit C-0081); Interim Arbitral Award on Claimant’s Motion for Interim Measures, dated 30 January 2004 (Exhibit C-0075, Exhibit C-0212); *Act No. 344/1992 Sb. Coll. on the Land Register of the Czech Republic* (Czech Republic) (Exhibit R-0133), s. 5; Letter from Cadastral Office in Uherské Hradiště to Transfin, dated 11 March 2004 (Exhibit R-0108); Letter from Cadastral Office in Uherské Hradiště to Transfin, dated 14 May 2004 (Exhibit R-0109); Letter from Cadastral Office in Uherské Hradiště to Transfin, dated 11 October 2004 (Exhibit R-0110); *Act No. 99/1963 Coll., the Code of Civil Procedure* (Exhibit R-0130), s. 267(1), 268(1).

123. In February and March 2004, local newspapers reported that the principals of MA and LZ were facing criminal charges related to the transfer of assets from LZ to another company, CML Plus, whose sole owner was Soska.<sup>126</sup>
124. On 30 March 2004, LZ was declared bankrupt and Sládek was appointed as bankruptcy trustee.<sup>127</sup>
125. On 19 April 2004, Petr Hajtmar (“Hajtmar”) was appointed as preliminary bankruptcy trustee for MA pursuant to Claimant’s request of 27 February 2004.<sup>128</sup>
126. On 5 May 2004, the Regional Court invited Claimant to confirm whether it intended to pursue the Resolutions Claim. Claimant confirmed to the Regional Court on 24 May 2004 that it did wish to continue with the claim.<sup>129</sup> On 26 May 2004, the Regional Court requested that Claimant pay the CZK 1,000 court fee in order to proceed with the Resolutions Claim. The fee was paid by Claimant on 31 May 2004.<sup>130</sup>
127. Between 9 June 2004 and 23 December 2004, Claimant and LZ exchanged written submissions with regard to the Resolutions Claim.<sup>131</sup>

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<sup>126</sup> Claimant’s Memorial, ¶29; Claimant’s Pre-Hearing Memorial, ¶¶24, 69; Jewitt Witness Statement, ¶101.

<sup>127</sup> Claimant’s Memorial, ¶13; Jewitt Witness Statement, ¶5.

<sup>128</sup> Respondent’s Counter-Memorial, ¶59 (note 43); Letter from Transfin to Regional Court, dated 27 February 2004 (Exhibit C-0080); Resolution of Regional Court, dated 19 April 2004 (Exhibit C-0086). Claimant notes that in her reasons appointing Hajtmar (Exhibit C-0086), JUDr Ludmila Hanzlikova, the judge overseeing the bankruptcy proceedings of MA at the Regional Court, noted that the Interim Award was “binding and enforceable on the territory of Czech Republic” under the *New York Convention*, that the arbitration was resolving the priority of satisfaction of Claimant’s claims within the Promissory Note, and that the court was taking Claimant’s proposal “as an initiation for the instalment of the Preliminary trustee”. The judge also noted that while Claimant was not a part of the bankruptcy proceedings at that time, “the facts quoted by [Claimant were] very serious.” Claimant’s Pre-Hearing Memorial, ¶71.

<sup>129</sup> Annex A to Respondent’s Counter-Memorial, ¶¶9-10; Request from Regional Court, dated 5 May 2004 (Exhibit R-0051); Submission by FPS to Regional Court, dated 24 May 2004 (Exhibit R-0052).

<sup>130</sup> Annex A to Respondent’s Counter-Memorial, ¶11; Request from Regional Court, dated 26 May 2004 (Exhibit R-0053); Submission by FPS to Regional Court, dated 31 May 2004 (Exhibit R-0054).

<sup>131</sup> Annex A to Respondent’s Counter-Memorial, ¶12; Request from Regional Court, dated 9 June 2004 (Exhibit R-0055); Submission by LZ to Regional Court, dated 23 November 2004 (Exhibit R-0056);

128. Between 15 June 2004 and 8 July 2004, the Police Commissioner conducted a further investigation into the case arising from Claimant's 10 December 2002 motion. This investigation was ordered by the Chief State Prosecutor pursuant to a request from the Ministry of Justice.<sup>132</sup>
129. On 18 June 2004, MA was declared bankrupt and Hajtmar was appointed as bankruptcy trustee.<sup>133</sup> As a result of the bankruptcy of MA, LZ was deprived of its rights over the LET Assets (although it still retained their operational use).<sup>134</sup>
130. When LZ and MA were declared bankrupt in March and June of 2004, Claimant requested and was granted leave of the tribunal in the Stockholm Arbitration to continue the arbitration proceedings against them on 3 June 2004 and 28 July 2004, respectively.<sup>135</sup>
131. On 28 June 2004, Claimant applied for separate satisfaction in the bankruptcy proceedings for MA.<sup>136</sup>

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Request from the Regional Court, dated 29 November 2004 (Exhibit R-0057); Submission by FPS to Regional Court, dated 22 December 2004 (Exhibit R-0058).

<sup>132</sup> This further investigation involved a series of interviews with Soska, Mr. Petr Olbort (the lawyer for MA who participated in the drafting of the USA), Joachimczyk, and Štefánek. Respondent's Counter-Memorial, ¶¶132-133; Letter from State Prosecutor's Office in Brno to the Ministry of Justice, dated 23 December 2005 (Exhibit R-0075). The Minister of Justice appears to have been responding to Claimant's request, presumably the request of 9 February 2004 described *supra*, ¶117.

<sup>133</sup> Notice of Arbitration, ¶¶2, 54; Claimant's Memorial, ¶13; Claimant's Pre-Hearing Memorial, ¶¶24, 93; Jewitt Witness Statement, ¶5; Resolution of Regional Court, dated 19 April 2004 (Exhibit C-0086). Claimant refers to a passage from the Decision of Regional Court declaring bankruptcy of MA, dated 18 June 2004 (Exhibit C-0089), which indicates that while the bankruptcy judge for MA, Hanzlikova, referred to the Tora Group Petition, she refrained from investigating it because substantiation of the facts underlying the Tora Group Petition would have exceeded the framework of the bankruptcy proceedings.

<sup>134</sup> Respondent's Pre-Hearing Memorial, ¶25.

<sup>135</sup> In its reasons for granting Claimant's motion to continue the Stockholm arbitration, the Stockholm Tribunal noted that both Claimant and Respondent had relied upon Section 14(1)(c) of the Czech Bankruptcy law when arguing the motion (but disagreed on how to interpret and apply that provision). Notice of Arbitration, ¶54; Claimant's Memorial, ¶13; Claimant's Pre-Hearing Memorial, ¶24; Order of Stockholm Tribunal on Claimant's motion to continue proceedings, dated 3 June 2004 (Exhibit C-0220); Order of Stockholm Tribunal on Claimant's motion to continue proceedings, dated 28 July 2004 (Exhibit C-0223). In its order of 3 June 2004, the tribunal also referred to Section 2(5) of the Arbitration Act of the Czech Republic (Act No. 216/1994 Coll., on Arbitral Proceedings and Execution of Arbitral Awards (Czech Republic), as printed in International Handbook on Commercial Arbitration, Supplement 60, July 2010 (publication forthcoming)) ["*Arbitration Act*"].

132. On 15 July 2004, the Police Commissioner who had been ordered to reopen the case arising from Claimant's motion of 10 December 2002 to initiate criminal prosecution of Soska and Joachimczyk again dismissed Claimant's complaint.<sup>137</sup>

133. On 19 July 2004, Claimant appealed the 15 July 2004 dismissal of its motion to initiate criminal prosecution of Soska and Joachimczyk. This appeal was dismissed on 18 August 2004 by the Office of the Regional Prosecutor for the following reasons:

The public prosecutor agrees with the police authority, stating that the matter in hand is exclusively of a commercial-law nature and that the criminal liability of the suspected persons cannot be deduced in connection with the conduct described in the verdict [...]. After assessing the above-mentioned circumstances, it can be stated that the [USA] does not impose an obligation on [MA] to transfer 49% of the shares in [LZ] to FPS free of charge. In a situation where [MA] in accordance with the [USA], undertook to repay the provided loan to FPS, including interest, such procedure would appear to be illogical and completely commercially disadvantageous for [MA].<sup>138</sup>

134. On 26 July 2004, Claimant applied for separate satisfaction in the bankruptcy proceedings for LZ.<sup>139</sup>

135. Also on 26 July 2004, in response to a request from Claimant for information on the listing of the LET Assets on the bankruptcy list of Moravan, Orbesová informed Claimant that she was unable to provide the information due to the "complete lack of cooperation of the statutory bodies of MA, a.s. and other subsidiaries of [Moravan]".<sup>140</sup>

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<sup>136</sup> Claimant's Pre-Hearing Memorial, ¶82; Claim for receivable in bankruptcy proceedings of MA, dated 28 June 2004 (Exhibit C-0150).

<sup>137</sup> Respondent's Counter-Memorial, ¶134; Resolution of the Police of the Czech Republic, dated 15 July 2004 (Exhibit R-0080).

<sup>138</sup> Claimant's Memorial, ¶28; Jewitt Witness Statement, ¶¶97, 98, 103; Respondent's Counter-Memorial, ¶¶134-135; Appeal by FPS against resolution of the Police of the Czech Republic, dated 19 July 2004 (Exhibit R-0081); Resolution of Regional Public Prosecutor's Office, dated 19 August 2004 (Exhibit C-0092).

<sup>139</sup> Claimant's Pre-Hearing Memorial, ¶82; Claim for receivable in bankruptcy proceedings of LZ, dated 23 July 2004 (Exhibit C-0121).

<sup>140</sup> Claimant's Post-Hearing Memorial, ¶37; Letter from JUDr Bronislava Orbesová of LEGES to Transfin, dated 26 July 2004 (Exhibit C-0090).

136. On 30 and 31 August 2004, a hearing on the merits was held in the Stockholm Arbitration without the participation of Sládek and Hajtmar notwithstanding that they were duly notified and invited to participate in the Stockholm Arbitration.<sup>141</sup>
137. On 29 September 2004, a review hearing was held at the Regional Court in respect of the bankruptcy of MA.<sup>142</sup>
138. On 9 December 2004, Claimant received LZ's response to the Regional Court (dated 23 November 2004) with respect to Claimant's Resolutions Claim.<sup>143</sup>
139. By letter dated 29 November 2004, the Stockholm Tribunal indicated that it anticipated rendering an award towards the middle of December 2004.<sup>144</sup>
140. On 22 December 2004, Claimant requested that the Regional Court postpone the hearing of the Resolutions Claim until Claimant had received the Final Award in the Stockholm Arbitration.<sup>145</sup>
141. The Stockholm Tribunal rendered its final award on 30 December 2004 ("Final Award"). It determined that Alberta law governed both the USA and the Promissory Note.<sup>146</sup> The Final Award provided:
1. The Arbitral Tribunal hereby declares that Frontier is entitled to a first secured charge against the LET ASSETS and all of the property of [MA] of every nature and kind wheresoever located as of August 15, 2001 until such time as the loan in the amount of 204,170,000 Czech crowns together with interest in the amount of six percent (6%) per annum, payable and

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<sup>141</sup> Notice of Arbitration, ¶55; Claimant's Memorial, ¶14; Final Award, dated 30 December 2004 (Exhibit C-0094).

<sup>142</sup> Minutes of Second Review Hearing for bankruptcy of MA, dated 11 May 2005 (Exhibit C-0339).

<sup>143</sup> Annex A to Respondent's Counter-Memorial, ¶13; Request from Regional Court, dated 9 June 2004 (Exhibit R-0055); Submission by LZ to Regional Court, dated 23 November 2004 (Exhibit R-0056).

<sup>144</sup> Claimant's Reply Memorial, ¶59; Letter from Chairman of Stockholm Tribunal to FPS, dated 29 November 2004 (Exhibit C-0279).

<sup>145</sup> Claimant's Reply Memorial, ¶59; Annex A to Respondent's Counter-Memorial, ¶13; Submission by FPS to Regional Court, dated 22 December 2004 (Exhibit R-0058).

<sup>146</sup> Claimant's Post-Hearing Memorial, ¶19; Final Award, dated 30 December 2004 (Exhibit C-0094).

compounded monthly on the first day of each and every calendar month in each and every year from and including August 10, 2002 to and including the date upon which all of the principal amount and all interest accrued thereon have been repaid in full;

2. The Arbitral Tribunal hereby orders the trustee in bankruptcy of [MA] and the trustee in bankruptcy of LZ, respectively, immediately upon the delivery of this Final Award to grant to Frontier first secured charges against the LET ASSETS and all of the property of [MA] of every nature and kind wheresoever located all in accordance with the declaration in item 1, above;
3. The Arbitral Tribunal hereby orders that Frontier is entitled to an accounting for the LET ASSETS held, or alternatively, sold, traded, pledged, encumbered, or otherwise disposed of from August 15, 2001 including those sold, traded, pledged, encumbered or otherwise disposed of from January 30, 2004;
4. [MA] and LZ are hereby ordered jointly and severally to pay to Frontier interest on the amount of 204,170,000 Czech crowns payable monthly at the rate of six percent (6%) per annum, payable and compounded monthly on the first day of each and every calendar month in each and every year from and including August 10, 2002 to and including the date upon which all of the 204,170,000 Czech crowns and all interest accrued thereon have been re-paid in full;
5. The Arbitral Tribunal hereby declares that Frontier is entitled to 49% of the shares of LZ, against the consideration of USD 100, payment of which amount is to be made by way of set off against amounts otherwise owing to Frontier by [MA] and LZ under the Promissory Note;
6. The Arbitral Tribunal hereby directs Luis Konski, Esq. of the law firm of Becker & Poliakoff, P.A., 5201 Blue Lagoon Drive, Suite 100, Miami, Florida 33126, USA, in his capacity as trustee [“Konski”], to deliver unconditionally forthwith the share certificates for 49% of the shares of LZ to Frontier in care of its counsel, Burnet, Duckworth & Palmer LLP, Calgary; for which delivery [Konski] shall be reimbursed for reasonable out-of-pocket expenses;
7. [MA] and LZ are hereby ordered jointly and severally to pay to Frontier USD 600,000;
8. [MA] and LZ are hereby ordered jointly and severally to pay to Frontier its costs in this arbitration in the total amount of USD 926,038.55;

9. The compensation for the arbitrators is determined at a total amount of USD 395,124.53, whereof USD 361,525 constitute fees and USD 33,599.53 incurred costs;
  10. [MA] and LZ are hereby ordered jointly and severally to pay to Frontier the amount of USD 245,124.53, corresponding to Frontier's share of the advance payments made by the Parties to cover the fees and costs of the arbitrators;
  11. The Arbitral Tribunal denies all other claims for relief brought by the Parties.<sup>147</sup>
142. On 7 January 2005, Konski notified the Stockholm Tribunal that he had delivered share certificates for 49% of the shares of LZ to Burnet, Duckworth & Palmer LLP, which was also acting as counsel for Claimant in the Stockholm Arbitration, in accordance with the Final Award.<sup>148</sup>
143. By letters dated 28 February 2005, Claimant through Tutterova sent letters to JUDr. Ludmila Hanzlikova, ("Hanzlikova") and to Boháček, the judges overseeing the bankruptcy proceedings of MA and LZ, respectively, at the Regional Court, requesting that they exercise their authority and ensure that the Final Award be recognised, in particular, by the bankruptcy trustee. Claimant also quoted the *dispositif* of the Final award, referred to Article III of the *New York Convention*, and referred to the BIT.<sup>149</sup> Claimant also wrote to Hajtmar and Sládek, requesting with reference to the Final Award that they (i) pay Claimant's share of the costs of the Stockholm Arbitration and the damages awarded as receivables claimed against the corresponding estate of MA or LZ; (ii) conclude contracts of pledge for movable and immovable assets presently owned by MA; and (iii) submit an accounting of the LET Assets.<sup>150</sup>

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<sup>147</sup> Claimant's Memorial, ¶¶14, 30; Jewitt Witness Statement, ¶¶144-146; Final Award, dated 30 December 2004 (Exhibit C-0094). Respondent alleges that the damages awarded to Claimant in the amount of USD 600,000 were symbolic, representing 0.2% of the USD 300,000,000 originally claimed. Respondent's Pre-Hearing Memorial, ¶27.

<sup>148</sup> Annex A to Respondent's Counter-Memorial, ¶13; Final Award, dated 30 December 2004 (Exhibit C-0094), ¶6 of the *dispositif*; E-mail from Konski to Chairman of Stockholm Tribunal, dated 7 January 2005 (Exhibit C-0281).

<sup>149</sup> Claimant's Memorial, ¶31; Jewitt Witness Statement, ¶¶146, 149; Letter from Tutterova to Hanzlikova, dated 28 February 2005 (Exhibit C-0156).

<sup>150</sup> Claimant's Memorial, ¶31; Jewitt Witness Statement, ¶¶146, 149; Letter from Tutterova to Hajtmar, dated 28 February 2005 (Exhibit C-0157).

144. On 22 March 2005, Claimant submitted the Final Award and an accompanying submission to the Regional Court with respect to the Resolutions Claim, stating that the Final Award showed (i) that it was already a 49% shareholder of LZ on the date of the LZ General Meeting, and (ii) that the decisions adopted at the LZ General Meeting were not adopted as required by law because Claimant's shares were voted with by an unauthorised person.<sup>151</sup>
145. Claimant and LZ exchanged further submissions on the merits of the Resolutions Claim between 22 March and 24 June 2005.<sup>152</sup>
146. By letter dated 31 March 2005, Sládek informed Claimant that he refused to comply with Claimant's requests of 28 February 2005. He rejected Claimant's receivable for a number of reasons, including that the claim was based upon a legal relationship with MA, not LZ, and that the Final Award contravened the public policy of the Czech Republic:

In [*sic*] Article V para (2) letter b) of the [*New York Convention*] stipulates that the recognition (and enforcement) of a foreign arbitral award shall be denied if the award would contravene public policy of the country where the recognition (and enforcement) is supposed to be executed. In terms of the subject arbitral award, I must state that it indeed contradicts the public policy of the Czech Republic. I see this contradiction in an apparent incompatibility with the Czech mandatory legal regulations, in particular Act No. 328/1991 Coll., on bankruptcy and composition. Since bankruptcy proceedings mean serious intervention in the legal status of a broad spectrum of subjects, they are regulated by a [*sic*] strictly mandatory legislation which must be unconditionally observed. [...] Since the Arbitral Award fails to respect mandatory legislation regulating bankruptcy proceedings and fundamental legal principles, it is unacceptable in the Czech legal system. Therefore I cannot consider it in the bankruptcy proceedings. (emphasis added)<sup>153</sup>

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<sup>151</sup> Annex A to Respondent's Counter-Memorial, ¶13; Submission by FPS to Regional Court, dated 21 March 2005 (Exhibit R-0059).

<sup>152</sup> Annex A to Respondent's Counter-Memorial, ¶14; Request from Regional Court, dated 22 March 2005 (Exhibit R-0060); Submission by LZ to Regional Court, dated 18 May 2005 (Exhibit R-0061); Request from Regional Court, dated 25 May 2005 (Exhibit R-0062); Submission by FPS to Regional Court, dated 20 June 2005 (Exhibit R-0063); Request from Regional Court, dated 24 June 2005 (Exhibit R-0064). There was no reply from LZ to this latest Court request.

<sup>153</sup> Annex C to Respondent's Counter-Memorial, ¶4; Jewitt Witness Statement, ¶150; Letter from Sládek to Transfin, dated 31 March 2005 (Exhibit C-0097); Letter from Sládek to Tutterova, dated 31 March 2005 (Exhibit C-0127).

147. On 7 April 2005, Mgr. Vladan Vala (“Vala”), legal advisor to Hajtmar, filed an action on behalf of Hajtmar requesting that the Regional Court annul the Final Award in its entirety on the basis of Section 31(a), (b) and (f) of the *Arbitration Act*,<sup>154</sup> alleging that it ordered Hajtmar to “effect performance that is impossible or impermissible according to domestic law”, and explaining that “in bankruptcy proceedings the bankruptcy trustee cannot be ordered to secure a right for one of the creditors which would establish a more beneficial position of this creditor as compared to the other bankruptcy creditors [and that] [s]uch decision is in strict violation of the basic principles of the [*Bankruptcy Act*].” Vala also noted that “once the bankruptcy order was adjudicated, the arbitral proceedings should have been suspended”, with reference to Section 14(1)(c) of the *Bankruptcy Act*.<sup>155</sup>

148. Similarly, by letter dated 8 April 2005, Vala advised Claimant that:

The Creditors Committee of [MA] discussed the Final Arbitral Award issued by the Arbitral Tribunal on December 30, 2004. The Creditors Committee concluded that this Final Award orders the bankruptcy trustee to effect performance that is impermissible according to domestic law. Moreover, in our opinion the arbitration proceeding should have been discontinued once the bankruptcy adjudication order was issued, since the Claimant’s alleged rights should have been claimed in bankruptcy proceedings. Due to the above, the Creditors Committee enjoined the bankruptcy trustee to file an action requesting cancellation of the arbitral award. This action was filed today. Since we request that the arbitral award be cancelled in all its points, we are not willing at this time to

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<sup>154</sup> Section 31 of the *Arbitration Act* provides, in relevant part:

Upon a request by either party, the court shall set aside an arbitral award if –

- (a) it was rendered in a matter in which no arbitration agreement can be validly concluded;
- (b) the arbitration agreement is invalid for other reasons, or was cancelled, or does not apply to the subject matter;

[...]

- (f) the arbitral award requires a party to proceed with performance that was not requested by the claimant or performance that is impossible or unlawful under domestic law; ...

<sup>155</sup> Commencement of Action for Nullification of Final Award at Regional Court, dated 7 April 2005 (Exhibit C-0179).

reimburse the costs of the arbitration to your client. (emphasis added)<sup>156</sup>

149. On 11 May 2005, a second review hearing was held at the Regional Court in respect of the bankruptcy of MA, notice of which was published on the Regional Court's Official Board and in the Commercial Bulletin. Minutes from the meeting reflect that Claimant's receivable was not discussed and was transferred to the next review hearing "given the seriousness of this case".<sup>157</sup>
150. On 17 May 2005, Claimant, through Tutterova, filed four motions with the Regional Court. The first two motions requested that the Regional Court issue a resolution requiring (i) that Hajtmar and Sládek each submit an accounting of the LET Assets pursuant to the Final Award; (ii) that Hajtmar and Sládek each grant Claimant first secured charges against the LET Assets pursuant to the Final Award; and (iii) that Hajtmar and Sládek cancel the tender process over the assets of MA and LZ that they had jointly announced on or sometime prior to 2 May 2005.<sup>158</sup> The second two motions requested interim injunctions to prevent Hajtmar and Sládek from disposing of the LET Assets until the Regional Court had decided on the first two motions noted above.<sup>159</sup>
151. On 19 May 2005, Hanzlikova denied Claimant's motion for an interim injunction in respect of the LET Assets in the bankruptcy estate of MA on the grounds that it was not necessary. Hanzlikova explained that (i) the bankruptcy trustee needed court approval to realise any sales of the objects, rights, or other assets used to run the company; (ii) that such court approval had not yet been issued; and (iii) that the court would "carefully consider further action in a way that the rights of either participant [would not] be violated".<sup>160</sup>

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<sup>156</sup> Annex C to Respondent's Counter-Memorial, ¶4; Jewitt Witness Statement, ¶150; Letter from Vala to Tutterova, dated 8 April 2005 (Exhibit C-0180).

<sup>157</sup> Claimant's Memorial, ¶37; Claimant's Pre-Hearing Memorial, ¶80; Jewitt Witness Statement, ¶158; Minutes of Second Review Hearing for bankruptcy of MA, dated 11 May 2005 (Exhibit C-0339).

<sup>158</sup> Claimant's Memorial, ¶33; Jewitt Witness Statement ¶¶152, 154; Motion by FPS to Regional Court, dated 17 May 2005 (Exhibit C-0128); Motion by FPS to Regional Court, dated 17 May 2005 (Exhibit C-0158); Announcement of Joint Tender (Exhibit C-0310).

<sup>159</sup> Claimant's Pre-Hearing Memorial, ¶¶74-77; Annex C to Respondent's Counter-Memorial, ¶7; Motion by FPS to Regional Court, dated 17 May 2005 (Exhibit C-0129); Motion by FPS to Regional Court, 17 May 2005 (Exhibit C-0159); Announcement of Joint Tender (Exhibit C-0310).

<sup>160</sup> Claimant's Memorial, ¶34; Claimant's Pre-Hearing Memorial, ¶77; Jewitt Witness Statement, ¶156; Resolution of Regional Court, dated 19 May 2005 (Exhibit C-0160).

152. On 23 May 2005, Boháček denied Claimant’s motion for an interim injunction in respect of the LET Assets in the bankruptcy estate of LZ. Boháček explained that court authorisation was required for the monetisation of a bankruptcy estate through the sale of the bankrupt party’s business. As no authorisation had been issued in this case, Boháček found that the court had no grounds for ordering the interim injunction. Boháček also asserted that a creditor’s charge based on the Final Award was unfounded under the *New York Convention* because recognition and enforcement of an award should be denied “if the award is not legally effective and enforceable pursuant to domestic law and the award would contravene public policy”.<sup>161</sup>
153. On 1 June 2005, a meeting was held between Hanzlikova, Boháček, Sládek, Hajtmar, and Vala, at the Regional Court. A legal opinion dated 25 May 2005 prepared by Vala (“Vala Opinion”) was discussed at this meeting. The Vala Opinion expressed various views as to why the Final Award and Claimant’s claim for a first secured charge over the LET Assets should be rejected.<sup>162</sup> The Vala Opinion reads, in part:

According to the above-quoted Article V [*New York Convention*], a Bankruptcy Trustee is entitled to raise his objections in a proceeding against an application petition for recognition and enforcement of an award. However, since the Creditor never initiated any such proceeding (which is incomprehensible to the Bankruptcy Trustee, if the Creditor believes that in the case of this Arbitral Award there are no reasons why recognition and enforcement should be denied), then the Bankruptcy Trustee clearly does not understand why, over a period of more than 4 months, the Creditor was unable to file an application for recognition and enforcement of the subject foreign Arbitral Award.

[...] According to the Bankruptcy Trustee, the bankruptcy adjudication has discontinued the arbitral proceeding. [...] [T]he arbitral proceeding could not continue and that the receivables would have had to be claimed in bankruptcy proceedings.

The Creditor did claim cash receivables, but unfortunately, he failed to claim the secured charges pertaining to these receivables. However, the Creditor did claim this right in the arbitration proceeding, prior to claiming the receivables in this bankruptcy.

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<sup>161</sup> Claimant’s Memorial, ¶¶15, 35; Claimant’s Pre-Hearing Memorial, ¶¶78-79; Jewitt Witness Statement, ¶157; Resolution of Regional Court, dated 23 May 2005 (Exhibit C-0130).

<sup>162</sup> Claimant’s Memorial, ¶37; Claimant’s Pre-Hearing Memorial, ¶81.

This means that it knew to claim the secured charges, which generally afford the right to separate satisfaction.

The fact that the Arbitral Award ordered the Bankruptcy Trustee to grant first secured charges to the Creditor is contrary to the respective provisions of the Bankruptcy and Composition Act. It fails to respect the equality of bankruptcy creditors to the extent that after the bankruptcy adjudication, the Bankruptcy Trustee is not entitled to perform acts aimed at securing receivables that arose prior to the bankruptcy adjudication (*i.e.* receivables that must be claimed). In this sense, the Arbitral Award is contrary to the public policy of this country, which constitutes another reason why the recognition and enforcement of the Arbitral Award must be rejected.

[...]

Until a decision is made with regard to the complaint requesting nullification of the Arbitral Award or until the Creditor files an application requesting recognition and enforcement of the subject Arbitral Award and the respective decision is made, the Creditor is not entitled to any secured charges against assets listed in the bankruptcy estate.<sup>163</sup>

154. Minutes from the meeting recorded the following:

The Bankruptcy Trustee of [MA] filed a complaint with this court requesting nullification of the [Final Award].

All parties present agree that the [Final Award] cannot be respected in view of the provisions of § 39, letter b) and § 31, letter f) of Act No. 216/1994 Coll. on bankruptcy proceedings and the enforcement of arbitral awards, because it adjudicates the party to perform acts that are impossible or illegal under domestic law and because, according to Article V.2.B) and Decree No. 74/1959 Coll. on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the recognition or enforcement of the Award would contradict the public policy of the Czech Republic.

This means that in the course of the bankruptcy proceeding, the right to separate satisfaction from the Bankrupt's assets cannot be established for a creditor and therefore the Bankruptcy Trustee can neither conclude a contract of pledge to the benefit of the creditor nor provide any other security for his receivable. Such approach would be in gross violation of the Bankruptcy and Composition Act. Apart from separate satisfaction based on a promissory note (see above), the creditor did not claim any right to separate satisfaction in either of the bankruptcy proceedings; therefore, such claim could

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<sup>163</sup> Claimant's Pre-Hearing Memorial, ¶81; Statement by Vala, dated 25 May 2005 (Exhibit C-0340).

not have been reviewed in the review hearing and this creditor is not a separate creditor.<sup>164</sup>

155. On 2 June 2005, Hajtmar sent an e-mail to Sup reporting on the 1 June 2005 meeting, as follows:

Yesterday there was a meeting at the court of Brno dealing with the issue of allowing the sale of assets of MA/LZ in conjunction with the application for injunction from the Frontier Company.

[...]

On this meeting was presented a legal opinion from MA side, the analysis of present situation regarding to [Final Award] (and so the answer to the courts prompt). From the analysis and the discussion is clear that requested injunction against the assets has no ground. And will be refused by both judges.

The sale of LZ was approved by the judge and sale of assets held by MA will be approved also. Also MA facility in Otrokovice could be prepared for sale as planned.

Also in discussion was a fact that steps taken by FPS, while taken to protect their interest are not compatible with interest of remaining creditors. (If FPS would be successful the rest of the creditors would get nothing).

And so it is question for creditors of MA and specifically members of Creditors Committee [sic][“CC”] if it is correct that FPS is a member of CC. The question of removal FPS would be presented on the next meeting of CC and it is preferable that members would create their opinion about this.

Present situation is as follows; I am expecting delivery of the inventory list from Leges specifically the assets Leges included first (as per signed contract), based on that I will correct the inventory of MA so all possible duplicity would be eliminated. This step has no influence on ongoing process, on dividing of the proceedings from the sale and which trustee would be selling what.<sup>165</sup>

156. Also on 2 June 2005, the Regional Court denied Claimant’s 17 May 2005 motion for a resolution cancelling the tender process and ordering Hajtmar to submit an accounting of assets and grant a first secured charge to Claimant. Hanzlikova concluded that:

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<sup>164</sup> Claimant’s Memorial, ¶37; Claimant’s Pre-Hearing Memorial, ¶80; Jewitt Witness Statement, ¶158; Minutes of 1 June 2005 meeting between trustees for MA and LZ and bankruptcy judges, dated 1 June 2005 (Exhibit C-0341).

<sup>165</sup> Claimant’s Memorial, ¶38; Jewitt Witness Statement, ¶160; Letter from Hajtmar to Transfin, dated 2 June 2005 (Exhibit C-0098).

[...] an Award ordering the bankruptcy trustee to grant secured charges against the bankrupt's assets to the benefit of a creditor, cannot be enforced because such act would contradict to the Bankruptcy and Composition Act and as such it would be generally illegal and in breach of the country's public order.<sup>166</sup>

157. On 6 June 2005, Claimant through Tutterova appealed Hanzlikova's 19 May 2005 decision denying Claimant's motion for an interim injunction in respect of the LET Assets in the bankruptcy estate of MA to the High Court in Olomouc.<sup>167</sup> By resolution dated 27 July 2005, the High Court in Olomouc rejected Claimant's appeal, but observed that the Regional Court had not addressed Claimant's grounds for seeking an interim injunction in its reasons, in particular Claimant's submissions in respect of the Final Award.<sup>168</sup>
158. On 6 June 2005, Claimant through Tutterova also appealed Boháček's 23 May 2005 decision denying Claimant's motion for an interim injunction in respect of the LET Assets in the bankruptcy estate of LZ to the High Court of Olomouc.<sup>169</sup> This appeal was rejected on 4 August 2005.<sup>170</sup>
159. On 9 June 2005, the Regional Court also denied Claimant's 17 May 2005 motion for a resolution cancelling the tender process and ordering Sládek to submit an accounting of assets and grant a first secured charge to Claimant. In his reasons, Boháček stated that the Final Award was contrary to the *Bankruptcy Act* and, in accordance with the Sections 31 and 39 of *Arbitration Act* could not be enforced.<sup>171</sup>

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<sup>166</sup> Claimant's Memorial, ¶39; Jewitt Witness Statement, ¶161; Resolution of Regional Court, dated 2 June 2005 (Exhibit C-0161).

<sup>167</sup> Claimant's Memorial, ¶40; Annex C to Respondent's Counter-Memorial, ¶9; Appeal by FPS of 19 May 2005 Resolution of Regional Court, dated 6 June 2005 (Exhibit C-0162).

<sup>168</sup> Claimant's Memorial, ¶40; Jewitt Witness Statement, ¶163; Resolution of High Court in Olomouc, dated 27 July 2005 (Exhibit C-0164).

<sup>169</sup> Claimant's Memorial, ¶40; Annex C to Respondent's Counter-Memorial, ¶9; Appeal by FPS of 23 May 2005 Resolution of Regional Court, dated 6 June 2005 (Exhibit C-0131).

<sup>170</sup> Annex C to Respondent's Counter-Memorial, ¶9; Resolution of High Court in Olomouc, dated 27 July 2005 (Exhibit C-0164); Resolution of High Court in Olomouc, dated 4 August 2005 (Exhibit C-0133).

<sup>171</sup> Annex C to Respondent's Counter-Memorial, ¶10; Resolution of Regional Court, dated 9 June 2005 (Exhibit C-0132).

160. On 9 June 2005, Kaj Hobér, Chairman of the Stockholm Tribunal attested that the Final Award was legally effective and enforceable under Swedish law.<sup>172</sup>
161. By motions each dated 16 June 2005, Claimant filed four claims for the enforcement of the Final Award. The first motion was filed at the District Court in Uherské Hradiště and requested that the court order execution of the Final Award against LZ. The second motion was filed at the District Court in Zlín and requested that the court order execution of the Final Award against MA. The third and fourth motions were both filed at the Municipal Court in Brno and requested that the court order execution of the Final Award against Sládek and Hajtmar, respectively. Each of these requests was based upon the provisions of §36 *et seq* of the Arbitration Act and the Minister of Foreign Affairs Decree No. 74/1959 Coll. on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>173</sup>
162. On 27 June 2005, the Creditor's Committees for LZ and MA accepted an offer of CZK 67,000,000 from Aircraft Industries a.s. to purchase the assets of LZ.<sup>174</sup> By Resolution dated 28 June 2005, the Regional Court approved the sale of assets included in the bankruptcy estate of MA. In this Resolution, Hanzlikova stated, in part:

Issues relating to the sale were discussed at a joint meeting held June 1, 2005 between the judges of departments 26 K and 44 K and both bankruptcy trustees in connection with the claim filed by creditor Frontier Petroleum Services Ltd., Canada, based on an arbitral award issued on December 30, 2004 by an arbitral tribunal in Stockholm. The court concluded that this claim did not hinder the sale as part of the joint tender.<sup>175</sup>

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<sup>172</sup> Jewitt Witness Statement, ¶162; Letter from Burnet, Duckworth & Palmer LLP to Stockholm Tribunal, dated 7 June 2005 (Exhibit C-0318); Attestation of legal effect and enforceability of Final Award, dated 9 June 2005 (Exhibit C-0319).

<sup>173</sup> Annex C to Respondent's Counter-Memorial, ¶12; Motion by FPS to District Court in Uherské Hradiště, dated 16 June 2005 (Exhibit C-0138); Motion by FPS to Municipal Court in Brno, dated 16 June 2005 (Exhibit C-0139); Motion by FPS to District Court in Zlín, dated 16 June 2005 (Exhibit C-0171); Motion by FPS to Municipal Court in Brno, dated 16 June 2005 (Exhibit C-0172).

<sup>174</sup> Jewitt Witness Statement, ¶168; Minutes from joint meeting of the creditors' committees of MA and LZ, dated 27 June 2005 (Exhibit C-0100).

<sup>175</sup> Jewitt Witness Statement, ¶165; Resolution of Regional Court, dated 28 June 2005 (Exhibit C-0163).

163. On 4 July 2005, the District Court in Uherské Hradiště ordered execution of the Final Award against LZ on the basis of Claimant's motion of 16 June 2005.<sup>176</sup> On 19 July 2005, the court-appointed executor attempted to enforce the specific performance obligations of the Final Award and levied a penalty of CZK 5,000 against LZ for failure to comply.<sup>177</sup>
164. On 2 August 2005, Claimant filed a complaint with the Constitutional Court against the Regional Court's Resolution of 28 June 2005 that approved the sale of the assets of MA. This complaint was denied on 20 December 2005 on the basis that Claimant's constitutional rights had not been breached.<sup>178</sup>
165. On 5 August 2005, the Municipal Court in Brno rejected Claimant's motion of 16 June 2005 requesting that the court order execution of the Final Award against Hajtmar. Claimant appealed to the Regional Court, where the Municipal Court's decision was upheld on 25 August 2006. Claimant further appealed to the Supreme Court of the Czech Republic, where the Municipal Court's decision was again upheld on 31 March 2009.<sup>179</sup>
166. Also on 5 August 2005, the Municipal Court in Brno rejected Claimant's 16 June 2005 motion requesting that the court order execution of the Final Award against Sládek. Claimant did not appeal this decision.<sup>180</sup>
167. On 10 August 2005, Claimant filed two complaints with the Constitutional Court against the Regional Court's resolutions of 2 June 2005 and 9 June 2005 denying Claimant's motions for resolutions cancelling the tender process and ordering the bankruptcy trustees to submit an accounting of assets and grant first secured charges to Claimant. These

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<sup>176</sup> Annex C to Respondent's Counter-Memorial, ¶16; Resolution of District Court in Uherské Hradiště, dated 4 July 2005 (Exhibit C-0140).

<sup>177</sup> Annex C to Respondent's Counter-Memorial, ¶16; Execution Order, dated 19 July 2005 (Exhibit C-0141).

<sup>178</sup> Jewitt Witness Statement, ¶166; Appeal by FPS of 28 June 2005 Resolution of Regional Court, dated 2 August 2005 (Exhibit C-0165); Resolution of Constitutional Court, dated 20 December 2005 (Exhibit C-0166).

<sup>179</sup> Annex C to Respondent's Counter-Memorial, ¶14; Resolution of Municipal Court in Brno, dated 5 August 2005 (Exhibit R-0116); Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117); Resolution of Supreme Court, dated 31 March 2009 (Exhibit R-0118).

<sup>180</sup> Annex C to Respondent's Counter-Memorial, ¶18; Resolution of Municipal Court in Brno, dated 5 August 2005 (Exhibit R-0124).

complaints were denied on 20 December 2005 and 17 January 2006, respectively, on the basis that Claimant's constitutional rights had not been breached.<sup>181</sup>

168. Sládek appealed the 5 July 2005 order of the District Court of Uherské Hradiště to the Regional Court, where the penalty was struck down and execution of the Final Award pursuant to the District Court's order was declared legally impermissible on 25 August 2006.<sup>182</sup> The enforcement was discontinued in its entirety by the District Court on 8 November 2006.<sup>183</sup>
169. Also on 8 November 2006, the Regional Court recognised Claimant's receivable with respect to LZ on the basis of an acknowledgement of its existence by Sládek and on the grounds of unjust enrichment and penalty interest in the amount of CZK 3,837,711.40.<sup>184</sup>
170. By letter dated 23 November 2005, Sup submitted a complaint to the Prime Minister of the Czech Republic, Jiří Paroubek, requesting the appointment of an authorised person to review Claimant's case, and indicating that unless financial compensation was provided, the matter would become the subject of arbitration against the Czech Republic. By letter dated 26 January 2006, JUDr. Petr Petržilek of the Office of the Czech Government, Prime Minister's Expert Department, responded to Claimant, (i) explaining that the judge in charge of the case had been on maternity leave; (ii) describing what steps were available to Claimant to address the delay through the courts; and (iii) indicating that the Czech government was not a party to the Stockholm Arbitration and therefore the Final Award could not be enforced against it.<sup>185</sup>

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<sup>181</sup> Annex C to Respondent's Counter-Memorial, ¶11; Resolution of Constitutional Court, dated 17 January 2006 (Exhibit C-0135); Resolution of Constitutional Court, dated 20 December 2005 (Exhibit R-0018).

<sup>182</sup> Claimant's Pre-Hearing Memorial, ¶86; Annex C to Respondent's Counter-Memorial, ¶16; Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0120).

<sup>183</sup> Claimant's Pre-Hearing Memorial, ¶86; Annex C to Respondent's Counter-Memorial, ¶16; Resolution of District Court in Uherské Hradiště, dated 8 November 2006 (Exhibit R-0121).

<sup>184</sup> Resolution of Regional Court, dated 8 November 2006 (Exhibit C-0126). This decision was issued in response to an application by Claimant on 26 July 2004 for a determination of its receivable vis-à-vis LZ (Claim for receivable in bankruptcy proceedings of LZ, dated 23 July 2004 (Exhibit C-0121)).

<sup>185</sup> Claimant's Reply Memorial, ¶59; Letter from Transfin to Prime Minister Jiří Paroubek, dated 23 November 2005 (Exhibit C-0103); Letter from Prime Minister's Expert Department to Transfin, dated 26 January 2006 (Exhibit C-0107).

171. On 24 January 2006, a Joint Meeting of the creditors' committees of Moravan and MA was convened. Sup was present at this meeting and recorded Claimant's disapproval of the sale of MA. The Creditor's Committees for MA and Moravan as well as Hajtmar and Orbesová, agreed to proceed with the sale of MA to the sole interested party, Czech Aircraft s.r.o.<sup>186</sup>
172. On 25 January 2006, the District Court in Zlín rejected Claimant's motion requesting that the court order execution of the Final Award against MA.<sup>187</sup> Claimant appealed to the Regional Court, where the District Court in Zlín's decision was upheld, in part, on 15 February 2007.<sup>188</sup> The District Court's decision was upheld to the extent that Claimant's request for an order of execution of the Final Award with regard to the obligation on the bankruptcy trustees for MA and LZ to submit an accounting of the LET Assets and grant a first secured charge in the LET Assets and other property of MA was denied. The Regional Court modified the District Court's decision with regard to (i) the obligation to pay interest on the loan under the USA; (ii) the damages award in the amount of USD 600,000 for Claimant's lost business opportunity; (iii) the arbitration costs in the amount of USD 926,038.55; and (iv) Claimant's share of the advance payments to cover the fees and costs of the arbitrators in the amount of USD 245,124.53. On 28 May 2007, Claimant further appealed to the Supreme Court.<sup>189</sup> According to Mr. Jewitt, on 27 March 2009, the Supreme Court again denied Claimant's "right to separate (preferential) satisfaction".<sup>190</sup> However, according to Respondent, as of 20 July 2009, the Supreme Court's decision was still pending.<sup>191</sup>
173. On 27 February 2006, the Regional Court held a hearing with respect to the Resolutions Claim, which was not attended by LZ. The court announced its decision at the hearing,

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<sup>186</sup> Jewitt Witness Statement ¶197; Minutes from joint meeting of the creditors' committees of MA and Moravan, dated 24 January 2006 (Exhibit C-0346).

<sup>187</sup> Resolution of District Court in Zlín, dated 25 January 2006 (Exhibit C-0173).

<sup>188</sup> Annex C to Respondent's Counter-Memorial, ¶15; Resolution of Regional Court, dated 15 February 2007 (Exhibit C-0174).

<sup>189</sup> Annex C to Respondent's Counter-Memorial, ¶15; Extraordinary Appeal of Resolution of Regional Court of 25 May 2007, dated 25 May 2007 (Exhibit R-0119).

<sup>190</sup> Jewitt Witness Statement, ¶171.

<sup>191</sup> Annex C to Respondent's Counter Memorial, ¶15.

noting that Claimant was a shareholder in LZ and therefore entitled to file a motion and declaring that the Resolutions adopted at the LZ General Meeting increasing the basic capital and changing the Articles of Association were invalid because the general meeting did not have a quorum and could not validly adopt any resolution.<sup>192</sup>

174. On 1 September 2006, Claimant notified Respondent of a dispute under the BIT. The Parties engaged in consultations over the following year but were unable to arrive at an amicable settlement.<sup>193</sup>

175. On 28 November 2006, Claimant appealed the 8 November 2006 decision of the District Court in Uherské Hradiště to discontinue execution of the Final Award to the Regional Court.<sup>194</sup> On 30 March 2007, the Appellate Division of the Regional Court (“Appellate Division”) upheld the parts of the Regional District Court’s decision that discontinued execution of the orders under the Final Award directing the bankruptcy trustees of MA and LZ to (i) provide Claimant with an accounting for the LET Assets, and (ii) grant Claimant first secured charges against the LET Assets and all of the property of MA (in accordance with the terms of the USA) (“Order on Security”). The Appellate Division struck down parts of the Regional Court’s decision that discontinued execution of the monetary relief claims, including (i) the obligation to pay interest on the loan under the USA, (ii) the damages award in the amount of USD 600,000 for Claimant’s lost business opportunity, (iii) the arbitration costs in the amount of USD 926,038.55, and (iii) Claimant’s share of the advance payments to cover the fees and costs of the arbitrators in the amount of USD 245,124.53. The Appellate Division noted, however, that while there was no bar to the issuance of an enforcement order, such order could not be executed during bankruptcy proceedings.<sup>195</sup>

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<sup>192</sup> Notice of Arbitration, ¶29; Claimant’s Memorial, ¶27; Claimant’s Pre-Hearing Memorial, ¶64; Jewitt Witness Statement, ¶88; Resolution of Regional Court, dated 27 February 2006 (Exhibit C-0114).

<sup>193</sup> Claimant’s Memorial, ¶48.

<sup>194</sup> Annex C to Respondent’s Counter-Memorial, ¶17; Appeal by FPS of 8 November 2006 Resolution of District Court in Uherské Hradiště, dated 28 November 2006 (Exhibit R-0122).

<sup>195</sup> Annex C to Respondent’s Counter-Memorial, ¶17; Resolution of Appellate Division, dated 30 March 2007 (Exhibit C-0144).

176. On 21 June 2007, Claimant appealed the 30 March 2007 decision of the Appellate Division of the Regional Court, referring specifically to parts of that decision which upheld the discontinuation of execution of the orders under the Final Award directing the bankruptcy trustees of MA and LZ to (i) provide Claimant with an accounting for the LET Assets, and (ii) grant Claimant first secured charges against the LET Assets and all of the property of MA (in accordance with the terms of the USA). According to Respondent, as at 20 July 2009, this appeal was still pending.<sup>196</sup>
177. With respect to MA, on 28 May 2007, the Regional Court recognised Claimant's receivable in the amount of CZK 229,967,440.69 but rejected Claimant's claim for separate satisfaction. Hajtmar appeared but did not participate in the hearing. The Regional Court agreed with Hajtmar's decision to recognise Claimant's receivable in the amount of CZK 229,967,440.69 but to reject Claimant's request for separate satisfaction because security in the form of a promissory note did not warrant separate satisfaction under the *Bankruptcy Act* and because the assets for which separate satisfaction was claimed were not specified.<sup>197</sup>
178. By Notice of Arbitration dated 3 December 2007, Claimant commenced this arbitration against Respondent pursuant to the BIT.<sup>198</sup>
179. According to Claimant, the assets of MA were sold by the bankruptcy trustees for MA and LZ to Czech Aircraft, s.r.o.<sup>199</sup>
180. On 8 September 2008, the Regional Court terminated Hajtmar's 7 April 2005 action to annul the Final Award on the grounds that it had no jurisdiction to set aside a foreign arbitral award.<sup>200</sup>

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<sup>196</sup> Extraordinary Appeal by FPS of 30 March 2007 Resolution of Regional Court, dated 21 June 2007 (Exhibit R-0123); Annex C to Respondent's Counter-Memorial, ¶17.

<sup>197</sup> Resolution of Regional Court, dated 28 May 2007 (Exhibit C-0155). This decision was issued in response to an application by Claimant on 14 October 2004 for a determination of its receivable vis-à-vis MA and its right to separate satisfaction (Claim for receivable in bankruptcy proceedings of MA, dated 14 October 2004 (Exhibit C-0151)).

<sup>198</sup> Claimant's Memorial, ¶48.

<sup>199</sup> Jewitt Witness Statement, ¶198.

<sup>200</sup> Claimant's Reply Memorial, ¶90(a); Resolution of Regional Court, dated 9 September 2008 (Exhibit C-0327).

181. On 25 March 2009, Sládek confirmed that he had recognised Claimant's receivable in the full amount but classified it as a class 2 receivable without the right to separate satisfaction. According to Claimant, this recognition is essentially pointless because the assets of LZ were sold at considerably less than the value of the receivables.<sup>201</sup> By letter dated 28 April 2009, Sládek informed the Regional Court that he had recognised Claimant's receivable.

182. In its Memorial, Claimant asserts that in mid-2009 a constitutional appellate court vindicated Claimant's position with respect to the 19 May 2005 and 23 May 2005 resolutions of the Regional Court denying its motions for interim injunctions in respect of the LET Assets in the bankruptcy estates of MA and LZ.<sup>202</sup> Respondent notes that Claimant has not provided a copy of or reference to this ruling and that it is unable to find any basis for Claimant's assertion.<sup>203</sup> A copy of the constitutional appellate court's decision referred to by Claimant has not been submitted to the Tribunal.

## **6. RELEVANT PROVISIONS OF THE BIT**

183. The BIT provides, in relevant part:

### **Article I**

#### **Definitions**

For the purpose of this Agreement:

- (a) the term "investment" means any kind of asset held or invested either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes:
  - (i) "movable and immovable property and any related property rights, such as mortgages, liens or pledges";
  - (ii) "shares, stock [...] or any other form of participation in a company, business enterprise or joint venture";
  - (iii) "claims to money, and claims to performance under contract having a financial value";

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<sup>201</sup> Jewitt Witness Statement, ¶172; Letter from Sládek to Claimant, dated 25 March 2009 (Exhibit C-0328); Letter from Sládek to Regional Court, dated 28 April 2009 (Exhibit C-0329).

<sup>202</sup> Claimant's Memorial, ¶82.

<sup>203</sup> Respondent's Counter-Memorial, ¶108.

- (iv) “intellectual property rights, including rights to [...] patents, trademarks as well as trade names, industrial designs, good will, trade secrets and know-how”; and
- (v) “rights, conferred by law or under contract, to undertake economic and commercial activity”.

Any change in the form of an investment does not affect its character as an investment.

- (b) the term “investor” means:
  - (i) any natural person possessing the citizenship of or permanently residing in a Contracting Party in accordance with its laws; or
  - (ii) any corporation, partnership, trust, joint venture, organization, association or enterprise incorporated or duly constituted in accordance with applicable laws of that Contracting Party,

provided that such investor has the right, in accordance with the laws of the Contracting Party, to invest in the territory of the other Contracting Party.

- (c) the term “returns” means all amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties, fees or other current income;
- (d) the term “territory” means:
  - (i) in respect of Canada, the territory of Canada, as well as those maritime areas, including the seabed and subsoil adjacent to the outer limit of the territorial sea, over which Canada exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources of such areas;
  - (ii) in respect of the Czech and Slovak Federal Republic, the territory of the Czech and Slovak Federal Republic.

## **Article II**

### **Promotion of Investment**

- (1) Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory.
- (2) Subject to its laws and regulations, each Contracting Party shall admit investments of investors of the other Contracting Party.
- (3) This agreement shall not preclude either Contracting Party from prescribing laws and regulations in connection with the establishment of a new business enterprise or the acquisition or

sale of a business enterprise in its territory, provided that such laws and regulations are applied equally to all foreign investors. Decisions taken in conformity with such laws and regulations shall not be subject to the provisions of Articles IX or XI of this Agreement.

### **Article III**

#### **Protection of Investment**

- (1) Investments or returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in accordance with principles of international law and shall enjoy full protection and security in the territory of the other Contracting Party.
- (2) Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party in its own territory, treatment no less favourable than that which it grants to investments or returns of investors of any third State.
- (3) Each Contracting Party shall grant investors of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments or returns in its territory, treatment no less favourable than that which it grants to investors of any third State.
- (4) Each Contracting Party shall, to the extent possible and in accordance with its laws and regulations, grant to investments or returns of investors of the other Contracting Party a treatment no less favourable than that which it grants to investments or returns of its own investors.

### **Article IV**

#### **Exceptions**

The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefits of any treatment, preference or privilege resulting from:

- (a) any existing or future agreement establishing a free trade area or customs union;
- (b) any multilateral agreement for mutual economic assistance, integration or cooperation to which either of the Contracting Parties is or may become a party;
- (c) any bilateral convention, including any customs agreement, in force on the date of entry into force of this Agreement which contains provisions similar to those contained in paragraph (b) above; or
- (d) any existing or future convention relating to taxation. [...]

## **Article IX**

### **Settlement of Disputes Between an Investor and the Host Contracting Party**

- (1) Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party on the management, use, enjoyment or disposal of an investment made by the investor, and in particular, but not exclusively, relating to expropriation referred to in Article VI of this Agreement or to the transfer of funds referred to in Article VII of this Agreement, shall, to the extent possible, be settled amicably between them.
- (2) If the dispute has not been settled amicably within a period of six months from the date on which the dispute was initiated, it may be submitted by the investor to arbitration.
- (3) In that case, the dispute shall then be settled in conformity with the Arbitration Rules of the United Nations Commission on International Trade Law, as then in force.

## **Article XIII**

### **Application**

This Agreement shall apply to any investment made by an investor of one Contracting Party in the territory of the other Contracting Party on or after January 1<sup>st</sup>, 1955.

## **7. REQUESTS FOR RELIEF**

184. Claimant requests that the Tribunal grant it the following relief:<sup>204</sup>

- (1) Damages of approximately USD 20,000,000<sup>205</sup> as compensation for the losses arising out of Respondent's conduct which it alleges is inconsistent with its obligations contained within Articles II and/or III of the Treaty;

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<sup>204</sup> Claimant's Memorial, ¶118; Claimant's Reply Memorial, ¶¶138-139; Claimant's Pre-Hearing Memorial, ¶¶107-108. It is noted that Claimant later omitted its claim for "Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity".

<sup>205</sup> Claimant has submitted different claims for damages in its pleadings: Claimant's Memorial, ¶118 (not less than USD 20,000,000); Claimant's Reply Memorial, ¶¶138-139, Claimant's Pre-Hearing

- (2) Costs associated with these proceedings, including all professional fees and disbursements;
- (3) Costs associated with the arbitral proceedings referred to herein and the Investor's attempts to enforce the orders and awards issued by the previous international arbitral tribunal in its favour before the Courts of the Czech Republic;
- (4) Pre-award and post-award interest at a rate to be fixed by the Tribunal;
- (5) Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and
- (6) Such further relief as counsel may advise and that this Tribunal may deem appropriate.

185. Respondent requests that the Tribunal grant it the following relief:<sup>206</sup>

- (1) A declaration that it does not have jurisdiction over any claim based upon Article II of the BIT;
- (2) A declaration that Claimant's claims are dismissed;
- (3) A declaration that the Czech Republic has not violated the BIT with respect to Frontier's investment howsoever defined; and,
- (4) An order that Frontier shall be liable for all costs of this proceeding, including the Czech Republic's legal costs and expert fees, on a full indemnity basis.

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Memorial, ¶¶107-108 (49% of CZK 1.6 billion, 49% of USD 23,600,000, or 70% of USD 23,600,000, according to various scenarios).

<sup>206</sup> Respondent's Counter-Memorial, ¶224; Respondent's Rejoinder Memorial, ¶184; Respondent's Pre-Hearing Memorial, ¶99.

## 8. SUMMARIES OF THE PARTIES' POSITIONS AND THE TRIBUNAL'S ANALYSES

186. What follows are summaries of the positions of the Parties and the Tribunal's corresponding analyses. The summaries of the Parties' positions are without prejudice to the Parties' full arguments as submitted in written pleadings and at the hearing, including supporting documents and witness and expert testimony that the Tribunal has taken into consideration in making its determinations.

### 8.1 JURISDICTION

#### 8.1.1 Respondent's Acceptance of this Tribunal's Jurisdiction and Failure to Raise Jurisdictional Objections in Time

##### *Claimant's Position*

187. Claimant argues that Respondent is estopped from maintaining any objection to the Tribunal's jurisdiction on the basis that it (i) explicitly admitted the Tribunal's jurisdiction as recorded at paragraph 2 of Procedural Order No. 1: "it is agreed by the Respondent that the Tribunal has the jurisdiction to hear and decide all the matters referred to arbitration by the Claimant in its Notice of Arbitration dated 3 December 2007"; and (ii) failed to raise its objections until long after it was permitted to do so pursuant to Article 21(3) of the UNCITRAL Rules to the extent that Respondent's Notice of Appointment of Arbitrator constituted a statement of defence.<sup>207</sup>

188. Even if Respondent had not already explicitly admitted jurisdiction, Claimant asserts that it would nonetheless be estopped from pursuing any of its jurisdictional objections because it has waived any such right under applicable rules of international law by not bringing its objections in a timely manner.<sup>208</sup>

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<sup>207</sup> Claimant's Reply Memorial, ¶22; Claimant's Pre-Hearing Memorial, ¶¶31-32; Claimant's Post-Hearing Memorial, ¶¶76-78; Claimant's Reply to Respondent's Post-Hearing Memorial, ¶37; Article 21(3) of the UNCITRAL Rules provides that "[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."

<sup>208</sup> In support, Claimant cites *S.D. Myers Inc. v. Attorney General of Canada*, [2004] IIC 252, 2004 FC 38 (Can.), ¶49 ["*S.D. Myers Fed. Ct.*"] (Tab 7 of Claimant's Post-Hearing Memorial) (cited in Claimant's Post-Hearing Memorial, ¶77) and *CME Czech Republic B.V. v. The Czech Republic*, IIC 61 (2001), Partial Award on the Merits and Separate Opinion of 13 September 2001, ¶¶378-380 ["*CME*"] (Tab 8 of Claimant's Post-Hearing Memorial) (cited in Claimant's Post-Hearing Memorial, ¶78).

### *Respondent's Position*

189. Respondent contends that (i) Claimant's arguments regarding Respondent's alleged acceptance of the Tribunal's jurisdiction were first raised in its pre-hearing submissions and are therefore out of time;<sup>209</sup> (ii) from the documents relied on by Claimant, the Tribunal cannot draw the inference that "a sovereign State would waive in advance of even seeing Claimant's pleading any jurisdictional objections in the future";<sup>210</sup> and (iii) the Tribunal joined Respondent's jurisdictional objections to the merits in paragraph 2.5 of Procedural Order No. 5 after its objections were made; any conclusion that Respondent had waived its jurisdictional objections would contradict that ruling of the Tribunal.<sup>211</sup>

### *Tribunal's Analysis*

190. It is helpful to recall the events and submissions relevant to the Parties' dispute regarding Respondent's alleged admission of jurisdiction and its jurisdictional objections.
191. Respondent received Claimant's Notice of Arbitration on 13 December 2007 and on 14 January 2008 responded with its Notice of Appointment of Arbitrator. In it, Respondent stated, *inter alia*, that "it [did] not consider the Notice of Arbitration a filing containing a statement of claim pursuant to Article 3(4) letter c) of the UNCITRAL Rules of Arbitration" and that it "[sought] the filing made hereby not to be considered a statement of defence pursuant to Article 19 of the Rules." Respondent also submitted that "it does not believe that the 'investment' described in Claimant's Notice of Arbitration represents an investment as defined in Article 1 letter a) of the Treaty."<sup>212</sup>
192. In a letter to the Tribunal dated 4 July 2008, Respondent, in commenting on a draft version of Procedural Order No. 1 that had been circulated to the Parties, reiterated its position that Claimant had not filed a statement of claim and that its Notice of Appointment of Arbitrator

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<sup>209</sup> Claimant's Pre-Hearing Memorial, ¶¶31-32; Respondent's Post-Hearing Memorial, ¶30; Transcript of Hearing on the Merits (October 8, 2009), 560:25, 561:1-6.

<sup>210</sup> Transcript of Hearing on the Merits (October 8, 2009), 561:7-11.

<sup>211</sup> Transcript of Hearing on the Merits (October 8, 2009), 561:11-16. Paragraph 2.5 of Procedural Order No. 5 provides that "the Tribunal hereby joins the Respondent's objection to jurisdiction, as set out in paragraphs 32 to 33 and 224 of the Respondent's Counter-Memorial, to the merits and this matter will fall for determination in the Tribunal's Final Award."

<sup>212</sup> Notice of Appointment of Arbitrator dated 14 January 2008, pp. 3 (¶3), 19.

was not intended as a statement of defence in accordance with Article 19 of the UNCITRAL Rules. In case the Tribunal considered Claimant's Notice of Arbitration as a statement of claim, Respondent requested that it be granted sufficient and reasonable time to prepare a proper statement of defence.

193. By e-mail dated 22 July 2008, the Tribunal indicated to the Parties that it believed that the Memorial and Counter-Memorials should contain at least all of the particulars that one would usually find contained in statements of claim and defence, and that they could be "regarded as a full statement of a party's case [...]. [It] will usually draw attention to all important aspects of law on which the party intends to rely, or upon which the opposing party may be relying, and may often contain reasonably detailed submissions on the application of relevant legal principles to the evidence and matters in issue."
194. At paragraph 2 of Procedural Order No. 1 dated 26 September 2008, the Tribunal recorded that "[i]t is agreed by the Respondent that the Tribunal has jurisdiction to hear and decide all the matters referred to arbitration by the Claimant in its Notice of Arbitration dated 3 December 2007."
195. On 4 February 2009, Procedural Order No. 4 was issued which contained a procedural timetable for the written submissions of the Parties including Claimant's Memorial and Respondent's Counter-Memorial.
196. On 16 May 2009, Claimant submitted its Memorial.
197. By letter dated 1 June 2009, Respondent advised that it had appointed new counsel, and on 20 July 2009 it submitted its Counter-Memorial in which it raised objections to the jurisdiction of the Tribunal.<sup>213</sup>
198. On 7 August 2008, the Tribunal issued Procedural Order No. 5 in which it joined Respondent's jurisdictional objections to the merits to be decided in the Final Award, and invited Claimant to address Respondent's objections in its Reply.

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<sup>213</sup> Respondent's Counter-Memorial, ¶¶23-33, 224.

199. Claimant did so, and also submitted that Respondent's objections were made out of time pursuant to Article 21(3) of the UNCITRAL Rules.<sup>214</sup> In its Pre-Hearing Memorial dated 25 September 2009, Claimant argued that Respondent had already admitted the Tribunal's jurisdiction as per paragraph 2 of Procedural Order No. 1,<sup>215</sup> and that "to the extent the [Notice of Appointment of Arbitrator] constituted a statement of defence", Respondent's jurisdictional arguments are out of time.
200. The Parties pleaded their cases on jurisdiction in all subsequent rounds of written submissions and at the hearing.
201. The written submissions phase of this arbitration was designed such that the Parties' first opportunity to set forth their full claims and defences accompanied by factual evidence and witness testimony was Claimant's Memorial and Respondent's Counter-Memorial respectively. Respondent was never invited to file a statement of defence *per se*, and its Notice of Appointment of Arbitrator was never deemed to be its statement of defence. As such, Respondent's Counter-Memorial was in effect the equivalent to what Article 19 of the UNCITRAL Rules contemplates as the statement of defence.
202. It is true that, notwithstanding that Respondent appeared to raise a jurisdictional objection in its Notice of Appointment of Arbitrator, it was later recorded in Procedural Order No. 1 that Respondent agreed that this Tribunal has jurisdiction to hear and decide all the matters referred to arbitration by Claimant in its Notice of Arbitration. Be that as it may, and bearing in mind that Respondent changed its legal representatives after Procedural Order No. 1 was issued, it became clear from the earliest appropriate pleading in the procedural timetable (*i.e.* Respondent's Counter-Memorial) that Respondent did have jurisdictional objections.
203. At that time, the Tribunal did not consider that Respondent was precluded from raising such objections by either paragraph 2 of Procedural Order No. 1 or Article 21(3) of the UNCITRAL Rules, and allowed Respondent's jurisdictional objections to be included as issues for determination in this arbitration pursuant to Article 21 of the UNCITRAL Rules.

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<sup>214</sup> Claimant's Reply Memorial, ¶22.

<sup>215</sup> Claimant's Pre-Hearing Memorial, ¶31.

The Tribunal also invited Claimant to respond to them, which Claimant did in all of its subsequent submissions and at the hearing.

204. Accordingly, the Tribunal finds that Respondent raised its objections at the earliest appropriate opportunity according to the procedural timetable established in this case under the UNCITRAL Rules, and that Claimant cannot be said to have suffered prejudice as a result of the timing of Respondent's jurisdictional objections because it has had several opportunities to plead its position both in writing and at the hearing.

205. Under Article 15(1) of the UNCITRAL Rules the Tribunal enjoys a broad discretion to conduct the arbitration in such a manner as it considers appropriate, provided that the Parties are treated with equality and that at any stage of the proceedings each Party is given a full opportunity of presenting its case. It cannot be said that these two conditions are not fulfilled here with respect to Respondent's jurisdictional objections.

206. Further, relevant commentary on Article 21(3) of the UNCITRAL Rules provides:

Although Article 21(3), taken alone, appears to place a mandatory time limit on raising objections to jurisdiction, the drafters clearly felt a tribunal in its discretion over procedure [Article 15(1)] or by allowing amendments [Article 20] might permit such pleas to be raised at a later date.<sup>216</sup>

207. In light of the foregoing, the Tribunal rejects Claimant's argument that Respondent is estopped from raising any objection to the Tribunal's jurisdiction on the grounds that it explicitly admitted that the Tribunal has jurisdiction to hear the claim, and that it failed to raise its objections in a timely manner under Article 21(3) of the UNCITRAL Rules.

208. With respect to *S.D. Myers Fed. Cr.*<sup>217</sup> and *CME*,<sup>218</sup> that Claimant has submitted as support for its assertion that Respondent's jurisdictional objections are untimely as a matter of international law, the Tribunal considers that the factual matrix of these cases differ significantly from the present case.

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<sup>216</sup> DAVID CARON ET AL., THE UNCITRAL ARBITRATION RULES: A COMMENTARY 449 (2006).

<sup>217</sup> *Supra* note 208.

<sup>218</sup> *Supra* note 208.

209. *S.D. Myers Fed. Ct* was a decision of the Federal Court of Canada denying Canada’s application for judicial review of a series of awards. Canada referred to a general statement in its statement of defence in which it denied the facts alleged in certain paragraphs of the claimant’s statement of claim and put the claimant to the strict proof of every fact alleged in those paragraphs.<sup>219</sup> Canada argued that it had made a timely challenge to the jurisdiction of the tribunal because a number of the paragraphs that it had referred to in the statement of claim fell under the heading “Jurisdiction of the Tribunal”. The court ruled that in accordance with Article 21(3) of the UNCITRAL Rules, an objection to jurisdiction “must be raised clearly at the outset of the arbitration [and] Canada failed to do so in this case.” This Tribunal finds that the pivotal issue in *S.D. Myers Fed. Ct* was whether Canada’s jurisdictional objection was “raised clearly”, or, in the words of the court, whether it was a “specific, express objection to jurisdiction”. In this case, the Tribunal finds that Respondent’s jurisdictional objections have been “raised clearly” in its Counter-Memorial, which represents its first opportunity to fully plead its case, and considers them to be timely filed.

210. In *CME*,<sup>220</sup> the tribunal decided that, in accordance with Article 21(3) of the UNCITRAL Rules, the respondent had waived its jurisdictional objection with respect to one of the claimant’s investments by failing to raise it in its statement of defence. The tribunal observed that given that the respondent had expressly raised other jurisdictional objections in its statement of defence and not the later objection, the jurisdictional objection in question was untimely.<sup>221</sup> This case differs significantly because Respondent in the present case fully argued all of its jurisdictional objections in its Counter-Memorial. In addition, Respondent did not subsequently raise additional objections to those first raised in its Counter-Memorial.

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<sup>219</sup> Canada’s Statement of Defense, ¶4, as cited in *S.D. Myers Fed. Ct.*, *supra* note 208, ¶48.

<sup>220</sup> *CME*, *supra* note 208.

<sup>221</sup> *CME*, *supra* note 208, ¶378.

### 8.1.2 Articles I(a) and IX of the BIT – Whether ‘Investment’ Made and Whether Dispute Has Arisen in Respect of a ‘Measure’

#### *Respondent’s Position*

211. Respondent submits that Article IX of the BIT requires Claimant to establish that it has made an investment in the Czech Republic, and that a dispute has arisen in respect of a measure of the Czech Republic that has had an impact on the management, use, enjoyment or disposal of that investment.<sup>222</sup> Respondent argues that the Tribunal’s jurisdiction *ratione materiae* is limited to claims directly related to the host state’s interference with the investor’s bundle of ownership rights over the assets comprising the investment.<sup>223</sup> Respondent asserts that Claimant has simply declared that its claims fall within Article III(1) without providing any analysis for such assertions,<sup>224</sup> and that it has failed to plead its claims with anything like the precision required by the express terms of Article IX(1).<sup>225</sup>
212. Respondent argues that what Claimant is asking the Tribunal to do is to ignore the express terms of Article IX and replace them with the more common formulation of consent to arbitration of the type “any dispute between an investor of one Contracting party and the other Contracting Party in connection with an investment”.<sup>226</sup> It is Respondent’s position that there is no presumption in international law that obligations set out in a treaty must be fully actionable before an arbitral tribunal.<sup>227</sup>
213. Respondent contends that the only point made by Claimant in relation to the express terms of Article IX is that “[w]hatever else Article IX may mean, it cannot be read so as to diminish the protections promised to a Canadian investor under Articles II and III”; Respondent argues that such an approach is incompatible with Article 31 of the VCLT.<sup>228</sup>

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<sup>222</sup> Respondent’s Counter-Memorial, ¶¶24-26, 32-33; Respondent’s Rejoinder Memorial, ¶11-17; Respondent’s Pre-Hearing Memorial, ¶¶6, 9-10; Respondent’s Post-Hearing Memorial, ¶17.

<sup>223</sup> Respondent’s Post-Hearing Memorial, ¶21-24.

<sup>224</sup> Respondent’s Counter-Memorial, ¶31; Respondent’s Rejoinder, ¶11. Respondent notes in its Rejoinder that Claimant did not address this objection in its Reply Memorial.

<sup>225</sup> Respondent’s Post-Hearing Memorial, ¶23.

<sup>226</sup> Respondent’s Post-Hearing Memorial, ¶19.

<sup>227</sup> Respondent’s Post-Hearing Memorial, ¶20.

<sup>228</sup> Claimant’s Pre-Hearing Memorial, ¶38; Respondent’s Post-Hearing Memorial, ¶18.

214. With respect to Claimant’s “claim to money, in the form of the Final Award”,<sup>229</sup> Respondent submits that it could not have been part of Claimant’s investment until it came into existence on 30 December 2004. Respondent questions how acts of the Czech Republic before 30 December 2004 said to constitute a breach of the BIT impacted upon Claimant’s management, use, enjoyment or disposal of Frontier’s claim to money in the form of the Final Award.<sup>230</sup>
215. Respondent acknowledges that Claimant’s contribution of loan capital to LZ is capable of constituting an investment under Article I of the BIT,<sup>231</sup> but Respondent believes that Claimant has been very careful not to characterise its investment as such because none of its claims against the Czech Republic concern interference with this contribution of loan capital.<sup>232</sup>
216. With respect to Claimant’s definition of its investment as set forth in its Pre-Hearing Memorial, Respondent makes the following comments:
- (i) With respect to Claimant’s alleged entitlements (a) “to a first secured charge over the assets of LZ as security for its loan”; (b) “to acquire 49% of the shares of LZ for nominal consideration”; and (c) “as a shareholder of LZ, to participate in the business of the joint venture” these were asserted by Frontier under the USA and were the subject of the private dispute between Claimant and LZ and MA over which the Stockholm Tribunal had exclusive jurisdiction. Respondent submits that there is no allegation in this arbitration that Respondent interfered in Claimant’s enforcement of those aspects of the Final Award against MA and LZ.<sup>233</sup> Nor is there any allegation that the Czech Republic interfered with Claimant’s attempt to register a security interest during the Stockholm Arbitration;<sup>234</sup> and,

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<sup>229</sup> Claimant’s Post-Hearing Memorial, ¶84(c); Respondent’s Post-Hearing Memorial, ¶25.

<sup>230</sup> Respondent’s Post-Hearing Memorial, ¶¶25-28.

<sup>231</sup> Respondent notes that Claimant has sought a more expansive interpretation of its investment. *See supra* ¶218; Respondent’s Post-Hearing Memorial, ¶32.

<sup>232</sup> Respondent’s Post-Hearing Memorial, ¶¶32-38.

<sup>233</sup> Respondent’s Post-Hearing Memorial, ¶¶32, 33, 35-37.

<sup>234</sup> Respondent acknowledges that Claimant says that Respondent interfered with its entitlement to a first secured charge when the Czech courts declined to register the security interest over LZ’s assets following the issuance of the Final Award (*see infra* section 8.3.4.).

(ii) Concerning Claimant’s claim to (a) money in the form of the Final Award; and (b) the “aircraft type certificates to be acquired by Frontier through the joint venture”, Respondent submits that they are not the subject of any claim in these proceedings. The claim to money in the Final Award has been recognised in the insolvency proceedings related to MA and LZ, and the right to “aircraft type certificates” has never been mentioned before in the context of any of Claimant’s claims.<sup>235</sup>

217. Respondent has not specifically contested whether the alleged acts or omissions of the Czech Republic complained of fall within the meaning of the term “measure” and has conceded that this term has been defined broadly.<sup>236</sup> Rather, Respondent argues that Claimant has failed to identify measures which have “interfered with the management, use, enjoyment, or disposal of [Claimant’s] investment”. Respondent submits that “whilst there is probably jurisdiction in relation to some of the claims, there is certainly no causation on the basis of that provision in relation to a great number of the aspects of the investment.”<sup>237</sup> In its closing statement at the hearing, Respondent submitted that:

[t]o be clear about the jurisdictional objections, it would be possible to formulate claims based upon what happened, the money that was spent in the Czech Republic, to be within this Tribunal’s jurisdiction. Our jurisdictional objections have been designed to put the Claimant to the discipline which it is obliged to be put to, to plead its claims based upon the provision which gives this Tribunal jurisdiction. It hasn’t done so, and it hasn’t done so because of the way it would expose itself, as I had mentioned in the opening submissions, to very obvious flaws in its causation arguments in particular, but also in respect of other aspects of the Treaty which is relied upon; in other words, the other obligations it’s relying upon.<sup>238</sup>

*Claimant’s Position*

218. Claimant submits that the term “investment” found in Article I(a) of the BIT is satisfied in this case, as follows:

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<sup>235</sup> Respondent’s Post-Hearing Memorial, ¶¶32-34

<sup>236</sup> Transcript of Hearing on the Merits (5 October 2009), 170:20–23.

<sup>237</sup> Transcript of Hearing on the Merits (5 October 2009), 170:20–171:15.

<sup>238</sup> Transcript of Hearing on the Merits (8 October 2009), 562:9-21.

- (i) the payments made to MA and Davidová between 18 April 2001 and 14 August 2001 constitute an “asset held or invested” in the Czech aviation industry in the Czech Republic;<sup>239</sup>
- (ii) the pledge in the USA whereby Claimant advanced the funds necessary to acquire the LET Assets in exchange for a first secured charge constitutes an interest in “moveable and immovable property and any related property rights, such as mortgages, liens or pledges”;
- (iii) the agreement in the USA that after all of the LET Assets are transferred to LZ, Claimant was to acquire 49% of the shares of LZ for nominal consideration constitutes “shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture”;
- (iv) Claimant’s claim to money in the form of the Final Award against both MA and LZ constitutes “claims to money, and claims to performance under a contract having a financial value”;
- (v) the contract for the acquisition of the aircraft type certificates constitutes “intellectual property rights, including rights with respect to copyrights, patents, trademarks as well as trade names, industrial designs, good will, trade secrets and know-how”; and,
- (vi) the agreement that both Claimant and MA as shareholders of LZ shall participate in the business of LZ constitutes “rights, conferred by law or under contract, to undertake any economic and commercial activity”.<sup>240</sup>

219. Article IX of the BIT provides that any dispute “between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party on the management, use, enjoyment or disposal of an investment made by the investor” that cannot be settled amicably shall be submitted to UNCITRAL Rules arbitration.

220. Claimant submits that it has “made out a *prima facie* case demonstrating in considerable detail how the myriad failings of the Czech legal regime, and of Czech officials, resulted in the substantial deprivation of Claimant’s management, use, enjoyment and disposition of its investments” and that the term “measure” refers broadly to any acts or omissions

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<sup>239</sup> Claimant’s Pre-Hearing Memorial, ¶33; Claimant’s Post-Hearing Memorial, ¶84.

<sup>240</sup> Claimant’s Memorial, ¶49, with a general reference to the Jewitt Witness Statement; Claimant’s Pre-Hearing Memorial, ¶33; Claimant’s Post-Hearing Memorial, ¶84.

attributable to a state party under an international trade or investment agreement.<sup>241</sup> Claimant also asserts that, whatever else Article IX may mean, it cannot be read so as to diminish the protections promised to a Canadian investor under Articles II and III of the BIT.<sup>242</sup>

221. Claimant submits that the Tribunal should interpret the text of the BIT broadly, so as to favour the protection of covered investments.<sup>243</sup> Claimant contests Respondent's narrow construction of Article IX as being inconsistent with the object and purpose of an investment promotion and protection treaty.<sup>244</sup> Claimant asserts that the terms "management, use, enjoyment or disposal of an investment" should not be construed in isolation from the standards the BIT accords to investors when Article 31 of the VCLT requires these terms to be construed in context, taking into account how these standards are fulfilled.<sup>245</sup>
222. Claimant contends that by arguing that only the loan Claimant made under the USA is capable of being defined as an investment, Respondent is relying upon the outcome suffered by Claimant as a result of Respondent's failure to properly protect its investment such that Claimant could not realise the fruits of its investment.<sup>246</sup> Claimant argues that Respondent has already admitted that Claimant is a protected "investor" and made a protected "investment" under the BIT at paragraph 4 of its Notice of Appointment of Arbitrator.<sup>247</sup>

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<sup>241</sup> Claimant's Memorial, ¶47; Claimant's Reply Memorial, ¶¶14, 15, 23.

<sup>242</sup> Claimant's Pre-Hearing Memorial, ¶38; Claimant's Post-Hearing Memorial, ¶86.

<sup>243</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, ¶116 (cited in Claimant's Reply to Respondent's Post-Hearing Memorial, ¶37) (Tab 3 of Claimant's Reply to Respondent's Post-Hearing Memorial).

<sup>244</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶37.

<sup>245</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶39.

<sup>246</sup> Claimant's Post-Hearing Memorial, ¶¶80-83.

<sup>247</sup> Specifically when Respondent stated that it "does not challenge the fact that the Claimant could not be an investor pursuant to Article I b)(ii) of the Treaty and [...] that provision of a loan to [MA] could not be qualified as investment pursuant to the provision of Article I a) of the [BIT] either."; Claimant's Pre-Hearing Memorial, ¶30.

*Tribunal's Analysis*

223. There is little doubt that the term “measure” generally encompasses both actions and omissions of a state in international law. The *ILC Articles* provide that an internationally wrongful act of a state may arise by “conduct consisting of an action or omission.” The *Commentary to the ILC Articles* explains that “[c]ases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two”. The *Commentary to the ILC Articles* also sets out that “it may be difficult to isolate an “omission” from the surrounding circumstances which are relevant to the determination of responsibility” and that, in certain cases, it may be the combination of an action and an omission which is the basis for responsibility.<sup>248</sup>
224. In the *Fisheries Case (Canada v. Spain)*,<sup>249</sup> the ICJ upheld the proposition that “in its ordinary sense the word [“measure”] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby.”<sup>250</sup>
225. In *Eureko v. Poland*,<sup>251</sup> the tribunal ruled that the term “measure” in a BIT provision similar to the one before this Tribunal<sup>252</sup> encompassed both actions and omissions by the respondent state. The tribunal stated that “[i]t is obvious that the rights of an investor can be violated as such by the failure of a Contracting State to act as by its actions”, referring to

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<sup>248</sup> International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, online: <[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)> *ILC Articles*] and International Law Commission, “Commentary to Article 2 of the Articles on Responsibility of States for Internationally Wrongful Acts” at p. 35, ¶4.

<sup>249</sup> *Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction of the Court, Judgment, [1998] I.C.J. Rep. 432 at 66.

<sup>250</sup> See also Claimant’s Reply Memorial, ¶14.

<sup>251</sup> *Eureko B.V. v. Poland*, Partial Award of Ad hoc Arbitral Tribunal of August 19, 2005, ¶¶116, 226-235 [“*Eureko*”]. In this case, the failure of the State Treasury to transfer a controlling stake in a Polish insurance company was found to be in breach of the fair and equitable treatment standard.

<sup>252</sup> See Article 8(1) of the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment: “Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business, such as the measures mentioned in Article 5 of this Agreement or transfer of funds mentioned in Article 4 of this Agreement, shall to the extent possible, be settled amicably between both parties concerned.”, as cited in *Eureko*, *supra* note 251 at ¶76.

similar findings by numerous other international arbitral tribunals.<sup>253</sup> Claimant also asserts that the award in *Saipem v. Bangladesh* demonstrates how the failure of a state to ensure that an international arbitration award is recognised and enforced may be characterised as a “measure” subject to that state’s obligations under a BIT.<sup>254</sup>

226. Claimant argues that *Oil Fields of Texas Inc. v. NIOC* supports the proposition that various judicial acts may be properly characterised as “measures affecting property rights”.<sup>255</sup> However, the *Oil Fields* case specifically addressed the question of whether a judicial decision could amount to a “measure of appropriation”. The tribunal in *Oil Fields* noted that it took into account that it was impossible for Claimant to challenge the judicial decision in question in Iran, and held that the order in question – issued by an Iranian court – amounted to a permanent deprivation of Claimant’s rights.<sup>256</sup>

227. The claims asserted by Claimant in this case are, in broad terms,<sup>257</sup> based upon (i) the alleged failure of the Regional Court to respond to Claimant’s application to invalidate the LZ Resolutions; (ii) the allegedly flawed decision-making process of the bankruptcy judges; (iii) the alleged failure of various Czech officials to exercise their authority to remedy the treatment being received by Claimant, and to assist it in preserving its investment (referring specifically to the handling of the criminal complaint, the commercial registry complaint, and the failure of the Ministry of Industry and Trade through the CKA to enter into negotiations with Soska); and (iv) the failure of Respondent’s legal system to comply with Respondent’s international obligations under the *New York Convention* to

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<sup>253</sup> *Eureko*, *supra* note 251 at ¶186. See also *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007, ¶246 [“PSEG”], where Turkey’s silence during contract negotiations with a foreign investor was found to breach its obligation of fair and equitable treatment.

<sup>254</sup> Claimant’s Reply Memorial, ¶15; *Saipem v. Bangladesh*, Award, 30 June 2009 (ICSID Case No. ARB/05/7) (Tab 9 of Claimant’s Post-Hearing Memorial, Exhibit R-0166) [“*Saipem*”].

<sup>255</sup> Claimant’s Reply Memorial, ¶15; *Oil Fields of Texas Inc. v. NIOC*, 12 Iran-US Cl Trib Rep 308 (1986) at 318-319.

<sup>256</sup> Alford explains that “the purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.” See Roger Alford, 26 June 2003 - ICSID, Digest by ITA Board of Reporters (accessed through [KluwerArbitration.com](http://KluwerArbitration.com))

<sup>257</sup> Claimant’s Memorial, ¶71; Claimant’s Reply Memorial, ¶¶58-131.

maintain an effective means for enforcement of an international tribunal's orders and awards.

228. In light of the generally accepted rule that the ordinary meaning of the term “measure” includes acts and omissions, it appears that there would be no difficulty in construing the acts and omissions that form the basis of Claimant’s claims as “measures”. This is not contested by Respondent.
229. Respondent does contest whether Claimant has satisfactorily established that this dispute relates to the effects of a measure taken by Respondent on the management, use, enjoyment, or disposal of an investment made by Claimant. Respondent’s position is that Claimant has not been able to identify measures taken by the Czech Republic that have interfered with the management, use, enjoyment, or disposal of Claimant’s investment under each and every one of its claims. Respondent sets out specifically in which instances it believes Claimant has failed to establish such a connection (*see supra* paragraphs 216-217). Claimant for its part, argues that “[i]t is abundantly clear [...] that the dispute between the parties concerns an accumulation of acts of omission committed by the Respondent that have permanently impaired Frontier’s ability to manage, use, enjoy or dispose of its investment in the Czech Republic (from exercising its right to participate in the joint venture to having its property interests in the LET Assets enforced). [...] While under the control and direction of Soska, MA and LZ fundamentally breached the terms of the USA [...]. It was the failings of the Czech legal regime, however, which prevented Frontier from protecting its investment when it became apparent that its erstwhile joint venture partner was acting fraudulently.”<sup>258</sup>
230. The Tribunal considers that Claimant has stated in sufficiently clear terms what it alleges to constitute measures taken by Respondent and what comprises its investment in the Czech Republic. The question is then whether there exists the requisite nexus between the two to establish the Tribunal’s jurisdiction *ratione materiae* under Article IX. Respondent acknowledges that there is one “measure” taken by Respondent that may have a conceivable connection to Claimant’s investment: “Claimant says that the Czech Republic interfered with its entitlement to a first secured charge when the Czech courts declined to register the security interest over LZ’s assets following the Final Award. [...] Save for [this

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<sup>258</sup> Claimant’s Post-Hearing Memorial, ¶¶86-87.

claim], none of the Claimant's other claims have any conceivable connection to its investment as belatedly described in its Pre-Hearing Submission."<sup>259</sup>

231. This Tribunal accepts that Claimant's original investment consisted of the payments made to MA and Davidová between 18 April 2001 and 14 August 2001, which were transformed into an entitlement to a first secured charge in the Final Award. The Tribunal also notes that Article 1(a) of the BIT provides that "[a]ny change in the form of an investment does not affect its character as an investment". Accordingly, by refusing to recognise and enforce the Final Award in its entirety, the Tribunal accepts that Respondent could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment. Further, Article IX refers to "a measure" in the singular, such that this Tribunal's jurisdiction *ratione materiae* may be established over this dispute if Claimant shows that it relates to the effects of at least *one* measure taken by Respondent on the management, use, enjoyment, or disposal of its investment.
232. The issues that Respondent has raised under this jurisdictional objection overlap to a significant extent with the merits of Claimant's claims, particularly concerning questions of attribution and causation. Respondent appears to acknowledge this as its argument that all but one of Claimant's claims have no conceivable connection to its investment is made under the heading "The Significance of the Claimant's Description of its Investment for the Merits of its Claims".<sup>260</sup> Accordingly, the Tribunal will address the issues raised in this section as part of the merits, to the extent necessary.
233. In view of its findings in paragraphs 230 and 231 that an investment was made by Claimant and that a dispute arose in respect of a measure it follows that Respondent's jurisdictional objections have not been established. The Tribunal therefore concludes that it has jurisdiction to hear Claimant's claims.

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<sup>259</sup> Respondent's Post-Hearing Memorial, ¶¶39-40.

<sup>260</sup> Respondent's Post-Hearing Memorial, p. 10.

### 8.1.3 Article II(1) of the BIT – Existence of Enforceable Obligations Relating to Promotion of Investment

#### *Claimant's Position*

234. Claimant asserts that Article II(1) of the BIT imposes a positive obligation upon the Czech Republic with respect to the establishment of favourable conditions for Canadian investors to make investments in its territory, and, together with Article III(1), should be construed as imposing an ongoing obligation upon the Czech Republic to ensure that it has taken the necessary steps to create and maintain favourable investment conditions.<sup>261</sup> It is Claimant's position that this "obligation subsists on the part of the Host State, post-establishment, because the investor relied upon the continuing promise of the Host State to maintain favourable conditions when making the decision to establish its investment."<sup>262</sup>
235. Claimant further submits that if the Parties had actually intended for admission and establishment measures to be excluded from the application of the BIT, or from dispute settlement under the BIT, they would have expressly said so.<sup>263</sup> Claimant considers that there is no indication in Article IX that a claim cannot be brought in respect of the host state's failure to honour its obligations under Article II(1), so long as the impugned measure was neither a decision taken by a host state pursuant to a new, non-discriminatory establishment measure, nor the measure itself.<sup>264</sup>

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<sup>261</sup> Claimant's Memorial, ¶¶54-66; Claimant's Reply Memorial, ¶¶16-20; *National Grid plc v. The Argentine Republic*, Award of 3 November 2008, ¶¶174, 176["*National Grid*"]; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007, ¶262 ["*Enron*"]; *Saluka Investment BV v. The Czech Republic*, IIC 210 (2006), Partial Award dated 17 March 2006 (Tab 10 of Claimant's Post-Hearing Memorial, Tab 1 of Claimant's Reply to Respondent's Post-Hearing Memorial), ¶¶301-303 ["*Saluka*"]; *PSEG, supra* note 253; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award of 20 November 1984, pp. 490, 493; *CME, supra* note 208, ¶611; *International Thunderbird Gaming Corporation v. Mexico*, Separate Opinion of 26 January 2006, ¶¶5, 30; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, ¶¶274-277 ["*CMS Award*"]; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Annulment Decision of 25 September 2007, ¶89; and to the definition of the principle of good faith found in *Third Restatement of the Foreign Relations Law of the United States*, §711.

<sup>262</sup> Claimant's Memorial, ¶¶54.

<sup>263</sup> Claimant's Reply Memorial, ¶19.

<sup>264</sup> Claimant's Reply Memorial, ¶20; *see also* ¶¶17-19.

236. At a minimum, Claimant argues, “favourable conditions” for foreign investment include (i) a local court system in which criminal complaints are addressed fairly and efficaciously and emergency petitions for relief do not languish before the courts for years before the provision of a belated answer; (ii) a transparent, up-to-date and reliable local registry system, both for corporate affairs and registration and for property registration; (iii) bankruptcy trustees conducting themselves in accordance with accepted professional norms and applicable international law; and (iv) a promise that the orders and awards of international arbitral tribunals will be respected and enforced in compliance with a Party’s international obligations, such as those included in the *New York Convention*. Claimant asserts that each of these conditions make up the framework of a transparent, stable, and secure investment environment, which is exactly what was promised to Claimant by Respondent, through its agents, officials, and its promotional materials, when Claimant was considering whether to invest in the Czech aircraft industry. Claimant asserts that it relied upon the existence of such commitments and made its decision to invest with sufficient prudence, after having been involved with Soska and MA in their original joint venture with MA and addressing risks inherent in dealing with a local partner by including a suitable arbitration clause in the USA.<sup>265</sup>

237. Claimant has stated its position with respect to how its claims under Article II of the BIT relate to its claims under Article III of the BIT over the course of these proceedings as follows:

238. In its Reply Memorial, Claimant submits that:

The two standards [referring to full protection and security and fair and equitable treatment] are far from being mutually exclusive; indeed, they can often overlap considerably. Similarly, as indicated by Claimant in its Memorial, the protection contained within Article II:1 of the Treaty need not serve as a basis for establishing an independent breach (especially not in the circumstances of the instant case). While the Claimant disagrees that this provision can never be enforced against a Treaty party, in this case the primary function of the provision is essentially to reinforce the scope and content of the fair and equitable treatment standard.<sup>266</sup>

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<sup>265</sup> Claimant’s Memorial, ¶58; Claimant’s Pre-Hearing Memorial, ¶¶41, 43, 56; Claimant’s Post-Hearing Memorial, ¶¶88-90.

<sup>266</sup> Claimant’s Reply Memorial, ¶37.

239. Claimant also submits that “[w]ithin the context of this case, it was the obligation to provide full protection and security which was supposed to have ensured that the favourable conditions for investment that the Respondent was obliged to maintain, under Article II:1, were indeed maintained.”<sup>267</sup>
240. In its Pre-Hearing Memorial, Claimant sets forth examples of “favourable conditions” that it alleges that Respondent failed to provide in violation of Article II(1), which it repeats in its Post-Hearing Memorial (*see supra* paragraph 236).<sup>268</sup>
241. In its opening submissions at the hearing, Claimant stated that “[t]he first protection we have referred to in our submissions has been Article II(1) [...]. We say simply that it is consistent with the preamble and other protections in Article III. They probably overlap. We make no great do about invoking Article II(1), although we say emphatically that Article II(1) does extend a specific form of protection to investors: the creation of favourable conditions.”<sup>269</sup> In its closing statement at the hearing, Claimant did not discuss Article II(1).
242. In its Post-Hearing Memorial, Claimant states that Article II(1) of the Treaty can be regarded as reinforcing – if not broadening – the scope of the fair and equitable treatment standard owed by Respondent to Frontier.<sup>270</sup>
243. In its Reply to Respondent’s Post-Hearing Memorial, Claimant submits that “Canadian investors are entitled to expect that all Czech officials involved in this case exercise their delegated discretion in a manner consistent with these standards [referring to full protection and security and fair and equitable treatment] as part and parcel of the promise of these standards and of the favourable conditions for investment promised under Article II(1) of the Treaty.”<sup>271</sup>

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<sup>267</sup> Claimant’s Reply Memorial, ¶39.

<sup>268</sup> Claimant’s Pre-Hearing Memorial, ¶¶41-43; Claimant’s Post-Hearing Memorial, ¶90.

<sup>269</sup> Transcript of Hearing on the Merits (October 5, 2009), 28:14-23.

<sup>270</sup> Claimant’s Post-Hearing Memorial, ¶93.

<sup>271</sup> Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶3.

### *Respondent's Position*

244. Respondent asserts that the obligations under Article II(1) are related to the admission of investments and are not obligations of result that would be enforceable against the Contracting Parties, and that this is made “abundantly clear” by the language of Articles II(2) and (3). Respondent notes that Article IX defines the scope of the jurisdiction *ratione materiae* of the Tribunal in terms of measures impacting upon existing investments, rather than claims relating to the admission of investments. Therefore, Respondent submits, any claim founded upon Article II(1) of the BIT is manifestly outside the jurisdiction of the Tribunal.<sup>272</sup> Respondent also notes that Claimant has clarified that its claim rests on two grounds, one arising from the obligation to provide full protection and security and the other arising from the obligation to provide fair and equitable treatment, and that therefore it is difficult to comprehend the relevance of Article II to the claims submitted by Claimant.<sup>273</sup>

### *Tribunal's Analysis*

245. Articles II(1) and (2) refer to the admission of investments and Article II(3) refers to the enactment of laws in connection with the establishment or acquisition of a business enterprise. Article III outlines the protections that apply to investments that have already been established. The jurisdiction *ratione materiae* of this Tribunal as defined by Article IX(1) of the BIT refers to established investments, *i.e.* “an investment *made* by the investor”. In light of this text, the Tribunal concludes that Article II(1) does not create an obligation with respect to *existing* investments that would be enforceable against the Contracting Parties. The wording of Article IX(1) – “an investment made by the investor” – makes this clear.
246. In any event, the Tribunal considers that it is not necessary to determine whether Article II of the BIT creates an enforceable obligation in light of the fact that Claimant does not appear to raise independent claims under that provision. Claimant’s comment at paragraph 37 of its Reply Memorial is of note, *i.e.* that “the protection contained within Article II:1 of the Treaty need not serve as a basis for establishing an independent breach (especially not

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<sup>272</sup> Respondent’s Counter-Memorial, ¶¶27-30; Respondent’s Rejoinder Memorial, ¶8-10; Respondent’s Pre-Hearing Memorial, ¶7-8.

<sup>273</sup> Respondent’s Rejoinder Memorial, ¶¶8-10; Respondent’s Pre-Hearing Memorial, ¶8.

in the circumstances of the instant case)” and “[w]hile the Claimant disagrees that this provision can never be enforced against a Treaty party, in this case the primary function of the provision is essentially to reinforce the scope and content of the fair and equitable treatment.”

#### **8.1.4 Articles III(2) and (3) of the BIT and Article VI(1) of the U.S./Czech Republic BIT – Operation of Most-Favoured Nation Provision**

##### *Claimant’s Position*

247. Claimant submits that, should the Tribunal conclude that it lacks jurisdiction on the basis of any of Respondent’s objections, it should find that Claimant is entitled to benefit from the broader terminology found in the dispute settlement provision of Article VI(1) of the *Treaty Between the Czech Republic and the United States of America for the Reciprocal Encouragement and Protection of Investment* (“*US-Czech Republic BIT*”) by operation of the most-favoured nation (“MFN”) provision at Article III(2) and (3) of the BIT, as limited by Article IV.<sup>274</sup> Article VI of the *US-Czech Republic BIT* provides, in part:

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party’s foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

##### *Respondent’s Position*

248. Respondent argues that its offer of consent to arbitration is contained in Article IX of the BIT and the arbitration agreement between Respondent and Claimant was perfected upon Claimant’s filing of its Notice of Arbitration on 3 December 2007. Respondent asserts that Claimant cannot seek to modify the terms of the arbitration agreement unilaterally by recourse to the MFN clause of the BIT.<sup>275</sup>

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<sup>274</sup> Claimant’s Reply Memorial, ¶¶31, 33.

<sup>275</sup> Commentary to Rule 43 in ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 344 *et seq* (2009) (Exhibit R-0161) [“*Douglas*”], (cited in Respondent’s Rejoinder Memorial, ¶20). Respondent also refers to *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, ¶¶207, 223 (Exhibit R-0162) (cited in Respondent’s Rejoinder Memorial, ¶20; Respondent’s Pre-Hearing Memorial, ¶12(1)).

249. Further, Respondent contends that even if Claimant could rely on the MFN clause, the terms of Article III(2) indicate that it cannot be invoked in respect of jurisdictional matters, *i.e.* the treatment of investments in the Contracting Party's territory cannot, in accordance with the ordinary meaning of those terms pursuant to Article 31 of the VCLT,<sup>276</sup> encompass matters relating to the jurisdiction of an international tribunal established under Article IX of the BIT. Respondent notes that when contracting state parties wish to include jurisdictional matters within the scope of an MFN clause, they do so expressly.<sup>277</sup>
250. Respondent also submits that Claimant's MFN arguments are made out of time; Claimant could have articulated this basis for jurisdiction in its Notice of Arbitration and in its Memorial, but did not do so.<sup>278</sup>
251. Finally, Respondent argues that Claimant's reliance on the MFN clause of the BIT does not rectify Claimant's failure to identify the specific assets that are said to constitute an investment pursuant to Article I(a) of the BIT and to demonstrate that acts attributable to the Czech Republic have impaired those assets by reference to a demonstrable loss.<sup>279</sup>

*Tribunal's Analysis*

252. Given that the Tribunal has not found its jurisdiction to be lacking on the basis of Respondent's objections, the Tribunal does not find it necessary to make a determination with respect to the Parties' arguments regarding the operation of the MFN provisions in Articles III(2) and (3) of the BIT.

**8.2 MERITS - INTERPRETATION OF THE BIT PROVISIONS**

253. In assessing the Parties' arguments on the interpretation of the relevant BIT provisions as well as Claimant's treaty violation claims, this Tribunal's task is limited to applying the

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<sup>276</sup> 23 May 1969, 1155 U.N.T.S. 331 (cited in Respondent's Rejoinder Memorial, ¶24).

<sup>277</sup> Respondent refers to Articles 3(3) and 8 of the United Kingdom Model BIT as an example of such an express consent to the inclusion of jurisdictional matters within the scope of an MFN clause. *See* United Kingdom Model BIT (2005, with 2006 amendments) in *Douglas, supra* note 275 (Exhibit R-0148) (cited in Respondent's Rejoinder Memorial, ¶¶24-25; Respondent's Pre-Hearing Memorial, ¶12(2)).

<sup>278</sup> Respondent's Rejoinder Memorial, ¶26; Respondent's Pre-Hearing Memorial, ¶12(3).

<sup>279</sup> Respondent's Rejoinder Memorial, ¶27; Respondent's Pre-Hearing Memorial, ¶13.

relevant provisions of the BIT as far as necessary in order to decide on the relief sought by the Parties.

### 8.2.1 Article III(1) – Full Protection and Security

#### *Claimant's Position*

254. Claimant submits that the obligation of full protection and security requires a host state to maintain a regulatory and commercial framework that ensures full protection and security for foreign investments at all cost. Claimant asserts that *prima facie* evidence of a host state's failure to provide full protection and security is manifested in the fact of insufficient government action, combined with contemporaneous loss or damage to the investor's ability to manage, use, enjoy, or dispose of its investment.<sup>280</sup>
255. Claimant rejects Respondent's argument that it is only obliged to provide police protection on the ground that according to the BIT, Respondent is obliged to provide "full protection and security" in accordance with principles of international law which is in no way restricted to customary international law. Claimant notes that there is authority for its position that full protection and security extends beyond protection from physical violence.<sup>281</sup> According to Claimant, the host state's obligation is one of due diligence, requiring its constant vigilance in ensuring that the regulatory and commercial legal protections it has put in place function efficiently and effectively.<sup>282</sup> Failure to establish or

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<sup>280</sup> Claimant's Memorial, ¶67; *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990 (Tab 14 of Claimant's Post-Hearing Memorial) ["AAPL"].

<sup>281</sup> Claimant's Pre-Hearing Memorial, ¶51; Claimant's Post-Hearing Memorial, ¶95. Claimant refers to RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 141 (2008) (Tab 12 of Claimant's Post-Hearing Memorial) ["Dolzer/Schreuer"] and *Siemens AG v. Argentina*, ICSID, ARB/02/9, Award of 6 February 2007, ¶81 ["Siemens"], which Claimant notes is cited by *Dolzer/Schreuer*.

<sup>282</sup> Claimant's Memorial, ¶69, Claimant's Pre-Hearing Memorial, ¶53; Claimant's Post-Hearing Memorial, ¶96. Claimant refers to *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008 (cited in Claimant's Reply to Respondent's Post-Hearing Memorial, ¶51) (Tab 8 of Claimant's Reply to Respondent's Post-Hearing Memorial) ["Rumeli"]:

The obligation to accord full protection and security requires the host State to exercise due diligence in the protection of foreign investments. It imposes an objective standard of vigilance and thus requires the State to afford the degree of protection and security that should be legitimately expected from a reasonably well-organized modern State[.] [...] According to the United Nations Conference on Trade and Development, the full protection and security standard: 'connotes the assurance of full protection and security for foreign investors as contemplated or required by customary international

maintain such reasonable measures of protection can be justified on rare occasions, but only on the basis of a pressing and reasonable public policy objective.<sup>283</sup> While this duty should not be extended to become a *de facto* “all risks” insurance policy for investors, Claimant also argues that it should not be confined to situations involving “a violent mob or insurrection”.<sup>284</sup>

256. Claimant asserts that pursuant to this obligation under the BIT, Respondent should have ensured that its legal and political institutions operated as well as they had been advertised as operating. As such, Respondent was obliged to maintain (i) a working registry system; (ii) courts capable of providing urgent relief to a defrauded shareholder; (iii) police inspectors prepared to fully and finally investigate allegations of commercial fraud, even when made by a foreigner against a local businessman; and (iv) bankruptcy judges who do not prejudge issues while partaking in *ex parte* communications with parties adverse in interest to the primary (foreign) creditor”.<sup>285</sup> Claimant relies upon *Lauder v. Czech Republic* for the proposition that the obligation to accord full protection and security to an investment extends to the host state’s ability to furnish the investor with an effective and efficient judicial system thereby enabling the investor to obtain a timely and proficient adjudication of its rights, in keeping with international standards.<sup>286</sup>

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law. At the same time, the clause on full protection and security is unusual in that it contemplates protecting investment against private as well as public action, that is, the clause requires that the host country should exercise reasonable care to protect investment against injury by private parties.’ [...] It is inconsequential whether the damage is caused by a member of the State forces or by a private party. In either case, the State has a ‘primary obligation’ to exercise due diligence to provide adequate protection. The State’s failure to comply with this objective obligation due to the mere lack of diligence is sufficient, without any need to establish malice or negligence.

<sup>283</sup> Claimant’s Memorial, ¶70; *Saluka*, *supra* note 261, ¶490.

<sup>284</sup> Claimant’s Memorial, ¶68; Claimant’s Reply Memorial, ¶39; *Wena Hotels Ltd v. Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, ¶ 84 [“*Wena Hotels*”].

<sup>285</sup> Claimant’s Reply Memorial, ¶¶39–40.

<sup>286</sup> Claimant’s Pre-Hearing Memorial, ¶53; Claimant’s Post-Hearing Memorial, ¶96; *Lauder v. Czech Republic*, 9 ICSID Rep 66, Final Award of 3 September 2001, ¶314 (Tab 15 of Claimant’s Post-Hearing Memorial, Exhibit R-0126) [“*Lauder*”]. The Tribunal notes that ¶314 of *Lauder* reads as follows: “The investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent’s only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims”.

*Respondent's Position*

257. Respondent rejects Claimant's assertion that the host state's obligation is one of due diligence, requiring its constant vigilance to ensure that the regulatory framework and commercial legal protections it has put in place for the benefit of a foreign investor function efficiently and effectively, noting that no tribunal has ever adopted this interpretation.<sup>287</sup> Respondent also objects to the assertion that it is under an obligation to ensure that a regulatory and commercial framework to ensure full protection and security for foreign investments is maintained at all cost, noting the subjectivity of the level of protection and security that might be expected by a particular investor.<sup>288</sup>
258. Respondent explains that the vast majority of investment treaty awards have limited the obligation of full protection and security to ensuring the physical safety of the investment property and personnel in the host state consistent with the resources available to the host state, which Respondent notes is in line with the historical development of the standard in customary international law.<sup>289</sup> Respondent asserts that it is only in this context that it is correct to characterise the obligation as one of due diligence.<sup>290</sup> While it is clear that this obligation extends to third parties (in so far as states have an obligation of due diligence to protect property and personnel from the violent acts of mobs or armed militias),

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<sup>287</sup> Respondent's Rejoinder Memorial, ¶¶41-44; Respondent's Post-Hearing Memorial, ¶¶148-149.

<sup>288</sup> Respondent's Rejoinder Memorial, ¶40-45. Respondent refers ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 310 (2009), cited in *Pantechniki S.A. Contractors & Engineers v. Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, ¶81 [*"Pantechniki"*] (Exhibit R-0164):

[a]lthough the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.

<sup>289</sup> Respondent's Rejoinder Memorial, ¶48. Respondent refers to *AAPL, supra* note 280, *American Manufacturing and Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, Award of 21 February 1997 [*"AMT"*], *Saluka, supra* note 261, *TECMED, supra* note 316, *PSEG, supra* note 253, *Eureko, supra* note 251, and *Pantechniki, supra* note 288.

<sup>290</sup> Respondent's Rejoinder Memorial, ¶45; Respondent's Pre-Hearing Memorial, ¶36; Respondent's Post-Hearing Memorial, ¶150. Respondent refers again to *Pantechniki, supra* note 288, for the proposition that it is an obligation of means and not of result and the acts required of the state depend in part upon the resources at its disposal.

Respondent contends that it cannot properly be said to extend to “other non violent acts by third parties, such as commercial acts of the private business partners of the foreign investor.”<sup>291</sup>

259. Respondent contends that even if on the basis of *Lauder*, “full protection and security” could be extended to the host state’s judicial system to allow assessment of its effectiveness by reference to international standards, the decisions of the Czech Supreme Court and Constitutional Court not to enforce the Order on Security in the Final Award is consistent with the major legal systems of the world and with the Council of Ministers of the European Union regulation on insolvency proceedings (“*EC Regulation*”).<sup>292</sup>

*Tribunal’s Analysis*

260. Most bilateral or multilateral treaties dealing with the protection of investments contain clauses with the same or similar wording as the full protection and security clause in Article III(1) of the BIT.<sup>293</sup> Some omit the adjective “full”, others put “security” before “protection” and some refer to “most constant protection and security”, but these variations do not appear to carry any substantive significance.<sup>294</sup>
261. The wording of these full protection and security clauses suggests that the host state is under an obligation to take active measures to protect the investment from adverse effects that stem from private parties or from the host state and its organs.<sup>295</sup> The mere fact, however, that the investor lost its investment is insufficient to demonstrate a breach of full protection and security.

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<sup>291</sup> Respondent’s Rejoinder Memorial, ¶47; Respondent’s Pre-Hearing Memorial, ¶37. Respondent refers to *AAPL*, *supra* note 280, *AMT*, *supra* note 289, *Saluka*, *supra* note 261, *TECMED*, *infra* note 316, *PSEG*, *supra* note 253, *Eureka*, *supra* note 251, ¶¶236-237, and *Pantechniki*, *supra* note 288 as awards that support the proposition that a state cannot be held to be under a general obligation of due diligence in respect of all aspects of the regulatory framework for foreign investments.

<sup>292</sup> Claimant’s Post-Hearing Memorial, ¶96; Respondent’s Post-Hearing Memorial, ¶151; Council regulation (European Communities) No. 1346/2000 of 29 May 2000 on insolvency proceedings (Tab 1 of Claimant’s Post-Hearing Memorial; Exhibit R-0101) [*“EC Regulation”*].

<sup>293</sup> See *G. Cordero Moss*, Full Protection and Security, in (A. Reinisch ed.) *Standards of Investment Protection*, pp. 131- 150 (2008).

<sup>294</sup> *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, ¶354 [*“Parkerings”*].

<sup>295</sup> See H.E. Zeitler, *The Guarantee of “Full Protection and Security” in Investment Treaties Regarding Harm Caused by Private Actors*, *Stockholm Intl. Arbitration Review* 2005:3, p. 1.

262. It is not disputed that the standard of full protection and security relates to the investor's physical safety, nor is it particularly relevant to the circumstances of this case.<sup>296</sup> In a number of cases tribunals have suggested that the standard of full protection and security applies exclusively or preponderantly to physical security and to the host state's duty to protect the investor against violence directed at persons and property stemming from state organs or private parties.<sup>297</sup> For example, in *Saluka*, the Tribunal said:

The "full protection and security" standard applies essentially when the foreign investment has been affected by civil strife and physical violence. [...] [T]he "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.<sup>298</sup>

263. But, there are also authorities which show that the principle of full protection and security extends beyond protection against physical violence to legal protection for the investor.<sup>299</sup> Contrary to Respondent's assertions,<sup>300</sup> it is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors – including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights.

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<sup>296</sup> *PSEG*, *supra* note 253, ¶¶257-259. In a number of cases the facts involved violent action by demonstrators, employees or business partners. See *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ Reports 1989, p.15, ¶¶105-108 ["*ELSI*"]; *Wena Hotels*, *supra* note 284; *TECMED*, *infra* note 316, ¶¶175-177; *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, ¶¶164-166 ["*Noble*"]; *Pantehniki*, *supra* note 288, ¶¶71-84. In other cases actions by elements of the host state's armed forces (see *AAPL*, *supra* note 280, ¶¶45-53, 78-86; *AMT*, *supra* note 289, ¶¶6.02-6.11) or unidentified national authorities were the cause of the complaints (*Eureko*, *supra* note 251, ¶¶236,237)

<sup>297</sup> *Enron*, *supra* note 261, ¶¶284-287; *BG Group Plc v. Republic of Argentina*, Award of 24 December 2007, ¶¶323-328 ["*BG Group*"]; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, ¶¶321-324 ["*Sempra*"]; *Plama 2008*, *infra* note 465, ¶180; *Rumeli*, *supra* note 282, ¶668; *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award of 27 March 2007, ¶203.

<sup>298</sup> *Saluka*, *supra* note 261, ¶¶483, 484.

<sup>299</sup> See e.g. T. W. Wälde, *Energy Charter Treaty-based Investment Arbitration*, 5(3) Journal of World Investment 373, 390-391 (2004); *Československá Obchodní Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award of 29 December 2004, ¶170; *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, ¶¶406, 408 ["*Azurix*"]; *National Grid*, *supra* note 261, ¶189; and *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, ¶¶7.4.13-7.4.17 ["*Compañía*"].

<sup>300</sup> See *supra* ¶258.

264. In the *ELSI* case<sup>301</sup> before the ICJ, a treaty guarantee of “the most constant protection and security” was applied to a complaint concerning the time taken (16 months) for a decision on an appeal against an order requisitioning the factory at issue. While the ICJ’s Chamber rejected the argument on factual grounds,<sup>302</sup> this decision indicates that “protection and security” is not restricted to physical protection but extends to legal protection through domestic courts.

265. *CME* and *Lauder* both indicate that the principle of protection and security is relevant to the protection of legal rights including the availability of a judicial system that protects the investor’s interests. The tribunal in *CME* applied the full protection and security clause of a BIT between the Czech Republic and the Netherlands and observed that:

The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.<sup>303</sup>

266. Similarly, in *Lauder*<sup>304</sup> the tribunal found that:

The investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent’s only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims[.]<sup>305</sup>

267. In *Siemens*<sup>306</sup> the tribunal derived additional authority for the proposition that “full protection and security” extends beyond physical security from the fact that the applicable BIT’s definition of investment applied also to intangible assets:

As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than

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<sup>301</sup> *ELSI*, *supra* note 296, p. 15.

<sup>302</sup> *ELSI*, *supra* note 296, ¶109.

<sup>303</sup> *CME*, *supra* note 208, ¶613. *See also* *Lauder*, *supra* note 286, ¶314, which concerned the same set of facts.

<sup>304</sup> *Lauder*, *supra* note 286.

<sup>305</sup> *Lauder*, *supra* note 286, ¶314.

<sup>306</sup> *Siemens*, *supra* note 281, ¶81.

“physical” protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved.<sup>307</sup>

268. On the basis of the wording of Article III(1) of the BIT, “full protection and security” and general international law appear as two discrete standards. By contrast, the fair and equitable treatment clause of Article III(1) is supplemented by the words “in accordance with principles of international law”. Whatever the exact meaning of this reference, the fact that it does not qualify the full protection and security standard is an argument against the latter standard being regarded as equivalent to customary international law.

269. There is broad agreement that the obligation to provide protection and security does not create an obligation of result or absolute liability, as noted in the *ELSI* case:<sup>308</sup>

The reference [...] to the provision of “constant protection and security” cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.<sup>309</sup>

270. Rather, as noted by Claimant,<sup>310</sup> the standard is one of “due diligence”:

[T]he standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment as opposed to creating “strict liability” which would render a host State liable for any destruction of the investment even if caused by persons whose acts could not be attributed to the State.<sup>311</sup>

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<sup>307</sup> *Siemens*, *supra* note 281, ¶303. This trend was confirmed in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, ¶729 (Exhibit R-0165) [“*Biwater*”].

<sup>308</sup> *ELSI*, *supra* note 296, p.15. *See also AAPL*, *supra* note 280, ¶¶45-53, where the tribunal rejected the claimant’s plea that the Government of Sri Lanka assumed strict liability under the BIT without any need to, among other things, establish the state’s responsibility for not acting with due diligence. *See also TECMED*, *infra* note 316, ¶177, in which the tribunal states that the guarantee of full protection is not absolute and does not impose strict liability upon the state that grants it.

<sup>309</sup> *ELSI*, *supra* note 296, ¶108.

<sup>310</sup> *See supra* ¶255.

<sup>311</sup> R. DOLZER & M. STEVENS, *BILATERAL INVESTMENT TREATIES* 61 (1995). *See also Dolzer/Schreuer*, *supra* note 281, 149-150. *See also Noble*, *supra* note 296, ¶164, where the tribunal characterised full protection and security as “not a strict standard, but one requiring due diligence to be exercised by the States”.

271. In *Pantechniki*, the tribunal applied a modified objective standard of due diligence in a situation of public violence. It found that liability in a situation involving civil strife depended on the host state's resources.<sup>312</sup> However, there are no authorities which indicate that other situations, not involving violence, would warrant the application of a relative standard.

272. The tribunal in *Parkerings* analysed the host state's duty under the full protection and security standard to make its judicial system available in the following terms:

The Respondent's duty under the Treaty was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court. There is no evidence – not even an allegation – that the Respondent has violated this obligation.

The Claimant had the opportunity to raise the violation of the Agreement and to ask for reparation before the Lithuanian Courts. The Claimant failed to show that it was prevented to do so. As a result, the Arbitral Tribunal considers that the Respondent did not violate its obligation of protection and security under Article III of the BIT.<sup>313</sup>

273. In this Tribunal's view, where the acts of the host state's judiciary are at stake, "full protection and security" means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor. On the other hand, not every failure to obtain redress is a violation of the principle of full protection and security. Even a decision that in the eyes of an outside observer, such as an international tribunal, is "wrong" would not automatically lead to state responsibility as long as the courts have acted *in good faith* and have reached decisions that are *reasonably tenable*. In particular, the fact that protection could have been more effective, procedurally or substantively, does not automatically mean that the full protection and security standard has been violated.

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<sup>312</sup> *Pantechniki*, *supra* note 288, ¶¶71-84.

<sup>313</sup> *Parkerings*, *supra* note 294, ¶¶360, 361.

## 8.2.2 Articles II(1) and III(1) – Creation of Favourable Conditions and Fair and Equitable Treatment

### *Claimant's Position*

274. As set forth above (*see supra* paragraphs 234-243), it is Claimant's position that Article II(1) can be regarded as reinforcing, if not broadening, the scope of the fair and equitable treatment standard.<sup>314</sup> Claimant asserts that two fundamental obligations arise from the application of Articles II(1) and III(1) to the facts of the present dispute: first, Respondent must encourage the creation of favourable conditions for investment and honour any legitimate expectation generated thereby; second, Respondent must exercise due diligence in maintaining a transparent, stable and predictable investment climate.<sup>315</sup>
275. Claimant asserts that from the fair and equitable treatment standard flows a duty of fidelity to the principle of good faith, which requires a state to ensure that its officials are exercising their authority in a reasonable and fair-minded manner that is neither arbitrary nor unjust.<sup>316</sup> Claimant asserts that there is consensus about the entitlement of a foreign investor to hold a legitimate expectation that the state, in promoting investment, is prepared to take reasonable steps to ensure that its officials exercise any discretion delegated to them in good faith and in a reasonable and fair-minded manner. Claimant disagrees with Respondent's position that it is unreasonable for an investor to form legitimate expectations based solely on the promises made by a state by way of international agreement and that such expectations may only be made upon specific assurances provided by state officials.<sup>317</sup>
276. Claimant argues that accordingly, it held legitimate expectations in 2001 and 2002 that "favourable conditions" existed for it and its investments, including an effective and

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<sup>314</sup> Claimant's Reply Memorial, ¶37; Claimant's Post-Hearing Memorial, ¶93.

<sup>315</sup> Claimant's Memorial, ¶¶50-53; Claimant's Pre-Hearing Memorial, ¶44.

<sup>316</sup> Claimant's Memorial, ¶¶59-66; Claimant's Reply Memorial, ¶41; Claimant's Pre-Hearing Memorial, ¶¶45-46; Claimant's Post-Hearing Memorial, ¶93. Claimant refers to the definition of the fair and equitable treatment standard set out in *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003, ¶154 ["TECMED"], (cited in Claimant's Pre-Hearing Memorial, ¶45) and the further discussion of the standard at ¶154. *See also* references listed *supra*, note 261.

<sup>317</sup> Claimant's Post-Hearing Memorial, ¶92; Respondent's Rejoinder Memorial, ¶¶32-35; Respondent's Pre-Hearing Memorial, ¶¶32, 33.

internationally competitive legal regime.<sup>318</sup> Claimant specifies that “it was entitled to expect that the means existed for its reasonable requests for assistance (such as a serious investigation of its criminal fraud complaints or good faith review of the interim measures of protection it was never able to effectuate)”, and “that its requests and petitions would be considered in a manner consistent with both the standards of fairness and protection set out in the BIT, but also with general principles of international law, such as the principle of good faith, and with other principles of international law, as required under Article III(1) [of the BIT]”.<sup>319</sup>

277. Claimant also advances that, as a signatory to the *New York Convention*, Respondent holds itself out to foreign investors and traders as essentially being a “fully paid member” of the modern regime for international arbitration whose business and regulatory climate are conducive to successful foreign investment.<sup>320</sup>
278. Claimant rejects Respondent’s position that the reference to “principles of international law” in Article III(1) refers only to customary international law. Claimant submits that the sensible approach is to accord these words their plain and ordinary meaning in context, and in light of the liberalising object and purpose of the BIT. Thus, Claimant concludes that international arbitral law and practice, and the general principle of good faith, should be considered.<sup>321</sup> However, regardless of whether fair and equitable treatment is owed as a matter of customary international law, or as part of an autonomous treaty standard, Claimant argues that fair dealing, reasonableness, and fidelity are always “part and parcel” of the good faith exercise of public authority owed by all states to foreign investors under the fair and equitable treatment standard.<sup>322</sup>

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<sup>318</sup> Claimant asserts that the fact that Respondent agreed in Article II(1) to ensure that such favourable conditions would be maintained only added to the detriment that greeted the investor when its reliance proved to be misplaced. Claimant’s Reply Memorial, ¶55.

<sup>319</sup> Claimant’s Reply Memorial, ¶56.

<sup>320</sup> Claimant’s Reply Memorial, ¶¶54, 55.

<sup>321</sup> Claimant refers to *Saipem, supra* note 254, ¶145 (cited in Claimant’s Reply Memorial, ¶52), where the tribunal considered “all universally accepted rules regarding international arbitration, the *New York Convention* and other principles of international law as well as the law of Bangladesh itself”.

<sup>322</sup> Claimant’s Pre-Hearing Memorial, ¶¶47-50; Claimant’s Post-Hearing Memorial, ¶¶91, 93. Claimant also refers to *Waste Management, Inc. v. United Mexican States (Number 2)*, ICSID Case No. ARB(AF)/00/3, Final Award dated 30 April, 2004, ¶98 [“*Waste Management*”] where the tribunal summarised its position on what conduct might infringe fair and equitable treatment standard in NAFTA. Claimant also refers to *Saluka, supra* note 261, ¶¶301-303, where a similar “fair and

*Respondent's Position*

279. Respondent posits that while Claimant has set out what it considers to be the content of Articles II(1) and III(1),<sup>323</sup> it has not explained how specific acts attributable to the Czech Republic have breached those Articles and caused an injury to Claimant's investment.<sup>324</sup> While Respondent acknowledges that the standards of the BIT can operate to protect legitimate expectations founded upon the host state's contractual commitments to the investor, or other forms of binding promises recognised by the host state's administrative law, those standards cannot be invoked as the source of the legitimate expectations. Respondent argues that Claimant disregards the high threshold for a finding of liability on the basis of the obligation to accord fair and equitable treatment and pleads its claim on the basis that any acts of state not meeting its own approval must be condemned as violations of international law.<sup>325</sup>

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equitable treatment" was addressed and the tribunal determined that the investor was entitled to legitimate expectations including observation of "fundamental standards [like] good faith, due process, and non-discrimination". Claimant notes that the *Saluka* tribunal also drew a sharp distinction between an autonomous standard of fair and equitable treatment, such as Article III of the BIT, and a standard whose terms refer explicitly to customary international law, such as NAFTA Article 1105.

<sup>323</sup> Claimant's Memorial, ¶¶97, 99.

<sup>324</sup> Respondent's Rejoinder Memorial, ¶31.

<sup>325</sup> Respondent's Rejoinder Memorial, ¶32; Respondent's Pre-Hearing Memorial, ¶¶33-34; Respondent's Post-Hearing Memorial, ¶¶145-146. Respondent refers to *Biwater, supra note 307*, ¶¶596-600:

The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.

and

[T]he general threshold for finding a violation of the standard [...] is a high one. As stated by the tribunal in *Waste Management v. Mexico (No. 2)*: '[...] the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety-as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.' [...] [I]n *Thunderbird v. Mexico* [the Tribunal] held that: 'acts that would give rise to a breach of the minimum standard of treatment prescribed by the

280. Respondent refers to the guidance provided in *Continental* as to the form of the state's conduct that may generate a reasonable legitimate expectation as applied within the fair and equitable treatment standard, which Respondent notes is consistent with comparative jurisprudence on legitimate expectations in national and supranational legal systems:

[I]n order to evaluate the relevance of [the concept of reasonable legitimate expectations] applied within Fair and Equitable Treatment standard and whether a breach has occurred, relevant factors include:

- i) the specificity of the undertaking allegedly relied upon [...] which is mostly absent here, considering moreover that political statements have the least legal value, regrettably but notoriously so;
- ii) general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and jus cogens;
- iii) unilateral modification of contractual undertakings by governments, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve clearly more scrutiny, in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance[.]<sup>326</sup>

281. According to Respondent, Claimant provides little evidence of concrete expectations that were generated by the acts or omissions of state officials in the Czech Republic; Respondent submits that this is because there were none. Respondent explains that Claimant had no contractual relationship with any state agent or entity and no state agent or entity made a representation to Claimant upon which Claimant subsequently relied. Respondent asserts that the closest Claimant comes to articulating the basis for its expectations is the assertion in its Memorial that Jewitt perused the general promotional literature on the Czech Republic as a place to do business. This alone, Respondent argues, could never generate legitimate expectations capable of founding a cause of action based

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NAFTA and customary international law [...] amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.

<sup>326</sup> *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008, ¶261 (Exhibit R-0171) [*“Continental”*], (cited in Respondent's Rejoinder Memorial, ¶36; Respondent's Pre-Hearing Memorial, ¶31).

upon an investment protection standard.<sup>327</sup> Furthermore, Respondent submits that the evidential basis for any such expectation has been discredited as Claimant did not even produce the documents it purported to rely upon and, moreover, Jewitt testified that he had no specific knowledge of the arbitration regime in the Czech Republic when he signed the USA.<sup>328</sup>

282. Respondent argues that the source of Claimant’s alleged expectations is not even akin to legislation of general prescription which, unlike the general promotional literature on the Czech Republic, contains norms that are binding. Respondent also notes that the principles articulated by the tribunal in *Continental* are entirely consistent with comparative jurisprudence on legitimate expectations in national and supranational legal systems. Respondent also notes that the European Court of Justice has held that the state’s conduct must amount to a “precise assurance”.<sup>329</sup> Thus, Respondent concludes that Claimant’s case on the frustration of legitimate expectations must fail.<sup>330</sup>

#### *Tribunal’s Analysis*

283. The Tribunal has already noted that Article II of the BIT does not create an enforceable obligation and, in any event, is of little import as Claimant does not raise independent claims under it.<sup>331</sup> In addition, the Tribunal considers that there is no basis in the text of the BIT to conclude that Article II(1) broadens the fair and equitable treatment clause of Article III(1).
284. By examining arbitral practice and attempting to recognise typical situations to which the concept of fair and equitable treatment has been applied by tribunals, it is possible to

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<sup>327</sup> Respondent’s Rejoinder Memorial, ¶34; Respondent’s Pre-Hearing Memorial, ¶35; Document entitled “Czech Republic Business Guide & Quick Reference Slovakia” (Exhibit C-0002); Document entitled “Doing Business in the Czech Republic” (Exhibit C-0049).

<sup>328</sup> Respondent’s Post-Hearing Memorial, ¶¶141-144; Transcript of Hearing on the Merits (6 October 2009), 210:1-211:22. Respondent explains that Jewitt testified that he relied upon documents “like” the ones annexed to his witness statement, which documents were not on the record. Respondent also points out that the publications annexed to the Jewitt Witness Statement were published several years after Claimant signed the USA.

<sup>329</sup> Case T-123/89, *Jean Louis Chomel v. Commission of the European Communities*, 1990 E.C.R. II-00131, ¶26 (Exhibit R-0163)(cited in Respondent’s Rejoinder Memorial, ¶38; Respondent’s Pre-Hearing Memorial, ¶32).

<sup>330</sup> Respondent’s Rejoinder Memorial, ¶39.

<sup>331</sup> *See supra* ¶¶245-246.

identify some concrete principles.<sup>332</sup> The typical situations most relevant to the present case are (i) protection of the investor's legitimate expectations; (ii) procedural propriety and due process; and (iii) action in good faith.

- ***Protection of the Investor's Legitimate Expectations***

285. The protection of the investor's legitimate expectations is closely related to the concepts of transparency and stability. Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework. Stability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected. The investor may rely on that legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts. Consequently, an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment. While the host state is entitled to determine its legal and economic order, the investor also has a legitimate expectation in the system's stability to facilitate rational planning and decision making.

286. There are numerous examples of the protection of legitimate expectations in investment cases. For example, in *Metalclad v. Mexico*<sup>333</sup> the investor was assured that it had all the construction and operating permits it needed for its landfill project, but the municipality refused to grant a construction permit. The Tribunal held that the investor was entitled to rely on the representations of the federal officials and that the acts of the state and the municipality were in violation of fair and equitable treatment under Article 1105 of NAFTA.<sup>334</sup>

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<sup>332</sup> For a systematic examination of practice, see C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 JOURNAL OF WORLD INVESTMENT & TRADE 357-386.

<sup>333</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000 [*"Metalclad"*].

<sup>334</sup> *Metalclad*, *supra* note 333, ¶89. See also *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, ¶113, ¶163, where inconsistent action between two arms of the same government vis-à-vis the investor was found to breach fair and equitable treatment - the investor's building project failed because it was inconsistent with zoning regulation but the investor had signed a contract for construction of the project with the Chilean Foreign Investment Commission; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award of 1 July 2004 [*"Occidental"*], ¶184, where a change in tax law was found

287. Tribunals have stated consistently that protected expectations must rest on the conditions as they exist at the time of the investment.<sup>335</sup> They have pointed out that a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the time of the investment. For example, in *TECMED*,<sup>336</sup> the Tribunal said that for a violation of fair and equitable treatment the investor must have relied on his expectations when making the investment.<sup>337</sup> In *Duke Energy v. Ecuador*,<sup>338</sup> the Tribunal explicitly excluded the protection of expectations that may have arisen from an agreement that had been entered into two years after the relevant investment had been made.<sup>339</sup> Also, the tribunal in *Continental*<sup>340</sup> rejected the existence of legitimate expectations based on general legislative “assurances” because the investor had entered the host state before those assurances were made. Of note, where investments are made through several steps, spread over a period of time, legitimate

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to breach fair and equitable treatment; *CMS Award*, *supra* note 261, ¶¶274-276, where legislation terminating certain guarantees for price adjustment with regard to the transportation of natural gas was found to compromise a stable legal and business environment, an essential element of fair and equitable treatment; and *PSEG*, *supra* note 253, ¶¶238-256, where legislative changes affecting the construction and operation of a power station were found to breach fair and equitable treatment by compromising the stable and predictable business environment the investor had relied upon.

<sup>335</sup> *Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, ¶¶82, 83; *Saluka*, *supra* note 261, ¶329; *Azurix*, *supra* note 299, ¶372; *PSEG*, *supra* note 253, ¶255; *Siemens*, *supra* note 281, ¶299; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award of 6 November 2008 [“*Jan de Nul*”], ¶265; *EDF v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009 (Tab 10 of Claimant’s Reply to Respondent’s Post-Hearing Memorial), ¶219.

<sup>336</sup> *TECMED*, *supra* note 316, ¶154.

<sup>337</sup> See *GAMI Investments, Inc. v. Mexico*, Award of 15 November 2004, ¶¶93-94, where the tribunal held that its mandate was to assess how the legal regime in place at the time of the investment had been applied to the investor and not whether it was the proper legal regime; and *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, 21 ICSID Review (2006) 203 [“*LG&E Liability*”], ¶130, where the tribunal stated categorically that the investor’s fair expectations are based on the conditions offered by the host state at the time of the investment; and *Enron*, *supra* note 261, ¶262, where the tribunal noted that it was essential for the protection of legitimate expectations that they existed at the time of the investment. See also *BG Group*, *supra* note 297, ¶¶297-298; *National Grid*, *supra* note 261, ¶173; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 August 2009, ¶¶190, 191.

<sup>338</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008 [“*Duke*”], ¶340.

<sup>339</sup> *Duke*, *supra* note 338, ¶365.

<sup>340</sup> *Continental*, *supra* note 326, ¶259.

expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment.<sup>341</sup>

288. It follows from the above that any legitimate expectations, in order to be protected by the fair and equitable treatment standard, must have existed at the time the investment was made. Expectations created after that date, especially in the course of seeking remedies, would not be covered by the notion of legitimate expectations as developed in the context of the fair and equitable treatment standard.

- ***Procedural Propriety and Due Process***

289. The Tribunal observes that in a number of cases, tribunals have held that an absence of fair procedure or a finding of serious procedural shortcomings was an important element for a breach of fair and equitable treatment. For example, in *Metalclad v. Mexico*, a lack of procedural propriety (a failure to hear the investor) was considered in the tribunal's ruling that the fair and equitable treatment guarantee in Article 1105 of the NAFTA had been breached.<sup>342</sup>

290. The Tribunal refers to the formulation of the fair and equitable treatment standard in *Waste Management*:<sup>343</sup>

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<sup>341</sup> See C. Schreuer and U. Kriebaum, *At What Time Must Legitimate Expectations Exist?*, in J. Werner and A. H. Ali (eds.), *A LIBER AMICORUM: THOMAS WÄLDE: LAW BEYOND CONVENTIONAL THOUGHT* 265-276 (2009).

<sup>342</sup> *Metalclad*, *supra* note 333, ¶91. The Award in *Metalclad* was set aside in part by the Supreme Court of British Columbia on grounds that are peculiar to NAFTA. The Court found that the Tribunal had improperly based its award on transparency even though that principle is not contained in Chapter 11, to which the Tribunal's jurisdiction extended, but in Chapter 18 of NAFTA, *see Mexico v. Metalclad Corp.*, Review by British Columbia Supreme Court, 2 May 2001, 5 ICSID Reports 238, ¶¶ 57-76. *See also Middle East Cement Shipping and Handling Co. S. A. v. Arab Republic of Egypt*, Award, 12 April 2002, 7 ICSID Reports 178 [*"Middle East Cement"*] ¶143, where the absence of a direct notification regarding the auction of the claimant's ship after it had been seized failed to meet the requirements of the fair and equitable standard; and *Loewen Group Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003, ¶136 (Tab 23 of Claimant's Post-Hearing Memorial) [*"Loewen Award"*], where a finding that the trial court permitted the jury to be influenced by persistent appeals to local favouritism against the foreign claimant was found to be a breach of fair and equitable treatment. In addition, at ¶137, the tribunal referred to the specific conduct in ¶136 and other aspects of the trial to find that: "the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."

<sup>343</sup> *Waste Management*, *supra* note 322, ¶98.

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct [...] involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.

291. In *Petrobart v. Kyrgyz Republic*, interference by the state in court proceedings was found to violate the standard of fair and equitable treatment.<sup>344</sup>

292. In *Thunderbird v. Mexico* the tribunal held that the standards of due process and procedural fairness applicable in administrative proceedings are lower than in a judicial process. However, the tribunal found no violation of the fair and equitable treatment standard because the claimant had been given a full opportunity to be heard and to present evidence and that the proceedings were subject to a judicial review by the courts.<sup>345</sup> However, in other cases, serious administrative negligence and inconsistency,<sup>346</sup> and denial of access to a file in an administrative appeals process<sup>347</sup> have been found to breach fair and equitable treatment. While these situations are typically procedural in nature, the tribunal in *Rumeli* ruled that where a court decision is so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith, the fair and equitable treatment standard can be breached.<sup>348</sup>

293. The fair and equitable treatment standard has been found on several occasions to encompass the notion of a denial of justice which, in turn, implies the requirement to

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<sup>344</sup> *Petrobart Limited v. Kyrgyz Republic*, Arb. No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce, Award of 29 March 2005 [*“Petrobart”*], ¶82. The investor had obtained a judgment from a local court against a state entity and the state had foiled execution of the judgment by securing postponement of execution and by rendering the state entity bankrupt by transferring assets away from it.

<sup>345</sup> *International Thunderbird Gaming Corporation v. Mexico*, Award of 26 January 2006 (Tab 24 of Claimant’s Post-Hearing Memorial), ¶¶197-201 [*“Thunderbird Award”*]. See also *Parkerings*, *supra* note 294, ¶¶317-320, where the Tribunal found it to be decisive whether the investor was denied access to domestic courts and whether such a lack of remedies had consequences on the investment. No breach of fair and equitable treatment was found because the investor did have access to the courts and because experts had confirmed that the courts were independent and levels of corruption had declined significantly.

<sup>346</sup> *PSEG*, *supra* note 253, ¶246.

<sup>347</sup> *Siemens*, *supra* note 281, ¶308.

<sup>348</sup> *Rumeli*, *supra* note 282, ¶¶651-653,657.

exhaust local remedies. In *Jan de Nul*,<sup>349</sup> the claimants had complained about an excessive duration of proceedings before the courts of Egypt, which lasted nearly ten years. The tribunal said:

[...] there is no doubt that ten years to obtain a first instance judgment is a long period of time. However, the Tribunal is mindful that the issues were complex and highly technical, that two cases were involved, that the parties were especially productive in terms of submissions and filed extensive expert reports. For these reasons, it concludes that, while the duration of the proceedings leading to the Ismailia Judgment is certainly unsatisfactory in terms of efficient administration of justice, it does not rise to the level of a denial of justice.<sup>350</sup>

294. With respect to substantive denial of justice, the tribunal in *Jan de Nul* found that there was no indication of any discrimination, bias or malicious application of the law based on sectional prejudice.<sup>351</sup>
295. In *Toto*,<sup>352</sup> the claimant sought to base its claim for violation of the fair and equitable treatment standard on the slow progress of proceedings before the respondent's Conseil d'Etat since the proceedings had not progressed over six years.<sup>353</sup> After examining the practice under the *International Covenant on Civil and Political Rights* ("ICCPR"), the tribunal identified several factors that needed to be assessed when determining a denial of justice claim, namely the complexity of the matter, the need for celerity of decision and the diligence of claimant in prosecuting its case.<sup>354</sup>
296. This Tribunal notes that nearly all of the decisions dealing with procedural propriety and due process in the context of fair and equitable treatment have concerned proceedings involving disputes with the host state or with state entities. This may suggest that

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<sup>349</sup> *Jan de Nul, supra* note 335, ¶¶187, 188, 191, 255-261. The Tribunal added that the requirement to exhaust local remedies would not apply to a claim of excessive delays in judicial proceedings (¶256).

<sup>350</sup> *Jan de Nul, supra* note 335, ¶204.

<sup>351</sup> *Jan de Nul, supra* note 335, ¶211.

<sup>352</sup> *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009 ["*Toto*"].

<sup>353</sup> *Toto, supra* note 352, ¶¶139-144.

<sup>354</sup> *Toto, supra* note 352, ¶¶163, 165. The Tribunal also considered the turbulent political situation in Lebanon prevailing at the time.

complaints about lack of due process in disputes with private parties are better dealt with in the context of the full protection and security standard. As noted above in paragraph 263, full protection and security obliges the host state to provide a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs, whereas fair and equitable treatment consists mainly of an obligation on the host state's part to desist from behaviour that is unfair and inequitable.

- ***Action in Good Faith***

297. Good faith is a broad principle that is one of the foundations of international law and has been confirmed as being inherent in fair and equitable treatment.<sup>355</sup>

298. In *Saluka*, the tribunal gave a central role to the requirement of good faith in its description of fair and equitable treatment. The tribunal said:

A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination.<sup>356</sup>

299. Specifically, the tribunal found that the host state's refusal to negotiate in good faith to resolve the problem constituted a violation of the fair and equitable treatment guarantee.<sup>357</sup>

300. Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created. It also includes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government,<sup>358</sup> and expulsion of an investment

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<sup>355</sup> See *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001, ¶367: "Acts that would violate this minimum standard [of fair and equitable treatment] would include [...] subjective bad faith." See also *TECMED*, *supra* note 316, ¶153, relying on I. Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 19 (1989).

<sup>356</sup> *Saluka*, *supra* note 261, ¶307.

<sup>357</sup> *Saluka*, *supra* note 261, ¶¶361-416. In the same sense: *PSEG*, *supra* note 253, ¶¶245-247, 251-255. See also *Siemens*, *supra* note 281, ¶308 and *Sempra*, *supra* note 297, ¶¶297-299.

<sup>358</sup> *Waste Management*, *supra* note 322.

based on local favouritism.<sup>359</sup> Reliance by a government on its internal structures to excuse non-compliance with contractual obligations would also be contrary to good faith.

301. It follows from these authorities that action by the host state that is not in good faith is at variance with the fair and equitable treatment promise. However, not every violation of the standard of fair and equitable treatment requires bad faith. The fair and equitable treatment standard may be violated, even if no *mala fides* is involved.<sup>360</sup>

### 8.3 MERITS - CLAIMANT'S TREATY VIOLATION CLAIMS

302. Claimant asserts that the Czech Republic has violated its obligations under Articles II(1) and III(1) of the BIT in the following ways:

- (1) The Regional Court in Brno inexplicably took more than three years to respond to Claimant's application to invalidate the decision that served to solidify Soska's illegal control of LZ in September 2002 and ongoing breaches of the USA;
- (2) The bankruptcy judges for both MA and LZ jointly partook in a fundamentally flawed decision-making process that both deprived the Investor of any chance of rescuing LZ and the LET Assets and its right to benefit from its position as a secured creditor in both bankruptcies once the judges had permitted the liquidation to be commenced;
- (3) Czech officials could have exercised their authority to remedy the treatment being received by Claimant but consistently failed to do so; and
- (4) Because Respondent's legal system was manifestly inadequate for the tasks required of it under applicable international law, it failed to comply with Respondent's international obligation to maintain an effective means for the enforcement of an international tribunal's orders and award.<sup>361</sup>

303. In its final submission to the Tribunal, Claimant set out the following as the key questions for the Tribunal's determination:

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<sup>359</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, pp. 242-252.

<sup>360</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002 (Tab 21 of Claimant's Post-Hearing Memorial), ¶116 [*"Mondev"*]; *TECMED*, *supra* note 316, ¶153; *Loewen Award*, *supra* note 342, ¶132; *Occidental*, *supra* note 334, ¶186; *CMS Award*, *supra* note 261, ¶280; *Azurix*, *supra* note 299, ¶372; *LG&E Liability*, *supra* note 337, ¶129; *PSEG*, *supra* note 253, ¶¶245-246; *Siemens*, *supra* note 281, ¶299; *Enron*, *supra* note 261, ¶263.

<sup>361</sup> Claimant's Memorial, ¶71; Claimant's Reply Memorial, section IV.

- (a) whether the lack of transparency and ineffective operation of Respondent's Commercial Registry, coupled with the deficient operation of its bankruptcy regime, fell below the standards promised in Articles II or III of the Treaty;
- (b) whether the LZ joint venture could have been protected in a timely and effective manner if Claimant had received:
  - (i) access to an investment protection regime, whose operation was consistent with the promise of full protection and security; and
  - (ii) the assistance of the Czech state, once it offered its assurance to use its position as the largest potential creditor of Moravan to negotiate with Soska;
- (c) whether the Czech bankruptcy trustees and bankruptcy judges were required to exercise their discretion under the Czech bankruptcy code and applicable law in a manner consistent with the standard of fair and equitable treatment, the principle of good faith, and otherwise in accord with the Czech state's international obligations.<sup>362</sup>

304. Respondent asserts that by the end of its submissions, Claimant abandoned the formulation described above (*see supra* paragraph 302), but never sought to amend its claims as presented in its Memorial with reference to Article 20 of the UNCITRAL Rules. Respondent submits that, in the event that Claimant seeks to amend the formulation of its claims, Respondent reserves its right to request that the Tribunal decline to grant leave to do so having regard to the delay and prejudice that would be caused to Respondent in accordance with Article 20 of the UNCITRAL Rules.<sup>363</sup>

*Tribunal's Comment*

305. The Tribunal notes Respondent's comments concerning the different formulation of Claimant's claims in its last submission. The Tribunal does not find that Claimant has actually varied its claims, but rather has just expressed them in a different way. In the Tribunal's view, Claimant's rephrasing of its claims does not justify an application to amend.

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<sup>362</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶8.

<sup>363</sup> Respondent's Post-Hearing Memorial, ¶3.

### 8.3.1 Claim 1 - Court Delays

#### *Claimant's Position*

306. Claimant asserts that the 39-month time period during which the Regional Court failed to determine Claimant's Resolutions Claim<sup>364</sup> breached international standards. Claimant characterises the Regional Court's failure to act as a denial of justice prohibited under the customary international law minimum standard of treatment, which it asserts is also encapsulated within the more substantively expansive and autonomous standard of "fair and equitable treatment" under Article III(1) of the BIT.<sup>365</sup> Claimant argues that the Regional Court's failure to act is also prohibited under the customary international law version of the fair and equitable treatment standard which Claimant observes both Parties agree is informed by the doctrine of denial of justice.<sup>366</sup>
307. Claimant notes that Respondent is a Party to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("ECHR"), Article 6(1) of which specifies that states must ensure that all persons receive fair, transparent, and expeditious access to a court. Claimant submits that this right, particularly when the nature of the dispute is urgent, also stands as an obligation required under the minimum standard of treatment under customary international law.<sup>367</sup> Claimant argues that by operation of Articles III(3) and III(4) of the BIT, Respondent was obliged to afford it the most favourable treatment it otherwise would be obliged to provide to its own investors or to the investors of third parties; thus, Claimant argues, it is entitled to the same right to expeditious proceedings

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<sup>364</sup> Claimant's Reply Memorial, ¶60; Jewitt Witness Statement, ¶109; *Act No. 513/1991 Coll., the Commercial Code* (Exhibit R-0129). Claimant notes that it is not disputed that either the bankruptcy of Moravan (on 21 August 2002) or the personal bankruptcy of Soska (on 27 February 2002, though later reversed on appeal) provided a proper basis for invoking section 31(a) in relation to Soska, Joachimczyk, and Štefánek. Claimant's Post-Hearing Memorial, ¶41.

<sup>365</sup> Claimant's Memorial, ¶72. Claimant later objects to the framing of its arguments as a denial of justice (Claimant's Reply Memorial, ¶42). Claimant refers to *Saluka, supra* note 261 (cited in Claimant's Memorial, ¶73): "[I]nvestors' protection by the 'fair and equitable treatment' standard is meant to be a guarantee providing a positive incentive for foreign investors. Consequently, in order to violate the standard, it may be sufficient that States' conduct displays a relatively lower degree of inappropriateness."

<sup>366</sup> Claimant's Pre-Hearing Memorial, ¶¶63-64.

<sup>367</sup> Claimant's Memorial, ¶77.

before a court in the Czech Republic as are those legal persons entitled to such treatment under the *ECHR*.<sup>368</sup>

308. Claimant denies that it took no steps to accelerate the court proceedings, explaining that it contacted members of parliament with respect to the delays.<sup>369</sup> Claimant argues that there was no excuse for Czech government officials to do nothing to help Claimant when alerted to this delay.<sup>370</sup>
309. Claimant rejects Respondent's suggestion that it contributed to the delay by failing to pay a court fee and seeking a postponement of the court proceedings pending the Final Award. Claimant notes that if a court fee is not paid when a motion is filed, the court is required by the *Court Fees Act* to request payment,<sup>371</sup> and the Regional Court did not request payment until 26 May 2004, following which the fee was paid immediately.<sup>372</sup> Claimant also states that its request of 23 December 2004 for suspension of the proceedings in light of the imminent release of the Final Award caused virtually no delay; following translation and certification, the Final Award was filed with the Regional Court on 22 March 2005, a full year before the Regional Court's final decision.<sup>373</sup>
310. Claimant rejects Respondent's characterisation of its claim as a "denial of justice" claim, explaining that its claim has been framed in terms of breach of the fair and equitable treatment standard and breach of the duty of full protection and security. Claimant also asserts that Respondent cannot point to any authority for the proposition that claims under autonomous treaty standards can be effectively "down-converted" to customary

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<sup>368</sup> Claimant's Memorial, ¶¶74-75. Claimant refers to *Anatskiy v. Ukraine* where it was decided that a litigant who had been unable to have his judgment enforced, as against a private party for three years and one month, had been denied a fair trial under Article 6(1) of the European Convention. *See Anatskiy v. Ukraine*, Eur. Ct. H.R., Application no. 10558/03, Judgment of 13 December 2005, ¶¶22-23.

<sup>369</sup> Claimant's Reply Memorial, ¶59(b).

<sup>370</sup> Claimant's Memorial, ¶76.

<sup>371</sup> Claimant's Reply Memorial, ¶59(c); *Act No. 549/1991 Sb. Coll. on Court Fees*, Section 9.

<sup>372</sup> Claimant's Reply Memorial, ¶59(c); Request from Regional Court, dated 26 May 2004 (Exhibit R-0053); Submission by FPS to Regional Court, dated 31 May 2004 (Exhibit R-0054).

<sup>373</sup> Claimant's Reply Memorial, ¶59(d); Letter from Chairman of Stockholm Tribunal to FPS, dated 29 November 2004 (Exhibit C-0279); Submission by FPS to Regional Court, dated 22 December 2004 (Exhibit R-0058); Submission by FPS to Regional Court, dated 21 March 2005 (Exhibit R-0059).

international law claims on the sole basis of a theory of denial of justice.<sup>374</sup> Claimant notes that the tribunal in *Saipem* determined that a claim for substantial impairment of an investment need not be treated as a denial of justice case simply because judicial officials were responsible for the offending measure.<sup>375</sup>

311. In response to Respondent's argument that Claimant has failed to show that the delays caused its loss, Claimant explains that if the Resolutions had been enjoined or annulled by the Regional Court, Soska, Joachimczyk, and Štefánek could not have continued to control LZ, and instead Orbes, as trustee for Moravan, would have been entitled to assume control of MA and LZ and commence fulfilment of the USA pursuant to the Draft Cooperation Agreement.<sup>376</sup> Claimant also argues (i) that the Commercial Register should have immediately terminated the offices of Soska, Štefánek, and Joachimczyk when Soska submitted the WIMCO Resolutions by concluding that these Resolutions did not confirm their election or appointment in accordance with Section 31(a)(6) of the *Commercial Code*; and (ii) that if the putative transfer of all of MA's shares to WIMCO had been disclosed by the Commercial Register, either Claimant or Orbes could have legally challenged that submission.<sup>377</sup> Claimant disputes Respondent's assertion that Soska and his cohorts would have ensured their reappointment even if the Resolutions Claim had been successful, arguing that this overlooks the probability that any involvement by WIMCO was unlawful.<sup>378</sup>

312. In response to Respondent's allegation that Claimant misled Czech authorities by making contradictory statements about the LZ share certificates in three different legal fora, Claimant argues that it simply did what any sensible investor would have done.<sup>379</sup>

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<sup>374</sup> Claimant's Reply Memorial, ¶61.

<sup>375</sup> *Saipem*, *supra* note 254, ¶38 (cited in Claimant's Reply Memorial, ¶61).

<sup>376</sup> Claimant's Reply Memorial, ¶60; Claimant's Post-Hearing Memorial, ¶44; Respondent's Counter-Memorial, ¶73; Jewitt Witness Statement, ¶¶74-75, Draft Agreement between LEGES and FPS, dated January 2003 (Exhibit C-0295).

<sup>377</sup> Claimant's Post-Hearing Memorial, ¶¶43-45. Jewitt Witness Statement, ¶¶80-81; Transcript of minutes of LZ General Meeting, dated 9 October 2002 (Exhibit C-0038, Exhibit R-0085).

<sup>378</sup> Claimant's Post-Hearing Memorial, ¶46.

<sup>379</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶¶35-36.

*Respondent's Position*

313. Respondent asserts that Claimant's claim with respect to court delays rests upon a misrepresentation of the procedure before the Regional Court. Respondent argues that there was a delay attributable to the Czech Republic of no more than 18 months at a time when the responsible judge was on maternity leave during which Claimant (i) took no steps to accelerate the proceedings as it was entitled to under Czech law; (ii) did not communicate with the court; (iii) requested postponement of the proceedings pending the Final Award; and (iv) did not pay the requisite court fee, which resulted in a delay of issuance of the court's decision.<sup>380</sup>
314. Respondent also asserts that the notion that an 18-month delay in court proceedings might constitute a denial of justice in international law and rise to the level of a breach of Article III of the BIT is "preposterous"; there would be few, if any, legal systems in the world that would satisfy this unrealistic standard. Moreover, Respondent contends that the inaction of Claimant during this period is fatal to its claim.<sup>381</sup>
315. Respondent refers to a ruling of the English High Court concerning delay in the Czech courts, which acknowledged that "delay may be so great as to amount to a denial of substantial justice [and] breach of Art.6 of [the *ECHR*]", but concluded that a five or six year delay does not mean that substantial justice cannot be obtained.<sup>382</sup>

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<sup>380</sup> Respondent's Counter-Memorial, ¶72; Respondent's Pre-Hearing Memorial, ¶¶45, 47; Respondent's Post-Hearing Memorial, ¶54.

<sup>381</sup> Respondent's Counter-Memorial, ¶¶74, 77; Respondent's Pre-Hearing Memorial, ¶42. Respondent refers to A. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 246 (1938) (Exhibit R-0044) [*Freeman*] (cited in Respondent's Counter-Memorial, ¶77): "About the most that one can affirm with confidence is that the injurious delay must be abnormal or abusive, and that the responsibility of the State can not be said to be engaged merely by the fact that the time requirements of the local law, if any, have not been observed." Respondent acknowledges that most of the precedents analysed in Freeman's text relate to criminal proceedings and notes the decisions of *El Oro Mining* (British Mexican Claims Commission), cited in *Freeman, supra*, 259 (cited in Respondent's Counter-Memorial, ¶78) where the Mexican courts were censured for a delay of nine years in circumstances where there was no resolution of the case in sight) and Conseil d'État, Garde des sceaux, Ministre de la justice/M. Magiera, 28 June 2002, as cited in J. PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 178 (2005) (Exhibit R-0045) [*Paulsson*], (cited in Respondent's Counter-Memorial, ¶79), where the Conseil d'État found that the right to a fair trial guaranteed by Article 6 of the *European Convention on Human Rights* was violated where the administrative tribunal of Versailles took seven-and-a-half years to rule on a request "which did not present any particular difficulty".

<sup>382</sup> Respondent's Counter-Memorial, ¶¶82-83; *Ceskoslovenská obchodní banka a.s. v. Nomura International*, (2003) I.L.Pr. 20, ¶16 (Exhibit R-0046). Respondent also refers to a decision of Lord

316. Respondent argues that Claimant has not provided the Tribunal with an objective test for when judicial acts satisfy the threshold for a breach of the fair and equitable standard of treatment or the standard of full protection and security. Without this, Respondent asserts, adjudication of this claim would become a wholly subjective exercise and the Tribunal would be wrongfully deciding the matter *ex aequo et bono*.<sup>383</sup> Respondent concludes therefore that the cases dealing with denial of justice and *forum non conveniens* are essential to the determination of whether there has been a breach of the international standard encapsulated in Article III(1).<sup>384</sup>
317. Respondent further asserts that international tribunals with jurisdiction to review the decisions of national courts on the ground of procedural irregularity have, without exception, insisted upon a high threshold for a breach of the international standard.<sup>385</sup>
318. Respondent distinguishes *Saipem* as concerning the illegality of judicial interference with an ICC arbitration. Respondent asserts that the tribunal correctly adapted the test for liability under the relevant investment protection standards to account for the judicial nature of the impugned acts by mirroring the high threshold for the international censure of judicial acts found in cases of denial of justice.<sup>386</sup>
319. Respondent submits that the conduct of Claimant over the relevant period is significant for a denial of justice claim.<sup>387</sup> Respondent asserts that Claimant could have accelerated the

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Justice Neill in which an expected delay of three to four years was not considered to be inordinate, *Hamed El Chiaty & Co. T/A Travco Nile Cruise Lines) v. The Thomas Cook Group Ltd*, (1994) 1 Lloyd's Rep. 10 (Exhibit R-0047) (cited in Respondent's Counter-Memorial, ¶84). Respondent also refers to *Konamaneni And Others v. Rolls Royce Industrial Power (India) Ltd*, (2002) 1 WLR 1269, ¶177 (Exhibit R-0048) (cited in Respondent's Counter-Memorial, ¶85).

<sup>383</sup> Respondent's Rejoinder Memorial, ¶¶52-53; Respondent's Pre-Hearing Memorial, ¶43.

<sup>384</sup> Respondent's Pre-Hearing Memorial, ¶44.

<sup>385</sup> Respondent's Rejoinder Memorial, ¶¶53-54.

<sup>386</sup> Respondent's Rejoinder Memorial, ¶¶56-57; Respondent's Pre-Hearing Memorial, ¶43; *Saipem*, *supra* note 254, ¶¶181-182.

<sup>387</sup> Respondent refers to *Freeman*, *supra* note 381 at 246 (Exhibit R-0044)(cited in Respondent's Counter-Memorial, ¶90):

In this class of cases again the substance of the litigation must be known and the facts of each case inspected in order to determine whether there were justifiable causes for the delays complained of, whether they were excused by various extenuating factors in

proceedings before the Regional Court, it could have complained to the President of that Court and, if not satisfied, to the Ministry of Justice or to the appellate court with a request for the setting of a mandatory timetable for the case.<sup>388</sup> Respondent maintains that although Claimant's failure to initially pay the fee did not cause substantial delays in the proceeding, it was symptomatic of Claimant's failure to prosecute its Resolutions Claim properly.<sup>389</sup>

320. With regard to Claimant's assertion that it used available legal remedies by lobbying members of parliament,<sup>390</sup> Respondent submits that it would have been "outrageous" for the Czech parliament to interfere with the Regional Court because the Czech Constitution is based upon the separation of powers and the rule of law.<sup>391</sup> Moreover, Respondent observes that Claimant's complaint to the Prime Minister occurred on 23 November 2005, *i.e.* some three years after the Resolutions Claim was commenced.<sup>392</sup>

321. Respondent also submits that Claimant has failed to establish a causal connection between the alleged denial of justice before the Regional Court and the downfall of its investment.<sup>393</sup> Respondent posits that even if the Regional Court had ruled immediately in Claimant's favour, it would have made no difference to the "fortunes of [Claimant's] investment in

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criminal cases, or whether they were directly traceable to the alien's own laches in civil proceedings.

Respondent also refers to commentary in *Paulsson, supra* note 381 at 178 (Exhibit R-0045) (cited in Respondent's Counter-Memorial, ¶91) on the leading case of the French Conseil d'Etat:

[T]he Conseil d'Etat emphasised the need to evaluate the matter concretely and in its entirety, taking into account its degree of complexity, the conduct of the parties in the course of the proceedings, as well as any known facts pointing to a legitimate interest in celerity. (In that case, the claimant was a public works contractor aged 72 at the date of his petition).

<sup>388</sup> Respondent's Counter-Memorial, ¶89; *Act No. 6/2002 Coll. on Courts and Judges*, Sections 164, 170 and 174a (Exhibit R-0136).

<sup>389</sup> Respondent's Rejoinder Memorial, ¶73.

<sup>390</sup> Respondent's Rejoinder Memorial, ¶¶74-75; Respondent's Pre-Hearing Memorial, ¶49.

<sup>391</sup> Respondent's Rejoinder Memorial, ¶76; Respondent's Pre-Hearing Memorial, ¶48(2).

<sup>392</sup> Respondent's Rejoinder Memorial, ¶78; Respondent's Pre-Hearing Memorial, ¶49(2); Letter from Transfin to Prime Minister Jiří Paroubek, dated 23 November 2005 (Exhibit C-0103); Letter from Prime Minister's Expert Department to Transfin, dated 26 January 2006 (Exhibit C-0107).

<sup>393</sup> Respondent's Rejoinder Memorial, ¶¶49, 79-93; Respondent's Pre-Hearing Memorial, ¶¶38, 50; *Biwater, supra* note 307. Respondent observes that Claimant responded only to the issue of causation with regard to court delays.

LZ”.<sup>394</sup> Respondent argues that all that Claimant could achieve with a decision in its favour was the right to request the convening of a general meeting of LZ and exercising of its minority shareholder rights at such meeting which could not assure a successful restructuring of LZ.<sup>395</sup>

322. Respondent notes that there is no evidence for Claimant’s claim that Orbes would have been willing to “commence fulfilment of the USA” and that, in any event, the absence of a court decision about the resolutions was irrelevant for the actions which Claimant expected him to take.<sup>396</sup> Moreover, according to Respondent, Orbes contemporaneously took steps that directly contradicted the Draft Cooperation Agreement.<sup>397</sup>

323. Respondent also argues that, if anything, it was a different resolution adopted at the LZ General Meeting which confirmed Soska, Joachimczyk, and Štefánek as members of the board of directors of LZ that could have been seen as perpetuating their membership on the board of directors of LZ.<sup>398</sup> Respondent notes that Claimant did not contest this resolution within the statutory deadline set so it became legally valid.<sup>399</sup>

324. Respondent observes that Claimant appears to give little importance to this claim in its Post-Hearing Memorial,<sup>400</sup> which Respondent attributes to Jewitt’s admission under cross-examination that he had pursued a course of conduct that was premised on the simultaneous validity of Claimant’s share certificates in LZ (before the Regional Court) and their forgery (before the Czech police).<sup>401</sup> Respondent also notes that Claimant represented to the

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<sup>394</sup> Respondent’s Counter-Memorial, ¶73.

<sup>395</sup> Respondent’s Counter-Memorial, ¶94; Respondent’s Rejoinder Memorial, ¶84; Respondent’s Pre-Hearing Memorial, ¶51; Respondent’s Post-Hearing Memorial, ¶56.

<sup>396</sup> Respondent’s Rejoinder Memorial, ¶¶49-51, 80; Jewitt Witness Statement, ¶¶75-76; Draft Agreement between LEGES and FPS, dated January 2003 (Exhibit C-0295).

<sup>397</sup> Respondent’s Rejoinder Memorial, ¶87; Respondent’s Pre-Hearing Memorial, ¶52; Bankruptcy inventory of Moravan, dated 10 December 2002 (Exhibit C-0043); Letter from Orbes to FPS, dated 12 December 2002 (Exhibit C-0046).

<sup>398</sup> Respondent’s Rejoinder Memorial, ¶83; Transcript of minutes of LZ General Meeting, dated 9 October 2002 (Exhibit C-0038, Exhibit R-0085).

<sup>399</sup> Respondent’s Rejoinder Memorial, ¶83; Respondent’s Pre-Hearing Memorial, ¶51.

<sup>400</sup> Respondent’s Post-Hearing Memorial, ¶¶1, 42.

<sup>401</sup> Respondent’s Post-Hearing Memorial, ¶43. Respondent notes that the record is ambiguous as to when exactly Claimant discovered the invalidity of the share certificates. Jewitt confirmed that he discovered in July 2002 that the share certificates he received from Soska were a sham. Transcript

Stockholm Tribunal that it had never received any shares at all.<sup>402</sup> Respondent contends that Claimant thus deliberately misled the Czech courts and the police.<sup>403</sup> Claimant's positive statements of fact in three different judicial fora that are in direct contradiction of each other and are therefore known to be false, Respondent argues, is reason enough for this claim to be dismissed.<sup>404</sup>

*Tribunal's Analysis*

325. The Tribunal notes that while Claimant initially appeared to formulate this claim as a denial of justice claim as well as a claim for breach of the fair and equitable treatment standard under the BIT, it later clarified that this is a claim for breach of the fair and equitable treatment and full protection and security protections under the BIT.<sup>405</sup> This Tribunal will analyse Claimant's claims as they have been formulated by Claimant, *i.e.* as alleged breaches of the BIT.
326. The Tribunal examines as a first matter the timing of the Injunctions and Resolutions Claims before the Regional Court. There is some disagreement with regard to the filing date of the Resolutions and Injunctions Claim with Claimant alleging that it filed these claims on 22 November 2002 and Respondent alleging that Claimant filed these claims on 3 December 2002. The Regional Court rendered a decision on the Injunctions Claim on 4 December 2002.<sup>406</sup> Given the Regional Court's promptness here, the Tribunal does not accept that Claimant has any basis to argue that the Regional Court was delayed with respect to the Injunctions Claim. The Tribunal rejects Claimant's claims in this regard and turns now only to assess its claims vis-à-vis the Resolution Claims.

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of Hearing on the Merits (6 October 2009), 196:20–21 (cited in Respondent's Post-Hearing Memorial, ¶44). This contradicts the statement of Matušík before the Stockholm Tribunal that he had recognised that they were a sham immediately upon receipt in April 2002. Respondent's Post-Hearing Memorial, ¶44; Transcript of Hearing held on August 30 and 31, 2004, pp. 251-2. Jewitt later stated that he had been uncomfortable with the certificates from the beginning. Respondent's Post-Hearing Memorial, ¶44; Transcript of Hearing on the Merits (6 October 2009), 233:9–10.

<sup>402</sup> Respondent's Post-Hearing Memorial, ¶¶47-52.

<sup>403</sup> Respondent's Post-Hearing Memorial, ¶43.

<sup>404</sup> Respondent's Post-Hearing Memorial, ¶¶52-53.

<sup>405</sup> Claimant's Reply Memorial, ¶61.

<sup>406</sup> *Supra* ¶88.

327. With regard to the Resolutions Claim, the first action by the Regional Court occurred on 5 May 2004, approximately 18 months after Claimant's filing. The parties exchanged submissions between June 2004 and June 2005, and a hearing was held on 27 February 2006 at which the Regional Court granted Claimant's request (i) confirming that Claimant was a shareholder in LZ and thus entitled to file a motion; (ii) finding that the Resolutions were invalid; and (iii) ordering that the Resolutions not be entered in the Commercial Register.<sup>407</sup> The Tribunal notes that there were delays in these proceedings – notably the 18-month delay following Claimant's initial filing – that could form the basis of a complaint by Claimant. Whether such delays rise to the level of breaches of the BIT is a different question that the Tribunal will turn to now.

328. As already discussed (*see supra* paragraphs 289 *et seq.*), the Tribunal is satisfied that procedural propriety and due process are well-established principles under the standard of fair and equitable treatment.<sup>408</sup> In assessing whether the delays at the Regional Court were such that they constituted a breach of the fair and equitable treatment standard, the Tribunal finds the criteria set forth in *Toto*<sup>409</sup> useful:

To assess whether court delays are in breach of the requirement of a fair hearing, the ICCPR Commission takes into account the complexity of the matter, whether the Claimants availed themselves of the possibilities of accelerating the proceedings, and whether the Claimants suffered from the delay.<sup>410</sup>

329. First, the Tribunal considers that the matters before the Regional Court were not unusually complex. With respect to the Resolutions Claim, only three submissions were made prior to the hearing (two by Claimant and one by LZ). The hearing itself only lasted approximately one hour with the court declaring its decision within minutes of Claimant's closing argument.<sup>411</sup> The relatively short reasons provided at page 4 of the Regional Court's resolution of 27 February 2006 emphasises the fact that the court did not treat this

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<sup>407</sup> *Supra* ¶173.

<sup>408</sup> *Toto*, *supra* note 352, ¶160; *Metalclad*, *supra* note 333, ¶91; *Middle East Cement*, *supra* note 342, *Loewen Award*, *supra* note 342, ¶¶136-137; *TECMED*, *supra* note 316, ¶162; *Waste Management*, *supra* note 322, ¶¶98, 130; *Petrobart*, *supra* note 344, ¶82; *Thunderbird Award*, *supra* note 345, ¶¶197-201.

<sup>409</sup> *Toto*, *supra* note 352, ¶160.

<sup>410</sup> *Toto*, *supra* note 352, ¶160.

<sup>411</sup> Record of Regional Court Hearing on Resolutions Claim, dated 8 March 2006 (Exhibit R-0066).

matter as if it were unusually complex.<sup>412</sup> In light of these considerations, the Tribunal does not consider that the complexity of the claims was such that it justified protracted proceedings. The fact that the Regional Court proceedings took over three years from beginning to end to deal with what were ultimately not extraordinarily complex claims does not, without more, satisfy this Tribunal that a breach of the fair and equitable treatment standard occurred.

330. Second, with regard to the issue of whether Claimant availed itself of the possibilities of accelerating the proceedings, the Tribunal finds that the evidence suggests that it did not. The Tribunal does not find the fact that Claimant requested the suspension of these proceedings to be dispositive of this issue because Claimant had legitimate reasons for doing so. However, the Tribunal does find that there is no evidence that Claimant tried to accelerate its claim in accordance with Czech law and court practice. Claimant's counsel confirmed at the hearing in this arbitration that there is nothing on the record to indicate that Claimant contacted the Regional Court to inquire as to the status of the action during the relevant period.<sup>413</sup> Claimant also failed to pay the court fee at its earliest opportunity and needed to be reminded to do so. It is difficult for this Tribunal to reconcile Claimant's assertion that it considered these proceedings to be urgent with its conduct at the actual time which does not evidence that.

331. Third, it is not clear how Claimant suffered from this delay. While Claimant asserts that the matter was urgent, it has not established to the Tribunal's satisfaction that earlier action on the part of the Regional Court would have made any difference to the purported effect of the Resolutions on Claimant's investment. As noted by Respondent, it is far from certain that, had the Resolutions Claim been successful at an earlier stage, (i) Soska *et al* would not have been able to control LZ; and (ii) Orbes (as trustee for Moravan which, according to Claimant, remained the sole shareholder of MA at the time) could have stepped in to control MA and LZ and fulfil the terms of MA's agreement with Claimant. The Tribunal finds that Claimant has failed to establish that Orbes would have taken control of MA if the

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<sup>412</sup> Resolution of Regional Court, dated 27 February 2006 (Exhibit C-0114).

<sup>413</sup> See Transcript of Hearing on the Merits (5 October 2009), 44:2-44:13; Respondent's Counter-Memorial, ¶89.

Commercial Register had terminated the offices of Soska, Štefánek, and Joachimczyk when Soska submitted the WIMCO Resolutions.<sup>414</sup>

332. The subject matter of the Resolutions Claims included a determination of the validity of two resolutions that purported to (i) change the Articles of Association of LZ (approving an increase of the number of the members of the board of directors of LZ from 3 to 5); and, (ii) establish a CZK 298,000,000 capital increase to be effected through a monetary contribution of Claimant. Even if the Regional Court had immediately declared these two resolutions invalid, it would not have meant that Soska would not still have been able to control LZ because these resolutions did not affect the ownership of shares of LZ. Under the USA, Claimant had agreed to be a minority shareholder in LZ in which Mr. Soska was to retain majority shareholder control.
333. Nor would it have meant that Orbes would have taken control of MA and LZ and fulfilled the terms of the USA. The unsigned Draft Cooperation Agreement between Claimant and LEGES (prepared by Claimant) anticipated that LEGES, as the bankruptcy trustee of Moravan, would (i) change the board of directors of MA; (ii) change the board of directors of LZ; and, (iii) fulfil the terms of the USA.<sup>415</sup> There is no evidence to show that LEGES ever agreed to this, and in fact the Draft Cooperation Agreement was never signed (notwithstanding that there was nothing to prevent LEGES from signing it during the pendency of the Resolutions Claims). By contrast, rather than sign the Draft Cooperation Agreement, in December 2002, LEGES included all of the LET Assets in the bankruptcy estate of Moravan of which LEGES was the trustee (*see supra* paragraph 91). By including all of the assets held in the subsidiaries of Moravan into Moravan's bankruptcy estate, it set out to assert ownership rights of Moravan to these assets; this action was in contradiction to what Claimant would have had LEGES do pursuant to the Draft Cooperation Agreement.

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<sup>414</sup> The Tribunal finds that the only undertaking clearly agreed to by Orbes was to exchange information with Claimant with respect to the bankruptcy proceedings of Moravan:

The parties have agreed that they would mutually exchange information regarding all facts relating to assets included in the bankruptcy estate of MORAVAN akciová společnost and will continue to discuss future steps to ensure the legal certainty of the parties and the rights and warranted interests of all creditors.

*See* Minutes of meeting between LEGES and FPS, dated 14 January 2003 (Exhibit C-0050).

<sup>415</sup> Draft Agreement between LEGES and FPS, dated January 2003 (Exhibit C-0295).

334. In the Tribunal's view, while an inordinate delay can amount to a violation of the fair and equitable treatment standard, the circumstances in the present case do not meet the required threshold. The Tribunal notes that there is disagreement between the Parties as to the exact amount of delay at the Regional Court that is attributable to Respondent, but, even on Claimant's case that the Regional Court was responsible for a total delay of 39 months, the Tribunal is not satisfied that such a delay constitutes a breach of the fair and equitable treatment standard of the BIT. As discussed above at paras. 293 and 295, in *Jan de Nul*<sup>416</sup> and *Toto*,<sup>417</sup> delays in court proceedings of ten and six years respectively did not amount to a violation of the fair and equitable treatment standard. Even if this Tribunal were to conclude that the entire delay was attributable to Respondent, it does not find that a delay of just over 3 years amounts to a breach of the fair and equitable treatment standard of the BIT in the present circumstances.
335. To the extent that Claimant has pleaded this claim as a breach of full protection and security, the Tribunal dismisses Claimant's allegations. The judicial system of the Czech Republic was available to Claimant and responsive to Claimant's requests. The Injunctions Claim was addressed promptly (within twelve days assuming Claimant's alleged filing date of 22 November 2002). Also, once the Regional Court requested payment of the court fee, and it was paid, the Regional Court's response time between submissions never exceeded ten days. For example, nine days after the fee was paid, the Court sent a request to LZ to submit comments with regard to Claimant's claim within ten days. Similarly, six days after LZ submitted its comments, the Regional Court requested a reply from Claimant.<sup>418</sup>
336. The Tribunal notes that there was a delay of 18 months following Claimant's initial filing when the Regional Court took no action and this Tribunal acknowledges that such a delay is not ideal. However, this Tribunal appreciates that at the time in question, the Czech courts were experiencing at once a high volume of cases and a shortage of judges.<sup>419</sup> This helps to explain the delay, and although not an optimal situation for the efficient resolution

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<sup>416</sup> *Jan de Nul*, *supra* note 335, ¶204.

<sup>417</sup> *Toto*, *supra* note 352, ¶160.

<sup>418</sup> *Supra* ¶127.

<sup>419</sup> Letter from Prime Minister's Expert Department to Transfin, dated 26 January 2006 (Exhibit C-0107).

of claims, this Tribunal does not find that such a delay rises to the level of a breach of the BIT.

337. With respect to Claimant's argument that government officials wrongfully failed to take action when alerted to the delay at the Regional Court, the Tribunal considers that the government officials were not under an obligation to intervene in court proceedings between private parties, and therefore no right of Claimant had been breached by their failure to act. On this point, the Tribunal finds it relevant that while Claimant complained to government officials, it only did so well after the proceedings were concluded. Again, there is no evidence that Claimant took active measures to accelerate the procedure at the Regional Court during the actual processing of the Resolutions Claim.

338. With respect to Claimant's argument that by operation of Articles III(3) and III(4) of the BIT, Claimant was entitled to the same right to expeditious proceedings before a court in the Czech Republic as are persons entitled to such treatment under the *ECHR*, the Tribunal notes that rights under the *ECHR* accrue to everyone, regardless of nationality. This obviates Claimant's need to rely on the BIT to invoke such rights. The Parties have not pleaded the jurisprudence of the *ECHR* in these proceedings, therefore this Tribunal makes no finding as to whether any standard set by the *ECHR* is applicable here and has been breached.

### **8.3.2 Claim 2 - Actions of Bankruptcy Judges**

#### *Claimant's Position*

339. Claimant contends that actions of the bankruptcy judges for MA and LZ breached the fair and equitable treatment standard and the full protection and security standard, which Claimant argues "must extend to the protection of foreign investors from private parties when they act through the judicial organs of the State."<sup>420</sup> Claimant asserts that they arbitrarily exercised their discretion and demonstrated an unacceptable bias against Claimant as a foreigner when they denied any interim relief or recognition and enforcement

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<sup>420</sup> *Loewen Group Incorporated and Loewen (Raymond L.) v. United States*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction of 5 January 2001, ¶¶53-58, cited in *Paulsson*, *supra* note 381, 43-44 (cited in Claimant's Memorial, ¶78).

of the Interim and Final Awards.<sup>421</sup> Claimant asserts that “all concerned were misguided in thinking that an allegedly mandatory municipal law could deny recognition and enforcement, or that the arbitration had not lawfully been pursued, or that there was a public policy reason not to recognise and enforce the Final Award”.<sup>422</sup>

340. Claimant objects to the meeting between the two judges and the bankruptcy trustees on the grounds that it was procedurally unfair to Claimant and “typifies the disposition of Czech officials to adopt an arbitrary and parochial construction of their delegated authority in order to justify, on a post hoc basis, their decision not to act in a fair and equitable manner towards [Claimant].”<sup>423</sup>

341. Claimant also objects to Hanzlikova’s decision that “the fact that the arbitration proceeding continued after the adjudication of a bankruptcy order constitutes a reason for the denial of the Award’s recognition and enforcement pursuant to [Article V(2)(a) of the *New York Convention*]”, asserting that this decision contravenes Claimant’s rights under Article III of the BIT, Respondent’s obligations under the *New York Convention*,<sup>424</sup> and Article 15 of the *EC Regulation*, which provides:

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.<sup>425</sup>

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<sup>421</sup> Claimant’s Memorial, ¶78; Claimant’s Reply Memorial, ¶83; Claimant’s Post-Hearing Memorial, ¶61; Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶5.

<sup>422</sup> Claimant’s Pre-Hearing Memorial, ¶82; Claimant’s Post-Hearing Memorial, ¶59.

<sup>423</sup> Claimant’s Reply Memorial, ¶87; Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶¶24-26.

<sup>424</sup> Claimant refers to *Syska et al. v. Vivendi Universal SA et al.*, (2008) EWHC 2155 (Comm), ¶54 (Tab 12 of Claimant’s Pre-Hearing Memorial, Tab 4 of Claimant’s Reply to Respondent’s Post-Hearing Memorial) [“*Syska*”] (cited in Claimant’s Post-Hearing Memorial, ¶58).

<sup>425</sup> Claimant’s Reply Memorial, ¶90(c); Claimant’s Pre-Hearing Memorial, ¶¶9, 89; *EC Regulation*, *supra* note 292. Claimant refers to *Eco Swiss China Time Ltd./Benetton International NV*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 25 February 1999, Case C-126/97 (Neth.), ¶18 (Exhibit R-0102) (cited in Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶43) for the proposition that European Community rules apply even where the party with an interest in application of those provisions has not relied on them.

342. Claimant contends that according to Article 4 of the *EC Regulation*, the law of Sweden applies.<sup>426</sup>
343. Claimant submits that it is evident that when she was appointing Hajtmar as preliminary trustee for MA, Hanzlikova recognised that (i) the Interim Award was binding and enforceable in the Czech Republic; (ii) in the face of possible bankruptcy, the arbitration proceedings would serve to resolve the priority of Claimant’s claims; and (iii) MA and LZ were specifically prohibited by the terms of the Interim Award from any further sale, transfer, encumbrance, or any other method of disposal of the LET Assets regardless of whether the assets were in actual possession or control of MA or LZ.<sup>427</sup> Claimant disputes Respondent’s contention that Hanzlikova was merely reciting Claimant’s position in her decision.<sup>428</sup>
344. Claimant argues that the Vala Opinion, upon which it alleges the bankruptcy judges based their rulings, was wrong in several material respects, explaining that: (i) Claimant had applied for separate satisfaction in the bankruptcy proceedings by filings dated 28 June 2004 in the case of MA and 26 July 2004 in the case of LZ; and (ii) its entitlement to a first secured charge as of 15 August 2001 had been confirmed by the Stockholm Tribunal, who did not purport to grant a first secured charge, but rather ordered the trustees to grant it.<sup>429</sup> Claimant also argues that, as explained above, the Vala Opinion was wrong

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<sup>426</sup> Article 4 reads as follows: “The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular [...] the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending”. Claimant notes that it is irrelevant that Swedish law was never raised before the Stockholm Tribunal because that tribunal made clear at the outset that Swedish procedural law applied to the Stockholm Arbitration. Claimant refers to the attestation of 9 June 2005 as to the legal effect and enforceability of the Final Award by Kaj Hobér, Chairman of the Stockholm Tribunal. Claimant’s Reply Memorial, ¶¶90(c); Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶44; Attestation of legal effect and enforceability of Final Award, dated 9 June 2005 (Exhibit C-0319); Transcript of hearing held on 8 and 9 January 2004 in Stockholm Arbitration (Exhibit C-0207), 4:1-5, 10:2-6, 13:12-25 and 14:1-20.

<sup>427</sup> Claimant’s Pre-Hearing Memorial, ¶¶72-73; Claimant’s Post-Hearing Memorial, ¶¶51-52, 55; Letter from Transfin to Regional Court, dated 27 February 2004 (Exhibit C-0080); Resolution of Regional Court, dated 19 April 2004 (Exhibit C-0086); Interim Arbitral Award on Claimant’s Motion for Interim Measures, dated 30 January 2004 (Exhibit C-0075, Exhibit C-0212).

<sup>428</sup> Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶41; Respondent’s Post-Hearing Memorial, ¶114.

<sup>429</sup> Claimant’s Pre-Hearing Memorial, ¶¶82, 84; Claimant’s Post-Hearing Memorial, ¶56; Claim for receivable in bankruptcy proceedings of LZ, dated 23 July 2004 (Exhibit C-0121); Claim for receivable in bankruptcy proceedings of MA, dated 28 June 2004 (Exhibit C-0150).

in that (i) Claimant had a right to pursue arbitration after insolvency because the Stockholm Arbitration had been pending well before the declarations of bankruptcy of MA and LZ;<sup>430</sup> (ii) the Final Award was legally effective and enforceable;<sup>431</sup> and (iii) Respondent was bound by the *New York Convention* to allow the Stockholm Tribunal to complete its work.<sup>432</sup> Claimant also notes that the trustees of MA and LZ had lawfully been joined to the Stockholm Arbitration.<sup>433</sup>

345. Claimant also refers to Hanzlikova’s finding that “an Award ordering the bankruptcy trustee to grant secured charges against the bankrupt’s assets to the benefit of a creditor, cannot be enforced because such an act would contradict to [*sic*] the Bankruptcy and Composition Act and as such it would be generally illegal and in breach of this country’s public order.”<sup>434</sup> Claimant asserts that merely because a Czech law is considered to be mandatory does not render the law to the category of public policy. Public policy, Claimant argues, contemplates exceptional considerations which transcend specific state regulation, such as human rights and corruption, not the equality of bankruptcy creditors.<sup>435</sup>

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<sup>430</sup> Claimant’s Post-Hearing Memorial, ¶¶57, 59; *EC Regulation*, *supra* note 292. Furthermore, Claimant notes that the Interim Award was obtained before either LZ or MA was adjudged bankrupt. Claimant’s Pre-Hearing Memorial, ¶36.

<sup>431</sup> Claimant’s Post-Hearing Memorial, ¶57.

<sup>432</sup> Claimant refers to *Syska*, *supra* note 424, ¶54 (cited in Claimant’s Post-Hearing Memorial, ¶58).

<sup>433</sup> Claimant’s Post-Hearing Memorial, ¶¶56-57, 89; Application by FPS to Stockholm Tribunal to continue proceedings, dated 30 April 2004 (Exhibit C-0219); Letter from FPS to Stockholm Tribunal, dated 25 May 2004 (Exhibit C-0257); Letter from Konski to Stockholm Tribunal, dated 9 April 2004 (Exhibit C-0250); Letter from Konski to Stockholm Tribunal, dated 18 April 2004 (Exhibit C-0251); Letter from Chairman of Stockholm Tribunal to Konski, dated 4 May 2004 (Exhibit C-0253); Letter from Konski to Stockholm Tribunal, dated 20 May 2004 (Exhibit C-0256).

<sup>434</sup> Claimant’s Reply Memorial, ¶90(b); Resolution of Regional Court, dated 2 June 2005 (Exhibit C-0161).

<sup>435</sup> Claimant’s Reply Memorial, ¶90(e); Claimant’s Post-Hearing Memorial, ¶¶60-62. Claimant explains that the public policy defence applies only to “those principles by which the Czech Republic must unconditionally abide.” ZDENĚK KUČERA, *INTERNATIONAL PRIVATE LAW* 185 (2001) (Tab 5 of Claimant’s Post-Hearing Memorial). Claimant also refers to *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l’industrie du papier*, 508 F. 2d 969 (2d Cir. 1974) (Tab 4 of Claimant’s Post-Hearing Memorial) for the proposition that enforcement should only be denied where it would “violate the forum state’s most basic notions of morality and justice”. Claimant also refers to V. Shaleva, *The ‘Public Policy’ Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia*, 19 *Arb. Int.* 72 (2003) (Tab 6 of Claimant’s Post-Hearing Memorial).

346. Claimant also disputes Respondent’s contention that a party must apply for recognition and enforcement of an arbitral award and that Claimant had failed to do so. Claimant submits that Section 40 of the *Czech Law on International Private and Procedural Law* states that recognition of a foreign arbitral award does not require a separate ruling.<sup>436</sup>
347. Claimant disputes Respondent’s contention that the substance of Claimant’s request of the trustees pursuant to the Interim Award was satisfied by their temporary freezing of the disposition of the LET Assets controlled by MA or LZ until a declaration of bankruptcy. Claimant suggests that the trustees could have stayed their processes until after issuance of the Final Award because all transactions concerning the company are subject to the preliminary trustee’s consent.<sup>437</sup>
348. Claimant disputes Respondent’s assertion that the *New York Convention* does not require its courts to honour interim measures of protection, noting that international jurisprudence currently takes a “pro-enforcement” approach.<sup>438</sup>
349. Claimant asserts that, as the Czech Republic is an “avowedly proud” “Model Law Country”, the 2006 amendments to the UNCITRAL Model Law, which apply to preliminary and interim measures, should be used as a yardstick for measuring how Respondent could have acted fairly and equitably in the circumstances.<sup>439</sup>
350. Claimant submits that the actions of the bankruptcy trustees fall under two categories of attribution to Respondent: (i) exercise of delegated legislative authority; and (ii) control by

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<sup>436</sup> Claimant’s Pre-Hearing Memorial, ¶84. Claimant notes that under section 40, the award in question must comply with the conditions in section 39. Claimant refers to the *Act of the Czech Republic No. 97/1963 Sb. on International Private and Procedural Law* but has not provided a copy. Claimant appears to be referring to the *Arbitration Act* (*i.e.* Act No. 216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards), of which Section 40 sets out that the recognition of foreign arbitral awards shall not be expressed by a special decision, and that foreign arbitral awards are required to comply with the conditions provided by Section 39 (*i.e.* that the arbitral award must be final and enforceable pursuant to the law of the state where it was issued, that it must not suffer a defect under Section 31, and that the award must not be contrary to the public order).

<sup>437</sup> Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶40.

<sup>438</sup> Claimant’s Reply Memorial, ¶74.

<sup>439</sup> Claimant’s Reply Memorial, ¶¶81-82; UNCITRAL Secretariat, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006, No. E.08.V.4 (UN Publications, Vienna: 2008), Section 4, Article 17H-17I (Exhibit R-0149) [*“UNCITRAL Model Law”*].

an organ of the Czech state. Claimant also argues that it is not essential for the conduct of the trustees to be attributed to the state in order to succeed in its claim because their conduct is part and parcel of Respondent's bankruptcy regime.<sup>440</sup>

351. Claimant explains that the trustees possessed the delegated legislative authority necessary to act as “*de facto* gatekeepers for Respondent's bankruptcy regime” in that they make initial decisions about whether a creditor's claim is valid on its face or should be excluded.<sup>441</sup> Claimant argues that the fact that the erroneous decision not to include Claimant's claim was not corrected by either bankruptcy judge confirms that the trustees' decisions should be attributed to the Czech state.<sup>442</sup>

352. Claimant contends that it is not a controversial proposition in international law that such delegated authority may serve as the source for attribution.<sup>443</sup> Claimant also notes that the Czech Constitutional Court has ruled that bankruptcy trustees exercise state authority in a manner akin to a public body.<sup>444</sup>

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<sup>440</sup> Claimant explains that the actions of both trustees always fell to review by a more senior administrative official, *i.e.* a ‘bankruptcy judge’. Claimant's Post-Hearing Memorial, ¶¶104-106; Resolution of Supreme Court, dated 25 June 2002 (Exhibit C-0363).

<sup>441</sup> Claimant's Post-Hearing Memorial, ¶105.

<sup>442</sup> Claimant's Post-Hearing Memorial, ¶110.

<sup>443</sup> Claimant's Post-Hearing Memorial, ¶105; JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 100, ¶2 (2002) (Tab 16 of Claimant's Post-Hearing Memorial).

<sup>444</sup> Resolution of Supreme Court, dated 25 June 2002 (Exhibit C-0363) (cited in Claimant's Post-Hearing Memorial, ¶106):

According to doctrine, the bankruptcy trustee is a special public law body whose task is to ensure proper execution of the bankruptcy proceeding

[...]

The Constitutional Court agrees with the doctrine definition based on aspects defining the term “public law body”. They include public purpose, the method of appointment and authority. The public purpose of the institute of the bankruptcy trustee must be seen in the acceptance of a limited public intervention in the resolution of property relations that have run into a crisis. The method of appointment is the decision of a state body (court). The bankruptcy trustee's powers, which are laid down in a number of Bankruptcy and Composition Act provisions (Section 14, Sections 17 through 20, Section 24, Sections 26 through 29), given their heteronymous nature (since the bankruptcy trustee is neither considered to be a representative of the bankruptcy creditors nor the bankrupt) then represent the execution of authority (in contrast to the heteronymous nature of public law acts, private law acts – legal acts – have an autonomous nature).

*Respondent's Position*

353. Respondent argues that there was nothing objectionable about the meeting between the bankruptcy judges and trustees and Vala because (i) Claimant's requests for preliminary injunctions had already been denied; (ii) Claimant's *ex parte* request calling on the judges to exercise their supervisory discretion under Section 12 of the *Bankruptcy Act* did not constitute an adversarial proceeding; and (iii) the bankruptcies of LZ and MA were inextricably linked, requiring the involvement of all of the attendees in question.<sup>445</sup> Respondent notes that Claimant was provided with a detailed account of the discussions the following day and that Claimant was well aware of ongoing coordination between the bankruptcy trustees and the creditors' committees of MA and LZ, who met regularly in joint meetings, because Sup was present at those meetings. While Claimant may not have known the content of the Vala Opinion, Respondent argues that this is not attributable to Respondent.<sup>446</sup>
354. Respondent dismisses Claimant's suggestion that there was a conspiracy to block recognition and enforcement of the Final Award, noting that six different courts including the Supreme Court and the Constitutional Court subsequently upheld the ruling against Claimant's application to enforce the Order on Security in the Final Award.<sup>447</sup>
355. Respondent argues that the Interim Award was not enforceable under the *New York Convention*<sup>448</sup> and that even if it was, one cannot enforce a judgment or award simply by

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<sup>445</sup> Respondent's Counter-Memorial, ¶107; Respondent's Pre-Hearing Memorial, ¶¶58-59; Respondent's Post-Hearing Memorial, ¶60. Respondent notes that the bankruptcies became linked when the bankruptcy trustee of MA successfully avoided the contribution of assets by MA into the capital of LZ in October 2001. Respondent explains that this contribution of assets was ineffective by operation of law against the bankruptcy creditors of MA because it occurred after the bankruptcy petition had been lodged against MA on 14 August 2001 and that these assets had been physically used and operated by LZ since 2001. Thus, Respondent observes, the coordination was essential for any contemplated sale of those assets.

<sup>446</sup> Claimant's Reply Memorial, ¶88; Respondent's Counter-Memorial, ¶103; Respondent's Rejoinder Memorial, ¶122; Respondent's Pre-Hearing Memorial, ¶58; Letter from Hajtmar to Transfin, dated 2 June 2005 (Exhibit C-0098).

<sup>447</sup> Respondent's Pre-Hearing Memorial, ¶60.

<sup>448</sup> Respondent's Counter-Memorial, ¶¶100-101; Respondent's Post-Hearing Memorial, ¶62.

instructing an agent to write letters to various institutions; a judicial procedure must be followed.<sup>449</sup>

356. Even though Claimant's various applications with respect to the Interim Award actually went beyond the relief granted by the Stockholm Tribunal,<sup>450</sup> Respondent argues that all of Claimant's requests were reviewed and those that were in accordance with applicable law were granted.<sup>451</sup> Claimant's request for appointment of an interim receiver in MA and an injunction to prevent disposition of the assets of MA (to give effect to the Interim Award) was upheld as no consent was given for any dispositions of assets by LZ during the preliminary bankruptcy trusteeship of LZ (9 January 2004 to 30 March 2004), and a preliminary bankruptcy trustee was installed in MA such that there were no dispositions relating to MA's property.<sup>452</sup> Respondent also notes that the Cadastral Office was unable to obtain Claimant's cooperation in dealing with its request for a seal to be imprinted by identifying the real property affected by the Interim Award and confirming the Interim Award's final and binding effect.<sup>453</sup>
357. Respondent disagrees with Claimant's characterisation of the Czech Republic as an "UNCITRAL Model Law" country, noting also that the Interim Award was issued on

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<sup>449</sup> Claimant's Reply Memorial, ¶¶64-66; Respondent's Rejoinder Memorial, ¶¶96-101; Respondent's Post-Hearing Memorial, ¶63. Respondent contends that Claimant's actions, namely instructing Sup to write letters to various institutions and judges, did not constitute the proper judicial procedure.

<sup>450</sup> Respondent's Rejoinder Memorial, ¶¶95-96; Letter from Transfin to Regional Court, dated 27 February 2004 (Exhibit C-0079). Respondent notes that Claimant's Exhibit C-0080 (Letter from Transfin to Regional Court, dated 27 February 2004) contains an incorrect translation. Where the letter requests that "all parties" be enjoined from any disposition with assets of MA, the Czech original of the letter specifies that it is the preliminary bankruptcy trustee who should be enjoined. Respondent refers to Letter from Transfin to Regional Court, dated 27 February 2004 (Exhibit R-0155) as the correct translation of the letter.

<sup>451</sup> Respondent's Counter-Memorial, ¶¶100-101; Respondent's Rejoinder Memorial, ¶99; Respondent's Pre-Hearing Memorial, ¶53; Respondent's Post-Hearing Memorial, ¶62.

<sup>452</sup> Respondent's Counter-Memorial, ¶¶100-101; Respondent's Rejoinder Memorial, ¶95; Letter from Transfin to Regional Court, dated 27 February 2004 (Exhibit C-0080); Resolution of Regional Court, dated 19 April 2004 (Exhibit C-0147).

<sup>453</sup> Annex B to Respondent's Counter-Memorial, ¶8; Respondent's Rejoinder Memorial, ¶¶96, 98; Letter from Transfin to Cadastral Office in Uherské Hradiště, dated 27 February 2004 (Exhibit C-0077); Letter from Transfin to District Court in Uherské Hradiště, dated 27 February 2004 (Exhibit C-0078); Letter from Transfin to District Court in Zlín, dated 27 February 2004 (Exhibit C-0081).

30 January 2004, almost three years before the 2006 amendments to the UNCITRAL Model Law regarding interim measures were adopted.<sup>454</sup>

358. In response to Claimant's arguments under Article 15 of the *EC Regulation*, Respondent posits that Article 15 only determined the procedural effects of bankruptcy proceedings commenced in the Czech Republic on the Stockholm Arbitration,<sup>455</sup> but does not determine anything with respect to the enforceability of any ultimate judgment or award against the litigant party subject to the bankruptcy proceedings.<sup>456</sup>
359. Respondent rejects Claimant's submission that the conduct of the bankruptcy trustees for MA and LZ is attributable to the Czech state and submits that it is settled Czech law that the Czech Republic is not liable for acts of the bankruptcy trustees.<sup>457</sup> Respondent explains that under the *Bankruptcy Act*, the bankruptcy trustee is an independent procedural entity and, although the trustee is selected by the bankruptcy court from a list of independent private individuals or legal entities registered with the court, the trustee is not a court proxy and is not acting on its behalf.<sup>458</sup> Once appointed by the court, the bankruptcy trustee is obliged to fulfil its obligations autonomously, with professional care and under personal liability for damage caused by its acts.<sup>459</sup> The remuneration and expenses of the bankruptcy trustee are borne by the creditors as they are paid out from the proceeds of the sale of the

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<sup>454</sup> Claimant's Reply Memorial, ¶¶76, 81; Respondent's Rejoinder Memorial, ¶¶102, 103, 108; Respondent's Pre-Hearing Memorial, ¶55(2); Respondent's Post-Hearing Memorial, ¶64; *Status of Enactments of UNCITRAL Model Law on International Commercial Arbitration*, online: <[www.uncitral.org](http://www.uncitral.org)> (Exhibit R-0150); *UNCITRAL Model Law*, *supra* note 439.

<sup>455</sup> Respondent also notes that, as explained at ¶192 of its Counter-Memorial, the *EC Regulation stricto sensu* applied only to the bankruptcy of MA, as the bankruptcy proceedings in respect of LZ were commenced before accession of the Czech Republic to the European Union on 1 May 2004. *EC Regulation*, *supra* note 292 (cited in Respondent's Rejoinder Memorial, ¶111).

<sup>456</sup> Respondent's Counter-Memorial, ¶¶192-202; Respondent's Rejoinder Memorial, ¶113; Respondent's Pre-Hearing Memorial, ¶55(3).

<sup>457</sup> Claimant's Post-Hearing Memorial, ¶¶105-106; Respondent's Post-Hearing Memorial, ¶¶155, 160.

<sup>458</sup> Expert Opinion of Dr. Hulmák, ¶18, as cited in Respondent's Post-Hearing Memorial, ¶162.

<sup>459</sup> Respondent's Post-Hearing Memorial, ¶162; Section 8(2) of the *Bankruptcy Act*, *supra* note 117:

(2) The bankruptcy trustee is obliged to carry out the duties assigned to him by the law or by the court with expert care and is liable for any damage resulting from a breach of such duties. In case a general partnership has been appointed as a trustee, its associates are liable for any damage resulting from a breach of the duties of a bankruptcy trustee jointly and severally. The bankruptcy trustee shall conclude an insurance agreement on liability for damages that could arise in connection with execution of his duties.

bankruptcy assets.<sup>460</sup> Respondent explains that the bankruptcy trustee does not possess the authority to decide on the existence or priority of a claim in bankruptcy.<sup>461</sup>

360. Respondent dismisses Claimant's reliance on the Constitutional Court's statement that a bankruptcy trustee exercises state authority in a manner akin to a public body, noting that the decision in which the statement is found did not substantively deal with the position of the bankruptcy trustee, but rather decided on the abolition of certain provisions of the *Bankruptcy Act* relating to the process of remunerating a bankruptcy trustee, on the basis that they violated the principle of equality.<sup>462</sup> Respondent notes that the decisions of other Czech courts have dealt with the issue more directly and support its position.<sup>463</sup>

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<sup>460</sup> Respondent refers to Section 8(3) of the *Bankruptcy Act*, *supra* note 117:

(3) The trustee is entitled to remuneration and to reimbursement of his cash expenses. Any other agreement on the trustee's remuneration or reimbursement of expenses concluded by the trustee with the parties to the bankruptcy proceedings shall be null and void. An account of such remuneration and reimbursement of expenses shall be given by the bankruptcy trustee in his final report or, if there is none, on cancellation of the bankruptcy proceedings; the court may approve the provision of advances to the bankruptcy trustee. According to the circumstances of the case, the court may adequately increase or reduce the remuneration calculated according to another act. Creditors may provide the trustee, even repeatedly, with advances of his expenses on the basis of a resolution made by the creditors' committee, approved by the court; when advances are provided, the purpose of the expenses and the conditions of accounting for them may be determined. The bankruptcy trustee is entitled to entrust a third person with duties which he is obliged to perform on account of the bankrupt's estate, only with consent of the creditors' committee.

<sup>461</sup> Respondent's Post-Hearing Memorial, ¶157; Opinion of Supreme Court, dated 17 June 1998 (Exhibit C-0362, Exhibit R-0173) [*Opinion No. R 52/98*]. Respondent explains that the bankruptcy trustee is only one of the many stakeholders with the right to opine on a claim, and in the event a claim is contested, the courts of the Czech Republic and not the trustee must decide. Respondent submits its own translation of the relevant parts of *Opinion No. R 52/98* as Exhibit R-0173.

<sup>462</sup> *Opinion No. R 52/98*, *supra* note 461.

<sup>463</sup> Respondent's Post-Hearing Memorial, ¶158. Respondent refers to Resolution of Supreme Court, dated 26 November 2008 (Exhibit R-0190):

In judicial practice there is a uniform interpretation with regard to the fact that the bankruptcy trustee is not a participant in the bankruptcy proceedings. As a special procedural entity, the Trustee has a separate status both in relation to the bankrupt entity and in relation to the bankruptcy creditors and the Trustee cannot be viewed as a representative of the bankruptcy creditors and neither can he be viewed as the bankrupt entity's representative. [...] The Constitutional Court further added - with regard to the status of a bankruptcy trustee - that such Trustee is a special public body. A Trustee is not, however, a body of a State Agency or of a state organization (and it is quite apparent that neither is he a body of a social organization) within the meaning of Section 1(1) of the Act [Act No. 58/1969 Coll., on liability for damages caused by a decision of a public body], and this can also be seen from the fact that (in contrast with a State Agency), he bears personal liability for damages that arise due to a breach of

361. Under international law, Respondent submits that the acts of a bankruptcy trustee do not satisfy the test for attribution under Article 5 or Article 8 of the *ILC Articles*. Respondent explains that a bankruptcy trustee is not a *de jure* or *de facto* public organ for the purposes of Article 5, nor does a bankruptcy trustee act “on the instructions of, or under the direction or control of” the Czech state for the purposes of Article 8.<sup>464</sup>
362. Respondent notes that the issue of responsibility of a state for a bankruptcy trustee acting within a civilian legal framework similar to that of the Czech Republic has been discussed in *Plama v. Bulgaria* where the tribunal decided that Bulgaria was not responsible for the actions of its bankruptcy trustees.<sup>465</sup>

*Tribunal’s Analysis*

363. Given the significant degree of overlap between Claim 2 and Claim 4, only Claimant’s complaints regarding the 1 June 2005 meeting between Hanzlikova, Boháček, Sládek, Hajtmar, and Vala (the bankruptcy judges and trustees), and the treatment of the Vala

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the duties imposed on him by the law or duties imposed by a court (Cf. Section 8(2) of the Act on Bankruptcy and Composition). [...] A contrary interpretation would lead to the conclusion that a bankruptcy trustee is not a party that has the capacity to be sued in a legal action for compensation of damages caused by a breach of the bankruptcy trustee’s duties during the performance of his post (this would mean that the only party that could be sued would in all cases be - in its capacity as the entity responsible for such ‘public body’ in its service - solely the Czech Republic, under the regime stipulated in Act No. 58/1969 Coll., or - with regard to the period from 15 May 1998 - under the regime stipulated in Act No 82/1998 Coll.). The settled interpretation seen in judicial practice, however, does not support such a view, which can be documented by, for example, the judgment of the Supreme Court published under number 88/2003 in the Collection of Court Decisions and Opinions (which in fact indicates that a bankruptcy trustee is a person that is independently liable pursuant to Section 420 (I) of the Civil Code for damages sustained by participants in bankruptcy proceedings or third parties in consequence of a breach of the duties imposed on the bankruptcy trustee by the law or a court decision). [...] To the extent that the parties that filed the extraordinary appeal have alleged that they sustained damages in consequence of, among other things, or any wrongful action of the bankruptcy trustee, the conclusion that can be stated is that the only party that they can be sued on the basis of such an allegation is the relevant Trustee, not the Czech Republic - which bears no direct liability for a wrongful action of a bankruptcy trustee.

<sup>464</sup> Respondent’s Post-Hearing Memorial, ¶161; Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, Annex. U.N. Doc. A/RES/56/83 (2002) [“*ILC Articles*”].

<sup>465</sup> *Plama Consortium v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 28 August 2008, ¶¶251-255 [“*Plama 2008*”] (Exhibit R-0183) (as cited in Respondent’s Post-Hearing Memorial, ¶165).

Opinion will be dealt with under this section. Claimant's claims relating to the substantive decisions of the bankruptcy judges and trustees, as well as other Czech courts, with respect to the recognition and enforcement of the Interim and Final Awards will be dealt with under Claim 4.

364. Claimant alleges that the 1 June 2005 meeting was procedurally unfair and demonstrative of Czech officials' adopting an arbitrary and parochial construction of their delegated authority in order to justify their decision not to act in a fair and equitable manner.<sup>466</sup> Claimant characterises this meeting as a "serious departure from basic principles of fairness and due process".<sup>467</sup> Claimant implies that it should have received notice of the 1 June 2005 meeting.<sup>468</sup>
365. With respect to the Vala Opinion, Claimant implies that it should have been provided with an opportunity to comment on the Vala Opinion.<sup>469</sup> Claimant finds the Vala Opinion to be both factually incorrect in that it wrongfully alleged that (i) Claimant had implied that the Final Award was in the process of being nullified; (ii) Claimant had never initiated any proceedings to recognise or enforce the award; and (iii) Claimant had never claimed separate satisfaction for its security interest pursuant to the Final Award. Claimant also asserts that the Vala Opinion was legally incorrect in that it wrongfully stated that (i) the Stockholm Arbitration was not permitted to continue once bankruptcy had been declared; (ii) the Arbitral Award contravened the public policy of the Czech Republic because it ordered the trustees to grant secured charges contrary to the *Bankruptcy Act* and failed to respect the equality of creditors in bankruptcy; and (iii) Claimant was not entitled to any secured charges until the proceedings with respect to nullification of the Final Award had been resolved, which Claimant notes did not occur until September 2008.<sup>470</sup>
366. As noted above (*see supra* paragraphs 289 to 296), in order to constitute a breach of fair and equitable treatment on the grounds of procedural impropriety and a lack of due process or bad faith, other tribunals have considered factors including a failure to hear the investor,

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<sup>466</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶¶24-26.

<sup>467</sup> Claimant's Memorial, ¶112.

<sup>468</sup> Claimant's Memorial, ¶¶36-37.

<sup>469</sup> Claimant's Memorial, ¶¶36-37.

<sup>470</sup> Claimant's Reply Memorial, ¶90; Claimant's Pre-Hearing Memorial, ¶¶81-82.

lack of proper notification, persistent appeals to local favouritism, and denial of access to the courts.

367. In this case, it is necessary to consider the exact nature of the 1 June 2005 meeting and the events which led up to it. These have already been described in outline in paragraphs 153 to 155 above, but a closer analysis is appropriate.

368. The Final Award in the Stockholm Arbitration was issued on 30 December 2004.<sup>471</sup>

369. On 28 February 2005, Czech counsel for Claimant submitted the Final Award, including a certified translation into the Czech language, to the judges seized with the bankruptcy proceedings against MA and LZ and to the trustees in bankruptcy for MA and LZ, Hajtmar and Sládek, respectively.<sup>472</sup> The submission to the judge overseeing the bankruptcy proceeding of MA expressly made the request that the Final Award be recognised:

Based on the above, I am herewith requesting you to exercise your authority and ensure that the above Arbitral Award be recognized, namely by the bankruptcy trustee.

370. Jewitt testified to his understanding that Claimant's counsel made a similar submission to the judge overseeing the LZ bankruptcy proceeding.<sup>473</sup> Respondent does not appear to challenge this evidence.

371. On 31 March 2005, the trustee in bankruptcy for LZ, Sládek responded to Claimant's correspondence of 28 February 2005 and sent an almost identical letter to Sup, of Transfin International s.r.o., the agent of Claimant in the Czech Republic.<sup>474</sup> In these letters, the objection that recognition and enforcement of the Final Award could contravene public policy was raised for the first time:

In [sic] Article V para (2) letter b) of the [New York] Convention stipulates that the recognition (and enforcement) of a foreign arbitral

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<sup>471</sup> Final Award, dated 30 December 2004 (Exhibit C-0094).

<sup>472</sup> Letter from Tutterova to Hanzlikova, dated 28 February 2005 (Exhibit C-0156); Letter from Tutterova to Hajtmar, dated 28 February 2005 (Exhibit C-0157); Jewitt Witness Statement, ¶149.

<sup>473</sup> Jewitt Witness Statement, ¶149.

<sup>474</sup> Letter from Sládek to Tutterova, dated 31 March 2005 (Exhibit C-0127); Letter from Sládek to Transfin, dated 31 March 2005 (Exhibit C-0097).

award shall be denied if the award would contravene public policy of the country where the recognition (and enforcement) is supposed to be executed. In terms of the subject arbitral award, I must state that it indeed contradicts the public policy of the Czech Republic. I see this contradiction in an apparent incompatibility with the Czech mandatory legal regulations, in particular Act No. 328/19991 Coll., on bankruptcy and composition. Since bankruptcy proceedings mean serious intervention in the legal status of a broad spectrum of subjects, they are regulated by a strictly mandatory legislation which must be unconditionally observed. [...] Since the Arbitral Award fails to respect mandatory legislation regulating bankruptcy proceedings and fundamental legal principles, it is unacceptable in the Czech legal system. Therefore I cannot consider it in the bankruptcy proceedings.

372. On 8 April 2005, Vala, counsel for the creditors' committee of MA, informed Czech counsel for Claimant that the creditors' committee "concluded that this Final Award orders the bankruptcy trustee to effect performance that is impermissible according to domestic law."<sup>475</sup> He also indicated that the creditors' committee filed an action requesting the cancellation of the Final Award.
373. The statement of claim filed with the Regional Court in Brno in the action to nullify the Final Award filed by Vala on behalf of Hajtmar, as trustee in bankruptcy of MA, alleges that compliance with the Final Award would be impossible or impermissible under domestic law.<sup>476</sup> Likely due to the nature of the proceeding, the public policy ground for refusing the recognition and enforcement of an arbitral award was not invoked.<sup>477</sup> Based on the evidentiary record, it does not appear that any similar arguments were made by the trustees in bankruptcy of either MA or LZ to the judges overseeing the respective bankruptcy proceedings.
374. On 11 May 2005, a representative of Claimant participated in the second review hearing in the bankruptcy proceeding for MA. Claimant's claimed receivable was not discussed and was transferred to the next review hearing "given the seriousness of this case".<sup>478</sup> It does

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<sup>475</sup> Letter from Vala to Tutterova, dated 8 April 2005 (Exhibit C-0180).

<sup>476</sup> Commencement of Action for Nullification of Final Award at Regional Court, dated 7 April 2005 (Exhibit C-0179), relying on s. 31 of the *Arbitration Act*.

<sup>477</sup> Found in section 39(c) of the *Arbitration Act*.

<sup>478</sup> Minutes of Second Review Hearing for bankruptcy of MA, dated 11 May 2005 (Exhibit C-0339).

not appear that the Final Award or its potential impact on the bankruptcy proceeding was discussed before the court.

375. On 17 May 2005, in response to a joint public tender for the assets of MA and LZ announced by the respective trustees in bankruptcy, Claimant applied for interim injunctions in both bankruptcy proceedings seeking to enjoin the trustees in bankruptcy from disposing of the assets of MA and LZ. At the same time, Claimant filed parallel motions to cancel the joint tender in each proceeding.<sup>479</sup>

376. On 19 May 2005, the court in the MA bankruptcy proceedings declined the application for an interim injunction. The court did not analyse the Final Award. Rather, it dismissed the injunction application with reference to its supervisory jurisdiction, which required the court's approval to any sale of the assets of MA. Since the approval had not been given, Claimant remained legally protected. The court observed:

Such approval has not been issued yet and in the future decision-making about the approval the court will take into consideration all of the above mentioned facts and will carefully consider further action in a way that the rights of either participant won't be violated.<sup>480</sup>

377. Claimant's appeal from the denial of the interim injunction was dismissed by the High Court in Olomouc on 27 July 2005 for the reasons expressed by the bankruptcy court. However, the appellate court also agreed with Claimant that its submissions in respect of the Final Award had not been addressed by the lower court:<sup>481</sup>

The appellate court agrees with the bankruptcy creditor's objection that the first instance court has not addressed the grounds for seeking an interim injunction. In the petition for an interim injunction, the Petitioner stated circumstances based on which he concluded that the execution of rights pursuant to the final award of December 30, 2004 had been frustrated. He explicitly stated that the enforcement of this award had been jeopardized [...]

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<sup>479</sup> Motion by FPS to Regional Court, dated 17 May 2005 (Exhibit C-0128); Motion by FPS to Regional Court, dated 17 May 2005 (Exhibit C-0129), Motion by FPS to Regional Court, dated 17 May 2005 (Exhibit C-0158); Motion by FPS to Regional Court, 17 May 2005 (Exhibit C-0159).

<sup>480</sup> Resolution of Regional Court, dated 19 May 2005 (Exhibit C-0160).

<sup>481</sup> Resolution of High Court in Olomouc, dated 27 July 2005 (Exhibit C-0164).

378. On 23 May 2005, the court supervising the bankruptcy proceedings involving LZ also denied Claimant's motion for an interim injunction. The decision rested on the same reason as expressed in the 19 May 2005 decision in the MA proceeding. However, as additional grounds, it concluded that recognition and enforcement of the Final Award should be denied pursuant to section 39(a) and (c) of the *Arbitration Act* "if the award is not legally effective and enforceable pursuant to domestic law and the award would contravene public policy."<sup>482</sup>
379. On the record, the bankruptcy court's decision in the LZ proceeding denying Claimant's application for an interim injunction was the first instance in which the incompatibility of the Final Award with Czech public policy was raised in the proceedings before the bankruptcy courts. At this point in time, Claimant's motions to strike the joint tender were still pending and it had not had an opportunity to make submissions on the public policy objections to the recognition and enforcement of the Final Award.
380. On 1 June 2005, the supervising judges in the bankruptcy proceedings involving MA and LZ held a joint meeting with the trustees in bankruptcy for the two companies, Hajtmar and Sládek. Claimant did not participate in the meeting. Its main witness, Jewitt, has testified that Claimant did not have notice of the meeting and only learned of the meeting the following day, when Hajtmar sent a reporting e-mail to Sup.<sup>483</sup>
381. At the 1 June 2005 meeting, the participants discussed the Final Award and Claimant's motions to cancel the joint tender. The minutes of this meeting report the following in respect of the recognition and enforcement of the Final Award:<sup>484</sup>

All parties present agree that the subject Arbitral Award cannot be respected in view of the provisions of §39, letter b) and §31, letter f) of Act No. 216/1994 Coll. on bankruptcy proceedings and the enforcement of arbitral awards, because it adjudicates the party to perform acts that are impossible or illegal under domestic law and because, according to Article V.2B) and Decree No. 74/1959 Coll. on the Convention on the Recognition and Enforcement of Foreign

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<sup>482</sup> Resolution of Regional Court, dated 23 May 2005 (Exhibit C-0130).

<sup>483</sup> Jewitt Witness Statement, ¶158 and ¶160.

<sup>484</sup> Minutes of 1 June 2005 meeting between trustees for MA and LZ and bankruptcy judges, dated 1 June 2005 (Exhibit C-0341).

Arbitral Awards, the recognition or enforcement of the Award would contradict the public policy of the Czech Republic.

This means that in the course of the bankruptcy proceeding, the right to separate satisfaction from the Bankrupt's assets cannot be established for a creditor and therefore the Bankruptcy Trustee can neither conclude a contract of pledge to the benefit of the creditor nor provide any other security for his receivable. Such approach would be in gross violation of the Bankruptcy and Composition Act. Apart from separate satisfaction based on a promissory note [...], the creditor did not claim any right to separate satisfaction in either of the bankruptcy proceedings; therefore, such claim could not have been reviewed in the review hearing and this creditor is not a separate creditor. [...]

Both Judges agree that the standing of creditor Frontier and claims raised by this creditor do not constitute an obstacle to the prepared sale.

Mgr. Vala submits to the court a written statement regarding the creditor's motion to proceed pursuant to §12 of the Bankruptcy and Composition Act [the cancellation of the tender].

382. The written statement referred to in the last paragraph of the excerpt from the 1 June 2005 minutes is the Vala Opinion.<sup>485</sup> Claimant did not receive a copy of the Vala Opinion until Respondent produced it in this arbitration.<sup>486</sup>

383. In respect of the recognition and enforcement of the Final Award, the Vala Opinion had, among other things, this to say:<sup>487</sup>

According to the above-mentioned Convention [the New York Convention] (specifically its article V./2), there are the following two reasons owing to which recognition and enforcement of an arbitral award may be rejected:

a) the subject matter of the difference cannot be settled by arbitration under the law of that country (Czech Republic in the given case)

b) recognition or enforcement of the award would be contrary to the public policy of that country. [...]

The fact that the Arbitral Award ordered the Bankruptcy Trustee to grant first secured charges to the Creditor is contrary to the respective provisions of the Bankruptcy and Composition Act. It

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<sup>485</sup> Statement by Vala, dated 25 May 2005 (Exhibit C-0340).

<sup>486</sup> Jewitt Witness Statement, ¶159.

<sup>487</sup> Statement by Vala, dated 25 May 2005 (Exhibit C-0340).

fails to respect the equality of bankruptcy creditors to the extent that after the bankruptcy adjudication, the Bankruptcy Trustee is not entitled to perform acts aimed at securing receivables that arose prior to the bankruptcy adjudication (i.e. receivables that must be claimed). In this sense, the Arbitral Award is contrary to the public policy of this country, which constitutes another reason why the recognition and enforcement of the Award must be rejected.

384. The Vala Opinion also asserted that the bankruptcy court lacked jurisdiction to recognise and enforce the Final Award and that Claimant had not yet made an application for recognition and enforcement to the competent court.

385. As indicated above, on 2 June 2005, the trustee in bankruptcy for MA, Hajtmar, reported by e-mail on the meeting with the bankruptcy judges to the creditors committee of MA. The report makes it clear that the purpose of the 1 June 2005 meeting was “in conjunction with the application for injunction [the motions to cancel the joint tender] from the Frontier Company.”<sup>488</sup> It also states clearly that the outcome of Claimant’s motions was decided, or at least conveyed, at the meeting and that the sale of the assets of LZ and MA was approved:

On [sic] this meeting was presented a legal opinion from MA side, the analysis of present situation regarding to Arbitral decision from Stockholm (and so the answer to the courts prompt) [sic]. From the analysis and the discussion is clear that requested injunction against the assets has no ground. And will be refused by both judges.

The sale of LZ was approved by the judge and sale of assets held by MA will be approved also. Also, MA facility in Otrokovice could be prepared for sale as planed [sic].(emphasis added)

386. Hajtmar then went on to convey the following from the meeting with the judges:

Also in discussion was a fact that steps taken by FPS, while taken to protect their interest are not compatible with interest of remaining creditors. (If FPS would be successful the rest of the creditors would get nothing.)

And so it is a question for creditors of MA and specifically members of Creditors Committee if it is correct that FPS is a member of CC [the creditors committee]. The question of removal FPS [sic] would be presented on the next meeting of CC and it is preferable that members would create their opinion about this.

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<sup>488</sup> Letter from Hajtmar to Transfin, dated 2 June 2005 (Exhibit C-0098).

387. As anticipated in the MA trustee's report, both bankruptcy courts subsequently denied Claimant's motion in respect of the joint tender. Already on 2 June 2005, the court in the MA bankruptcy proceedings issued its reasons.<sup>489</sup> The decision reproduced at some length passages from the Vala Opinion and concluded that:

[...] an Award ordering the bankruptcy trustee to grant secured charges against the bankrupt's assets to the benefit of a creditor, cannot be enforced because such act would contradict to [sic] the Bankruptcy and Composition Act and as such is would be generally illegal and in breach of this country's public order.

388. On 9 June 2005, the court in the LZ bankruptcy proceedings also denied Claimant's application to cancel the joint tender. The issue concerning the recognition and enforcement of the Final Award was addressed in one paragraph, without detailed analysis.<sup>490</sup>

Given the fact that the Arbitral Tribunal Award contradicts the Bankruptcy and Composition Act and with reference to the provisions of Section 39 of Act No. 39, letter (b) and Section 31 letter f) of Act No. 216/1994 Coll., the court has decided as stated above.

389. On 16 June 2005, Claimant filed four motions requesting the recognition and enforcement of the Final Award, one each in respect of MA, LZ, and Hajtmar and Sládek.<sup>491</sup>

390. After the creditor committees for LZ and MA accepted an offer by CZK to purchase the assets of the two bankrupt companies on 27 June 2005, the court supervising the bankruptcy proceedings involving MA approved the sale on 28 June 2005.<sup>492</sup> Claimant's constitutional complaint against the approval of the sale failed on the basis that the

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<sup>489</sup> Resolution of Regional Court, dated 2 June 2005 (Exhibit C-0161); *supra* ¶156.

<sup>490</sup> Resolution of Regional Court, dated 9 June 2005 (Exhibit C-0132).

<sup>491</sup> Motion by FPS to District Court in Uherské Hradiště, dated 16 June 2005 (Exhibit C-0138); Motion by FPS to Municipal Court in Brno, dated 16 June 2005 (Exhibit C-0139); Motion by FPS to District Court in Zlín, dated 16 June 2005 (Exhibit C-0171); Motion by FPS to Municipal Court in Brno, dated 16 June 2005 (Exhibit C-0172).

<sup>492</sup> Resolution of Regional Court, dated 28 June 2005 (Exhibit C-0163).

constitutional rights of Claimant were not breached.<sup>493</sup> The Constitutional Court reached the same conclusion with respect to Claimant's constitutional complaints against the dismissals of 2 and 9 June 2005, of its application to cancel the joint tender.<sup>494</sup>

391. The application for recognition and enforcement of the Final Award against Hajtmar was denied and the outcome was affirmed on appeal and Claimant's subsequent extra-ordinary appeal to the Czech Supreme Court.<sup>495</sup> The court of first instance and the appellate court both refused the recognition and enforcement of the Final Award on the basis of Article V(2)(b) of the New York Convention as contrary to the public policy of the Czech Republic, albeit for different reasons. The appellate court held in particular:<sup>496</sup>

It would be contrary to Czech laws as well as public policy in the Czech Republic, and would be contrary to the Constitution as well as all other rules in effect not only in the Czech Republic but also in other signatory countries to the New York Convention, for an obligation to be imposed on someone in contravention of his rights and obligations and in contravention of the laws and public policy of the country in which the enforcement (execution) is to be implemented. It is not possible to demand that a bankruptcy trustee breach the obligations imposed on him/her by the bankruptcy law. Moreover, in view of the foregoing it is also not possible to order a bankruptcy trustee to ensure a priority ranking for the entitled party in bankruptcy proceedings.

[...]

In conclusion it can be stated that the submitted execution title completely fails to respect the mandatory rules of Czech laws, has a tendency to unacceptably interfere with the powers, authority and independence of a bankruptcy court, attempts to force it to take steps that are contrary to Czech laws, principle [sic] of justice and equal status of parties in court proceedings. In the appellate court's opinion, in this case there are grounds for not recognizing the submitted execution title as enforceable on the territory of the Czech Republic when one applies Article V (2) (b) of the [New York Convention].

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<sup>493</sup> Appeal by FPS of 28 June 2005 Resolution of Regional Court, dated 2 August 2005 (Exhibit C-0165); Resolution of Constitutional Court, dated 20 December 2005 (Exhibit C-0166).

<sup>494</sup> Resolution of Constitutional Court, dated 17 January 2006 (Exhibit C-0135); Resolution of Constitutional Court, dated 20 December 2005 (Exhibit R-0018).

<sup>495</sup> Resolution of Municipal Court in Brno, dated 5 August 2005 (Exhibit R-0116); Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117); Resolution of Supreme Court, dated 31 March 2009 (Exhibit R-0118).

<sup>496</sup> Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117).

392. The appellate court further concluded that, as a matter of Czech law, the Final Award was not sufficiently specific and therefore not enforceable and that MA's bankruptcy trustee, Hajtmar, was the wrong respondent for Claimant's petition to recognise and enforce the award.<sup>497</sup> Claimant's extra-ordinary appeal from the appeal decision was denied as inadmissible by the Supreme Court of the Czech Republic.<sup>498</sup>
393. The application for recognition and enforcement of the Final Award against the trustee in bankruptcy for LZ, Sládek, was also dismissed by the Municipal Court in Brno as contrary to Czech public policy.<sup>499</sup> The court's reasoning is similar to the analysis adopted by the court of first instance in the proceedings against Hajtmar. The decision of the Municipal Court in the Hajtmar case was later upheld by the Regional Court of Brno and the Supreme Court of the Czech Republic.<sup>500</sup> Claimant did not appeal the Municipal Court's decision regarding Sládek.
394. In the proceedings against LZ for recognition and enforcement of the Final Award, Claimant had initially obtained an execution order.<sup>501</sup> This order was revoked on appeal on 25 August 2006 by the Regional Court in Brno,<sup>502</sup> sitting as the same panel that heard the appeal in the recognition and enforcement proceedings against the MA bankruptcy trustee.<sup>503</sup> The Regional Court in Brno based its decision on the same public policy grounds it had set out in its earlier decision in the MA proceedings.<sup>504</sup>

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<sup>497</sup> Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117).

<sup>498</sup> Resolution of Supreme Court, dated 31 March 2009 (Exhibit R-0118).

<sup>499</sup> Motion by FPS to Municipal Court in Brno, dated 16 June 2005 (Exhibit C-0139); Resolution of Municipal Court in Brno, dated 5 August 2005 (Exhibit R-0124).

<sup>500</sup> Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117); Resolution of Supreme Court, dated 31 March 2009 (Exhibit R-0118).

<sup>501</sup> Resolution of District Court in Uherské Hradiště, dated 4 July 2005 (Exhibit C-0140).

<sup>502</sup> Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0120).

<sup>503</sup> Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117).

<sup>504</sup> Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0120).

395. Following the dismissal of the enforcement proceedings, and an appeal by Claimant,<sup>505</sup> the Appellate Division of the Regional Court in Brno granted partial recognition of the Final Award against LZ on 30 March 2007.<sup>506</sup> However, the dismissal of the enforcement proceedings in respect of the accounting for all the property of LZ and the dismissal of the grant of a first secured charge against the LET Assets by entering into a pledge agreement with Claimant, as ordered by the Final Award, were upheld. In its reasons, the court referred to the public policy considerations in its 25 August 2006 decision in the same matter. As of mid-2009, a further, extraordinary appeal by Claimant to the Supreme Court of the Czech Republic, filed on 21 June 2007, was still pending.<sup>507</sup>
396. In the recognition and enforcement proceedings against MA, the District Court in Zlín denied Claimant's petition on 25 January 2006.<sup>508</sup> The court considered the Final Award to be not enforceable on procedural grounds. On appeal, the Regional Court in Brno partially reversed the lower court decision in a decision dated 15 February 2007.<sup>509</sup> In substance the decision parallels the ruling of the same court in the enforcement proceedings against LZ. The enforcement of the first three orders of the Final Award was denied; the enforcement of the payment orders Nos. 4, 7, 8 and 10 was granted. In respect of the former, the court held as follows:

In relation to the company [MA] [...] the principal question is how specifically the holding of this Arbitral Award is to be incorporated into proceedings pursuant to the provisions of Act 120/2001 Coll. in compliance with the Czech legal order. Imposing an obligation on a person that would violate such person's rights and obligations and contradict the legal and public order of the country in which such act (an execution) is to be carried out would indeed contravene the legal and public order of the Czech Republic, its Constitution and all legal standards applicable not only for the Czech Republic but also for

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<sup>505</sup> Resolution of District Court in Uherské Hradiště, dated 8 November 2006 (Exhibit R-0121), adopting the same public policy considerations as the Regional Court in Brno (see Exhibit R-0120).

<sup>506</sup> Resolution of Appellate Division, dated 30 March 2007 (Exhibit C-0144). The panel of judges hearing the appeal was the same as in the previous appeals in Claimant's enforcement proceedings (see Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117); Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0120)).

<sup>507</sup> Extraordinary Appeal by FPS of 30 March 2007 Resolution of Regional Court, dated 21 June 2007 (Exhibit R-0123) and Respondent's Counter-Memorial, Annex C, ¶17.

<sup>508</sup> Resolution of District Court in Zlín, dated 25 January 2006 (Exhibit C-0173).

<sup>509</sup> Respondent's Rejoinder Memorial, ¶155; Resolution of Regional Court, dated 15 February 2007 (Exhibit C-0174).

other signatory states of the New York Convention. A bankruptcy order has been adjudicated against the assets of [MA] [...]. Pursuant to the provisions of § 14, para 1, letter e) of Act 328/1991 Coll., the Bankruptcy and Composition Act, as amended, it shall be impossible to execute a judgment (execution order) relating to assets that are part of a bankrupt's estate and to acquire the right to separate satisfaction from any such assets. We cannot ask the Bankrupt to violate his obligations given the Bankruptcy Act. [...]

As the Appellate Court has already stated several times in the rationale of its rulings, the submitted execution title fails in this part to respect the mandatory standards of the Czech legal order; it tends unduly to encroach on the authority, competence and independence of the Bankruptcy Court and attempts to force it into taking steps that contravene the Czech legal order and the principle of justice and equality of the parties in judicial proceedings. Hence, in the Appellate Court's opinion, the discussed part of the execution title provides reasons for non-executability of the submitted execution title in the Czech Republic invoking Article V point 2, letter b) of the [New York Convention].

397. On 28 May 2007, Claimant filed an extraordinary appeal against the Regional Court of Brno's decision of 15 February 2007 to the Supreme Court.<sup>510</sup> According to Jewitt, "a ruling was issued on March 27, 2009, which again rejected the right to separate (preferential) satisfaction".<sup>511</sup> However, according to Respondent, as of 20 July 2009, the Supreme Court's decision was still pending.<sup>512</sup>

- ***Procedural Fairness***

398. The procedure followed by the Czech courts in addressing Claimant's applications of 17 May 2005 in the bankruptcy proceedings against MA and LZ to cancel the joint tender for the sale of MA's and LZ's assets raises concerns of procedural fairness and in particular, whether Claimant should have been heard on the arguments against enforceability of the Final Award raised by the trustees in bankruptcy for MA and LZ and adopted by the courts.

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<sup>510</sup> Annex C to Respondent's Counter-Memorial, ¶15; Jewitt Witness Statement, ¶171; Extraordinary Appeal of Resolution of Regional Court of 25 May 2007, dated 25 May 2007 (Exhibit R-0119).

<sup>511</sup> Jewitt Witness Statement, ¶171.

<sup>512</sup> Annex C to Respondent's Counter Memorial, ¶15.

399. These concerns arise out of the meeting of the judges supervising the MA and LZ bankruptcy proceedings with the responsible trustees and their counsel on 1 June 2005 and the failure of the courts to ensure the participation of Claimant in this meeting or to give Claimant an opportunity to respond to the submissions of the trustees in bankruptcy against the recognition and enforcement of the Final Award as contrary to the mandatory law and public policy of the Czech Republic.
400. While the trustee in bankruptcy first raised the public policy objection against the recognition and enforcement of the Final Award in the application of 7 April 2005 to have the award set aside, neither Hajtmar nor Sládek advanced this defence in the MA and LZ bankruptcy proceedings in response to Claimant's motion of 28 February 2005 to have the Final Award recognised.
401. In the context of the bankruptcy proceedings, the issue of whether the Final Award was enforceable was first referred to by the LZ bankruptcy court in rejecting Claimant's motion for an interim injunction on 23 May 2005. In the LZ and the MA bankruptcy proceedings, the main reason for rejecting the applications for interim measures was that the application was premature. Before the trustees in bankruptcy could proceed with the sale of the MA and LZ assets on the basis of the joint tender, approval of the court would be required. As the court in the MA proceedings put it, "in the future decision-making about the approval the court will take into consideration all of the above mentioned facts", which included Claimant's requests to recognise and enforce the Final Award.<sup>513</sup>
402. From the perspective of Claimant, there is certainly an argument to the effect that it was therefore reasonable to expect that not only would the sale of the LZ and MA assets require further court approval, but also that Claimant would be given an opportunity to be heard in respect of the sale and in respect of Claimant's pending motions to cancel the joint tender.
403. In fact, however, Claimant's motions to cancel were effectively dismissed – and the sale of the assets effectively approved – at the 1 June 2005 meeting among the bankruptcy judges and the trustees in bankruptcy and Vala: "From the analysis and the discussion is clear that the requested injunction against the assets has no ground. And will be refused by both

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<sup>513</sup> Resolution of Regional Court, dated 19 May 2005 (Exhibit C-0160).

judges. The sale of LZ was also approved by the judge and the sale of assets held by MA will be approved also.”<sup>514</sup>

404. During the meeting, Hajtmar and Vala first presented the Vala Opinion to the bankruptcy judges. The outcome of the meeting and the discussion between the bankruptcy judges and the trustees was clearly recorded in the minutes: “All parties present agree that the subject Arbitral Award cannot be respected [...] because it adjudicates the party to perform acts that are impossible or illegal under domestic law and because [...] the recognition or enforcement of the Award would contradict the public policy of the Czech Republic.”
405. Claimant did not have any notice or knowledge of the meeting. Claimant did not participate in the meeting and it did not have an opportunity to attend the meeting and present its case in respect of the objections that recognition and enforcement of the Final Award would be illegal and contrary to Czech public policy. Rather, Claimant first learned of the meeting and its outcome on the following day from Hajtmar.
406. That same day, 2 June 2005, the court in the MA bankruptcy proceeding issued its decision dismissing Claimant’s motion to cancel the joint tender. Thus, Claimant was also denied the opportunity to make submissions to the court on the objections against the recognition and enforcement of the Final Award following the 1 June 2005 meeting.
407. The 2 June 2005 reasons for judgment of the MA bankruptcy court indicated that the Vala Opinion was critical to the court’s analysis. As indicated in the introduction to the court’s analysis, the “court leans towards the trustee’s argument” and then went on to adopt the position expounded in the Vala Opinion.
408. However, there are several other important factors which need to be taken into account in evaluating the claim of procedural unfairness. First, there is an important difference between:
- (i) The court deciding on the basis of a legal theory of which a party was completely unaware; and,

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<sup>514</sup> Letter from Hajtmar to Transfin, dated 2 June 2005 (Exhibit C-0098).

- (ii) The court deciding on an issue raised by one or other party and of which both parties were or should have been aware.

409. On 31 March 2005, Claimant and its Czech representative were advised by the bankruptcy trustee for LZ that the recognition and enforcement of the Final Award could contravene public policy. Further, it can be said that a reasonably well-informed observer would have been alert to the public policy argument that to uphold and enforce the Final Award in the context of ongoing bankruptcy proceedings would necessarily conflict with the fundamental principle of equal *pro rata* sharing of assets of the bankrupt's estate, except in the case of secured creditors. That observer would also have appreciated that since a public policy issue was involved, the courts would be obliged to examine it, irrespective of whether the parties themselves pursued it.
410. Secondly, another important reason why the Tribunal cannot uphold the suggestion that there was procedural unfairness and a denial of justice is that after the decision of the bankruptcy courts on 2 and 9 June 2005, Claimant had the opportunity to appeal the decisions to the Municipal Court and the Supreme Court and did so. There were no complaints by Claimant in this case about the fairness of the appellate processes. Even if there was any procedural unfairness in the decision-making of the bankruptcy courts the Tribunal considers that availability of full rights of appeal has satisfactorily eliminated any procedural imperfections in the process which occurred in the lower courts.
411. Thirdly, and importantly, from the perspective of causation, it is not likely that the decisions of the bankruptcy courts would or could have been different as a matter of Czech law, had Claimant been accorded an opportunity to be heard. Rather, the outcome of Claimant's subsequent four motions for recognition and enforcement of the Final Award and the consistent judicial reasoning in support suggest that the 2 and 9 June 2005 decisions of the bankruptcy courts generally reflect the public policy of the Czech Republic.
412. In particular, it is worth noting, that even though the Final Award was eventually partially recognised by the Czech appellate courts both in relation to MA and LZ, such recognition did not extend to the key first and second orders of the Stockholm Tribunal, which would have granted Claimant a first secured charge against the LET Assets and all of the property

of MA. Without the first secured charge, Claimant did not rank as a preferred creditor and could therefore not realise a right to separate satisfaction. Without the right to separate satisfaction, Claimant did not have a legal basis, as a matter of Czech bankruptcy law, to oppose the joint tender and eventual sale of the MA and LZ assets.

413. In short, the refusal of the bankruptcy courts to recognise and enforce the first and second orders granted in the Final Award on the ground that doing so would be contrary to Czech public policy appears consistent with Czech law. Hence it is open for this Tribunal to find in light of all the evidence, and it does so find, that the courts would not have come to a different conclusion had they given Claimant a hearing. This failure to provide a hearing had no bearing on the final outcome.

414. Finally, as to the meeting on 1 June 2005, there is force in Respondent's submission in paragraph 107 of its Counter-Memorial and in paragraph 59 of its Pre-Hearing Submissions:

"107. Frontier's request for the exercise of discretion by the court in a particular way was not an adversarial proceeding. In the circumstances, there was nothing improper or objectionable in the two judges jointly meeting with the bankruptcy trustees, who were *not* parties of the process commenced by Frontier's *ex parte* application, but who could be nonetheless affected by it, and to ascertain their views. The fact that Frontier was informed about the contents of the discussion by the bankruptcy trustee of MA the very next day speaks for itself." (emphasis in original)

"59. This meeting occurred after Frontier's requests for the issuance of preliminary injunctions enjoining the trustees from disposing of the assets of LZ and MA had been denied (on 19 and 23 May 2005, respectively) but before the two judges decided about Frontier's *ex parte* request calling on the judges to exercise their supervisory discretion in the bankruptcy proceedings pursuant to Section 12 of the Czech Bankruptcy Act. Given that Frontier's request for the exercise of discretion by the court in a particular way was not an adversarial proceeding, there was nothing improper or objectionable in the two judges jointly meeting with the bankruptcy trustees, who were *not* parties of the process commenced by Frontier's *ex parte* application, but who could be nonetheless affected by it, and in ascertaining their views." (emphasis in original)

415. The Tribunal considers that Claimant's loss flows primarily from Claimant's conduct from the outset of its dealings with MA in relation to the USA. Claimant never retained Czech counsel to advise it on the drafting of the USA. Claimant advanced two out of the four payments foreseen under the USA to MA before the USA was even concluded. It advanced the entirety of the funds to MA without acquiring any security over the LET Assets. At no time did Claimant properly file the security interest which would have given it a right to a first secured charge over the LET Assets. The Tribunal considers that this was the principal cause of Claimant's ultimate loss. Claimant argues that it was prevented from filing a first secured charge over the LET Assets because it was never provided with a complete listing of the LET Assets by Soska. Notwithstanding this, Claimant still chose to advance funds to MA. A more prudent approach would have been to advance the funds to Davidová, the LET trustee, on behalf of MA, on the condition of contemporaneous filings for the registration of security interests in the LET Assets and for the loan payments, or a similar process as provided by Czech law. The Tribunal also recalls that Claimant was on notice that MA's parent company was facing bankruptcy proceedings prior to signing the USA. Further, the USA was structured so that Claimant would only ever enjoy a minority shareholding in LZ. The Tribunal considers that it must have been evident to Claimant from the beginning that its dealings with MA held a significant level of risk. In the face of such risk, one might have expected a party in Claimant's position to take measures to protect its investment.

416. In light of this finding, the Tribunal does not consider it necessary to determine whether the actions of the bankruptcy trustees are attributable to the state.

### **8.3.3 Claim 3 - Failure of Czech Officials to Assist Claimant**

#### *Claimant's General Position*

417. Claimant's third claim is that Czech officials could have exercised their authority to remedy the treatment being received by Claimant but consistently failed to do so. Claimant frames this claim as a breach of the general international law principle of good faith and a breach of Respondent's obligations to ensure fair and equitable treatment and to provide full protection and security to Claimant's investment.<sup>515</sup>

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<sup>515</sup> Claimant's Memorial, ¶83.

418. Claimant submits that because Respondent failed to enforce its own laws, Soska was able to engage in the fraudulent conduct that ultimately destroyed Claimant's investment, including using Czech bankruptcy laws and pliable bankruptcy trustees to prevent Claimant from securing control over the LET Assets. Claimant submits that this failure was egregious because Claimant had brought these issues to the attention of Czech political and judicial officials on numerous occasions, to no avail.<sup>516</sup>

*Respondent's General Position*

419. Respondent asserts that this claim is devoid of a legal basis in international law because states are not under an obligation of due diligence to intervene in disputes between private parties where one of those parties happens to be a foreign investor.<sup>517</sup> Respondent asserts rather that states are required to maintain a system for the administration of justice to which an investor, foreign or domestic, can resort if it considers that its joint venture partner is defaulting in its commitments.<sup>518</sup>

420. Respondent asserts that Claimant has failed to articulate a basis for reviewing the exercise of discretion by the Czech officials that would even be cognisable in comparative administrative law.<sup>519</sup> Respondent contends that Claimant's claim is based on an erroneous hypothesis that the Tribunal has broad jurisdiction to "second guess" the exercise of discretion by public officials on the basis of Treaty obligations.<sup>520</sup>

421. Respondent asserts that it would only be possible for Czech officials acting in strict conformity with Czech law, to violate the *Canada-Czech Republic BIT*, if the relevant Czech laws in these circumstances constituted *per se* a violation of the BIT. Respondent asserts that Claimant has failed to engage with the relevant provisions of Czech law at all

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<sup>516</sup> Claimant's Memorial, ¶88.

<sup>517</sup> Respondent's Counter-Memorial, ¶112; Respondent's Pre-Hearing Memorial, ¶61.

<sup>518</sup> Respondent's Counter-Memorial, ¶¶111-113; Respondent's Pre-Hearing Memorial, ¶61. Respondent also notes that in this particular case, the USA contained an arbitration clause exempting disputes between the joint venture parties from the jurisdiction of the Czech courts.

<sup>519</sup> Respondent's Counter-Memorial, ¶114.

<sup>520</sup> Respondent's Pre-Hearing Memorial, ¶62.

and has limited itself to a series of vague assertions about relying upon Czech officials “in good faith” because “it was consistently encouraged to place its trust in these officials”.<sup>521</sup>

(i) The Criminal Complaint

*Claimant’s Position*

422. On 10 December 2002, Claimant addressed a criminal complaint to the Police Presidium of the Police of the Czech Republic (the highest organ of Czech Police) in which it requested that the Police prosecute Soska, Štefánek, and Joachimczyk for (i) the crimes of fraud; (ii) breach of obligations in the administration of property of others; (iii) breach of mandatory rules of commercial conduct; (iv) forging and altering of monetary instruments;<sup>522</sup> and, in a later amendment to its original application, (v) suspicion of misappropriation of assets.<sup>523</sup> In its complaint, Claimant referred to MA’s failure to comply with the USA by contributing less than all of the LET Assets into LZ, its receipt in April 2002 from Soska of two aggregate share certificates bearing an issue date of 18 December 2002,<sup>524</sup> and the barring of Claimant from the LZ General Meeting.
423. According to Claimant, the Czech officials charged with investigating the criminal complaints were negligent and did not proceed in an even-handed manner. Claimant notes that they (i) failed to obtain a proper translation of the USA; (ii) persistently refused to interview representatives of Claimant, while interviewing Soska, Štefánek, and Joachimczyk on multiple occasions; and (iii) refused to obtain legal advice on the law of Alberta.<sup>525</sup> It is Claimant’s view that the police in Brno and Prague arbitrarily exercised their discretion so as to effectively destroy the residual value of Claimant’s investment rather than safeguard it.<sup>526</sup>

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<sup>521</sup> Claimant’s Memorial, ¶83; Respondent’s Counter-Memorial, ¶115.

<sup>522</sup> Respondent’s Counter-Memorial, ¶¶118-119; Letter from Transfin to Police Presidium, dated 10 December 2002 (Exhibit C-0042).

<sup>523</sup> Amendment to motion to initiate criminal proceedings, dated 20 March 2003 (Exhibit C-0285).

<sup>524</sup> Copies of post-dated Letecké Závody a.s. bearer share certificates, dated 18 December 2002 (Exhibit C-0047).

<sup>525</sup> Claimant’s Memorial, ¶85; Claimant’s Post-Hearing Memorial, ¶49.

<sup>526</sup> Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶7.

424. Contrary to Respondent's assertion, Claimant argues that it did not mislead the police regarding the fraudulent nature of the share certificates because the police knew that the shares delivered to Claimant in April 2002 were post-dated.<sup>527</sup>
425. Claimant denies Respondent's allegations that Claimant's objective in filing the criminal complaint was to obtain leverage in its commercial dispute with Soska.<sup>528</sup> Claimant insists that its request for police assistance was fully justified given the fundamental breach of the USA by its partner, and that the failure of the Czech police to conduct a fair, impartial, and competent investigation breached Article III of the BIT.<sup>529</sup>

*Respondent's Position*

426. It is Respondent's position that there was nothing objectionable in the investigation of the criminal complaint by the police. Respondent points out that following his investigation, the police investigator concluded that this was a commercial dispute beyond his mandate and that the criminal liability as alleged by Claimant had not been established.<sup>530</sup> Respondent disagrees with Claimant that the Czech police were amiss by not consulting Alberta law to determine the correct interpretation of the USA.<sup>531</sup>
427. Respondent notes that Czech criminal law does not give the complainant a right to be heard at the preliminary stages of the proceedings, but rather only provides that a claim will be investigated and the complainant informed of the reasoned results. In this regard, Respondent notes that all of these rights were met.<sup>532</sup>
428. Respondent alleges that by filing its criminal complaint, Claimant was improperly seeking leverage in its commercial dispute with Soska.<sup>533</sup>

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<sup>527</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶42.

<sup>528</sup> Claimant's Reply Memorial, ¶95; Respondent's Counter-Memorial, ¶123.

<sup>529</sup> Claimant's Pre-Hearing Memorial, ¶69.

<sup>530</sup> Respondent's Counter-Memorial, ¶135; Respondent's Pre-Hearing Memorial, ¶65; Respondent's Post-Hearing Memorial, ¶72.

<sup>531</sup> Respondent's Pre-Hearing Memorial, ¶64, Respondent's Post-Hearing Memorial, ¶71.

<sup>532</sup> Respondent's Counter-Memorial, ¶138; Respondent's Rejoinder Memorial, ¶¶133-136; Respondent's Pre-Hearing Memorial, ¶66.

<sup>533</sup> Respondent's Counter-Memorial, ¶136; Respondent's Pre-Hearing Memorial, ¶64; Respondent's Post-Hearing Memorial, ¶¶68-70; Report by Transfin to FPS, dated 6 January 2003 (Exhibit

429. Respondent submits that the criminal complaint should be dismissed due to Claimant's own conduct in making contradictory statements in three different judicial fora with respect to the validity of the share certificates that were at the heart of Claimant's criminal complaint.<sup>534</sup>
430. Respondent notes that Claimant attributes little importance to this claim in its Post-Hearing Memorial.<sup>535</sup>

*Tribunal's Analysis*

431. Under this claim, Claimant alleges that the conduct of the Czech police authorities was so lacking that it constituted a breach of the international obligation of good faith and ultimately the fair and equitable treatment and full protection and security standards of the BIT. The Tribunal rejects Claimant's claim for the reasons that follow.
432. First, the evidence shows that the police undertook a considerable number of steps with respect to Claimant's complaints. For example, in response to Claimant's 10 December 2002 motion to initiate the criminal prosecution of Soska, Štefánek, Joachimczyk, the police conducted an investigation, which included the questioning of Soska and Davidová and the inspection of various public notary records. The police issued a resolution on the matter on 18 September 2003.<sup>536</sup> Claimant also filed a criminal complaint with the Supreme Public Prosecutor on 20 November 2002<sup>537</sup> and objected to the treatment of its complaint on 20 March 2003. The Supreme Public Prosecutor forwarded Claimant's complaint to the High Public Prosecutor's office to initiate supervision of the Regional

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C-0296), p. 4. Respondent argues that the purpose of the criminal complaint, as stated by Sup, was to paralyse the leading figures of LZ and negotiate with Mr. Joachimczyk, whereas Claimant argues that its objective in filing the complaint was "to get the benefit of his bargain". Transcript of Hearing on the Merits (5 October 2009), 34:17–35:8 (cited in Respondent's Post-Hearing Memorial, ¶71).

<sup>534</sup> Respondent's Post-Hearing Memorial, ¶53.

<sup>535</sup> Respondent's Post-Hearing Memorial, ¶¶1, 68

<sup>536</sup> Resolution of the Czech Republic Police, dated 18 September 2003 (Exhibit C-0066).

<sup>537</sup> Motion to Highest Public Prosecutor to initiate criminal proceedings, dated 18 November 2002 (Exhibit C-0041).

Public Prosecutor's investigation.<sup>538</sup> When Claimant filed an appeal regarding the Regional Public Prosecutor's Resolution on 30 September 2003, the Office of the Regional Prosecutor reviewed the investigation and found that it had been "performed in accordance with the law and that, within the framework of the investigation, sufficient material evidence was gathered for an objective decision". The Office of the Regional Prosecutor dismissed Claimant's appeal with detailed reasoning. Of note, the Office of the Regional Prosecutor informed Claimant that it would conduct a further investigation into why certain property in Uherské Hradiště had not been listed among the assets of LZ.<sup>539</sup>

433. The Tribunal notes that Claimant specifically complains about the fact that it was not interviewed during the investigation. Claimant's complaint appears to be based on the mistaken perception that a police investigation is an adversarial process which would accord Claimant with a right to be heard. But it is not. The process is an investigative one prescribed by the procedural requirements of Czech law. Claimant has not indicated what procedural requirements of Czech law, if any, the police authorities allegedly breached. The Tribunal notes that Respondent asserts that the requirements of Czech law have been met. The Tribunal rejects Claimant's assertion that it was entitled to be interviewed by the police authorities and that their failure to do so may form a basis for a breach of the BIT.
434. The Tribunal also notes that according to Claimant, the shortcomings of the police investigation are evidenced by their failure to obtain a translation of the USA and to seek advice on the law of Alberta. The Tribunal does not find that the police authorities' failure to do so is problematic. As above, Claimant has not pointed the Tribunal to any breach on the part of the police under Czech law based on these allegations. The Tribunal does not accept that the police were under any duty to obtain a translation of the USA or to seek advice on Alberta law in their investigations. Respondent has argued that the police investigated Claimant's complaint to the extent of their mandate, and when they reached the conclusion that the matter was more a commercial dispute than a criminal dispute, they concluded their investigations. Again, the Tribunal does not consider that this was an inappropriate course of action.

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<sup>538</sup> Notice of Arbitration, ¶43; Letter from Supreme Prosecutor to Transfin, dated 1 April 2003 (Exhibit C-0054).

<sup>539</sup> Resolution of the Office of the Regional Prosecutor, dated 1 December 2003 (Exhibit C-0072).

435. The Tribunal concludes that Claimant's case falls short of establishing that the police authorities displayed negligence so as to justify a finding of bad faith on their part. The Tribunal also determines that Claimant has failed to establish that the police conduct was so flawed and deficient that it constitutes a breach of Respondent's fair and equitable treatment obligation under the BIT.
436. The Tribunal finds that Claimant had access to the available resources of the Czech criminal system and that appropriate action was taken in response to its complaint. Therefore, the Tribunal rejects Claimant's claim that the actions of the police authorities could justify a claim for breach of the full protection and security standard of the BIT.
437. The Tribunal also notes that in any event Claimant has not shown a sufficient causal link between its desired outcome in the criminal proceedings and the loss of its investment. Claimant simply alleges that had its requests been properly considered, Soska would have "lost control over the joint venture before its assets were looted and before its business prospects had dimmed."<sup>540</sup>
438. Finally, the Tribunal turns to Respondent's submission that Claimant's criminal complaint should be dismissed due to its own fraudulent misconduct in making contradictory statements in three different judicial fora with respect to the validity of the share certificates. Although the Tribunal accepts that the statements made by Claimant appear to be inconsistent, the Tribunal does not accept that Respondent has established that they demonstrate fraudulent behaviour on Claimant's part.

(ii) The Commercial Register Complaint

*Claimant's Position*

439. On 24 January 2003, Claimant filed an *ex parte* submission with the Regional Court requesting that it amend the registrations of MA and LZ in the Commercial Register to the effect that Soska, Joachimczyk, and Štefánek be immediately deleted as members of the board of directors of LZ and MA by the court.<sup>541</sup> According to Claimant, the continued

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<sup>540</sup> Claimant's Memorial, ¶109.

<sup>541</sup> Respondent's Counter-Memorial, ¶139; Letter from Tutterova to Commercial Register, dated 24 January 2003 (Exhibit C-0176); *Act No. 99/1963 Coll., the Code of Civil Procedure* (Exhibit R-0130), s. 200b(2).

membership of these individuals automatically ceased when Moravan – on whose boards these individuals served – was declared bankrupt on 21 August 2002. Claimant relies on Section 31(a)(1) of the *Commercial Code* which provides that:

The statutory organ, a member of the statutory organ or another organ of a legal entity carrying on business may not be a person who performed any such office in a legal entity against which a bankruptcy order was adjudged. The same shall apply if a bankruptcy petition against the legal entity was dismissed due to a lack of assets.<sup>542</sup>

440. Claimant rejects Respondent’s argument that Moravan’s appeal against its bankruptcy rendered the statutory prohibition of a person performing an office in a bankrupt corporation inapplicable; there is no provision in Section 31(a) that suspends this legal impediment while an appeal is pending.<sup>543</sup> Claimant notes that the appeal was eventually rejected and Moravan remained in bankruptcy at all relevant times, thus Soska, Štefánek, and Joachimczyk were statutorily impeded from serving as directors of MA and LZ.
441. Claimant disputes Respondent’s argument that one of the resolutions adopted at the LZ General Meeting confirmed all three individuals in their positions on the LZ board and “was adopted by 100% of the shareholders of LZ and present at that general meeting”.<sup>544</sup> According to Claimant, the only way one could accept that the resolution passed at the LZ General Meeting was adopted by 100% of the shareholders was if one accepted as legitimate Soska’s allegedly unlawful conversion of Claimant’s shares for his own use.<sup>545</sup>
442. Claimant disagrees with Respondent’s view that the Regional Court required further information about the shareholdings of LZ and MA before it could legitimately make the deletions that Claimant was requesting.<sup>546</sup>

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<sup>542</sup> Claimant’s Reply Memorial, ¶¶100-101; *Act No. 513/1991 Coll., the Commercial Code* (Exhibit R-0129).

<sup>543</sup> Claimant’s Reply Memorial, ¶101.

<sup>544</sup> Respondent’s Counter-Memorial, ¶148.

<sup>545</sup> Claimant’s Reply Memorial, ¶102.

<sup>546</sup> Claimant’s Reply Memorial, ¶¶103-104.

443. Claimant refutes Respondent's contention that the Commercial Register acted properly because, upon receipt of Claimant's petition, it inquired as to the state of affairs with MA and was informed that Soska, Joachimczyk, and Štefánek had been confirmed as directors by the sole shareholder (alleged by Respondent to be a Panamanian entity known as WIMCO). Claimant submits that the letter from the Commercial Register inquiring about the state of affairs with MA was never answered and notes that there is no reason to believe that 100% of the shares of MA were lawfully transferred to WIMCO, particularly since Moravan was not a party to such transfer and because Orbes challenged any such transfer.<sup>547</sup>
444. In addition to the above, according to Claimant, the legitimacy of Soska's membership on the board of directors of LZ and MA was immediately imperilled as a result of his own personal bankruptcy on 27 February 2002.<sup>548</sup> Claimant disputes Respondent's suggestion that while Soska was declared bankrupt, he was still lawfully entitled to hold office in MA or LZ. Claimant contends that the effects of the declaration of bankruptcy against Soska in 2002 did not expire until his successful appeal decision was posted on the official bulletin board of the court of first instance.<sup>549</sup>

*Respondent's Position*

445. Respondent disputes that either the bankruptcy of Moravan or that of Soska provided a proper basis for invoking Section 31(a) of the *Commercial Code*.<sup>550</sup> Respondent argues that in accordance with Section 31(a) of the *Commercial Code*, the termination of existing directorships (in cases where an individual contemporaneously served on the board of a bankrupt entity) is not automatic and that it can be overruled by a two-third majority vote.
446. Respondent asserts that the personal bankruptcy of Soska was (i) never finally adjudicated because he successfully appealed against his bankruptcy declaration;<sup>551</sup> and (ii) irrelevant to

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<sup>547</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶¶55-56.

<sup>548</sup> Respondent's Counter-Memorial, ¶141.

<sup>549</sup> Claimant's Reply Memorial, ¶99.

<sup>550</sup> Claimant's Post-Hearing Memorial, ¶41, as cited in Respondent's Post-Hearing Memorial, ¶75.

<sup>551</sup> Respondent's Counter-Memorial, ¶144; Respondent's Pre-Hearing Memorial, ¶70(1); Resolution of High Court in Olomouc, dated 24 May 2004 (Exhibit R-0082).

the entry in the Commercial Register because it only applied if the person in question simultaneously performed such office in a legal entity which had gone bankrupt.<sup>552</sup>

447. Respondent submits that the status of Moravan was only finally adjudicated when its appeal against bankruptcy was rejected on 8 March 2005.<sup>553</sup> According to Respondent, under Section 31(a)(4)(a) of the *Commercial Code*, up until that date it was not certain whether an impediment existed for Soska, Štefánek, and Joachimczyk to retain their positions.<sup>554</sup>
448. Respondent notes that Claimant was advised twice of the correct meaning of Section 31(a) of the *Commercial Code* and of the steps taken by the court on the basis of its application, first at personal meetings with the judges of the Regional Court of Brno in April 2003 and second by letter dated 14 May 2003 from the Minister of Justice.<sup>555</sup>
449. Respondent refers to the LZ General Meeting at which, it argues, among other things, all three individuals were confirmed in their positions on the board of directors of LZ, and this resolution was adopted by 100% of the shareholders of LZ present at the meeting.<sup>556</sup> Thus, on a *prima facie* basis, Respondent explains that they retained their positions. Respondent asserts that according to the *Code of Civil Procedure* (Section 200d(1)), the court may record (or delete) information in the Commercial Register only in accordance with the law. As the Regional Court did not have complete information it could not lawfully make the deletions requested by Claimant.<sup>557</sup>

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<sup>552</sup> Respondent's Pre-Hearing Memorial, ¶70(1); Respondent's Post-Hearing Memorial, ¶76.

<sup>553</sup> Respondent's Counter-Memorial, ¶145; Respondent's Pre-Hearing Memorial, ¶¶67-68; Appeal by Moravan of decision declaring bankruptcy of Moravan, dated 8 September 2002 (Exhibit R-0083).

<sup>554</sup> Respondent's Pre-Hearing Memorial, ¶70(2); Respondent's Post-Hearing Memorial, ¶76; Letter from Regional Court to Ministry of Justice, dated 23 April 2003 (Exhibit R-0086).

<sup>555</sup> Respondent's Pre-Hearing Memorial, ¶71; Outline of case dated 13 February 2006, p.7 (Exhibit C-0325); Letter from Regional Court to Ministry of Justice, dated 23 April 2003 (Exhibit R-0086); Letter from Rychetsky to Filip, dated 14 May 2003 (Exhibit R-0140); Letter from Rychetsky to Filip (Exhibit R-0069).

<sup>556</sup> Respondent's Counter-Memorial, ¶148; Transcript of minutes of LZ General Meeting, dated 9 October 2002 (Exhibit C-0038, Exhibit R-0085); Letter from Regional Court to Ministry of Justice, dated 23 April 2003 (Exhibit R-0086).

<sup>557</sup> Respondent's Counter-Memorial, ¶153; Respondent's Pre-Hearing Memorial, ¶¶69-70; *Act No. 99/1963 Coll., the Code of Civil Procedure* (Exhibit R-0130), s. 200d(1).

450. Respondent notes that Claimant has *ex post facto* expanded its claim, now maintaining that the Commercial Register did not inform Claimant and Orbes of the steps taken in pursuance of Claimant's petition of 24 January 2003 and the information that it had obtained from MA. Respondent argues that Claimant has argued that both Claimant and Orbes were prevented from legally challenging the alleged transfer of shares in MA from Moravan to WIMCO.<sup>558</sup> In Respondent's view, the Commercial Register followed the standard procedure for the consideration of petitions for the disqualification of directors in respect of Claimant's petition of 24 January 2003 by verifying whether reasons for the suggested disqualification existed. It reviewed the minutes of the LZ General Meeting which were filed with the Commercial Register and which confirmed Soska, Joachimczyk, and Štefánek as directors of LZ.<sup>559</sup> With respect to MA, Respondent notes that the Commercial Register, upon receipt of Claimant's position, inquired as to the state of affairs with MA and was informed that Soska, Joachimczyk, and Štefánek had been confirmed as directors by the sole shareholder, WIMCO. Respondent also notes that MA was simultaneously notified that Moravan had been replaced as sole shareholder of MA by WIMCO.<sup>560</sup> Further, Respondent asserts that Claimant was notified about the status of its petition on several occasions and that it is not true that Orbes or Claimant would have been unaware of the changed ownership of MA.<sup>561</sup> Thus, Respondent concludes that the record does not support Claimant's allegation that Claimant or Orbes could have legally challenged the

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<sup>558</sup> Respondent's Post-Hearing Memorial, ¶77.

<sup>559</sup> Respondent's Post-Hearing Memorial, ¶79; Transcript of minutes of LZ General Meeting, dated 9 October 2002 (Exhibit C-0038, Exhibit R-0085); Letter from Regional Court to Ministry of Justice, dated 23 April 2003 (Exhibit R-0086).

<sup>560</sup> Respondent's Post-Hearing Memorial, ¶80.

<sup>561</sup> Respondent's Post-Hearing Memorial, ¶¶81-82. Respondent notes that this information was first given orally to Sup during his meetings with the Regional Court in Brno on this issue on 1 April 2003 (*see* Letter from Regional Court to Ministry of Justice, dated 23 April 2003 (Exhibit R-0086)) and second, in the letter of Rychetsky of 14 May 2003 (*see* Letter from Rychetsky to Filip, dated 14 May 2003 (Exhibit C-0058); Jewitt Witness Statement, ¶108), and third by letter from the Commercial Register dated 25 November 2003 (Letter from Commercial Register to Tutterova, dated 25 November 2003 (Exhibit C-0178)). Respondent also notes that there is evidence on the record that Orbes was aware of the share transfer to WIMCO no later than in December 2002 and disputed the legality of that transfer, using his prerogative as bankruptcy trustee for Moravan to include the shares of MA in the estate of Moravan, whereupon WIMCO had to sue in the bankruptcy proceedings to preserve title to the shares. Respondent's Post-Hearing Memorial, ¶83. Respondent also notes that minutes from the meeting between Orbes and Claimant on 14 January 2003 show that Claimant was familiar with this information. Respondent's Post-Hearing Memorial, ¶83; Minutes of meeting between LEGES and FPS, dated 14 January 2003 (Exhibit C-0050).

change of ownership of MA in favour of WIMCO if the corresponding share transfer had been disclosed by the Commercial Register.<sup>562</sup>

451. Respondent finally notes that Claimant devotes little attention to this claim in its Post-Hearing Memorial.<sup>563</sup>

*Tribunal's Analysis*

452. Claimant's allegations under this section involve highly technical issues of Czech commercial and bankruptcy law. The Parties have not pleaded the application of such Czech commercial and bankruptcy law to the extent that this Tribunal is in a position to review the actions of the Commercial Register. On the basis of the evidence presented, the alleged conduct or omissions by Respondent did not reflect such arbitrary or inadequate conduct as to amount to a breach of the fair and equitable and full protection and security standards. Even if this Tribunal were to find that the actions of the Commercial Register were contrary to Czech law, such a finding would not necessarily equate to a determination of a breach of the BIT with reference to the standards elucidated in Section 8.2 above.

453. Even if the Commercial Register had granted Claimant's application and struck Soska, Joachimczyk, and Štefánek from the records as members of the board of directors of LZ and MA, the Tribunal finds it significant that, Claimant would still have remained a minority shareholder. Accordingly, in order to achieve the desired outcome, Claimant would still have needed the assistance of the bankruptcy trustees and there is no evidence that they would have received such assistance. Therefore, even if a *prima facie* breach of the BIT had occurred here, which the Tribunal does not find to be the case, the Claimant would have failed to prove that it caused any loss.

(iii) State Agencies as Creditors

*Claimant's Position*

454. Claimant alleges that the Czech officials of the state agencies which were the largest creditors of both MA and LZ (other than Claimant) failed to "exert pressure" on the bankruptcy trustees to properly protect the interests of Claimant.<sup>564</sup>

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<sup>562</sup> Claimant's Post-Hearing Memorial, ¶45; Respondent's Post-Hearing Memorial, ¶85.

<sup>563</sup> Respondent's Post-Hearing Memorial, ¶74.

455. Claimant relies on two letters from the Ministry of Industry and Trade dated 26 July 2002 and 8 August 2002 (*supra* paragraph 76), in which the Deputy Minister of Industry and Trade (i) referred to the transfer of Moravan’s debt to the CKA and commented that “the State will have the possibility to enter into negotiations with [Soska] from its position as a creditor. We suppose that the solutions will be found allowing investments of your client to serve further on the original purpose”; and (ii) confirmed that he was authorised by the Minister to arrange “direct negotiation” of the transfer of debt related to Moravan from CSOB to the CKA.<sup>565</sup> Claimant characterises the outcome of its interactions with the Ministry of Industry and Trade as an implied undertaking from the state to assist.<sup>566</sup>
456. Contrary to Respondent’s suggestion that this was a matter involving private business relationships, Claimant avers that the Ministry saw a way to use its control of CKA to serve the original purpose of Claimant’s investment, and that with this proposal, Respondent made it clear that what it proposed was directly attributable to the Czech state.<sup>567</sup>
457. Claimant claims that the fact that the Czech state promised so much and delivered so little was a breach of its duty of reasonable due diligence in the protection of Claimant’s investment, and thus a breach of the BIT’s full protection and security standard.<sup>568</sup>
458. Claimant submits that liability for an international wrong will generally not be attributed to a state organ whose acts or omissions were committed in the course of a purely commercial

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<sup>564</sup> Claimant’s Memorial, ¶87.

<sup>565</sup> Claimant’s Reply Memorial, ¶¶91-93; Claimant’s Post-Hearing Memorial, ¶25; Jewitt Witness Statement, ¶58; Letter from Olsen to Doc. Ing. Miroslav Gregr, Minister for Industry and Trade, dated 9 July 2002 (Exhibit C-0029); Letter from Olsen to Rusnok, dated 26 July 2002 (Exhibit C-0030); Letter from Srba to Olsen, dated 26 July 2002 (Exhibit C-0031); Letter from Srba to Olsen, dated 8 August 2002 (Exhibit C-0032).

<sup>566</sup> Claimant’s Pre-Hearing Memorial, ¶62; Claimant’s Post-Hearing Memorial, ¶3; Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶54. Claimant rejects Respondent’s assertion that the letters from the Ministry of Industry and Trade dated 26 July 2002 and 8 August 2002 could not have been important to Claimant’s arguments because they were not mentioned in Claimant’s Memorial. Claimant notes that these letters were indeed relied upon at ¶25 of its Memorial and throughout its submissions as evidence of Respondent’s initial recognition of its BIT obligation to take what steps it could to provide relief and assistance to Claimant in its dealings with Soska.

<sup>567</sup> Claimant’s Reply Memorial, ¶93.

<sup>568</sup> Claimant’s Reply Memorial, ¶94.

undertaking.<sup>569</sup> In order to determine whether such an activity is purely commercial, Claimant explains that it is necessary to understand the political economy of the state in question.<sup>570</sup> The Czech Republic, Claimant asserts, had only recently emerged from decades of marginal existence as a one-party, centrally planned state.<sup>571</sup>

459. The LET Assets had been purchased from an organ of the Czech state at the time of the privatisation of the state-owned plant in the early 1990s, but these assets were not fully privatised until purchased by Ayres Corporation in 1998.<sup>572</sup> Through the CKA and its predecessors, Claimant notes that the Czech state had been intimately involved in a massive-scale privatisation of whole sectors of the Czech economy. Given this context and the fact that the CKA was by the summer of 2002 the largest single creditor of Moravan, Claimant asserts that there was every reason to expect that the CKA could render some assistance to Claimant in order to wrest practical control of the LET Assets from Soska.<sup>573</sup>
460. That being said, Claimant asserts that it is not its position that it is necessary for the Tribunal to attribute responsibility to the CKA, as the largest creditor of Moravan, in order for the claim to succeed. Claimant explains that it is sufficient that the CKA was in a position to assist Claimant. Claimant refers to the statement of the Deputy Minister of Industry and Trade, Srba, of his desire to “negotiate” with Soska once the assignments from CSOB to CKA were complete. Claimant rejects Respondent’s argument that no CKA official would dare intervene in such a manner, on threat of criminal liability. Rather, Claimant asserts, from Srba’s correspondence to Claimant’s representatives, and from the meetings with the Senior Director of the Ministry of Industry and Trade, Jarabica, Claimant

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<sup>569</sup> *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award of 13 November 2000 (Tab 17 of Claimant’s Post-Hearing Memorial) (cited in Claimant’s Post-Hearing Memorial, ¶114).

<sup>570</sup> Claimant’s Post-Hearing Memorial, ¶114. Claimant explains that there may still be occasions when an act normally viewed as commercial, such as investing in, or making a loan to, a commercial enterprise, takes on the characteristics of an act of state (e.g. when the Governments of the United States of America, Canada and the Province of Ontario recently purchased approximately 9/10 of the shares of General Motors Corporation, effectively nationalising it on a cooperative basis, but with a stated intent to reorganise the corporation and have it issue new shares so that it could eventually be returned to private sector control).

<sup>571</sup> Claimant’s Post-Hearing Memorial, ¶¶114-116.

<sup>572</sup> Claimant’s Post-Hearing Memorial, ¶117; Jewitt Witness Statement, ¶11.

<sup>573</sup> Claimant’s Post-Hearing Memorial, ¶117.

was entitled to expect that an arrangement could be made through Respondent's *de facto* influence over Moravan as its primary creditor.<sup>574</sup>

*Respondent's Position*

461. Respondent asserts that it is not clear how the Czech state agencies that were also creditors of MA and LZ were to "exert pressure" on the bankruptcy trustees to protect the interests of Claimant, without breaching key provisions of Czech law.<sup>575</sup> The respective positions of the bankruptcy trustees and creditors in bankruptcy were defined in Czech law and accepted by Claimant when it embarked on its transaction under the USA, Respondent states. Czech law does not allow any creditor to interfere with the independence of the bankruptcy trustee in its favour.<sup>576</sup>
462. Respondent asserts that the letters from the Ministry of Industry and Trade state that it could not intervene in a private commercial dispute and that no intention, or promise, to enter into negotiations with Soska regarding the USA can be inferred from the communications.<sup>577</sup> Respondent notes that Deputy Minister Srba in fact fulfilled the assurances he did provide, by arranging a meeting between Claimant and Jarabica and later arranging for a meeting between Claimant and Gröningerová.<sup>578</sup> In addition, Respondent asserts that there is no evidence of detrimental reliance upon the letters by Claimant and that the letters cannot possibly be a source of legitimate expectations.<sup>579</sup>
463. Respondent submits that the acts of the CKA are not attributable to the Czech state in international law as long as it acted in accordance with its rights and obligations as a

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<sup>574</sup> Claimant's Post-Hearing Memorial, ¶118.

<sup>575</sup> Claimant's Memorial, ¶87; Respondent's Counter-Memorial, ¶156; Respondent's Pre-Hearing Memorial, ¶73; Respondent's Post-Hearing Memorial, ¶96.

<sup>576</sup> Respondent's Counter-Memorial, ¶157, Annex B, ¶9; Respondent's Pre-Hearing Memorial, ¶74; Expert Report of Dr. Hulmák, ¶64.

<sup>577</sup> Respondent's Rejoinder Memorial, ¶130-132; Respondent's Pre-Hearing Memorial, ¶75; Respondent's Post-Hearing Memorial, ¶¶89-90.

<sup>578</sup> Respondent's Post-Hearing Memorial, ¶92; Respondent also notes that the meetings with Jarabica and Gröningerová were both conducted in Czech through Matušik (the Vice-President of FPS), who Respondent notes was not called as a witness (which Respondent asserts is fatal to Claimant's reliance on the content of those meetings); Respondent's Post-Hearing Memorial, ¶93; Transcript of Hearing on the Merits (6 October 2009), 203:22–205:2.

<sup>579</sup> Respondent's Post-Hearing Memorial, ¶99.

creditor.<sup>580</sup> Respondent insists that there is no obligation of due diligence in the BIT that would compel the state to intervene in disputes between private parties.<sup>581</sup> Respondent also refers to the testimony of Gröningerová stating that the CKA had only very limited capacity to influence the course of bankruptcy proceedings through its presence on the creditor's committee of Moravan.<sup>582</sup>

#### *Tribunal's Analysis*

464. Under this claim, Claimant is requesting this Tribunal to attribute the acts of Czech officials to the state, and to find that their failure to fulfil implied undertakings constitutes a breach of the state's duty of reasonable due diligence in the protection of Claimant's investment, and thus a breach of the full protection and security standard of the BIT. Leaving aside the question of attribution for the moment, this Tribunal has already set forth what it considers to be Respondent's duties under the full protection and security standard (*see supra* paragraph 273), *i.e.* that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor.
465. Claimant argues that in light of the implied undertakings from the state to assist, it was owed assistance. The Tribunal disagrees with Claimant's characterisation of the statements in the two letters from the Ministry of Industry and Trade dated 26 July 2002 and 8 August 2002. An examination of the text of these letters reveals that (i) the Ministry of Trade expressly stated that it was not a party to the dispute referred to by Claimant; and, notably (ii) that as the dispute concerned private subjects, the Ministry had "no possibility to intervene". The Ministry merely indicated that the state would have the possibility to enter into negotiations with Soska from its position as a creditor. This was not an undertaking. This was a signal to Claimant that there was a possibility that the state could negotiate. The

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<sup>580</sup> Respondent's Post-Hearing Memorial, ¶96. Respondent explains that the CKA was acting as a private creditor in the insolvency proceedings. Respondent also notes that in accordance with Article 8 of the *ILC Articles*, *supra* note 464, the CKA's conduct is not directed or controlled by the Czech state so long as it is maintaining its statutory independence from the Czech government. Respondent notes that if the CKA had entertained Claimant's demands, it would have stepped outside the statutory boundaries of its role in insolvency proceedings and its acts would thus be attributable to the state because it would be exercising a power that the other creditors would not possess.

<sup>581</sup> Respondent's Post-Hearing Memorial, ¶¶86-87.

<sup>582</sup> Respondent's Post-Hearing Memorial, ¶97; Gröningerová Witness Statement, ¶¶9, 11. Gröningerová explained that this influence was limited to expression of views on asset sales and did not include the power to issue binding instructions to the bankruptcy trustee.

possibility that the state could negotiate with Soska did not provide an adequate basis for the Claimant to rely on some form of representation or expectation.<sup>583</sup>

466. In the second letter, the Czech Official indicated that “[w]ith respect to the new facts concerning the debts transfer to the [CKA] and in order to meet your request I was entrusted by the Minister for Industry and Trade [...] to arrange their direct negotiation. Consequently, I have charged the Senior Director of our Ministry [...] to meet your clients in this matter.”<sup>584</sup> The Tribunal does not consider these statements to constitute an implied undertaking to assist Claimant.

467. The Czech Republic made a functioning system of courts and legal remedies available to Claimant. Claimant availed itself of this system with only limited success. However, not every failure to obtain redress is a violation of the principle of full protection and security. The Tribunal is satisfied that the grounds put forward by Claimant under this claim do not substantiate a finding of breach of the full protection and security obligation of Respondent.

468. To the extent that Claimant relies on these statements as creating legitimate expectations that it would be assisted in its dispute with Soska by the state, the Tribunal finds that the relevant statements do not exhibit the level of specificity necessary to generate legitimate expectations. More importantly, as the Tribunal has already noted (*see supra* paragraphs 287-288), legitimate expectations are temporally tied to the date of making the investment. They must have been in place at the time Claimant’s original investment was made. These statements were made after Claimant had already invested in the Czech Republic and therefore could not have generated legitimate expectations by Claimant vis-à-vis the state’s treatment of its investment.<sup>585</sup>

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<sup>583</sup> Letter from Srba to Olsen, dated 26 July 2002 (Exhibit C-0031).

<sup>584</sup> Letter from Srba to Olsen, dated 8 August 2002 (Exhibit C-0032).

<sup>585</sup> The Tribunal also notes that when the statements in question were made, Moravan may not have been the sole shareholder of MA, subject to Claimant’s allegations that the transfer to WIMCO was illegal (this point is not conclusively substantiated by the record). Accordingly, once the receivables relating to Moravan had been transferred from CSOB to the CKA, and the CKA had become a creditor of Moravan, the CKA may not in fact have had a commercial relationship with Soska.

### 8.3.4 Claim 4 - Failure to Provide Means to Enforce Arbitration Awards

#### *Claimant's Position*

469. Claimant's formulates its fourth claim as follows:

Because Respondent's legal system was manifestly inadequate for the tasks required of it under applicable international law, it failed to comply with Respondent's international obligation to maintain an effective means for the enforcement of an international tribunal's orders and award.<sup>586</sup>

470. Claimant impugns the failure of the Czech judiciary to honour the Interim Award, and to enforce and recognise the Order on Security of the Final Award by invoking the public policy exception under Article V(2)(b) of the *New York Convention*.

471. Claimant frames its claim in several ways: (i) the “[f]ailure to honour a validly-issued arbitral order or award, under the terms of the *New York Convention*, constitutes a breach of the international principle of good faith, which is [...] reflected in Article 26 of the VCLT. The principle of good faith is activated in this case because Article III:1 of the [BIT] explicitly provides that “fair and equitable treatment” shall be provided in accordance with “the principles of international law”;<sup>587</sup> (ii) “the decisions and inaction of the Czech judiciary in this case have ‘reduced to pointlessness’ one of the fundamental ‘favourable conditions’ for investment relied upon by [Claimant] when it made its investment decision: the availability of a judicial means of giving effective and immediate force to the orders and awards of an international arbitral tribunal”;<sup>588</sup> (iii) that Respondent's conception of its “obligation” under Article V(2)(b) of the *New York Convention* is not consistent with the object and purpose of the BIT, which is supposed to foster and sustain the development of a consistent and predictable investment climate (including the “favourable conditions” referred to in Article II of the BIT);<sup>589</sup> and (iv) that Respondent failed to offer full protection and security to Claimant by acting inconsistently with its obligation to make

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<sup>586</sup> Claimant's Memorial, ¶71(d).

<sup>587</sup> Claimant's Memorial, ¶90.

<sup>588</sup> Claimant's Memorial, ¶93.

<sup>589</sup> Claimant's Reply, ¶118, 124.

international arbitral orders and awards effective within the Czech Republic as per Article III of the *New York Convention*.<sup>590</sup>

472. It is Claimant's position that Articles IV and V of the *New York Convention* provide only limited exceptions to the general rule established by Article III,<sup>591</sup> and that it would be an abuse of right, contrary to the general international law principle of good faith, for a state party to the *New York Convention* to facilitate, encourage, or condone decisions by its designated "competent authority" (normally a municipal court) that do not comport with the exceptions found in Articles IV and V.<sup>592</sup>
473. According to Claimant, the construction of the exceptions to recognition and enforcement does not fall within the discretion of a municipal court; rather such courts must steadfastly observe the proper meaning of those exceptions in good faith.<sup>593</sup> If a controversy arises as to whether the decision of a competent authority is consistent with the provisions of Articles IV and V of the *New York Convention*, it is for an international tribunal, not the state party, to decide if the state party has complied with the *New York Convention*.<sup>594</sup>
474. Claimant notes that the decisions of Hanzlikova and Boháček demonstrate that Respondent is "championing the absolute autonomy of even its lower-rung judicial officials to declare any perceived inconsistency between an international tribunal's award and a local regulation as being contrary to the 'public policy' of the Czech State."<sup>595</sup> Claimant argues that under Article 27 of the VCLT, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".<sup>596</sup>

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<sup>590</sup> Claimant's Memorial, ¶96.

<sup>591</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶49.

<sup>592</sup> Claimant's Pre-Hearing Memorial, ¶37. Claimant notes that a breach of the *New York Convention* engages the Czech Republic's international responsibility, citing *Saipem, supra* note 254, ¶165 for the proposition that a state's invocation of provisions of its internal law as justification for its failure to perform a Treaty is not permissible because the characterisation of an internationally wrongful act is governed by international law, regardless of whether it is lawful by internal law.

<sup>593</sup> Claimant's Memorial, ¶93.

<sup>594</sup> Claimant's Reply Memorial, ¶¶115-116.

<sup>595</sup> Claimant's Reply Memorial, ¶120.

<sup>596</sup> Claimant's Reply Memorial, ¶47; Claimant's Pre-Hearing Memorial, ¶91.

475. Claimant argues that the Tribunal should be informed by the broad consensus that has been forming over the past five decades on the part of practitioners and states, about how the discretion granted to municipal courts to entertain requests for recognition and enforcement should be exercised. Claimant argues that the consensus is that “the discretion of municipal courts to a determination of whether the international public policy of a country would be breached, rather than the ‘public policy’ of that country writ large, demonstrates that the balancing of values on this issue has definitively come down in favour of supporting the object and purpose of the various instruments that compose the international commercial arbitration regime.”<sup>597</sup> It is Claimant’s position that local courts should exercise their discretion in a manner consistent with the preferred view that the “public policy” at issue is the international public policy of the host state, and not solely from within the context of applicable municipal law.<sup>598</sup>
476. Claimant referred to a Global Arbitration Review article entitled “Polish Court finds arbitration agreement valid despite bankruptcy” published on 21 December 2009.<sup>599</sup> That article concerned the decision of the Warsaw Court of Appeals in the ongoing Vivendi-Elektrim dispute that an LCIA Award was enforceable despite Polish law stating that a bankrupt enterprise was precluded from participating in arbitration. According to the article produced by Claimant, the Court found that, contrary to the earlier decision of the Warsaw District Court, Articles V(1)(a) and V(2)(b) of the *New York Convention* did not provide grounds for refusing enforcement of the Award. The report noted that “[t]he result paves the way for Vivendi to participate as a creditor in the upcoming bankruptcy proceedings.”
477. Claimant submits that Respondent wrongfully characterises this claim as a denial of justice claim when it is based on a breach of the Czech Republic’s obligation under the *New York*

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<sup>597</sup> Claimant’s Reply Memorial, ¶118.

<sup>598</sup> Claimant’s Reply Memorial, ¶¶122-123; Claimant’s Pre-Hearing Memorial, ¶92.

<sup>599</sup> Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶47, Tab 7. The decision itself was never produced, doubtless because, as stated in the Global Arbitration Review article, the decision was not publicly available. As a result, the Tribunal is unable to accord much weight, if any, to the Court’s ruling. In any event, judging from the contents of the article, the decision would not provide support for Claimant’s case since Vivendi argued that it had “the same right to have its claim recognised against the bankruptcy company as held by other creditors.” That situation is clearly distinguishable from the present case where Claimant seeks a prior or superior right to those rights held by the remaining creditors.

*Convention* to recognise and enforce international commercial arbitration awards according to international legal standards.<sup>600</sup>

478. According to Claimant, Article 15 of the *EC Regulation* expressly provides that the effects of insolvency proceedings on pending arbitrations are to be governed by the law of the member state, in this case Sweden, in which the arbitration was pending. Therefore, it says, the rights between Claimant and MA and LZ respectively, were to be determined exclusively by the Stockholm Tribunal.<sup>601</sup>

479. Respondent has argued that by operation of Sections 14(1)(e)-(f) and 15(1)(b) of the *Bankruptcy Law*, Claimant could never have acquired a right to a first secured charge over the assets of MA, or any right to separate satisfaction, given that its payments to acquire the LET Assets were made within two months of the first petition for bankruptcy filed by the Tora Group on 14 August 2001 (*i.e.* in April, June, and August 2001), and that the transfer of the LET Assets from MA to LZ in October 2001 was made within the six-month period before the filing of the Tora Group Petition.<sup>602</sup> In response, Claimant submits that it is undisputed that the Tora Group Petition was never recorded in the Commercial Register, that its existence was unknowable to Claimant, and that the information only became public at a much later date.<sup>603</sup> Claimant adds that at that time the Commercial Register was a focus of criticism for its lack of transparency, delays, and even alleged corruption.<sup>604</sup> Claimant argues that it cannot be criticised for not verifying the Commercial Register or instructing a Czech lawyer to do so when it executed the USA as that would have been futile; the Czech legal profession knew that such information was not recorded in the Commercial Register then.<sup>605</sup>

480. Further, Claimant disputes the purported retroactive effect of the Tora Group Petition and asserts that Respondent's reliance on this "retroactive effect" is itself a breach of the fair

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<sup>600</sup> Claimant's Reply, ¶106.

<sup>601</sup> Claimant's Reply, ¶105.

<sup>602</sup> Claimant's Post-Hearing Memorial, ¶¶63-66.

<sup>603</sup> Claimant's Post-Hearing Memorial, ¶¶67-69.

<sup>604</sup> Claimant's Post-Hearing Memorial, ¶69.

<sup>605</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶15; Respondent's Post-Hearing Memorial, ¶138(c).

and equitable treatment standard and, more broadly, further evidence of Respondent's breach of Article III of the BIT.<sup>606</sup>

481. Claimant argues that these transactions cannot be "forfeit from inception" and that the bankruptcy officials could and should have exercised their discretion in a fair and equitable manner, consistent with both good faith and the principles of international bankruptcy policy reflected in World Bank and UNCITRAL authorities.<sup>607</sup>

482. The lack of transparency in the Commercial Register and a strict interpretation of the *Bankruptcy Act*, Claimant argues, deprived Claimant of its investment.<sup>608</sup>

#### *Respondent's Position*

483. Respondent asserts that, by this fourth claim, Claimant is mounting a direct challenge to the decision of the Czech courts not to recognise and enforce the Order on Security of the Final Award.

484. Respondent asserts that the Czech courts declined to give effect to this Order on Security in the Final Award because doing so would violate Czech public policy by compelling the bankruptcy trustees to disregard mandatory provisions of Czech bankruptcy law, namely, the prohibition on the creation of security interests in the property of the debtor after bankruptcy proceedings have been opened.<sup>609</sup> Respondent notes that on 20 December 2005, the Czech Constitutional Court confirmed the correctness of the lower Czech courts' invocation of the public policy exception.<sup>610</sup>

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<sup>606</sup> Claimant's Post-Hearing Memorial, ¶¶67, 70.

<sup>607</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶20; UNCITRAL Report, dated 25 June 2004 (Exhibit C-0361); World Bank Report, dated April 2001 (Exhibit C-0364); World Bank Report, dated February 2004 (Exhibit C-0365).

<sup>608</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶¶16-23.

<sup>609</sup> Respondent's Counter-Memorial, ¶161; Respondent's Rejoinder Memorial, ¶154; Respondent's Pre-Hearing Memorial, ¶28; Respondent's Post-Hearing Memorial, ¶102. Respondent notes that Section 14(1)(e) of the *Bankruptcy Act*, *supra* note 117, entitled "Effects of Bankruptcy Order", reads: "Adjudication of a bankruptcy order has the following effects (consequences): It shall be impossible to execute an order (a judgment) relating to assets which are part of the bankrupt's estate and to acquire the right to separate satisfaction (section 28) from any such assets."

<sup>610</sup> Respondent's Counter-Memorial, ¶¶161, 211; Resolution of Constitutional Court, dated 20 December 2005 (Exhibit R-0018).

485. Respondent argues that Claimant’s claim is inadmissible because the Tribunal must, in order to dispose of this claim, make a ruling on the correctness of the Czech courts’ reliance upon the public policy exception in Article V(2)(b) of the *New York Convention*.<sup>611</sup> This would mean that the Tribunal would be acting as a court of appeal in respect of a decision of the Czech courts or as an international court with supervisory jurisdiction over contracting states’ obligations under the *New York Convention*. Respondent observes that the drafters of the *New York Convention* gave the final word to the national competent authorities on the issue of public policy as a bar to recognition and enforcement.<sup>612</sup> Respondent observes that the BIT does not allow an appeal of a municipal court decision on a question of municipal law and that something more than an error of law must be established to constitute a cause of action founded under the fair and equitable treatment standard, or otherwise.<sup>613</sup>
486. Respondent also asserts that while it is widely accepted that “public policy” in Article V(2)(b) of the *New York Convention* refers to international public policy, it is nonetheless a reference to the particular national conception of international public policy that is relevant, rather than to a conception of public policy that is in some way detached from the legal system of the place where recognition and enforcement is being sought,<sup>614</sup> thus the concept of public policy in Article V(2)(b) includes the mandatory rules of the forum.<sup>615</sup>

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<sup>611</sup> Respondent’s Counter-Memorial, ¶¶165, 170; Respondent’s Pre-Hearing Memorial, ¶77; Respondent’s Post-Hearing Memorial, ¶109.

<sup>612</sup> Respondent’s Counter-Memorial, ¶¶171-172; Respondent’s Pre-Hearing Memorial, ¶77; *Dicey, supra* note 635, 770; International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (London, 2000) [“*ILA Interim Report*”] (Exhibit R-0091).

<sup>613</sup> Respondent’s Counter-Memorial, ¶¶177-182; Respondent’s Post-Hearing Memorial, ¶109.

<sup>614</sup> Respondent’s Counter-Memorial, ¶¶173-174. Respondent refers to a statement of the leading English text on the conflict of laws, *Dicey, supra* note 635, with reference to Article V(2) of the *New York Convention*: “It is for the law of England to decide what matters are capable of settlement by arbitration, and it is English public policy which is meant”. Respondent also refers to a statement in *ILA Interim Report, supra* note 612: “Article V(2)(b) refers to the public policy of that country.” Respondent contends that the drafters of the 1958 Convention did not seek overtly to attempt to harmonise public policy or to establish a common international standard.

<sup>615</sup> Respondent’s Pre-Hearing Memorial, ¶91. Respondent cites P. Mayer, *Mandatory rules of law in international arbitration* 2 *Arb. Int.* 275 (1986) (Exhibit R-0125), the *ILA Interim Report, supra* note 612, P. Fouchard, *Arbitrage et faillite* [Arbitration and Bankruptcy], 3 *Revue de l'arbitrage* 480, 481 (1998) (Exhibit R-0106) (cited in Respondent’s Counter-Memorial, ¶204; Respondent’s Post-Hearing Memorial, ¶104). Respondent also submits that the courts of leading jurisdictions such as Germany, France, and the United States have refused to recognise and enforce foreign arbitral

Fundamental rules of insolvency laws, including the principle of equal treatment of creditors, Respondent asserts, are properly to be considered mandatory rules of public policy and serve “the essential political, social or economic interests of the State”.<sup>616</sup> Respondent submits that it has demonstrated that the courts of leading jurisdictions such as Germany, France, and the United States have refused to recognise and enforce foreign arbitral awards by invoking the public policy exception under Article V(2)(b) where they have conflicted with the principle of the equality of creditors, and that such an approach is also consistent with the *EC Regulation*.<sup>617</sup>

487. If the Tribunal is prepared to consider the merits of the decisions of the Czech courts on the application of Article V(2)(b) of the *New York Convention* in respect of the Order on Security in the Final Award of the Stockholm Tribunal, Respondent argues that the substance of the claim would still not give rise to liability under the investment protection standards set out in Article III of the BIT. As Claimant is seeking to impeach the decisions of the Czech courts, its claim must be properly characterised as a claim of denial of justice. It is a cardinal rule of the international law on denial of justice that erroneous decisions of national courts on questions of domestic law do not involve the international responsibility of the state.<sup>618</sup> Therefore, even if Claimant could establish that Respondent incorrectly

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awards by invoking the public policy exception in Article V(2)(b) of the *New York Convention* where they have conflicted with this principle of the equality of creditors. *Virgos-Schmidt Report*, ¶103, Appendix to R. GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW A70 (Exhibit R-0103). Respondent also refers to I. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 404 (2005) (Exhibit R-0099), ¶7.90 (cited in Respondent’s Post-Hearing Memorial, ¶107).

<sup>616</sup> Respondent’s Pre-Hearing Memorial, ¶92. Respondent refers to the position under French and English law, described at ¶¶204-207 of Respondent’s Counter-Memorial and the position under United States and German law, described at ¶¶160-161 of Respondent’s Rejoinder Memorial. Respondent also refers to S. Kröll, *Chapter 18: Arbitration and Insolvency Proceedings - Selected Problems* in L. MISTELIS & J. LEW (EDS.) PERVERSIVE PROBLEMS IN INTERNATIONAL ARBITRATION 360 (2006) (Exhibit R-0107) for the proposition that “in cases involving a true conflict between the insolvency provisions and arbitration the former will prevail” and further “[t]he clearest case of a true conflict between arbitration and insolvency exist when the execution of an award is at issue.”

<sup>617</sup> Respondent’s Post-Hearing Memorial, ¶¶105-107. Respondent refers to Article 5 of the *EC Regulation*, *supra* note 292: “The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.” Respondent also refers to the *Virgos-Schmidt Report*, *supra* note 615, which states “[A] right which exists only after insolvency proceedings have been opened, but not before, is not a right *in rem* for the purposes of Article 5 (which protects preexisting rights).”

<sup>618</sup> Respondent’s Counter-Memorial, ¶167; Respondent’s Pre-Hearing Memorial, ¶78.

applied the *New York Convention* public policy exception, such an error of law would not amount to the denial of justice in breach of Article III of the BIT.<sup>619</sup>

488. Further, if the Tribunal is prepared to determine the merits of the decisions of the Czech courts, Respondent also submits that those decisions are unimpeachable as a matter of international public policy by reference to comparative bankruptcy laws and EU law.<sup>620</sup> This branch of Respondent's defence rests on the following propositions (i) Czech law exclusively governs the requirements for the perfection of security interests over immovable and movable property situated in the Czech Republic as the *lex situs*;<sup>621</sup> (ii) that Claimant did not have perfected security interests when bankruptcy proceedings were commenced in respect of MA and LZ;<sup>622</sup> (iii) that the mandatory rules of Czech law prohibit the recognition of security interests over the debtor's property after the commencement of bankruptcy proceedings;<sup>623</sup> and (iv) that the Czech courts were entirely justified in giving effect to Czech mandatory rules (*i.e.* the *Bankruptcy Act* Section 14(1)(e)) by declining to recognise and enforce the Order on Security in the Final Award of the Stockholm Tribunal by reference to public policy in Article V(2)(b) of the *New York Convention*.<sup>624</sup>

489. Respondent submits that it is undisputed that Frontier was entitled to a "first secured charge" to the LET Assets and all of the assets of MA and to register its interests against

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<sup>619</sup> Respondent's Pre-Hearing Memorial, ¶79.

<sup>620</sup> Respondent's Counter-Memorial, ¶168; Respondent's Pre-Hearing Memorial, ¶80.

<sup>621</sup> Respondent's Counter-Memorial, ¶186; Respondent's Rejoinder Memorial, ¶143; Respondent's Pre-Hearing Memorial, ¶82. Respondent refers to *Re Weldtech Equipment*, (1991) BCC 16 (Ch.) (Exhibit R-0098), where an English company had contracted with a German seller of welding equipment, under a contract whose terms included a reservation of title clause that purported to extend the seller's rights to the proceeds of any resale of the goods by the buyer. Respondent notes that the English court characterised this clause as a charge upon the book debts of the company and thus subject to registration under section 396 of the Companies Act, 1985, c. 6 (Exhibit R-0105) (*i.e.* English Law). This was the case even though the contract was governed by German law and the clause under that law would be valid without registration.

<sup>622</sup> Respondent's Counter-Memorial, ¶¶187-190; Respondent's Pre-Hearing Memorial, ¶83.

<sup>623</sup> Respondent's Counter-Memorial, ¶191-202. Respondent also observes that Czech law, like English, Canadian, and Swedish law, and "possibly every other national legal system in the world" expressly prohibits bankruptcy trustees from recognising security interests over the debtor's property that are created after the bankruptcy proceedings have been opened. Respondent's Pre-Hearing Memorial, ¶84-90; Companies Act, 1985, c. 6, s. 395 (Exhibit R-0105); *Broadhead v. Royal Bank of Canada* (1968) 70 DLR (2d) 445 (Ont.) (Exhibit R-0104).

<sup>624</sup> Respondent's Counter-Memorial, ¶¶203-214; Respondent's Pre-Hearing Memorial, ¶85, 91-94.

title to all such property under the USA and Promissory Note since July 2001, but that at the time of the commencement of the bankruptcy proceedings in relation to MA and LZ, Frontier did not have a perfected security interest over such property.<sup>625</sup> The Stockholm Tribunal recognised in the Final Award that it could not create such a security interest, and that that could only be achieved through a subsequent execution of further contractual documentation between Claimant, MA and LZ in accordance with Czech law and the future perfection of the security interest so created. The Order on Security in the Final Award did not in and of itself create or perfect Claimant's security interest.<sup>626</sup>

490. Accordingly, Respondent submits, it might be said that there was no true conflict between the Order on Security in the Final Award and the mandatory rules of Czech bankruptcy law to the extent that the Stockholm Tribunal was ordering the bankruptcy trustees of MA and LZ to perform certain acts *to the extent possible* under the applicable Czech law.<sup>627</sup> By contrast, to the extent that the Stockholm Tribunal was purporting to order the bankruptcy trustees of MA and LZ to perform certain acts regardless of the applicable Czech law on bankruptcy and the *EC Regulation*, which Respondent contends is very unlikely, any aspect of the Final Award in conflict with Czech mandatory rules and EU law cannot be recognised and enforced in the Czech Republic by virtue of Article V(2)(b) of the *New York Convention*.<sup>628</sup>

491. Respondent notes that under Section 15(1)(b) of the *Bankruptcy Law*, the fact that the Tora Group filed a petition in mid-2001 caused the acts of MA in the 6 months prior to the filing of that petition to become ineffective against the creditors. In other words, any undertakings under the USA became unsecured claims in bankruptcy as they had not been executed by the time the Tora Group Petition was filed.<sup>629</sup>

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<sup>625</sup> Respondent's Rejoinder Memorial, ¶156.

<sup>626</sup> Respondent's Rejoinder Memorial, ¶158; Final Award, dated 30 December 2004 (Exhibit C-0094), ¶5.7.7. and ¶2 of the *dispositif*.

<sup>627</sup> Respondent's Counter-Memorial, ¶211; Respondent's Rejoinder Memorial, ¶152; Respondent's Pre-Hearing Memorial, ¶¶93-94; Resolution of Constitutional Court, dated 20 December 2005 (Exhibit R-0018).

<sup>628</sup> Respondent's Counter-Memorial, ¶212.

<sup>629</sup> Respondent's Counter-Memorial, ¶58-59, 104; Respondent's Rejoinder Memorial, ¶¶116-117.

492. In response to Claimant’s argument that the Tora Group Petition was not discoverable, Respondent responds that (i) Claimant never verified the Commercial Register itself or instructed a Czech lawyer to do so at the time it executed the USA or thereafter, so this cannot be a case of detrimental reliance; (ii) Claimant never did register a security interest over the LET Assets so it never had a security interest that could fall within the voidable preference period; (iii) the existence of the Tora Group Petition could have been ascertained by checking the court records at the corporate seat of MA in Brno, which would have been standard due diligence for any Czech lawyer; (iv) Jewitt was on notice of the bankruptcy of MA’s parent company, Moravan, prior to executing the USA; and (v) the fact that such information was not recorded in the Commercial Register at the time was known to the Czech legal profession.<sup>630</sup> Respondent further notes that Czech law, as well as other legal systems, extends the prohibition back in time to make any dispositions relating to the debtor’s property void or voidable if executed within a certain period before the commencement of bankruptcy proceedings.<sup>631</sup>
493. Respondent refutes Claimant’s characterisation of its reference to the Tora Group Petition as an argument that Claimant’s entitlement to a first secured charge was destroyed *ab initio* by operation of Czech law.<sup>632</sup> Respondent explains that Claimant never had a first secured charge and that it was only in a position to compel MA to register a secured charge when the Final Award was released, by which time it was too late as LZ and MA were already subject to bankruptcy proceedings.<sup>633</sup>
494. In response to Claimant’s argument that when applying Article V(2)(b) of the *New York Convention*, the “object and purpose” of the *New York Convention* must be taken into account, *i.e.* the promotion of the use of international commercial arbitration and a means of enhancing the security, predictability and growth of international commerce, Respondent

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<sup>630</sup> Respondent’s Post-Hearing Memorial, ¶138. Respondent notes that this was the system in place and that it was applied without discrimination to all legal entities incorporated in the Czech Republic. Respondent argues that it cannot be argued that the BIT requires a specific type of system for the registration of bankruptcy petitions, otherwise the failure to adopt the type of registration system that operates elsewhere (such as in Canada) would be a *per se* violation of the BIT.

<sup>631</sup> Respondent’s Pre-Hearing Memorial, ¶86.

<sup>632</sup> Respondent’s Post-Hearing Memorial, ¶139.

<sup>633</sup> Respondent’s Post-Hearing Memorial, ¶139.

argues that Claimant has ignored the reality that a functioning insolvency regime forms an indispensable basis for a “secure, predictable and growing international commerce”.<sup>634</sup>

495. With respect to Claimant’s allegations concerning the failure of the Courts with respect to the Interim Award, Respondent posits that the *New York Convention* does not extend to the recognition and enforcement of injunctions and, as a matter of fact, Claimant never sought enforcement of the Interim Award in the Czech Republic.<sup>635</sup>
496. Respondent notes that the monetary relief claims against MA and LZ in the Final Award were recognised and enforced by Czech courts under the *New York Convention* based on Claimant’s applications, subject to the limitations applicable to them in bankruptcy.<sup>636</sup> In accordance with applicable Czech bankruptcy law Claimant registered those claims against the bankruptcy estates of LZ and MA and they now await satisfaction from the proceeds of the bankruptcy proceedings.<sup>637</sup>
497. Respondent argues that proper consideration should be given to the *EC Regulation* which applies in a formal sense to the bankruptcy of MA, and is a source of guidance in relation to the international legality of the Czech legal system’s treatment of MA and LZ in bankruptcy and to the proper interpretation of Article III of the BIT.<sup>638</sup> Respondent submits that it (i) represents a consensus among European states on the proper approach to jurisdiction and choice of law in respect of bankruptcy, and (ii) forms part of the public

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<sup>634</sup> *EC Regulation*, *supra* note 292, Article 2 of Preamble (cited in Respondent’s Rejoinder Memorial, ¶¶162-164).

<sup>635</sup> Respondent’s Counter-Memorial, ¶¶99-101, 184. DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS 763 (2006) (Exhibit R-0092) [“Dicey”] (cited in Respondent’s Pre-Hearing Memorial, ¶55(1)): “To be entitled to recognition and enforcement [...] the decision of the arbitrator must constitute an arbitral award. An interlocutory order made by the arbitrator is not an award for these purposes.” *See also Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania* (No. 2), (2006) 1 Lloyd’s Rep 181 (A.C.) (Exhibit R-0096); *Re. Resort Condominiums International Inc.* (1995) 1 Q.R. 406 (Austl.) (Exhibit R-0097).

<sup>636</sup> Respondent’s Rejoinder Memorial, ¶155; Resolution of Regional Court, dated 15 February 2007 (Exhibit C-0174); Resolution of District Court in Uherské Hradiště, dated 4 July 2005 (Exhibit C-0140). Respondent notes that the 4 July 2005 Resolution of the District Court in Uherské Hradiště was subsequently confirmed with regard to the monetary claims – Resolution of Appellate Division, dated 30 March 2007 (Exhibit C-0144).

<sup>637</sup> Respondent’s Rejoinder Memorial, ¶155; Additional recognition of bankruptcy claim of the bankruptcy creditor No. 23 against Letecké Závody, a.s. dated 25 March 2009 (Exhibit R-0112); List of registered bankruptcy claims against LZ, dated 30 April 2009 (Exhibit R-0114).

<sup>638</sup> Respondent’s Pre-Hearing Memorial, ¶87.

policy of all EU Members such that an arbitral award in conflict with it must be denied recognition and enforcement pursuant to Article V(2)(b) of the *New York Convention*.<sup>639</sup>

498. Respondent asserts that in accordance with the *EC Regulation*, the “centre of main interests” of MA and LZ are in the Czech Republic and the Czech courts “shall have jurisdiction to open insolvency proceedings” pursuant to Article 3(1) of the *EC Regulation*. Article 17(1) of the *EC Regulation*, as explained by Respondent, sets out that the moment the bankruptcy proceedings were opened in relation to MA, the legal effects of those bankruptcy proceedings under Czech law had to be recognised in Sweden and thus by the Stockholm Tribunal. Further, Respondent notes that Articles 4 and 8 of the *EC Regulation* make clear that Czech law applied exclusively to the question of whether the bankruptcy trustees were entitled to register a security interest in favour of Claimant over the assets of MA and LZ after bankruptcy proceedings had been commenced. Thus, Respondent concludes, it was impossible for Respondent’s courts to give effect to the Order on Security in the Final Award in respect of the assets of MA and LZ.<sup>640</sup>
499. Respondent also notes that the *EC Regulation* only applied *ratione temporis* to the bankruptcy of MA but not to the bankruptcy of LZ.<sup>641</sup> Respondent argues that the attestation as to the legal effect and enforceability of the Final Award by the Chairman of the Stockholm Tribunal is irrelevant because while the Chairman confirmed that the formal requirements for the issuance of a binding award under Swedish law had been complied with, he did not purport to give a legal opinion on a question that was never raised before him.<sup>642</sup>

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<sup>639</sup> Respondent’s Counter-Memorial, ¶192; Respondent’s Pre-Hearing Memorial, ¶¶87; *Eco Swiss China Time Ltd. v. Benetton International NV*, Case C-126/97 [1999] ECR I-3055 (Exhibit R-0102). Respondent notes that the MA proceedings were opened after 1 May 2004, the date on which the Czech Republic joined the EU.

<sup>640</sup> Respondent’s Pre-Hearing Memorial, ¶¶88-90.

<sup>641</sup> Respondent’s Counter-Memorial, ¶192; Respondent’s Post-Hearing Memorial, ¶110.

<sup>642</sup> Claimant’s Post-Hearing Memorial, ¶107; Respondent’s Post-Hearing Memorial, ¶¶111-113; Final Award, dated 30 December 2004 (Exhibit C-0094), ¶¶2.10-2.11. Respondent also notes that the Stockholm Tribunal gave an award based upon Claimant’s interpretation of Section 14(1)(c) of the *Bankruptcy Act*, *supra* note 117, but did not receive any submissions (from either side) on the substantive effect of the insolvency proceedings on the matters in dispute as a matter of Czech law or Swedish law or any other law. Respondent finds it significant that Claimant’s counsel drafted the operative part of the Final Award and specifically requested a ‘declaration’ that it had a secured charge. Ultimately, Respondent notes, the Tribunal amended the text to the effect that Claimant was

500. Respondent argues that in order to appear on the “short list” (or “separate creditors”, as described in the *Bankruptcy Act*), a creditor must, no less than two months prior to the filing of the bankruptcy petition, have registered its pledge as a right *in rem* in accordance with Czech law.<sup>643</sup> In order to have a claim so secured by a lien (a pledge) as a right *in rem*, such pledge had at the time to be registered (perfected) in accordance with Czech law. Respondent submits that Jewitt was aware that Claimant had to take steps in the Czech Republic to register its security interest, but that no Czech lawyer had been instructed to procure the registration of the security interest and that there is no evidence on the record that Matušik or Jewitt requested the required documentation from Soska.<sup>644</sup> Respondent argues that the Czech Republic is in no way responsible for Claimant’s lack of diligence in duly perfecting its security interest.<sup>645</sup> Thus, without compliance with the relevant provisions of the *Bankruptcy Act*, Respondent concludes that there can be no discretion on the part of the bankruptcy trustees to accord Claimant preferred-creditor status.<sup>646</sup>

*Tribunal’s Analysis*

501. At the crux of this claim is the refusal by the Czech courts to recognise and enforce all of the orders contained in the Interim and Final Awards rendered by the Stockholm Tribunal.
502. As noted above at paragraph 363, Claimant has also raised this complaint with respect to the failure of the bankruptcy judges and trustees to give effect to the Interim and Final Awards when requested to do so. The Parties’ submissions in this regard are summarised at paragraphs 339-358 and will be dealt with under this section.
503. First, it is useful to review the factual background leading to (i) the failure by the bankruptcy trustees and the bankruptcy judges to give effect to the Interim and Final

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“entitled” to a secured charge, but was careful to carve out any questions relating to the bankruptcy of LZ or MA.

<sup>643</sup> Respondent’s Post-Hearing Memorial, ¶129; *Bankruptcy Act*, *supra* note 117. Respondent notes that Section 28 of the *Bankruptcy Act* provides that a creditor must have its claim secured “by lien and the right to retain a thing, or by limitation of the right to transfer real estate, or by transfer of a right under Section 553 of the Civil Code, or by assignment of a receivable under Section 554 of the Civil Code.”

<sup>644</sup> Respondent’s Post-Hearing Memorial, ¶125.

<sup>645</sup> Respondent’s Post-Hearing Memorial, ¶126.

<sup>646</sup> Respondent’s Post-Hearing Memorial, ¶130.

Awards, and (ii) refusal by the Czech courts to recognise and enforce the entirety of the Final Award.

504. On 27 February 2004, Claimant submitted the Interim Award to the District Courts in Uherské Hradiště and Zlín.<sup>647</sup> In its letters, Claimant *suggested* that “any and all executions of judgment held against [MA and LZ] be terminated or interrupted pursuant to §268 of the Civil Procedure Code” and requested that it “be kept informed of such judgment executions in order to be able to file the respective actions for exemption from judgment execution”. Claimant did not receive a response from the District Courts in Uherské Hradiště and Zlín in this regard.
505. On 27 February 2004, Claimant also submitted the Interim Award to Boháček in respect of the bankruptcy of LZ. Claimant requested that the Regional Court issue an interim injunction requesting that Sládek prevent disposition of any assets of LZ and open proceedings on the nullity of certain sales contracts and other acts.<sup>648</sup> Claimant did not receive a response from Boháček in this regard. A preliminary bankruptcy trustee had already been installed in LZ.<sup>649</sup>
506. Also on 27 February 2004, Claimant filed a motion at the Regional Court for appointment of an interim receiver in respect of MA enclosing the Interim Award. As for LZ, Claimant requested that the Regional Court enjoin all parties from any disposition of the assets of MA and open proceedings on the nullity of certain sales contracts and other acts.<sup>650</sup> On 19 April 2004, the Regional Court granted Claimant’s 27 February 2004 request for appointment of an interim receiver, but did not address or mention Claimant’s request that the Regional Court open proceedings on the nullity of certain sales contracts and other acts.<sup>651</sup> The Regional Court noted that Claimant was not part of the bankruptcy proceedings at the time. In substantiating the need to appoint a preliminary trustee (interim

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<sup>647</sup> Letter from Transfin to District Court in Uherské Hradiště, dated 27 February 2004 (Exhibit C-0078); Letter from Transfin to District Court in Zlín, dated 27 February 2004 (Exhibit C-0081).

<sup>648</sup> Respondent’s Counter-Memorial, ¶¶100-101; Letter from Transfin to Regional Court, dated 27 February 2004 (Exhibit C-0079).

<sup>649</sup> Resolution of Regional Court, dated 9 January 2004 (Exhibit R-0042).

<sup>650</sup> Respondent’s Counter-Memorial, ¶¶100-101; Letter from Transfin to Regional Court, dated 27 February 2004 (Exhibit C-0080).

<sup>651</sup> Resolution of Regional Court, dated 19 April 2004 (Exhibit C-0086).

receiver), the Regional Court also made reference to information provided by a number of other creditors, in particular the Workers Union, in respect of which it was “clear that [MA was] not fulfilling [its] obligations in the mater [*sic*] of workers compensation”.

507. On 28 February 2005, Claimant submitted the Final Award (including a certified translation into the Czech language) to the bankruptcy trustees and judges.<sup>652</sup> In the submission to the judge overseeing the MA bankruptcy proceedings, Claimant expressly requested that the Final Award be recognised: “I am herewith requesting you to exercise your authority and ensure that the above Arbitral Award be recognised, namely by the bankruptcy trustee.” A similar request was made to the bankruptcy judge overseeing the LZ bankruptcy proceedings.<sup>653</sup>
508. On 31 March 2005, the bankruptcy trustee for LZ responded to Claimant’s correspondence of 28 February 2005, stating that the recognition and enforcement of the Final Award could contravene public policy.<sup>654</sup>
509. On 8 April 2005, Vala informed Claimant that the creditors’ committee concluded that the Final Award “orders the bankruptcy trustee to effect performance that is impermissible according to domestic law.”<sup>655</sup>
510. On 23 May 2005, the court supervising the bankruptcy proceedings involving LZ denied Claimant’s motion for an interim injunction. In its decision, it added that recognition and enforcement of the Final Award should be denied pursuant to s. 39(a) and (c) of the Arbitration Act “if the award is not legally effective and enforceable pursuant to domestic law and the award would contravene public policy.”<sup>656</sup>

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<sup>652</sup> Letter from Tutterova to Hanzlikova, dated 28 February 2005 (Exhibit C-0156); Letter from Tutterova to Hajtmar, dated 28 February 2005 (Exhibit C-0157); Jewitt Witness Statement, ¶149.

<sup>653</sup> Jewitt Witness Statement, ¶149.

<sup>654</sup> Letter from Sládek to Tutterova, dated 31 March 2005 (Exhibit C-0127); Letter from Sládek to Transfin, dated 31 March 2005 (Exhibit C-0097).

<sup>655</sup> Letter from Vala to Tutterova, dated 8 April 2005 (Exhibit C-0180).

<sup>656</sup> Resolution of Regional Court, dated 23 May 2005 (Exhibit C-0130).

511. At the 1 June 2005 meeting, the bankruptcy trustees and judges agreed that the Final Award “could not be respected in view of the provisions of §39, letter b) and §31, letter f) of Act No. 216/1994 Coll. on bankruptcy proceedings and the enforcement of arbitral awards, because it adjudicates the party to perform acts that are impossible or illegal under domestic law and because, according to Article V.2B) and Decree No. 74/1959 Coll. on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the recognition or enforcement of the Award would contradict the public policy of the Czech Republic.”

512. On 2 June 2005, the court in the MA bankruptcy proceedings rejected Claimant’s motion to cancel the joint tender, and stated, in part, that:

The court leans towards the trustee’s argument stating that according to Article V.2. letter b) of Decree No. 74/1959 Coll. on the Convention on the Recognition and Enforcement of Foreign Awards, Award recognition and enforcement can also be denied if the respective body of the country in which the award is to be enforced finds that award enforcement would contradict that country’s law.

Pursuant to Act No. 216/1994 on arbitration proceedings and the arbitration award enforcement, the court will cancel an award based on a motion of each of the parties if the award orders the party to perform an act which is impracticable or illegal pursuant to the domestic law (see Section 31, letter (f)). For this reason, the recognition or enforcement of a foreign award will be denied (see Section [39], letter b)).

It is clear from the above that an Award ordering the bankruptcy trustee to grant secured charges against the bankrupt’s assets to the benefit of a creditor, cannot be enforced because such act would contradict to [sic] the Bankruptcy and Composition Act and as such it would be generally illegal and in breach of this country’s public order.<sup>657</sup>

513. On 9 June 2005, the Regional Court also denied Claimant’s application to cancel the joint tender in the LZ bankruptcy proceedings. The Regional Court addressed the issue of the recognition and enforcement of the Final Award, without detailed analysis, stating:

Given the fact that the Arbitral Tribunal Award contradicts the Bankruptcy and Composition Act and with reference to the provisions

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<sup>657</sup> Resolution of Regional Court, dated 19 May 2005 (Exhibit C-0160).

of Section 39 of Act No. 39, letter (b) and Section 31 letter f) of Act No. 216/1994 Coll., the court has decided as stated above.<sup>658</sup>

514. On 16 June 2005, Claimant filed four motions before two district courts and one municipal court requesting the recognition and enforcement of the Final Award, one each in respect of MA, LZ, and Hajtmar and Sládek, as set out below:

- ***Enforcement proceedings against bankruptcy trustee for MA***

515. The application for recognition and enforcement of the Final Award against Hajtmar was denied and the outcome was affirmed on appeal and Claimant's subsequent extra-ordinary appeal to the Czech Supreme Court was denied.<sup>659</sup> The court of first instance and the appellate court both refused the recognition and enforcement of the Final Award on the basis of Article V(2)(b) of the New York Convention as contrary to the public policy of the Czech Republic, albeit for different reasons. As noted earlier, the appellate court held in particular:

It would be contrary to Czech laws as well as public policy in the Czech Republic, and would be contrary to the Constitution as well as all other rules in effect not only in the Czech Republic but also in other signatory countries to the New York Convention, for an obligation to be imposed on someone in contravention of his rights and obligations and in contravention of the laws and public policy of the country in which the enforcement (execution) is to be implemented. It is not possible to demand that a bankruptcy trustee breach the obligations imposed on him/her by the bankruptcy law. Moreover, in view of the foregoing it is also not possible to order a bankruptcy trustee to ensure a priority ranking for the entitled party in bankruptcy proceedings. [...]

In conclusion it can be stated that the submitted execution title completely fails to respect the mandatory rules of Czech laws, has a tendency to unacceptably interfere with the powers, authority and independence of a bankruptcy court, attempts to force it to take steps that are contrary to Czech laws, principle [sic] of justice and equal status of parties in court proceedings. In the appellate court's opinion, in this case there are grounds for not recognizing the submitted execution title as enforceable on the territory of the Czech Republic when one applies Article V(2)(b) of the [New York Convention].<sup>660</sup>

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<sup>658</sup> Resolution of Regional Court, dated 9 June 2005 (Exhibit C-0132).

<sup>659</sup> Resolution of Municipal Court in Brno, dated 5 August 2005 (Exhibit R-0116); Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117); Resolution of Supreme Court, dated 31 March 2009 (Exhibit R-0118).

<sup>660</sup> Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117).

516. The appellate court further concluded that, as a matter of Czech law, the Final Award was not sufficiently specific and therefore not enforceable and that MA's bankruptcy trustee, Hajtmar, was the wrong respondent for Claimant's petition to recognise and enforce the award.<sup>661</sup> Claimant's extra-ordinary appeal from the appeal decision was denied as inadmissible by the Supreme Court of the Czech Republic.<sup>662</sup>

- ***Enforcement proceedings against bankruptcy trustee for LZ***

517. The application for recognition and enforcement of the Final Award against the bankruptcy trustee for LZ, Sládek, was also dismissed by the Municipal Court in Brno as contrary to Czech public policy. The court's reasoning was similar to the analysis adopted by the court of first instance in the proceedings against Hajtmar.<sup>663</sup> Claimant did not appeal this decision.

- ***Enforcement proceedings against LZ***

518. In the proceedings against LZ for recognition and enforcement of the Final Award, Claimant had initially obtained an execution order.<sup>664</sup> This order was revoked on appeal on 25 August 2006.<sup>665</sup> The Municipal Court in Brno rested its decision on the same public policy grounds it had set out in its earlier decision dealing with the MA proceedings.<sup>666</sup>

519. Following the dismissal of the enforcement proceedings in the lower court and an appeal by Claimant, the Regional Court in Brno granted partial recognition of the Final Award against LZ on 30 March 2007.<sup>667</sup> However, the dismissal of the enforcement proceedings in

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<sup>661</sup> Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117).

<sup>662</sup> Resolution of Supreme Court, dated 31 March 2009 (Exhibit R-0118).

<sup>663</sup> Resolution of Municipal Court in Brno, dated 5 August 2005 (Exhibit R-0124); *see also* Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117).

<sup>664</sup> Resolution of District Court in Uherské Hradiště, dated 4 July 2005 (Exhibit C-0140).

<sup>665</sup> Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0120).

<sup>666</sup> Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0120).

<sup>667</sup> Resolution of Appellate Division, dated 30 March 2007 (Exhibit C-0144). The panel of judges hearing the appeal was the same as in the previous appeals in Claimant's enforcement proceedings (*see* Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0117); Resolution of Regional Court, dated 25 August 2006 (Exhibit R-0120)).

respect of the accounting for all the property of LZ and the grant of a first secured charge against the LET Assets by entering into a pledge agreement with Claimant, as ordered by the Final Award, were upheld. In its reasons, the court referred to the public policy considerations in its 25 August 2006 decision in the same matter. According to Respondent, as at 20 July 2009, a further extraordinary appeal filed by Claimant on 21 June 2007 to the Supreme Court of the Czech Republic was still pending.<sup>668</sup>

- ***Enforcement proceedings against MA***

520. As noted earlier, in the recognition and enforcement proceedings against MA, the District Court in Zlín denied Claimant's petition on 25 January 2006. The court considered the Final Award not to be enforceable on procedural grounds.<sup>669</sup> On appeal, the Regional Court in Brno partially reversed the lower court decision in a decision dated 15 February 2007.<sup>670</sup> In substance, the decision parallels the ruling of the same court in the enforcement proceedings against LZ. The enforcement of the first three orders of the Final Award was denied; the enforcement of the payment orders Nos. 4, 7, 8 and 10 was granted. In respect of the former, the court held as follows:

In relation to the company [MA] [...] the principal question is how specifically the holding of this Arbitral Award is to be incorporated into proceedings pursuant to the provisions of Act 120/2001 Coll. in compliance with the Czech legal order. Imposing an obligation on a person that would violate such person's rights and obligations and contradict the legal and public order of the country in which such act (an execution) is to be carried out would indeed contravene the legal and public order of the Czech Republic, its Constitution and all legal standards applicable not only for the Czech Republic but also for other signatory states of the New York Convention. A bankruptcy order has been adjudicated against the assets of [MA] [...] Pursuant to the provisions of § 14, para 1, letter e) of Act 328/1991 Coll., the Bankruptcy and Composition Act, as amended, it shall be impossible to execute a judgment (execution order) relating to assets that are part of a bankrupt's estate and to acquire the right to separate satisfaction from any such assets. We cannot ask the Bankrupt to violate his obligations given the Bankruptcy Act.

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<sup>668</sup> Extraordinary Appeal by FPS of 30 March 2007 Resolution of Regional Court, dated 21 June 2007 (Exhibit R-0123); Annex C to Respondent's Counter-Memorial, ¶17.

<sup>669</sup> Resolution of District Court in Zlín, dated 25 January 2006 (Exhibit C-0173).

<sup>670</sup> Resolution of Regional Court, dated 15 February 2007 (Exhibit C-0174).

As the Appellate Court has already stated several times in the rationale of its rulings, the submitted execution title fails in this part to respect the mandatory standards of the Czech legal order; it tends unduly to encroach on the authority, competence and independence of the Bankruptcy Court and attempts to force it into taking steps that contravene the Czech legal order and the principle of justice and equality of the parties in judicial proceedings.

Hence, in the Appellate Court's opinion, the discussed part of the execution title provides reasons for non-executability of the submitted execution title in the Czech Republic invoking Article V point 2, letter b) of the [New York Convention].

521. On 28 May 2007, Claimant filed an extraordinary appeal against the Regional Court of Brno's decision of 15 February 2007 to the Supreme Court.<sup>671</sup> According to Jewitt, "a ruling was issued on March 27, 2009, which again rejected the right to separate (preferential) satisfaction".<sup>672</sup> However, according to Respondent, as of 20 July 2009, the Supreme Court's decision was still pending.<sup>673</sup>
522. The Order for Security in the Final Award directing the bankruptcy trustees to grant "a first secured charge against the LET ASSETS and all of the property of [MA] of every nature and kind wheresoever located",<sup>674</sup> was found by the Czech Courts to be (i) contrary to the *Bankruptcy Act* because it purported to accord to Claimant an exceptional status<sup>675</sup> after bankruptcy had been declared; and (ii) contrary to Czech public policy because it was in disregard of the "equality of rights of the bankrupt's creditors"<sup>676</sup> such that the Courts were justified in refusing its enforcement under Article V(2)(a) of the *New York Convention*.<sup>677</sup>
523. The Tribunal notes that the refusal to enforce the second specific performance obligation – the accounting of assets – was based on more technical grounds, such as the impossibility

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<sup>671</sup> Annex C to Respondent's Counter-Memorial, ¶15; Jewitt Witness Statement, ¶171; Extraordinary Appeal of Resolution of Regional Court of 25 May 2007, dated 25 May 2007 (Exhibit R-0119).

<sup>672</sup> Jewitt Witness Statement, ¶171.

<sup>673</sup> Annex C to Respondent's Counter Memorial, ¶15.

<sup>674</sup> Final Award, dated 30 December 2004 (Exhibit C-0094), ¶5.7.7.

<sup>675</sup> Resolution of Municipal Court in Brno, dated 5 August 2005 (Exhibit R-0116), 2.

<sup>676</sup> Resolution of Regional Court, dated 2 June 2005 (Exhibit C-0161).

<sup>677</sup> Some, but not all of the relevant decisions also make reference to the *Arbitration Act*, Section 31(f). See e.g. Resolution of Regional Court, dated 2 June 2005 (Exhibit C-0161).

of obliging the trustee to trace the assets of a third party (*i.e.* LET),<sup>678</sup> and the lack of concordance between the wording of Claimant's request and the Final Award.<sup>679</sup> With regard to the orders of the Stockholm Tribunal relating to (i) the obligation to pay interest on the loan under the USA; (ii) the damages award in the amount of USD 600,000 for Claimant's lost business opportunity; (iii) the arbitration costs in the amount of USD 926,038.55; and (iii) Claimant's share of the advance payments to cover the fees and costs of the arbitrators in the amount of USD 245,124.53, these claims were ultimately upheld.

524. The Tribunal observes that the Interim Award contained an order enjoining MA and LZ from breaching the USA and the Promissory Note and from any further selling, trading, pledging, encumbering, or otherwise disposing of the LET Assets. As noted above, a preliminary trustee, whose authorisation is required for the disposition of the bankrupt's assets,<sup>680</sup> was already installed in respect of LZ at the time Claimant submitted the Interim Award to the Regional Court. A preliminary trustee was installed pursuant to Claimant's request in respect of MA, even if it was not part of the bankruptcy proceedings at that time. The Tribunal considers that whether Claimant's requests that the Regional Court immediately open proceedings in respect of any sales contracts or other acts of MA and LZ were properly filed is a matter of Czech law. The Tribunal also considers that these requests were not clearly connected to the terms of the Interim Award. With respect to Claimant's letters to the District Courts in Uherské Hradiště and Zlín, the Tribunal considers that Claimant merely *suggested* that all judgment executions be terminated and requested that it be kept updated. Claimant had not indicated on what basis it would have a right to be updated and, even if there was such a right, has not shown that the District Courts neglected to keep it informed of judgment executions, if any. The Tribunal also accepts Respondent's point that the relief sought by Claimant with respect to the Interim Award sought to enjoin third parties, whereas the Interim Award itself addressed only MA and LZ.<sup>681</sup> Accordingly, the Tribunal is unable to conclude that the alleged inaction of the Regional Court and the District Courts in Uherské Hradiště and Zlín constituted a failure to properly give effect to the Interim Award.

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<sup>678</sup> See Resolution of Regional Court, dated 27 February 2006 (Exhibit C-0114);

<sup>679</sup> See Resolution of District Court in Zlín, dated 25 January 2006 (Exhibit C-0173).

<sup>680</sup> *Bankruptcy Act*, *supra* note 117, s. 9(c); Hulmák Expert Report, ¶29.

<sup>681</sup> Respondent's Rejoinder Memorial, ¶98.

525. As to the Final Award, the Tribunal rejects Respondent’s argument that this Tribunal does not have the power to review the decision of a national court’s conception of the public policy exception under the *New York Convention*. The Tribunal’s role under this claim is to determine whether the refusal of the Czech courts to recognise and enforce the Final Award in full violates Article III(1) of the BIT. In order to answer this question, the Tribunal must ask whether the Czech courts’ refusal amounts to an abuse of rights contrary to the international principle of good faith, *i.e.* was the interpretation given by the Czech courts to the public policy exception in Article V(2)(b) of the *New York Convention* made in an arbitrary or discriminatory manner or did it otherwise amount to a breach of the fair and equitable treatment standard.
526. Article V(2)(b) of the *New York Convention* gives a competent authority in the country where recognition and enforcement is sought the discretion to refuse the recognition and enforcement of an arbitral award if the competent authority finds that the recognition or enforcement of the award would be “contrary to the public policy of that country”. In the present case, this refers to the public policy of the Czech Republic. It is widely accepted that while the reference to “public policy” in Article V(2)(b) of the *New York Convention* refers to international public policy, it is nonetheless a reference to the particular national conception of international public policy that is relevant rather than to a conception of public policy that is in some way detached from the legal system at the place where recognition and enforcement is sought.<sup>682</sup>
527. The Czech courts concluded that the full recognition and enforcement of the Final Award would have been contrary to Czech public policy. In regard to this decision, it is not necessary for this Tribunal to determine whether the findings of the Czech courts meet the applicable standard of international public policy, or to determine the precise contents of that standard. States enjoy a certain margin of appreciation in determining what their own conception of international public policy is.<sup>683</sup> This Tribunal determines that it is sufficient to examine whether the conclusion reached by the Czech courts applied a plausible

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<sup>682</sup> See International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (London, 2000) (Exhibit R-0091).

<sup>683</sup> See *e.g.* E. Gaillard, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), ¶1712.

interpretation of the public policy ground in Article V(2)(b) of the *New York Convention*. Put another way, was the decision by the Czech courts *reasonably tenable* and made in *good faith*?

528. The Tribunal notes that other national courts and some academic writers have found that the equality of creditors in bankruptcy proceedings and the equitable and orderly distribution of assets are public policy principles sufficient to refuse the enforcement of arbitral awards under the *New York Convention*. The Tribunal refers to decisions of the French Cour de Cassation and the German Bundesgerichtshof where, in the context of enforcement of an arbitral award, the equal treatment of creditors (or some variant of that formulation) was determined to be an expression of public policy.<sup>684</sup> In one of its decisions of 20 December 2005, the Constitutional Court of the Czech Republic noted that “legal

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<sup>684</sup> See e.g. *Mandataires judiciaires associés v. International Company for Commercial Exchanges*, 6 May 2009, Cour de Cassation, case no. 509 in B. Derains & Y. Derains, Digest by ITA Board of Reporters (Kluwer Law International), in which an award rendered after a declaration of bankruptcy ordering payment by the bankrupt breached international public policy (“ordre public international”) – asserting that any award must be limited to a determination of the amount of debt; German Federal Court of Justice (Bundesgerichtshof), 29 January 2009 in R.H. Kreindler, Digest by ITA Board of Reporters, where the Bundesgerichtshof reversed the finding of the lower court that enforcement of two arbitral awards ordering the payment of money that had been rendered while the respondent was in bankruptcy would be contrary to German domestic public policy – the Bundesgerichtshof ruled that the awards should have been interpreted as determining that the claims should be filed along with other creditors’ claims but nonetheless asserted that the equitable and collective satisfaction of creditors in an insolvency proceeding was part of public policy (Exhibit R-0170); *Société SARET c/ SBBM*, Cour de cassation (Ch. commerciale), 4 février 1992, Rev. Arb. (1992), p. 663, Commentary J-H. Moitry, where the principle of equality among creditors was considered to be part of French domestic and international public policy, and the violation of this principle was the reason for the annulment of the arbitral award (as cited in P. Fouchard, *Arbitrage et faillite* [Arbitration and Bankruptcy], 3 Revue de l’arbitrage 480, 481 (1998) (Exhibit R-0106) *supra* note 615); see also, e.g. Lazic, *Insolvency Proceedings and Commercial Arbitration* (The Hague: Kluwer Law International, 1998), p. 305 [“*Lazic*”]: “some provisions of insolvency laws may have to be observed in order to ensure validity of the award. These are provisions intended to preserve the basic principles of insolvency law, such as the principle of ‘equal treatment of creditors’ [...], violation of which may be considered as contrary to public policy.” (*Lazic*, also referred to in S. Kröll, *Chapter 18: Arbitration and Insolvency Proceedings - Selected Problems* in L. MISTELIS & J. LEW (EDS.) *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 358, 359 (2006) (Exhibit R-0107)). It may be noted that the UNCITRAL Model Law on Cross-Border Insolvency of 1997, provides in paragraph (1)(b) of Article 20, “Effects of recognition of a foreign main proceeding”, that following the recognition of a foreign insolvency proceeding that is a foreign main proceeding, the execution against the debtor’s assets is stayed (UNCITRAL Model Law on Cross-Border Insolvency of 1997, listed as Appendix IV of I. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* (2005) (Exhibit R-0099)). The Legislative Guide on Insolvency Law, published by UNCITRAL in 2004, Recommendation 46 (p. 101), only addresses arbitrations in the context of Article 20(1)(a), recommending that arbitrations be included in the stay of “individual actions or individual proceedings concerning the debtor’s assets, rights obligation and liabilities.” (Exhibit R-0157, Exhibit C-0361).

authorities and jurisprudence in the United States likewise ruled on the public order exclusion in relation to the basic principles of equality of creditors in bankruptcy proceedings, *i.e.* for the same reasons applied in this case by the Czech ordinary court”.<sup>685</sup>

529. While these authorities may be distinguished from the present case, and the question generally has not yet received adequate treatment such that any firm conclusions can be drawn, they do lend support to the integrity of the approach of the Czech courts. Thus, in terms of the substantive law result, the interpretation of the international public policy of the Czech Republic adopted by the Czech courts is reasonably tenable. As far as the alleged violation of the fair and equitable treatment standard pursuant to Article III of the BIT is concerned, this Tribunal concludes that there is no indication that the courts determining Claimant’s requests for the recognition and enforcement of the Final Award acted arbitrarily, discriminatorily, or in bad faith. Claimant’s requests were entertained by four levels of courts and Claimant had several opportunities to submit legal arguments on the proper interpretation and application of the exceptions to the recognition and enforcement of the Final Award established under Article V of the *New York Convention*.

530. There is another reason why Claimant’s case in this area ought not to be sustained. In the present case, Claimant’s central claim was that it should receive preferential treatment (a first secured charge) on the strength of the Stockholm Award. This would have given it preference over other creditors who had participated and complied with a broad scheme which ensured the equal treatment of creditors. Inevitably, this would have worked to the detriment of the other creditors in the bankruptcy proceedings. In fact, it would have defeated the right of all the other creditors given the size of Claimant’s claim and the limited assets available. The full enforcement of the Stockholm Award would have seriously affected the position of the other creditors who had no part in the Stockholm proceedings and had never consented to them. The Tribunal considers that this

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<sup>685</sup> Resolution of Constitutional Court, dated 20 December 2005 (Exhibit R-0018), 4. The Court refers to S. Hutchinson, *Nonrecognition of Post-Bankruptcy Arbitration: Victrix Steamship Co. v. Salen Dry Cargo A.B.*, 22 Int’l L. 1183 (1988). In *Victrix Steamship Co. v. Salen Dy Cargo A.B.*, 825 F.2d 709, 711 (2d Cir. 1987) (Exhibit R-0156), which involved the recognition and enforcement of a foreign award (London), the Court of Appeals (Second Circuit) found that enforcement of both the London arbitral award obtained after bankruptcy and the British judgment on the award would conflict with the strong public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt (714). Accordingly, the Court refused enforcement of the London award (and the British judgment on the award).

consideration helps to support the point that the Czech courts' interpretation of the notion of "public policy" under the *New York Convention* was not unreasonable or impossible.

## 9. COSTS

### *Claimant's Position*

531. Claimant claims the following costs:<sup>686</sup>

<b>Legal costs</b>	
Fees and disbursements of Burnet Duckworth & Palmer <sup>687</sup> (this amount includes disbursements of Mr. Weiler of \$2,819.55; fees and disbursements of Ms. Tutterová of \$20,997.63; Blanka Owensová Translation Services fee of \$31,197.81; Worldwide Court Reporting fees of \$14,436.43)	CAD\$ 1,356,384.47
Fees of Mr. Todd Weiler	CAD\$ 207,900.00
Less court reporter costs (Worldwide Court Reporting) which are included in Burnet Duckworth & Palmer's disbursements above, <sup>688</sup> but are claimed as arbitral costs below, and taken into account there.	less CAD\$ 14,436.43
<b>Total legal costs claimed</b>	<b>CAD\$ 1,549,847.74</b>
<b>Arbitral costs</b>	
Advance payments towards the deposit	CAD\$ 121,667.05
Advance payment towards the deposit (18.02.2010)	€ 75,000.00
Advance payment towards the deposit (26.05.2010)	€ 42,500.00
Court reporter costs (Worldwide Court Reporting)	CAD\$ 14,436.43
Other costs (this amount includes payments to Mr. Weiler of \$23,591.40, Ms. Tutterová of \$46,519.19, Blanka Owensová Translation Services of \$23,938.67, Transfin (Mr. Sup) of \$55,270.38, Mr. Matusik of \$12,000.00, and approximately \$30,000.00 for the attendance of Messrs. Jewitt and Sanford at the hearing)	Approx CAD\$ 192,000.00
<b>Total arbitral costs claimed (approximately) in CAD\$</b>	<b>CAD\$ 313,667.05</b>
<b>Total arbitral costs claimed in EURO</b>	<b>€ 117,500.00</b>
<b>TOTAL</b>	<b>CAD\$ 1,877,951.52</b> <b>€ 117,500.00</b>

<sup>686</sup> Claimant's Post-Hearing Memorial, ¶¶144-150; Appendix A to Claimant's Post-Hearing Memorial.

<sup>687</sup> Claimant submits that "one significant outstanding disbursement that is not included in this amount is printing costs incurred during the hearing at Printstudio Stenkwartier BV in the amount \$4,109.00", Claimant's Post-Hearing Memorial, footnote 167.

<sup>688</sup> See Claimant's Post-Hearing Memorial, footnote 169.

532. Claimant also claims “such other Legal Costs and Arbitral Costs as Frontier may incur between [October 30, 2009, in the case of legal fees, and November 10, 2009, in the case of disbursements] and the Tribunal’s Award.”<sup>689</sup> Subsequent to the filing of its final submission on costs on 22 December 2009, *i.e.*, Claimant’s Reply to Respondent’s Post-Hearing Memorial, Claimant has provided no information on any additional costs that it may have incurred. The additional advance payments towards the deposit that Claimant made on 18 February and 26 May 2010 of € 75,000.00 and € 42,500.00, respectively, have been included in the above table.
533. With respect to the apportionment of costs, Claimant submits that it is entitled to both its legal and arbitral costs on a full indemnity basis, pursuant to Article 40(1) of the UNCITRAL Rules, in order to protect the integrity of the award which would otherwise fail to fully compensate Claimant for the losses it suffered as a result of the conduct of the Czech Republic.<sup>690</sup> While acknowledging that the Tribunal has discretion to depart from the basic principle that the unsuccessful party should bear the costs of arbitration, should Claimant prevail, it submits that the Czech Republic should bear the legal costs because (i) the conduct for which the Czech Republic may be found liable must be dissuaded; and (ii) an award of costs is needed to make Claimant whole.<sup>691</sup>
534. Should Respondent prevail, Claimant argues that it should not have to bear its costs. Claimant alludes to emerging tribunal practice with respect to costs in investor-state arbitrations in which the state prevails to argue that it remains a rarity in investment treaty arbitration for an unsuccessful claimant to be directed to pay for more than half of the arbitration costs or any portion of the respondent’s legal fees. The exceptions, Claimant notes, are cases where the tribunal determines that the claim was manifestly without merit or that its prosecution by Claimant, or her counsel, fell below commonly understood professional standards.<sup>692</sup> Claimant also argues that any costs award in favour of

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<sup>689</sup> Claimant’s Post-Hearing Memorial, ¶¶164, 146; *see also* Claimant’s Reply to Respondent’s Post-Hearing Memorial, ¶69.

<sup>690</sup> Claimant’s Post-Hearing Memorial, ¶¶134-135, 154.

<sup>691</sup> Claimant’s Post-Hearing Memorial, ¶156.

<sup>692</sup> Claimant’s Post-Hearing Memorial, ¶¶157-159. Claimant refers to *Azinian et al v. Mexico*, ICSID Case No ARB(AF)/97/2, Award of 1 November 1999, ¶126 (Tab 20 of Claimant’s Post-Hearing Memorial) (cited in Claimant’s Post-Hearing Memorial, ¶158). Claimant also refers to *Mondev*,

Respondent should be adjusted for certain burdensome costs that Claimant was required to incur in the period leading up to the hearing.<sup>693</sup>

535. Claimant asserts that it commenced this arbitration in good faith, that its claim was not frivolous, that it presented its case in an efficient manner, and that the arbitration raised novel and difficult questions related to the interaction between bankruptcy and arbitration, and state responsibility to ensure that bankruptcy proceedings are managed in a manner that protects the interests of foreign investors.<sup>694</sup> Thus, while as a matter of principle both Parties are entitled to full indemnity, Claimant submits that in the event that Respondent is successful in this arbitration, the Tribunal should order that each party bear its own costs and that the arbitral costs be divided evenly between the parties, subject to certain adjustments for the benefit of Claimant.<sup>695</sup>

536. Addressing Respondent's costs claims, Claimant submits that the fees of Rowan Legal seem high in view of the fact that Rowan Legal did not apparently draft or submit any legal argument for use at the hearing, nor attend the hearing itself. Claimant observes that the strategy pursued by Rowan Legal appeared to change dramatically with the introduction of the new legal team at the end of May 2009.<sup>696</sup>

537. In response to Respondent's objections to some of the costs claimed by Claimant,<sup>697</sup> Claimant asserts, *inter alia*, that they are reasonable costs incurred in relation to this arbitration.<sup>698</sup>

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*supra* note 360; *United Parcel Service of America v. Canada*, Award on the Merits of 24 May 2007 (Tab 22 of Claimant's Post-Hearing Memorial), ¶188; *Loewen Award*, *supra* note 342, ¶240; *International Thunderbird Gaming Corp. v. Mexico*, IIC 136 (2006), Separate Opinion dated 26 January 2006, ¶¶5, 30 (Tab 24 of Claimant's Post-Hearing Memorial); Claimant also refers to W. Ben Hamida, *Cost Issue in Investor-State Arbitration Decisions Rendered Against the Investor: A Synthetic Table 2(5) TDM* (2005) (Tab 25 of Claimant's Post-Hearing Memorial, Tab 9 of Claimant's Reply to Respondent's Post-Hearing Memorial) and Richard H. Kreindler, *Perspectives on State Party Arbitration: The Future of BITs – The Practitioner's Perspective* 23 *Arb. Int.* 43 (2007), 59 (Tab 26 of Claimant's Post-Hearing Memorial).

<sup>693</sup> Claimant's Post-Hearing Memorial, ¶¶135, 163.

<sup>694</sup> Claimant's Post-Hearing Memorial, ¶¶160-161.

<sup>695</sup> Claimant's Post-Hearing Memorial, ¶¶135, 162, and 163.

<sup>696</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶68.

<sup>697</sup> Respondent's Post-Hearing Memorial, ¶212.

<sup>698</sup> Claimant's Reply to Respondent's Post-Hearing Memorial, ¶67.

*Respondent's Position*

538. Respondent claims the following costs:<sup>699</sup>

<b>Legal costs</b>	
Rowan Legal	€ 705,685.30
Weil, Gotshal & Manges	€ 814,134.73
Translation costs	€ 10,914.36
Mr. Zachary Douglas and Matrix Chambers	€ 166,407.95
Bennet Jones LLP	€ 11,881.85
Advocatfirman Lindhal KB	€ 7,927.16
Travel costs of representatives of the Ministry of Finance of the Czech Republic	€ 4,157.99
<b>Total legal costs claimed</b>	<b>€ 1,721,109.34</b>
<b>Arbitral costs</b>	
Advance payments towards the deposit	€ 149,500.00
Advance payment towards the deposit (26.05.2010)	€ 42,500.00
Court reporters	€ 10,792.56
Interpreters	€ 6,569.31
Costs of experts:	
- Josef Kotrba of Deloitte	€ 195,378.18
- Dr. Milan Hulmák	€ 10,649.24
Travel costs of fact witness Ms. Zlata Gröningerová	€ 1,264.67
<b>Total arbitral costs claimed</b>	<b>€ 416,653.96</b>
<b>TOTAL COSTS CLAIMED</b>	<b>€ 2,137,763.30</b>

539. In its Post-Hearing Memorial, Respondent reserved the right to supplement its costs submission concerning future costs.<sup>700</sup> Respondent filed its final figures on costs on 2 March 2010. On 26 May 2010, Respondent made a further payment of € 42,500.00 towards the deposit which has been reflected in the above table.

<sup>699</sup> Respondent's Post-Hearing Memorial, ¶211; Table attached to Respondent's Post-Hearing Memorial; Letter from Respondent attaching total summary of the Respondent's costs, dated 2 March 2010.

<sup>700</sup> Respondent's Post-Hearing Memorial, ¶192.

540. With respect to Claimant’s assertion that it should not have to bear certain allegedly “burdensome expenses”,<sup>701</sup> Respondent notes that Claimant failed to specify these expenses and how they were caused by Respondent. Respondent also notes that the change in the legal representation of Respondent led to no delay in the arbitration.<sup>702</sup> Respondent further argues that it submitted 141 exhibits with its Counter-Memorial – as opposed to the 359 exhibits accompanying Claimant’s Memorial – all of which were on time, in good order, and with translations (where applicable), in printed and electronic form. Respondent notes that Claimant’s exhibits were repeatedly submitted after the agreed deadline and without translations or, in some cases, Czech originals.<sup>703</sup> Respondent also objects to the amounts claimed by Claimant for payments to Tutterová, Blanka Owensová Translation Services, Transfin (Sup), Matusik, and for the attendance of Jewitt and Sanford at the hearing.<sup>704</sup>

*Tribunal’s Analysis*

541. As noted by the Parties, Article 40(1) of the UNCITRAL Rules provides that, in principle, the costs of arbitration shall be borne by the unsuccessful party, however, the Tribunal may apportion such costs between the Parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. Pursuant to Article 40(2), with respect to the costs of legal representation and assistance, the 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.

542. The Tribunal sees no reason to depart from the basic premise of Article 40(1) of the UNCITRAL Rules which provides that, except in relation to the costs of legal representation and assistance, 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. The Tribunal orders that the costs of arbitration shall be borne by Claimant as Claimant has not succeeded on any of its claims.

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<sup>701</sup> Claimant’s Post-Hearing Memorial, ¶163; Respondent’s Post-Hearing Memorial, ¶207.

<sup>702</sup> Respondent’s Post-Hearing Memorial, ¶¶208-209.

<sup>703</sup> Respondent’s Post-Hearing Memorial, ¶210.

<sup>704</sup> Respondent’s Post-Hearing Memorial, ¶212.

543. The Tribunal fixes the costs of arbitration and its fees in accordance with Articles 38 and 39 of the UNCITRAL Rules as follows:

- As per Articles 38(a) and 39 of the UNCITRAL Rules, the fees of the Tribunal members amount to € 268,110.00, *i.e.* Mr. Williams' fees total € 94,500.00, Mr. Alvarez's fees total € 86,805.00, and Mr. Schreuer's fees total € 86,805.00;
- As per Article 38(b) of the UNCITRAL Rules, the travel and other expenses of the Tribunal members amount to € 15,684.48, *i.e.* Mr. Williams' expenses total € 7,702.91, Mr. Alvarez's expenses total € 5,844.54, and Mr. Schreuer's expenses total € 2,137.03;
- As per Article 38(c) of the UNCITRAL Rules, the cost of (i) expert advice required by the Tribunal is nil; and (ii) other assistance required by the Tribunal, which is comprised of PCA fees totalling € 63,700.00, and costs of catering, court reporting, information technology services, courier fees, office supplies, PCA travel and accommodation expenses, technical and secretarial staff at the Peace Palace, transportation, award filing fee at The Hague District Court, and bank charges, amounting to € 46,090.64;
- With respect to Article 38(d) of the UNCITRAL Rules (the travel and other expenses of witnesses to the extent such expenses are approved by the Tribunal), the Tribunal notes that Claimant has not submitted sufficient detail for the Tribunal to determine whether its costs should be approved or not. The Tribunal finds that the costs claimed by Claimant in respect of witnesses are relatively high but the Tribunal takes the matter no further because its ultimate ruling is that Claimant must bear the costs of the arbitration so the Tribunal's approval makes no practical difference. Accordingly, the costs under Article 38(d) equal € 22,201.77 and are comprised of € 20,937.10 (CAD\$ 30,000 for the attendance of Jewitt and Sanford at the hearing) and € 1,264.67 (travel costs of fact witness Gröningerová); and,
- As per Article 38(f) of the UNCITRAL Rules, the Tribunal notes that no costs have been incurred by any appointing authority in this matter, nor by the Secretary-General of the PCA.

544. With respect to the costs of legal representation under Article 38(e) of the UNCITRAL Rules, the Tribunal considers that each party shall bear its own costs. The Tribunal finds

that Claimant's claim was not frivolous. Indeed, as noted in paragraphs 398 to 414 above, the procedure followed by the Czech courts in addressing Claimant's applications of 17 May 2005 and the bankruptcy proceedings against MA and LZ raised concerns of procedural fairness although the actions of the bankruptcy judges and trustees in the end were not causative and did not rise to the level of treaty breaches. Accordingly, for the sake of Article 38(e) of the UNCITRAL Rules, the costs for legal representation and assistance of the successful party are not included in the costs of arbitration.

545. The Tribunal fixes the costs of arbitration at € 415,786.89.

546. Claimant is ordered to pay over to Respondent € 198,057.23, *i.e.* one-half of the costs of arbitration under Articles 38(a)-(c) plus Respondent's witness costs approved under Article 38(d), within thirty days of receipt of this Final Award.

## **10. DECISIONS OF THE TRIBUNAL**

547. The Tribunal hereby:

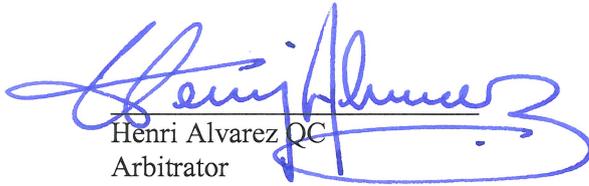
- (1) Dismisses Respondent's objections to the jurisdiction of the Tribunal.
- (2) Declares that Respondent has not violated the BIT with respect to Claimant's investment.
- (3) Dismisses all of Claimant's claims.
- (4) Fixes the costs of arbitration at € 415,786.89.
- (5) Orders Claimant to bear the costs of arbitration and pay over to Respondent its share of the costs of arbitration in the amount of € 198,057.23.
- (6) Orders each Party to bear its own costs for legal representation and assistance.

Place of arbitration: The Hague, The Netherlands

Date: *12 November 2010*



David A.R. Williams QC  
Presiding Arbitrator



Henri Alvarez QC  
Arbitrator



Christoph Schreuer  
Arbitrator