PCA Case No. 2018-18

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

- and -

THE UNCITRAL ARBITRATION RULES 1976

- between -

FYNERDALE HOLDINGS B.V.

(the "Claimant")

- and -

THE CZECH REPUBLIC

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

AWARD

The Arbitral Tribunal
Professor Dr. Dr. h.c. Rüdiger Wolfrum (President of the Arbitral Tribunal)
Dr. Wolfgang Kühn
Professor Laurence Boisson de Chazournes

Registry
The Permanent Court of Arbitration

29 April 2021

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GLOSSARY OF DEFINED TERMS

2013 Swiss Federal Court Judgment	Judgment of the Swiss Federal Court of 10 October 2013 and supplement of 29 November 2013; rectified on 30 May 2014
2016 Decision	Decision of the Police of the Czech Republic dated 8 February 2016
2017 Swiss Supreme Court Judgment	[redacted] contre Ministère public de la Confédération, Arrêt du 22 décembre 2017, Cour de droit pénal, 6B_688/2014 - with English translation
2018 Decision	Decision of the Police of the Czech Republic dated 20 December 2018
***Achmea* Judgment**	CJEU, *Slovak Republic v. Achmea*, 6 March 2018, Case C-284/16
Aida	Aida Export-Import s.r.o.
Answer	Answer on Jurisdiction of 29 April 2019
Appian 2	Appian Group 2, group of companies directed by Mr. [redacted]
Application	Application of 8 June 2020 by the EU to intervene as an *Amicus Curiae*
[redacted] **Statement**	Witness Statement of Mr. [redacted]
BIT(s)	Bilateral investment treaty (treaties)
Bohemia	Bohemia Profiinvest
[redacted] **Expert Report**	Expert report by Ms. [redacted] (K2 Intelligence)
CJEU	Court of Justice of the European Union
Claimant	Fynerdale Holdings B.V.
Contracting States	The Kingdom of the Netherlands and, in the present case, the Czech Republic (as successor of the Czech and Slovak Republics)
Court of Justice	Court of Justice of the European Union
DCCP	Dutch Code of Civil Procedure
EU	European Union
EU Treaties	TFEU and TEU
FAU	Czech Republic's Department of Financial Analysis of the Ministry of Finance
Fynerdale's UBOs	The ultimate beneficial owners of Fynerdale, Mr. [redacted] and Mr. [redacted]
[redacted] **Statement**	Witness Statement of Ms. [redacted]
[redacted] **Statement**	Witness Statement of Mr. [redacted]
MUS	Mostecká uhelná spolecnost, formally State-owned Czech coal company
MUS Fraud	Alleged money-laundering and embezzlement scheme that led to full ownership of MUS by certain individuals, including Fynerdale's UBOs
MUS 2	Mostecká Uhelná Společnost A.s., Pravni Nastupce
MUS 3	Mostecká Uhelná, A.S.
Newton	Newton Management
NFMG	Newton Financial Management Group A.S.
Notice of Arbitration	Notice of Arbitration of 19 December 2017
Notification of Facts	Complaint on behalf of Fynerdale to the Czech police of 26 March 2012, supplemented on 30 March 2012
NSI	Newton Stock Investment
[redacted] **Expert Report**	Expert report by Mr. [redacted] (Grant Thornton)

PCA	Permanent Court of Arbitration
Poppy Seed Merchants	The [redacted] and Mr. [redacted]
Prosecutor's Resolution	Resolution by the State Prosecutor of 25 September 2012
Ravileta	Czech company Ravileta
Reply	Reply on Jurisdiction of 28 January 2020
Rejoinder	Rejoinder on Jurisdiction of 27 March 2020
Resolution no. 1	Resolution initiating criminal prosecution against Mr. [redacted] Ms. [redacted] and Mr. [redacted] of 27 August 2012
Resolution no. 2	Second resolution of the Czech police on the commencement of criminal prosecution of 13 December 2013
Respondent	The Czech Republic
Statement of Claim	Statement of Claim and Jurisdiction and Liability of 15 November 2018
Submission on Jurisdiction	Submission of Jurisdiction of 14 February 2019
[redacted]	Mr. [redacted] and Mrs. [redacted]
Termination Agreement	Agreement for the Termination of Intra-EU Bilateral Investment Treaties, signed on 5 May 2020
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Treaty	Agreement between the Kingdom of the Netherlands and the Czech Republic for the Encouragement and Reciprocal Protection of Investments, signed on 29 April 1991
Tribunal	Arbitral Tribunal in the present case
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law of 1976
VCLT	Vienna Convention on the Law of Treaties, signed on 23 May 1969

I. INTRODUCTION

A. THE PARTIES

1. The Claimant in this arbitration is Fynerdale Holdings B.V., a company established and registered in the Netherlands, with a correspondence address at No. 11 L-Ufficcji, Misrah 28 ta'Frar 1883, Birkirkarara BKR 1501, Malta ("**Fynerdale**" or "**Claimant**"). The Claimant is represented in these proceedings by:

[redacted]
NautaDutilh N.V.
Beethovenstraat 400
1082 PR Amsterdam
The Netherlands

2. The Respondent in this arbitration is the Czech Republic, a sovereign State ("**Czech Republic**" or "**Respondent**"; together with the Claimant, the "**Parties**"). The Respondent is represented in these proceedings by:

[redacted]
Zeiler Floyd Zadkovich
Stubenbastei 2
1010 Vienna
Austria

H.E. Mr Ondřej Landa, Deputy Minister of Legal Affairs and Property of the State
Mr. Jaroslav Kudrna
Ms. Anna Bilanová
Ms. Kateřina Heroutová
Ms. Martina Matejová
Mr. Martin Nováček
Ministry of Finance of the Czech Republic
Letenská 15
118 10 Prague
Czech Republic

B. THE TRIBUNAL

3. The arbitral tribunal in the present case (the "**Tribunal**") is composed of:

(a) Dr. Wolfgang Kühn, appointed by the Claimant on 16 October 2018, whose address is Heuking Kühn Lüer Wojtek, Georg-Glock-Straße 4, 40474 Düsseldorf, Germany;

(b) Professor Laurence Boisson de Chazournes, appointed by the Respondent on 14 February 2018, whose address is 40, boulevard du Pont-d'Arve, 1211 Geneva 4, Switzerland; and

(c) Professor Dr. Dr. h.c. Rüdiger Wolfrum, appointed by the co-arbitrators as the presiding arbitrator on 12 March 2018, whose address is Max Planck Institute for Comparative Public Law and International Law, Im Neuenheimer Feld 535, 69120 Heidelberg, Germany.

4. Pursuant to the terms of appointment signed by the Parties and the Tribunal, the Permanent Court of Arbitration (the "**PCA**") provides administrative support in the present case and Dr. Dirk Pulkowski, Senior Legal Counsel, serves as Tribunal Secretary. The address of the PCA is Peace Palace, Carnegieplein 2, 2517 KJ, The Hague, the Netherlands.

C. THE DISPUTE

5. The Claimant alleges that the Respondent, by its acts and omissions, breached various provisions of the Agreement between the Government of the Kingdom of the Netherlands and the Government of the Czech and Slovak Republic (together, the "**Contracting States**") on encouragement and reciprocal protection of investments, signed on 29 April 1991 and entered into force on 1 October 1992 (the "**Treaty**").[1] In 1992, the Czech Republic succeeded to the Czechoslovak Republic, in respect of the Treaty. The Czech Republic has been recognized by the Kingdom of the Netherlands as an independent sovereign State as of 1 January 1993.[2]

6. The Claimant requests, among other things, damages provisionally quantified at CZK 2,438,178,229.

7. According to the Claimant, between 2007 and 2011, it invested over CZK 3 billion in the form of loans into the Czech Republic, to finance in particular the purchase of poppy seed. These loans were granted pursuant to an agreement with three individuals who had approached the Claimant with a business opportunity in the poppy seed market.

[1] Exhibit C-1, Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, 29 April 1991.

[2] *See* the website of the Dutch Ministry of Foreign Affairs on the bilateral relations between the Czech Republic and the Netherlands: https://www mzv.cz/hague/en/bilateral_relations/czech_dutch_bilateral_relations html.

8. According to the Claimant, however, a majority of these loans was not reimbursed, as the business opportunity was revealed to be a fraud, implemented by those individuals who had approached the Claimant. Consequently, the Claimant filed criminal complaints in 2012.

9. On 25 January 2017, the Czech courts issued a first instance judgment condemning the three individuals who had approached the Claimant.[3] This judgment was confirmed on 9 November 2017 by the High Court in Prague.[4]

10. The Claimant contends that the five-year delay between its criminal complaint and the issuance of the judgments represents an "unreasonable delay [… that] reduced the chance that (any of) the funds invested by Fynerdale could be recovered."[5] In comparison, it claims that the same sort of facts were dealt with in a much speedier fashion in an almost identical case where the victim was a Czech company.[6] The Claimant thus argues that the Czech Republic breached its obligations under the Treaty.

11. The Respondent in response considers that the Tribunal has no jurisdiction over the claims, because (i) there is no valid arbitration agreement following the accession of the Czech Republic to the European Union (the "**EU**"), as shown and confirmed by the decision of the Court of Justice of the European Union (the "**Court of Justice**" or "**CJEU**") in the case *Slovak Republic v. Achmea B.V.* (Case C-284/16) (the "***Achmea* Judgment**") and (ii) the investment was made in breach of Czech law, as evidenced by a judgment of the Swiss Supreme Court convicting *inter alia* the Claimant's ultimate beneficial owners for fraud. In any event, the Respondent argues, the Claimant's case is without merit.

D. BASIS OF THE ARBITRATION

12. The Claimant bases the jurisdiction of the Tribunal on Article 8 of the Treaty, which reads:

> 1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.
>
> 2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.
>
> 3) The arbitral tribunal referred to in paragraph (2) of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member

3 Exhibit C-3, Judgment of the Municipal Court in Prague, 25 January 2017.
4 Exhibit C-4, Judgment of the High Court in Prague, 9 November 2017.
5 Notice of Arbitration, para. 28.
6 Statement of Claim, paras. 80-82.

> of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal.
>
> 4) If the appointments have not been made in the above mentioned periods, either party to the dispute may invite the President of the Arbitration Institute of the Chamber of Commerce of Stockholm to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the most senior member of the Arbitration Institute who is not a national of either Contracting Party shall be invited to make the necessary appointments.
>
> 5) The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL).
>
> 6) The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> - the law in force of the Contracting Party concerned;
> - the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
> - the provisions of special agreements relating to the investment;
> - the general principles of international law.
>
> 7) The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute.

E. SCOPE OF THE AWARD

13. As recorded by the Tribunal in Procedural Order No. 1 dated 25 September 2018, the Parties agreed that the present proceedings should be bifurcated in two phases, one dedicated to the Respondent's jurisdictional objections and the second, if the Tribunal were to find jurisdiction, dedicated to the merits of the case and quantum.

14. The present award addresses only the Respondent's objections to the Tribunal's jurisdiction in this arbitration.

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION

15. On 19 December 2017, the Claimant commenced this arbitration by serving a Notice of Arbitration (the "**Notice of Arbitration**") on the Respondent, invoking Article 8 of the Treaty

and the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (the "**UNCITRAL Rules**"). In the Notice of Arbitration, the Claimant also notified the Respondent that it appointed Professor Francisco Orrego Vicuña as the first arbitrator.

16. Further to discussions between the Parties and the Tribunal between May and September 2018, the Tribunal issued Procedural Order No. 1, setting out the procedural framework for the arbitration in further detail, on 25 September 2018. In Procedural Order No. 1, the Tribunal *inter alia* noted and confirmed the Parties' selection of The Hague, the Netherlands, as seat of the arbitration.

17. Pursuant to the Procedural Calendar set out in Annex 1 to Procedural Order No. 1, the proceedings were bifurcated in jurisdictional and merits stages, with document production phases at both stages.

18. Having been informed on 3 October 2018 by the PCA, writing at the request of the President of the Tribunal, of Professor Orrego Vicuña's passing on 2 October 2018, the Claimant was invited to appoint a substitute arbitrator in accordance with Articles 7 and 13 of the UNCITRAL Rules. On 16 October 2018, the Claimant appointed Dr. Kühn.

19. On 30 November 2018, the PCA circulated the terms of appointment signed by the Parties and each member of the Tribunal.

20. On 15 November 2018, the Claimant submitted its Statement of Claim on Jurisdiction and Liability (the "**Statement of Claim**") accompanied by the witness statement CWS-1 of Ms. [redacted] (the '[redacted] **Statement**"). On 22 November 2018, the PCA received a complete electronic copy of these documents together with exhibits C-1 to C-24 and legal authorities CLA-1 to CLA-109.

21. The Respondent submitted its Submission on Jurisdiction (the "**Submission on Jurisdiction**") on 14 February 2019. The Respondent's Submission on Jurisdiction was accompanied by exhibits R-1 to R-14 and legal authorities RLA-1 to RLA-64.

22. On 29 April 2019, the Claimant submitted its Answer on Jurisdiction (the "**Answer**") accompanied by the witness statement CWS-2 of Mr. [redacted] (the '[redacted] **Statement**") and exhibits C-25 to C-49 and legal authorities CLA-110 to CLA-148.

B. FIRST DOCUMENT PRODUCTION PHASE

23. On 18 July 2019, the Tribunal issued Procedural Order No. 2 relating to the production of documents, ordering the Claimant to produce a series of documents requested by the Respondent and to produce by 8 August 2019 proof of its best efforts to seek documents held by a number of third parties, namely Mr. [redacted], Mr. [redacted], as well as the companies Camra, Virium, Appian Group 2 and Appian Services (Cyprus) Ltd.

24. On 8 August 2019, the Claimant produced some of the documents whose production had been ordered and submitted a Report Regarding Document Production on Jurisdiction indicating *inter alia* that it had reached out to Mr. [redacted], Mr. [redacted] and the above-cited companies by letter on 5 August 2019 and further called Mr. [redacted] and Mr. [redacted] on 7 and 8 August respectively. The Claimant further produced the replies issued by Mr. [redacted] and Mr. [redacted] indicating that the requested production of documents would take up to four months.

25. On 28 August 2019, the Respondent wrote to the Tribunal alleging that the Claimant had belatedly sought the cooperation of third parties and arguing that the delayed production of documents would result in procedural unfairness. The Respondent thus requested that the Claimant either be barred from submitting any further documents resulting from document production with its Rejoinder on Jurisdiction, or be ordered to produce all of the remaining documents in the possession of Mr. [redacted] and Mr. [redacted] within a short deadline, while granting a postponement for the submission of the Respondent's Reply on Jurisdiction.

26. On 30 August 2019, the Tribunal ordered the Claimant to:

> 1) Make immediate contact with Mr. [redacted] and Mr. [redacted], as well as the legal representatives of Camra, Virium, Appian Group 2, and Appian Services (Cyprus) Ltd.;
>
> 2) Request their urgent assistance in locating and producing, by 13 September 2019, any further documents falling within the categories whose production the Tribunal has ordered in Procedural Order No. 2; and
>
> 3) File, by the same date, a Supplementary Report Regarding Document Production on Jurisdiction, containing a chronology and description of all steps and measures that the Claimant has undertaken to obtain the documents in question.

The Tribunal further reserved any decision on the procedural timetable.

27. On 13 September 2019, the Claimant produced some documents whose production was ordered as well as a Supplementary Report Regarding Document Production on Jurisdiction. The Claimant separately wrote to the Tribunal to indicate that part of the requested documents would

not be available until 13 November 2019, requesting that it be granted until then to collect and produce the documents.

28. On 17 September 2019, the Respondent foreshadowed that it would not be in a position to review and analyse the newly produced documents in time for its Reply on Jurisdiction, due on 3 October 2019. On 20 September 2019, the Respondent requested an extension of at least fourteen days to submit its Reply. Furthermore, the Respondent requested that, if the Tribunal were to grant the Claimant's request for an extension until 13 November 2019 for the full production of the documents held by third parties, the deadlines for the second round of submissions be postponed *sine die* until the Respondent could review whatever documents were produced then.

29. On 24 September 2019, the Tribunal issued Procedural Order No. 3, by which it ordered the Claimant to produce by 13 November 2019 any further documents within the categories whose production the Tribunal ordered in Procedural Order No. 2 and which had not been produced until then, and to document its best efforts to obtain those documents from third parties in a second supplementary report. The Tribunal further decided to suspend the procedural calendar set out in Annex 1 to Procedural Order No. 1.

30. On 12 November 2019, the Claimant produced further documents whose production had been ordered, as well as a Secondary Supplementary Report Regarding Document Production on Jurisdiction. In particular, the Claimant indicated that it was producing documents from the Swiss criminal proceedings instituted against, *inter alia*, Mr. [redacted] and Mr. [redacted] in 2012, and further to contacts with specific people the Claimant had been ordered to reach out to.

31. On 19 November 2019, the Respondent wrote to the Tribunal indicating that it considered the Claimant's document production as of 12 November 2019 to be incomplete and non-compliant with the Tribunal's orders. The Respondent announced that it would address this issue and any related demands in its next submission. On 21 November 2019, the Claimant responded indicating that it regarded its document production to be complete and in accordance with the Tribunal's orders. The Tribunal took due note of the correspondence received from both Parties.

C. FURTHER WRITTEN SUBMISSIONS ON JURISDICTION

32. On 15 November 2019, the Tribunal requested that the Parties consult with each other with a view to reaching agreement on the remaining procedural steps for the jurisdictional phase of this case, and in particular the deadlines to be set for the second exchange of memorials on jurisdiction, by 27 November 2019.

33. On 27 November 2019, the Parties informed the Tribunal that they had reached agreement regarding the deadlines for the upcoming steps in the jurisdiction phase on the understanding – as indicated by the Tribunal by e-mail of 4 November 2019 – that the hearings would take place on 28-30 April 2020. These dates were confirmed by the Tribunal in Procedural Order No. 4 of 20 December 2020.

34. In accordance with the revised procedural calendar set out in Annex I of Procedural Order No. 4, on 28 January 2020, the Respondent submitted its Reply on Jurisdiction (the "**Reply**"), accompanied by the expert report of [redacted] of K2 Intelligence (the "[redacted] **Expert Report**"), exhibits R-15 to R-35 and legal authorities RLA-79 to RLA-173.

35. On 27 March 2020, the Claimant submitted its Rejoinder on Jurisdiction (the "**Rejoinder**") along with the expert report of Mr. [redacted] of Grant Thornton (the "[redacted] **Expert Report**"), a witness statement CWS-3 from Mr. [redacted] (the "[redacted] **Statement**"), exhibits C-85 to C-90 and legal authorities CLA-149 to CLA-185. The Claimant further indicated that, due to the exceptional circumstances of the Covid-19 pandemic, it had "not been able to access all the documents that are potentially relevant to its Rejoinder on Jurisdiction or the expert report submitted with the Rejoinder on Jurisdiction." The Claimant thus "reserve[d] the right - subject to the Tribunal's approval - to submit new documents prior to the hearing" and indicated that it would "make its best efforts not to delay the procedural timetable in this respect and inform the Tribunal and the Respondent immediately."

D. POSTPONEMENT OF THE HEARING ON JURISDICTION SCHEDULED IN APRIL 2020 DUE TO THE COVID-19 PANDEMIC

36. Pursuant to Procedural Order No. 4, the hearing on jurisdiction (the "**Hearing**") was scheduled to take place on 28 to 30 April 2020.

37. On 11 March 2020, in order to prepare for the upcoming Hearing, the Tribunal communicated to the Parties a draft of Procedural Order No. 5, addressing certain procedural matters not dealt with in Procedural Order No. 1, such as the allocation of time, the format of hearing and cross-examination bundles as well as demonstrative exhibits.

38. On 30 March 2020, the PCA wrote to the Parties on behalf of the President of the Tribunal to inform them that, due to the propagation of COVID-19 in Europe and considering the restrictions on travel and gatherings in the Netherlands, it was unlikely that an in-person hearing could be held in late April. As such, the Tribunal invited the Parties to consider whether the Hearing could

be held by video-conference, and any amendments of draft Procedural Order No. 5 that may be required.

39. On 2 April 2020, the Parties indicated that they considered that it would not be feasible to hold the Hearing by video-conference, in particular given that witnesses and experts would be cross-examined during the course of the Hearing. Both Parties thus requested the Tribunal to postpone the hearing until the fall of 2020.

40. On 7 April 2020, the Claimant called the Respondent's expert, Ms. [redacted] for cross-examination, while the Respondent called two of the Claimant's witnesses – Mr. [redacted] and Mr. [redacted] – as well as the Claimant's expert, Mr. [redacted], for cross-examination.

41. The Parties further provided comments on draft Procedural Order No. 5. The Parties indicated that they had agreed that they would file one round of post-hearing briefs in place of closing statements, with time and page limits to be agreed between them or to be determined by the Tribunal at the Hearing. These elements were incorporated in Procedural Order No. 5 dated on 21 April 2020, in which the Tribunal further fixed the dates of the Hearing from 1 to 3 September 2020.

E. THE EUROPEAN COMMISSION'S *AMICUS CURIAE* APPLICATION

42. On 8 June 2020, the European Commission filed an application for leave to intervene as *amicus curiae* in the current proceedings (the "**Application**"). In its Application, the European Commission explained:

> Articles 267 and 344 [… of the Treaty on Functioning of European Union] must be interpreted as precluding a provision in an international agreement concluded between Member States, **such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic**, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.
>
> Following the *Achmea* judgment, the European Commission decided to request leave to intervene in all pending intra-EU arbitration proceedings.

43. The European Commission thus requested the Tribunal to (i) grant the Commission leave to intervene in the present proceedings; (ii) accept the written *amicus curiae* submission attached to the present request, or set a deadline for the Commission to file such a submission; and (iii) allow the Commission to attend hearings in order to present oral argument and reply to the questions of the Tribunal at those hearings, should the Tribunal and the parties deem that useful.

44. On 3 July 2020, the Parties submitted their comments on the Application. The Claimant argued that the Tribunal should reject it, while the Respondent supported its admission.

45. On 16 July 2020, the Tribunal issued Procedural Order No. 6, accepting the European Commission's *amicus curiae* brief into the record of the arbitration on the basis that, without prejudice to the Tribunal's views as to any positions stated in that brief, the Tribunal considered that the European Commission may have a distinct perspective pertaining to the jurisdictional phase of the arbitration. The Tribunal rejected the European Commission's request to attend hearings in order to present oral argument.

F. REQUEST FOR SUBMISSION OF DOCUMENTS BY THE CLAIMANT BEFORE THE HEARING

46. Referring to an "ease of some Covid-19 restrictions", the Claimant informed the Respondent and the Tribunal on 20 August 2020 that it had been able to access some additional documents that turned out to be relevant for substantiating its position, enclosing seven new exhibits. The Claimant stated that it believed that the documents were submitted timely enough for the Respondent to take these into account in its preparation for the Hearing.

47. On 24 August 2020, the Respondent requested the Tribunal to reject the proposed new exhibits as belated, arguing that (i) the Claimant had failed to explain which "restrictions" kept it from accessing these documents earlier, (ii) the Claimant did not state which measures had been eased, and how this allowed any person to access these documents now, as opposed to weeks or even months earlier, and (iii) the timing of the submission did not leave the Respondent sufficient time to comment and submit counter-evidence as the Respondent is entitled to under paragraph 6.4 of Procedural Order No. 1.

48. On 28 August 2020, the Claimant provided additional explanation in support of its application to admit the new exhibits into the record, and on 31 August 2020, the Respondent elaborated on the reasons for its request to deny the Claimant's request.

49. Having heard the Parties on the issue during the first day of the hearing on 1 September 2020, the Tribunal ruled that the seven new exhibits submitted by the Claimant were inadmissible as the Claimant had been unable to provide sufficient justification for their late submission.

G. HEARING

50. The Hearing took place as scheduled between 1 and 3 September 2020 at the Peace Palace in The Hague. In light of the travel restrictions imposed by the COVID-19 pandemic, some participants attended by video-conference.

51. The Hearing was attended by:

(a) The Tribunal: Professor Dr. Dr. h.c. Wolfrum, Dr. Kühn, and Professor Boisson de Chazournes;

(b) For the Claimant: Ms. [redacted] Dr. [redacted], Ms. [redacted] and Prof. Dr. [redacted] as counsel; Ms. [redacted] and Mr. [redacted] as Party representatives;

(c) For the Respondent: Dr. [redacted], Dr. [redacted] Mr. [redacted] Mr. [redacted] and Ms. [redacted] as counsel; Mr. Landa, Ms. Matejová, Ms. Bilanová, and Mr. Kudrna as Party representatives;

(d) For the Permanent Court of Arbitration, Dr. Pulkowski and Ms. Andrea Lapunzina Veronelli (by video-conference).

(e) Mr. [redacted] and Mr. [redacted] (by video-conference) as witnesses;

(f) Ms. [redacted] (by video-conference) and Mr. [redacted] as experts.

52. The first day of the Hearing was dedicated to the Parties' opening statements. During the second day of the Hearing, the Parties' experts, Ms. [redacted] and Mr. [redacted] testified before the Tribunal. On the third day of the hearing, Mr. [redacted] and Mr. [redacted] testified as witnesses before the Tribunal.

53. At the end of the Hearing, on 3 September 2020, the Tribunal invited the Parties to consult with each other in respect of the contents and format of their post-hearing briefs.

54. In response, counsel informed the Tribunal that the Parties had agreed to submit their post-hearing briefs by 23 October 2020. The Parties further agreed that "[n]ew factual exhibits may be submitted on the questions posed to the parties today [*i.e.* on Day 3], not on any other issues."[7] In contrast, the Parties agreed that they could "re-address issues such as the *Achmea* objection, the

7 Hearing Transcript, Day 3, 160:02-03.

illegality objection and [… could] also there discuss and digest the answers given to questions of the Tribunal to the witnesses, but on those points, no new factual exhibits will be submitted."[8] The Tribunal confirmed the Parties' agreement.

H. POST-HEARING PHASE

55. On 23 October 2020, both Parties submitted post-hearing briefs, enclosing a limited number of factual and legal exhibits.

56. On 30 October 2020, the Claimant wrote to the Tribunal requesting it "to reject Exhibits R-36, R-37 and R-42, as well as the arguments made on the basis of these Exhibits, as belated and contrary to the express instructions of the Tribunal," arguing that the new documents did not relate to questions asked by the Tribunal on Day 3 of the Hearing.

57. On 3 November 2020, the Respondent opposed the Claimant's request, arguing that those exhibits "pertain to questions asked by the Tribunal on Day 3 of the Hearing," that "the Tribunal at the Hearing explicitly asked about the status of the criminal proceedings," and that the exhibits are significant "to clarify that statements made by Claimant in its Post Hearing Brief are false."

58. On 11 November 2020, the Tribunal issued Procedural Order No. 8, in which it admitted Exhibits R-36 and R-37 into the record without prejudice to the Tribunal's views as to their relevance and materiality or the probative weight to be given to them, and invited the Claimant to provide comments on these documents by 20 November 2020. The Tribunal further ruled that Exhibit R-42 was inadmissible and, consequently, both the exhibit and all references to its content would be disregarded by the Tribunal.

59. On 19 November 2020, the Claimant, on behalf of both Parties, informed the Tribunal that the Parties had agreed to submit a second round of post-hearing briefs, limited to 35 pages, by 13 January 2021. Further to the Parties' agreement, this second round of post-hearing briefs was to be limited to responding to the arguments raised in the first post-hearing briefs with respect to the jurisdictional objections of illegality and the indirect investment, with a focus on the newly submitted (factual) exhibits regarding these two jurisdictional objections. The Claimant additionally requested that it be allowed to provide comments on Exhibits R-36 and R-37 in its second post-hearing brief.

[8] Hearing Transcript, Day 3, 161:07-16.

60. On 20 November 2020, the Tribunal, after receiving confirmation from the Respondent of the Parties' agreement on 19 November 2020, noted the Parties' agreement and granted the Claimant's request to comment on the abovementioned exhibits.

61. On 12 and 13 January 2021, the Parties exchanged their second post-hearing briefs.

62. On 26 January 2021, the Respondent wrote to the Tribunal, indicating that the Claimant had made "at least two new arguments in its submission and thereby disadvantaged Respondent which now lacks an opportunity to make a rebuttal." The Respondent thus considered that the Claimant's arguments that the Respondent cannot rely on the illegality defence due to (i) corruption of a Czech official involved and (ii) the discontinuance of local Czech proceedings against the Claimant's UBOs in view of the lack of evidence were new arguments. Consequently, the Respondent requested that the Tribunal either dismiss these arguments as belated or authorize the Respondent to answer in a brief, two-page submission.

63. On the same date, upon the Tribunal's invitation, the Claimant replied that it was "obvious that a party may make new statements in a second PHB if they respond to arguments raised (for the first time) by the other party in the first PHB", as it alleged was the case here. Noting that the Parties had exchanged a total of eight submissions at this stage, the Claimant requested that the Tribunal deny the Respondent's request and proceed with the issuance of the award on jurisdiction.

64. On 1 February 2021, the Tribunal adopted Procedural Order No. 9, indicating that, at the present stage, the Tribunal considered that no further submissions from the Parties were necessary or appropriate. The Tribunal stated that it would consider the admissibility of the Claimant's arguments in the context of its deliberations on the Respondent's objections to the Tribunal's jurisdiction.

65. Having regard to the Parties' views, including the correspondence exchanged on 26 January 2021, the Tribunal now concludes that Procedural Order No. 1, in paras 6.3 and 6.4, limits only the ability of the Parties to adduce belated evidence. Procedural Order No. 1 does not exclude, however, that new arguments can be made. The Tribunal notes that the discontinuation of the Czech proceedings is not a new fact. What is new is only the Claimant's legal argument that the Respondent's defence should therefore precluded. Equally, the possibility of Czech officials having been involved in the bribery is not a new fact in itself although it was not specified earlier. Therefore, both objections are technically not covered by Procedural Order No. 1, paras 6.3 and 6.4.

66. However, in the interest of procedural fairness, the Tribunal may still use its power under Article 15 of the UNCITRAL Rules and exclude an argument as belated or to allow a response thereto, if appropriate. This is not necessary if the Tribunal considers the arguments advanced as unconvincing in any event. This is the case here and the Tribunal will turn to these two issues below.[9]

III. REQUESTS FOR RELIEF

A. THE RESPONDENT'S REQUEST

67. In its Submission on Jurisdiction, the Respondent requested the Tribunal:

> a) to declare that it lacks jurisdiction to hear Claimant's claims, and hence to dismiss its claims;
>
> b) *in eventu* to declare that the Claimant's claims are inadmissible, and hence to dismiss Claimant's claims;
>
> c) in either case, to order Claimant to reimburse Respondent for all costs, fees and expenses incurred in relation to these proceedings.[10]

68. The Respondent reiterated its request for relief in its Reply and its Post-Hearing Briefs.[11]

B. THE CLAIMANT'S REQUEST

69. In its Statement of Claim, the Claimant requested that the Tribunal:

> (a) DECLARE that the Czech Republic has violated its obligations to Fynerdale under the BIT;
>
> (b) DECLARE AND ORDER the Czech Republic to pay damages to Fynerdale in the amount of CZK 2,438,178,229;
>
> (c) DECLARE AND ORDER the Czech Republic to pay Fynerdale interest over the sum referred to above under (b) from the date of the to-be-rendered (Final) Award until the date of final payment; and
>
> (d) DECLARE AND ORDER the Czech Republic to pay all of the costs of this Arbitration, including the fees, costs and expenses of the Arbitral Tribunal, Fynerdale's legal fees and expert fees, and all other costs and expenses that Fynerdale has incurred in connection with this Arbitration and the attempt at amicable settlement of the dispute.[12]

9 *See* para. 520.
10 Respondent's Submission on Jurisdiction, 14 February 2019, para. 316.
11 Reply, para. 393; Respondent's Post-Hearing Brief, para. 201; Respondent's Second Post-Hearing Brief, para. 89.
12 Statement of Claim, para. 242.

70. In its Answer, the Claimant further requested that the Tribunal:

> a. DECLARE that the Tribunal has jurisdiction and to proceed to the merits of the case;
>
> b. DISMISS all the claims of the Czech Republic contained in its Submission on Jurisdiction;
>
> c. DECLARE AND ORDER the Czech Republic to pay all the costs of this Arbitration, including the fees, costs and expenses of the Arbitral Tribunal, Fynerdale's legal fees and expert fees, and all other costs and expenses that Fynerdale has incurred in connection with this Arbitration and the attempt at amicable settlement of the dispute.[13]

71. In its Rejoinder, the Claimant requested the Tribunal to further dismiss all of the Respondent's claims submitted in its Reply on Jurisdiction.[14]

72. In its Post-Hearing Briefs, the Claimant reiterated its requests.[15]

IV. FACTUAL BACKGROUND

73. While the facts are overall agreed between the Parties, the Parties' views differ starkly with regard to the origins of the funds used by Fynerdale for making its loan-based investments.

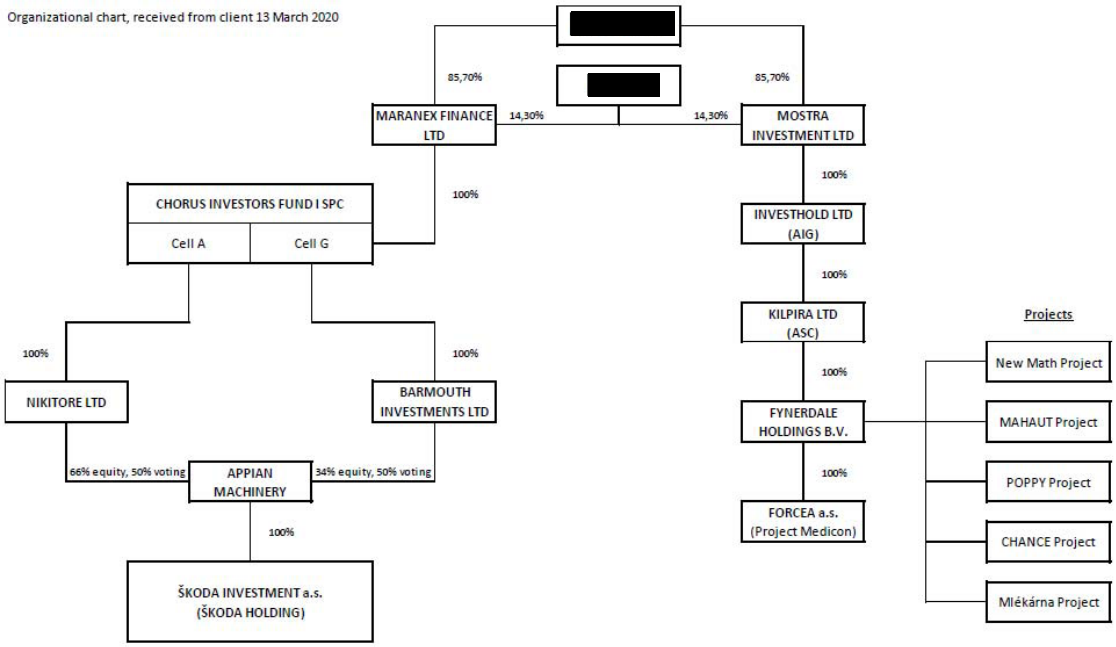
74. Before proceeding to the facts relied upon by the Parties, the Tribunal considers it necessary to briefly recall the history and corporate structure of Fynerdale as presented by the Parties.

A. CORPORATE STRUCTURE OF FYNERDALE

75. Fynerdale is a Dutch company, incorporated in 1993,[16] whose "statutory corporate objectives include the establishing and obtaining of, the taking part in, the working with, the directing of, as well as the financing of other businesses and the provision and conclusion of loans."[17] Its immediate shareholder is Appian Services (Cyprus) Ltd, a company incorporated in Cyprus.[18] Its ultimate beneficiary owners are Mr. [redacted] and Mr. [redacted] ("**Fynerdale's UBOs**"), two Czech nationals.[19] Mr. [redacted] also acted as advisor to Fynerdale.[20]

13 Answer, 29 April 2019, para. 200.
14 Rejoinder, 27 March 2020, para. 162.
15 Claimant's Post-Hearing Brief, 23 October 2020, para. 145; Claimant's Second Post-Hearing Brief, para. 85.
16 Exhibit C-22, Fynerdale's articles of incorporation, 3 August 1993 and Exhibit C-23, Amendment of Fynerdale's articles of incorporation, 27 July 2004.
17 Statement of Claim, para. 11.
18 Submission on Jurisdiction, para. 169; Exhibit R-7, Excerpt from the Commercial Register.
19 Statement of Claim, para. 16.
20 Exhibit C-5, [redacted] s Protocol of witness interrogation, 26 November 2014, p. 6 (PDF, p. 23).

76. Fynerdale is part of a group of entities and has multiple business activities, including a hospital-related project and gaming for sports projects.[21] Another company belonging to the same group of companies as Fynerdale is Škoda Investment a.s., which had a role to play in the investment made by Fynerdale in the Czech Republic. The Claimant's expert, Mr. [redacted] provided the following organizational charge with his report:



([redacted] Expert Report, p. 4)

B. INVESTMENT STRUCTURE OF FYNERDALE

77. In anticipation of making a loan-based investment in the poppy seed market in the Czech Republic, Fynerdale created and acquired a series of companies with its business partners, principally Ms. [redacted] a poppy seed merchant in the Czech Republic, and Newton Management ("**Newton**"), a company of which Fynerdale's UBO Mr. [redacted] had previously been a partner.[22]

78. First, Fynerdale, together with Ms. [redacted] and Newton, acquired in May 2007 Ytrix, a Czech company founded in February 2007[23] that would be the beneficiary of loans granted by

21 Claimant's Post-Hearing Brief, para. 107, *referring to* Hearing Transcript Day 3, 45:21-47:04.
22 Statement of Claim, paras. 16 and 18.
23 [redacted] Statement, para. 6.

Fynerdale.[24] Ms. [redacted] held a 95% shareholding in Ytrix, while Newton held 4% and Legate – a subsidiary of Fynerdale – held 1%. Ytrix's board of directors comprised Ms. [redacted] herself, Mr. [redacted] on behalf of Newton and Mr. [redacted] on behalf of Fynerdale.[25]

79. Second, Fynerdale and Newton established a joint venture through the company Poppyseed. Poppyseed was incorporated in Malta on 6 June 2007, directly owned by Cypriot company Masando Ltd, which itself was held by three Czech citizens, including Mr. [redacted] [26] Poppyseed was directed by Mr. [redacted] with the assistance of Dr. [redacted] who implemented instructions from the Czech shareholders.[27] In 2010, Mr. [redacted] became its beneficial owner.[28] According to the Claimant, "Fynerdale and Newton agreed that Mr [redacted] would be in charge of the daily control of the investment through Poppyseed, also on behalf of Fynerdale. As a result, Mr [redacted] communicated with the representatives of Fynerdale."[29]

80. The structure described above was chosen "[a]s Mrs. [redacted] did not want to be a shareholder of a foreign company". Accordingly, "it was agreed that Mrs. [redacted] would perform her share through Ytrix, and Fynerdale and [Newton Management] mainly through Poppyseed Limited."[30]

81. The loans would be granted to Ytrix via Poppyseed.[31] Poppyseed's profits would eventually be used to reimburse the loans, with such profits to be distributed between Fynerdale ($^4/_7$) and Newton ($^3/_7$).[32] While legally owned by a third company, Poppyseed was, according to the Claimant, *de facto* under Fynerdale's control.[33]

82. In 2010, the shares in Poppyseed were transferred to Breway, another company of which another third party was the sole shareholder. At this time, according to Mr. [redacted], "it was agreed that the company Breway would act on Fynerdale's instructions."[34] Moreover, "all initial profit

24 Statement of Claim, paras. 27-28, *referring to* Exhibit C-7, Indictment by the Metropolitan Prosecuting Attorney in Prague, 5 February 2016, p. 8.
25 Answer, para. 179. Claimant's Post Hearing Brief, para. 12.
26 Submission on Jurisdiction, paras. 265-266, *referring to* Exhibit R-13, Witness Statement of [redacted] before Courts of Magistrates (Malta), 22 October 2014, pp. 4, 7, 12 and 13.
27 Reply, para. 315.
28 Exhibit C-7, Indictment by the Metropolitan Prosecuting Attorney in Prague, 5 February 2016 (PDF p. 44).
29 Claimant's Post-Hearing Brief, para. 13, *referring to* [redacted] Statement, para. 9
30 [redacted] Statement, para. 7.
31 Statement of Claim, para. 30.
32 [redacted] Statement, para. 9.
33 Answer, para. 181. This issue is disputed by the Parties (*see* Section V.C.4.d).
34 Answer, para. 182, *referring to* [redacted] Statement, para. 11.

sharing agreements were terminated."[35] Later, in 2015, the shares of the company were transferred to the company Goldfield & Partners.[36]

C. FYNERDALE ENTERS THE POPPY SEED TRADE MARKET

83. In 2006, following an invitation from Newton, a company in which one of its UBOs had previously held an interest, Fynerdale decided to pursue a business opportunity in the poppy seed market,[37] namely through the grant of loans relating to the financing of poppy seed trade.

84. That same year, Fynerdale issued a first loan to Newton, which was fully reimbursed in principal and with the interest.[38] Following this first positive transaction, Newton introduced Fynerdale to three individuals, namely Ms. [redacted] and her husband, Mr. [redacted] (together, "**the [redacted]**") and Mr. [redacted], who were all involved in the poppy seed trade market (together, the "**Poppy Seed Merchants**").[39] Shortly thereafter, Fynerdale decided to become involved in the business of the poppy seed trade by means of its participation in a holding company, Poppyseed, and the grant of loans for the acquisition of poppy seed to Poppyseed.

85. According to the Claimant, the poppy seed trade mechanism was intended to work as follows:

(a) Fynerdale would grant loans to Ytrix either directly or through Poppyseed;

(b) Ytrix would then buy poppy seed from three Czech companies that were all controlled by the [redacted] and/or Mr. [redacted] Agrobyskovice, Bohemia Profiinvest ("**Bohemia**") and Aida Export-Import s.r.o. ("**Aida**"); the origin of the poppy seeds themselves was not communicated to Newton and the Claimant, as Ms. [redacted] wished to keep this information undisclosed;[40]

(c) Poppyseed would also purchase some poppy seed directly, from one of the three Czech companies controlled by the [redacted] and/or Mr. [redacted];

(d) The Czech company – be it Agrobyskovice, Bohemia or Aida – would store, clean, mix and pack the purchased poppy seed;

35 Answer, para. 182, *referring to* [redacted] Statement, para. 11.
36 Answer, para. 183, *referring to* Exhibit C-49.
37 Statement of Claim, para. 15; Answer, para. 175.
38 Statement of Claim, para. 20.
39 *Id.*, paras. 22-24.
40 *Id.*, para. 32. *See also* Exhibit C-5, [redacted] s Protocol of witness interrogation, 26 November 2014, p. 6 (PDF p. 23).

(e) Ytrix and Poppyseed would sell the poppy seed (through Poppyseed) to Tadorna, a company owned by Mr. [redacted]

(f) Tadorna would finally sell the poppy seed to domestic and international buyers.

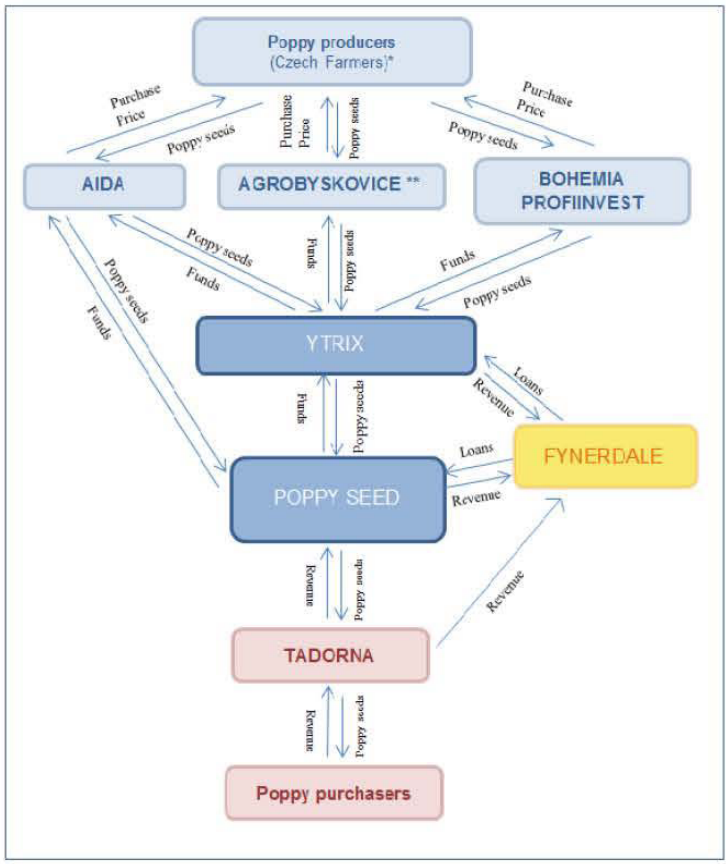
86. Following the sale, the profits made would finance the refund of the loans granted by Fynerdale,[41] through payments by Tadorna, Ytrix or Poppyseed.[42] According to Mr. [redacted]

> The agreement was that Ytrix could only purchase the poppy, with its main customer being Poppyseed. The agreement with Fynerdale was that the trade would go on for 4 years (2007-2001) [sic], and then its success rate would be assessed. The principal would be returned with interest. If this went well, Newton would be paid a commission for getting involved. There was a potential to carry on.[43]

87. The profits coming of the sale of poppy seed would be distributed as follows: 40% granted to Fynerdale, and 30% each for Ms. [redacted] and Newton.[44] Thus, according to the Claimant, the intended business model was as follows:

41 Statement of Claim, section 3.2, paras. 30-35.
42 Answer, para. 177.
43 Exhibit C-5 [redacted] s Protocol of witness interrogation, 26 November 2014, p. 4 (PDF p. 21).
44 Answer, para. 178.

DECLARED BUSINESS MODEL



* Identity of the Czech farmers was concealed to the investor.
** Agrobyškovice would store, clean, mix and pack the seeds before the dispatch. See contract on cleaning and blending of the goods dated 10 May 2008 (Exhibit C-8) and see also contract on storing the goods dated 10 May 2008 (Exhibit C-9).

(Statement of Claim, p. 12)

88. Over the course of the following years, relying on the exchanges with its partners and various site visits by its representatives, Fynerdale extended a number of loans to Ytrix and Poppyseed (the "**Loans**"): [45]

Loan	Date	Amount (in CZK)	Due Date	Duration	Interest Rate	Borrower
Loan 1	1 March 2007	43,000,000	Unknown	Unknown	Unknown	Aida, which assigned the debt to Ytrix on 22 May 2007

45 Statement of Claim, paras. 36-41. *See also* Exhibit C-3, Judgment of the Municipal Court in Prague, 25 January 2017, pp. 68-70 (PDF pp. 217-219).

Loan	Date	Amount (in CZK)	Due Date	Duration	Interest Rate	Borrower
Loan 2	9 July 2007	94,500,000	October 2007 (prolonged until October 2008)	3 months (prolonged to an extra year)	15% p. a.	Ytrix
Loan 3	11 August 2007	677,500,000	30 September 2011	4 years and 1 month	12% + 3M PRIBOR	Poppyseed
Loan 4	21 May 2008	470,000,000	6 October 2008	4 months	15% p. a.	Poppyseed/Ytrix[46]
Loan 5	21 October 2008	545,000,000	31 August 2009	11 months	15%	Poppyseed/Ytrix[46]
Loan 6[47]	11 May 2009	436,000,000	15 November 2009	5 months	30% p. a.	Ytrix
Loan 7[48]	20 May 2009	260,000,000	November 2009	6 months	15% p.a.	Poppyseed
Loan 8[49]	5 February 2010	500,000,000	May 2010	3 months	30% p.a.	Poppyseed
Loan 9[50]	9 May 2011	50,000,000	August 2011	3 months	15% p.a.	Ytrix

46 The entity to which Loans 4 and 5 were granted is in debate between the Parties. *See* Statement of Claim, para. 41; Submission on Jurisdiction, para. 198 (attributing both to Poppyseed).

47 Exhibit C-12, Credit Agreement from Fynerdale to Ytrix, 11 May 2009.

48 Exhibit C-13, Credit Agreement from Fynerdale to Poppyseed, 20 May 2009. *See also* Statement of Claim, para. 42.

49 Exhibit C-14, Credit Agreement from Fynerdale to Poppyseed, 5 February 2010. *See also* Statement of Claim, para. 43.

50 Exhibit C-15, Credit Agreement from Fynerdale to Ytrix, 9 May 2011. *See also* Statement of Claim, para. 44.

89. The fact that Fynerdale paid out all nine Loans to either Poppyseed or Ytrix is not in dispute between the Parties and is furthermore supported, for Loans 4 to 9, by Fynerdale's bank statements.[51]

90. According to the [redacted] Expert Report, based on the Claimant's bank accounts and notwithstanding the facts alleged in the Statement of Claim, Loans 4, 5, 6 and 9 were issued to Ytrix, possibly through Poppyseed.[52] The [redacted] Expert Report reached the same conclusions.[53] At the Hearing, the Claimant stated that "[t]hree of the nine loans were invested indirectly in the Czech Republic, namely through the Maltese company Poppyseed".[54]

91. The origin of the funds used to finance such Loans is a matter in dispute.[55]

92. By 2009, Fynerdale was repaid in full for Loans 1, 2, 4 and 5.[56] Although Loan 3 was still outstanding, Fynerdale granted four further loans to fund the poppy seed trade. According to the Claimant, these four last loans – Loans 6, 7, 8, and 9 – also remain outstanding.[57]

93. Throughout this period, the Claimant states, there was no reason for it to feel concerned. Indeed, Ms. [redacted] and Mr. [redacted] Newton's representative in Ytrix, were in regular contact with each other, notably exchanging business plans.[58] Mr. [redacted] visited the warehouse "twice or three times a year" and reported his "justified impression that the warehouses were full of poppy seed."[59] At that point, there was no reason to feel concerned.[60] Moreover, one of Fynerdale's UBOs, Mr. [redacted] acted as consultant on the granting of these loans.[61]

51 Exhibit GT-3, Relevant Bank Payments Fynerdale related to Loans; Exhibit GT-5, Bank Statements – CZK 470.000.000 May 2008 re. loan 4; Exhibit GT-7, Tadorna s.r.o. balance 31-12-2008 and PL account 2008; Exhibit GT-9, Bank statements CZK 436.000.000 May 2009 re. loan 6; Exhibit GT-11, Bank statements CZK 260.000.000 May 2009 re. loan 7; Exhibit GT-13A, ASC bank statement receipt CZK 500 mln Febr 2010 re. loan 8; Exhibit GT-13B, APM bank statement CZK 500m Chorus Inv.Fund re loan 8; Exhibit GT-15, Fynerdale bank movements Komercni 2 March – 11 May 2011; Exhibit GT-16, ASC bank statements 2011 re loan 9.

52 [redacted] Expert Report, para. 4.15; *See also* Sections 9, 10, 11 and 14.

53 [redacted] Expert Report, paras. 4.4.2; 4.4.3; 4.4.4; 4.4.7.

54 Hearing Transcript, Day 1, 125:15-17.

55 *See* Section V.C.2 below.

56 Statement of Claim, para. 42.

57 *See* Statement of Claim, paras. 3-4.

58 Claimant's Post-Hearing Brief, para. 26, *referring to* Exhibit C-3, Judgment of the Municipal Court in Prague, 25 January 2017 and Exhibit C-5, [redacted] s Protocol of witness interrogation, 26 November 2014.

59 Claimant's Post-Hearing Brief, para. 24, *referring to* Hearing Transcript Day 3, 136:3-16.

60 Statement of Claim, paras. 40-41.

61 Submission on Jurisdiction, para. 166, *referring to* Exhibit C-3, Judgment of the Municipal Court in Prague, 25 January 2017, p. 6.

94. However, in 2010, Ms. [redacted] informed Fynerdale that Ytrix would not be able to pay back its current loans due to the slowing down of the economy. At this time, Ms. [redacted] also suggested that Ytrix acquire all available stocks of poppy seed, the price of which had dropped, in order to sell them later on for a better margin. Fynerdale, allegedly "convinced by what seemed a reasonable explanation for the non-payment of the loans and a good opportunity to maximize benefits", further granted Loan 8.[62] At the time, Poppyseed's director, Mr. [redacted], understood this loan as having been granted to Poppyseed by a Dutch bank.[63]

95. A final loan – Loan 9 – was made in May 2011 to Ytrix, for an additional CZK 50 million, "to finance the purchase of nut mix."[64]

96. Thus, "between 2007 and 2010 Fynerdale had gradually invested a total of CZK 3,026,000,000 into the poppy seed trade and CZK 50,000,000 into the nut mix trade by way of nine credit agreements, through Ytrix and Poppyseed."[65] This amount was purportedly used to finance the purchase of over 123,000 tons of poppy seed[66] – an unrealistic amount according to the witness testimony of Mr. [redacted], co-founder and chairman of an association of poppy-seed growers, traders and university experts.[67]

D. THE ALLEGED FRAUD TO THE DETRIMENT OF THE CLAIMANT

97. In 2010, "[a]s first problems with the poppy seed trades appeared", Poppyseed's shares were transferred to Breway.[68] This, according to Mr. [redacted] was decided in addition to the cancellation of all initial profit sharing agreements, "as it was very likely that Mrs [redacted] was acting fraudulently and Fynerdale suffered enormous losses."[69]

62 Exhibit C-14, Credit Agreement from Fynerdale to Poppyseed, 5 February 2010. *See also* Statement of Claim, para. 43.

63 Exhibit R-13, Witness Statement of [redacted] before Courts of Magistrates (Malta), 22 October 2014, pp. 6 and 8.

64 Statement of Claim, para. 44. *See also* Exhibit C-3, Judgment of the Municipal Court in Prague, 25 January 2017, p. 70 (PDF p. 219).

65 Statement of Claim, para. 45. *See also* Exhibit C-3, Judgment of the Municipal Court in Prague, 25 January 2017, p. 70 (PDF p. 219).

66 Submission on Jurisdiction, para. 191, *referring to* Exhibit C-6, Resolution of the Czech police initiating criminal proceedings, pp. 6-7.

67 Exhibit R-10, Main Hearing Protocol, Municipal Court in Prague, Protocol 49 T 2/2016, Criminal case against the accused: [redacted] 27 June 2016 (PDF p. 47).

68 [redacted] Statement, para. 11.

69 *Id.*, para. 11.

98. In 2011, Mr. [redacted] was contacted by the director of Czech company Ravileta ("**Ravileta**") that claimed to have been defrauded by Newton and Fynerdale's business partners in the poppy seed market.[70] Immediately before that contact, according to his testimony before the Czech authorities, Mr. [redacted] indicates that Ms. [redacted] had asked him for a loan of CZK 260 million "for solving the business problem with the Ravileta company, with which, as [he] found out later, Mrs. [redacted] and Mr. [redacted] conducted business with poppy seeds that went against all the agreements, until some problem occurred."[71]

99. In October 2011, the Czech Republic's Department of Financial Analysis of the Ministry of Finance (the "**FAU**") filed a criminal complaint against – amongst others – Tadorna and Poppy Trade s.r.o., regarding facts indicating "suspicion that a crime was committed by unknown persons in connection with transactions carried out in [their] bank accounts".[72] According to the Claimant, this led to the uncovering of the fraudulent scheme implemented by the Poppy Seed Merchants.[73]

100. Mr. [redacted] then informed Fynerdale's representative in Ytrix, Mr. [redacted] and Poppyseed.[74] On 3 November 2011, together, Mr. [redacted] and Mr. [redacted] visited the warehouse where the merchandise was supposed to be stocked.[75] This visit was made possible only after Poppyseed filed a motion to the Czech courts to access the warehouses.[76]

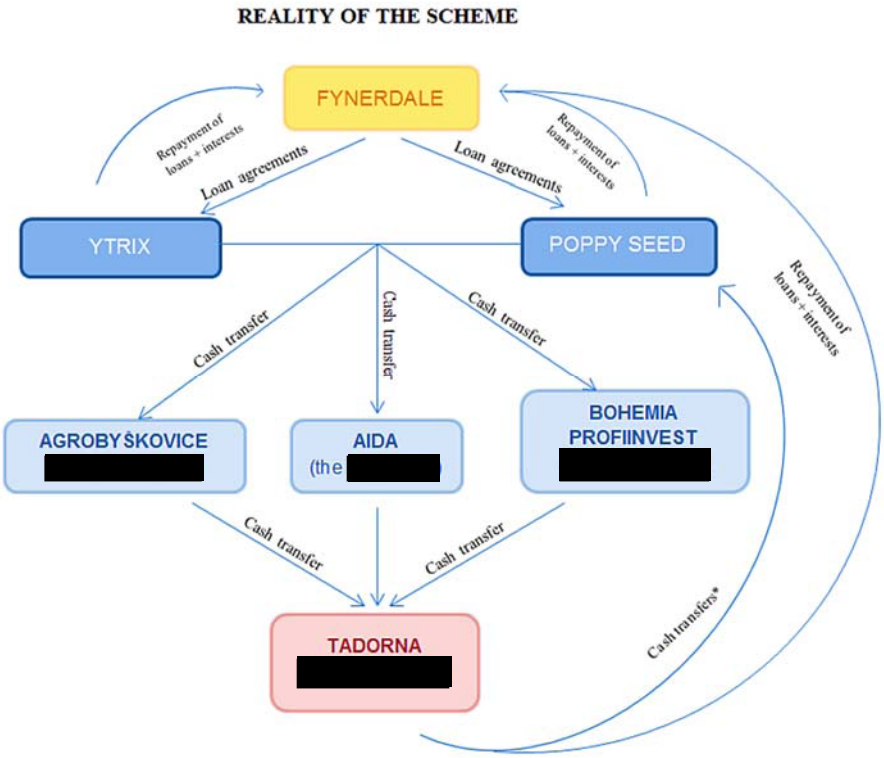
101. At a time when Ytrix was supposed to have bought all available stocks of poppy seed on the Czech market, Mr. [redacted] and Mr. [redacted] were surprised to notice that the warehouse contained fewer stocks than expected:[77] according to the notification of facts later handed to the Czech authorities, whereas 67,000,000 kg of poppy seed were to be held in the warehouse, only 1,500,000 kg – *i.e.* 2% of the total – were stocked there.[78] In her testimony, Ms. [redacted] indicates that "the inspection revealed that only about 4,000 tons of poppy instead of the declared

70 Statement of Claim, para. 50.
71 Exhibit C-5, [redacted] s Protocol of witness interrogation, 26 November 2014, p. 4 (PDF p. 21).
72 Exhibit C-33, Complaint of the Financial Analytical Unit of the Ministry of Finance of the Czech Republic, 20 October 2011 (PDF, p. 12).
73 Answer, para. 98.
74 Statement of Claim, para. 50.
75 *Id.*, para. 52.
76 Exhibit C-7, Indictment by the Metropolitan Prosecuting Attorney in Prague, 5 February 2016,(PDF, p. 45).
77 Statement of Claim, para. 52.
78 *Id.*, para. 59, *referring to* Exhibit C-17, Notification of facts suggesting that a crime has been committed, 26 March 2012.

60,000 tons were found in the storage facilities."[79] At that time, Mr. [redacted] and Mr. [redacted] discovered that no stock records were kept by Ytrix. [80]

102. In an attempt to understand the situation, Fynerdale and Newton's representatives broached the issue of the warehouse's stocks at various meetings, to no avail.[81]

103. According to the Claimant, the structure used for its operations in the poppy seed market had been diverted into a Ponzi scheme, as represented in its below diagram:[82]



(Statement of Claim, p. 16)

104. Fynerdale identifies 2009 as the starting point of the Poppy Seed Merchants' financial difficulties, at which point they sought to persuade Fynerdale to continue investing by communicating false information.[83]

79 [redacted] Statement, para. 4.
80 Statement of Claim, para. 52.
81 *Id.*, paras. 53-54.
82 *Id.*, para. 48.
83 *Id.*, para. 49.

105. Following discussions with legal counsel and with its business partners, Mr. [redacted] decided to submit a complaint to the Czech police on 26 March 2012, supplemented on 30 March 2012 (the "**Notification of Facts**"), indicating that

> [redacted] and [redacted] could have created a mechanism together, that would enable them to abuse the lack of proficiency and experience and the lack of knowledge of the agricultural commodities market of the other persons involved, and by this also abuse their trust to ensure their own profit, which resulted in losses of Poppyseed and Ytrix, respectively Fynerdale as their investor, in the total amount of at least 2,345,000,000 CZK, which is a considerable loss.[84]

106. In the Notification of Facts, Mr. [redacted] requested that the Czech Republic's "police verifies the aforementioned facts and ensures all necessary evidence, especially the accounting records of Ytrix that according to the notifier were done by [redacted] and also all contracts and delivery notes kept in the registered office of Ytrix with [redacted]"[85]

107. That same day, Poppyseed also filed a similar complaint.[86] On 20 August 2012, Fynerdale joined the proceedings as a damaged party.

E. PROCEEDINGS BEFORE THE CZECH COURTS

108. Following the Notification of Facts, criminal proceedings were formally initiated on 26 April 2012.[87] At this stage, the Claimant considers that, in accordance with Czech criminal law, the Notification of Facts ought to have been joined to the criminal proceedings initiated by Ravileta on 12 December 2011,[88] given that their claims relied on the same factual background.[89] In her witness statement, Ms. [redacted] explains that she was informed that the officers in charge of both investigations "would cooperate on the matter, and after the commencement of the criminal prosecution the cases would be merged and in essence there would be an extension of the charges already reported."[90]

84 Exhibit C-17, Notification of facts suggesting that a crime has been committed, 26 March 2012 (PDF, p. 16).
85 *Id.* (PDF, p. 17).
86 Exhibit C-18, Resolution of the Czech police initiating criminal proceeding, 27 August 2012, p. 5.
87 Statement of Claim, para. 64 and Exhibit C-18, Resolution of the Czech police initiating criminal proceeding, 27 August 2012.
88 Statement of Claim, para. 81.
89 *Id.*, para. 62.
90 [redacted] Statement, para. 7.

109. On 24 July 2012, the Czech police requested Ytrix's accountants to release certain financial documents pertaining to the investigation.[91] On 27 August 2012, the Czech police issued a resolution initiating criminal prosecution against Mr. [redacted] Ms. [redacted] and Mr. [redacted] ("**Resolution no. 1**"), which concluded that "[g]iven that the examination of the facts found clearly indicates that a particularly serious crime of fraud has been committed by the defendants indicated in the operative part of the resolution, criminal prosecution is justified."[92]

110. The Claimant notes that this resolution contained no reference to the financial documents that had been obtained from Ytrix's accountant by the Czech police.[93]

111. On 30 August 2012, the Czech police approached local banks requesting account information of the three prosecuted individuals and their companies.[94] On 1 September 2012, counsel for the [redacted] filed a complaint against Resolution no. 1, resulting in its annulment following the supervising State Prosecutor's resolution of 25 September 2012 (the "**Prosecutor's Resolution**"). According to the Prosecutor's Resolution,

> After examination of the resolution of initiating prosecution and the documents gathered by the police before issuing the resolution that illustrate the scope of the facts verified, which the police used to make the decision, I came to the conclusion that the resolution of the police is flawed and it is necessary to cancel it even with no regard to the complaint. The decision of the complaint precedes the right of the state prosecutor to cancel incorrect and unjustified resolutions of the police, therefore the resolution of initiating prosecution of the defendants [redacted] and [redacted] is hereby cancelled based on the complaints of the defendants. It is necessary to agree with this complaint. The police did not gather enough evidence during the examination and clarification of the facts suggesting that a crime has been committed, therefore their resolution was at least premature and it is therefore unjustified.[95]

112. The Prosecutor's Resolution also found procedural flaws in the proceedings, noting in particular that the suspects – the [redacted] and Mr. [redacted] – had not been heard and that the alleged criminal activities had not been properly qualified under law.[96]

113. In December 2012, the Czech police sought for the first time the assistance of the Financial and Analytical Unit of the Ministry of Finance in Fynerdale's case. Ms [redacted] indicates in her

91 Statement of Claim, para. 61; Exhibit C-19, Czech police request to/call for release of documents, 23 July 2012 and Exhibit C-20, Czech police protocol on the release of documents, 24 July 2012.

92 Statement of Claim, para. 64; Exhibit C-18, Resolution of the Czech police initiating criminal proceeding, 27 August 2012, p. 11 (PDF p. 25).

93 Statement of Claim, paras. 60-64.

94 *Id.*, para. 66; [redacted] Statement, para. 10.

95 Exhibit C-21, Resolution of the Municipal Prosecutor Office in Prague, 25 September 2012, (English translation, PDF, p. 11).

96 *Id.*, pp. 4-5, (English translation, PDF, p. 11-12).

statement that, as legal counsel for Fynerdale, she had proposed the police to ask for the cooperation of this unit much earlier, considering that this unit had assisted in the Ravileta case.[97] In that case, the Poppy Seed Merchants were found guilty in March 2013.[98]

114. In 2013, the supervising State Prosecutor was changed.[99] In March 2013, two other complainants were joined to Fynerdale's claim. The Claimant alleges that, at this point, it became aware of a close relationship between the former State Prosecutor and the owner of Ravileta: thanks to this proximity, Ravileta's case was concluded without Fynerdale being joined to Ravileta's claim and led to the seizure of all known possessions of the Poppy Seed Merchants.[100]

115. Pursuant to the Prosecutor's Resolution, the Czech police pursued its criminal investigation. On 13 December 2013, it issued a second resolution on the commencement of the criminal prosecution ("**Resolution no. 2**").[101] In Resolution no. 2, the Czech police summarized the situation as follows:

> By mutual agreement with the aim of defrauding the injured company Fynerdale of money, the defendants issued or ordered the issuance of fictitious invoices, delivery notes and other fictitious accounting documents, on the basis of which the funds provided by Fynerdale to YTRIX or Poppyseed were paid to companies AGROBYŠKOVICE, Bohemia Profiinvest and AIDA, which immediately transferred these funds to TADORNA, which was supposed to use them to purchase poppy from YTRIX and Poppyseed, which re-used the funds to buy poppy from the above-mentioned companies, creating a chain of payments that initially created the appearance of successful poppy trading, which, however, did not actually happen as the poppy was not bought from Czech growers in the declared amount; it could not, in fact, be bought since Czech production did not reach the declared level, so the defendants defrauded the injured of at least the amount representing the difference between the amount that was used or was to be used by YTRIX and Poppyseed to buy poppy through AGROBYŠKOVICE, Bohemia Profiinvest and AIDA, and the amount that was returned to YTRIX and Poppyseed by TADORNA and AIDA, amounting to CZK 1,395,001,963.
>
> The defendants thus enriched themselves by joint action consisting of misleading others and causing damage to other's property to a large extent, amounting to at least CZK 1,395,001,963.[102]

116. Resolution no. 2 further specified:

> In the case of the injured companies Fynerdale and Laudible, they have been misled by the defendants in a sophisticated and long-term manner, so that they believed that the business was profitable and "profit" from the deals was paid from the new funds provided

97 [redacted] Statement, paras. 8-9.
98 Statement of Claim, para. 73, *referring to* Exhibit C-6, Resolution of the Czech police initiating criminal proceedings, 13 December 2013, p. 17 (PDF, p. 41).
99 [redacted] Statement, para. 12.
100 [redacted] Statement, para. 12.
101 Exhibit C-6, Resolution of the Czech police initiating criminal proceedings, 13 December 2013.
102 *Id.*, p. 3 (English translation, PDF, p. 27).

> by the investor, (a pyramid scheme), therefore everything appeared as a working business for several years. Each year, however, part of the money was collected from the accounts of the defendant companies and probably passed to the defendants and This became apparent only in 2012 when it was also found that the agricultural commodities had never been stored in the declared quantities, of which all of the defendants had to be aware.[103]

117. On 5 December 2014, the Czech police closed the investigation. On 23 February 2015, the police re-opened the investigation at the supervising State Prosecutor's behest.[104]

118. Throughout this period, Fynerdale's Czech lawyer, Ms. , was in constant contact with the Czech police and provided them detailed financial information to facilitate the investigation.[105]

119. Upon the re-opening of the investigation in February 2015,[106] on 5 February 2016, charges were brought before the Municipal Court in Prague.[107] The and Mr. were indicted for unlawful enrichment "by misleading someone causing a large-scale damage to the property of another, while committing such a crime as a member of an organized group",[108] thus committing the offence of fraud.[109] At this stage, the Claimant alleges that "no violations of the law were found in connection with the financial transactions on Fynerdale's bank account."[110]

120. Noting that the poppy seed trade mechanism was disconnected from reality, and that in fact "no trade was happening or if there was any, it did not reach the declared volume, because the whole Czech production as such would not have been able to provide the declared volume",[111] the Municipal Court of Prague issued a judgment in favour of Fynerdale on 25 January 2017, considering that:

> We can conclude that **FYNERDALE had gradually invested CZK 3,076 million** into the trade (the Indictment states it was CZK 3,075.5 million, which must be an error in calculation of the individual items specified therein), so the Indictment must be adjusted in the sense that **the amount of CZK 2,452.5 million was invested, in a form of loans, to POPPYSEED**, whereas the funds were partly (CZK 1,437.5 million) sent to the account of POPPYSEED and partly (CZK 1,015 million) to YTRIX. FYNERDALE further provided a loan of **CZK 43 million** to AIDA and **CZK 94.5 million** to YTRIX,

103 Exhibit C-6, Resolution of the Czech police initiating criminal proceedings, 13 December 2013, p. 18 (English translation, PDF, p. 42).
104 Statement of Claim, para. 75.
105 *Id.*, para. 65; Statement, paras. 8, 13, 14.
106 Statement of Claim, para. 75.
107 Exhibit C-7, Indictment by the Metropolitan Prosecuting Attorney in Prague, 5 February 2016.
108 *Id.* (English translation, PDF, p. 42).
109 *Id.* (English translation, PDF, p. 43).
110 Answer, para. 99, *referring to* Exhibit C-7, Indictment by the Metropolitan Prosecuting Attorney in Prague, 5 February 2016.
111 Exhibit C-3, Judgment of the Municipal Court in Prague, 25 January 2017, p. 13 of the translation (PDF, p. 162).

> whereas liabilities from these loans were subsequently taken over by POPPYSEED (from the perspective of YTRIX the liabilities ceased to exist by set-off against the obligation of POPPYSEED under the agreement dated 11/7/2007). Based on loan agreements made directly with YTRIX, FYNERDALE further provided **CZK 436 million**. Analyses of the relevant accounts correspond to these conclusions – FYNERDALE sent the total amount of CZK 1,437,497,000 to POPPYSEED (the difference of CZK 3,000 probably corresponds to the fees) and the amount of CZK 1,596,500,000 to YTRIX (which corresponds to the sum of the loans of YTRIX, plus CZK 94.5 million resent via the account of the law office and the amounts which had to be paid to this account by POPPYSEED based on the loan agreements) and CZK 43 million to AIDA.
>
> **The court therefore considers it proven that the injured FYNERDALE had gradually invested the amount of CZK 3,076,000,000 into the trade, from which CZK 3,026,000,000 was meant for poppy seed trade and CZK 50,000,000 was meant for nut mixture trade.**[112]

121. In this decision, the Prague Municipal Court further noted the similarities between the Ravileta case and Fynerdale's own situation:

> in connection to the RAVILETA case and the deed under charge I the court found very similar features of the organized group (the same division of tasks, planning, coordination), whereas the connection of the two deeds as partial deeds implies a higher degree of stability of the group, which committed the same acts not just towards FYNERDALE but also towards RAVILETA.[113]

122. The Prague High Court mostly upheld the decision on 9 November 2017, rejecting the [redacted]' and Mr. [redacted]'s appeals, deciding in particular that "it can be concluded that the findings of the first instance court were found as corresponding to the content of the evidence produced by the appellate court and may be referred to in detail."[114]

F. SWISS PROCEEDINGS AGAINST FYNERDALE'S ULTIMATE BENEFICIARY OWNERS

123. The Respondent alleges that the funds used for the poppy seed trade mechanism derives from criminal activities, namely of money laundering and fraud. In support of its contention, the Respondent notably relies on criminal proceedings against Fynerdale's UBOs before the courts of Switzerland, which culminated, on 22 December 2017, in the Swiss *Tribunal fédéral* judgment (the "**2017 Swiss Supreme Court Judgment**") upholding a 2013 criminal judgment of the *Tribunal pénal fédéral* that had found Fynerdale's UBOs guilty of fraud and money laundering,

112 *Id.*, p. 70 of the translation (English translation, PDF, p. 219) [emphasis in the original].
113 *Id.*, p. 15 of the translation (English translation, PDF, p. 164).
114 Exhibit C-4, Judgment of the High Court in Prague, 9 November 2017, p. 23 (English translation, PDF, p. 59)

sentencing them to jail time and fines (the "**2013 Swiss Federal Court Judgment**"; together, the "**Swiss Judgments**").[115]

124. The Claimant denies any wrongdoing on the part of its UBOs. The Claimant further disputes the correctness of the findings of the Swiss courts. Moreover, the Claimant argues that the funds used for the investment in the Czech Republic were unrelated to the activities of which the UBOs were found guilty.

125. The Respondent acknowledges that Czech authorities, after investigation of the sale of the shares in MUS, had dismissed allegations that the sale arose from criminal offences in 2001, or that it was a form of fiscal fraud, in 2008.[116] However, this overall scheme led to a criminal procedure before the Swiss courts.[117] The *Tribunal pénal fed eral* thus convicted, amongst others, Mr. [redacted] and Mr. [redacted] – Fynerdale's UBOs – and sentenced them to approximately four years of imprisonment. The Swiss criminal court also convicted Mr. [redacted] and sentenced him to a conditional fine and to a civil fine.[118]

1. The Fraudulent Acquisition of MUS by Private Investors

126. The activities for which Fynerdale's UBOs were convicted precede by several years the events underlying the Claimant's claims in the present arbitration and relate to the privatisation in the late 1990s of a formally State-owned Czech coal company, Mostecká uhelná spolecnost ("**MUS**").[119] According to the Respondent, relying at length on decisions issued by the Swiss criminal courts, the Claimant's UBOs participated in a money-laundering and embezzlement scheme (the "**MUS Fraud**").

127. MUS was a mining company incorporated in 1993 by the Czech national patrimony fund, a public entity in charge of managing the Czech Republic's participations, and in particular of their transfer

115 Submission on Jurisdiction, para. 127; Exhibit CLA-135, Judgment of the Swiss Federal Court of 10 October 2013 and supplement of 29 November 2013; rectified on 30 May 2014; Exhibit R-5, [redacted] contre Ministère public de la Confédération, Arrêt du 22 décembre 2017, Cour de droit pénal, 6B_688/2014 - with English translation.

116 Exhibit C-32, Decision of the police of the Czech Republic, 24 July 2008.

117 Exhibit R-5, [redacted] contre Ministère public de la Confédération, Arrêt du 22 décembre 2017, Cour de droit pénal, 6B_688/2014 - with English translation.

118 *Id.*, p. 3 of the Judgment (PDF p. 9).

119 Submission on Jurisdiction, para. 132.

to private or public entities.[120] Until February 1998, it was principally owned by the Czech State (46.29% of the shares) and Czech cities and communes (8.88% of the shares).[121]

128. According to the 2017 Swiss Supreme Court, Fynerdale's UBOs, with other accomplices, participated in the purchase of a majority of shares of MUS, which was paid for by embezzling of that company's own funds.[122]

129. According to the 2017 Swiss Supreme Court Judgment, two companies of the Newton group, namely Newton Financial Management Group A.S. ("**NFMG**") and its daughter company Newton Stock Investment ("**NSI**"), indirectly and partly owned by Mr. [redacted], acquired a large amount of MUS shares.[123] Between April 1999 and March 2000, NFMG was transferred to Camra, a company founded in 1996 on the Isle of Man and indirectly owned by a number of Czech individuals, including Mr. [redacted].[124] In 2002, Mr. [redacted] acquired an indirect share in Camra.[125]

130. In January 1997, NFMG granted a loan of CZK 2.5 billion to MUS, which were destined for the acquisition of shares in other companies on behalf of and in favour of MUS, without MUS appearing as buyer.[126] However, only about CZK 447 million were used to that end.[127] Indeed, the majority of the remaining sum was transferred to NSI in 85 separate transfers.[128] The Newton group, through NFMG and NSI, acquired shares in MUS, and then transferred them to a number of other companies, all in the indirect control of Czech individuals, including Mr. [redacted] and Mr. [redacted] and some of which were part of the Camra group.[129] A minority shareholding in MUS was thus acquired with the very amounts that had been entrusted to NFMG to make investments for MUS.[130]

131. Between 1998 and 1999, the same individuals that indirectly controlled the new minority shareholders of MUS sought to acquire the remaining shareholding that remained in the hands of

120 Exhibit R-5, [redacted] contre Ministère public de la Confédération, Arrêt du 22 décembre 2017, Cour de droit pénal, 6B_688/2014 - with English translation, [redacted] contre Ministère public de la Confédération, Arrêt du 22 décembre 2017, Cour de droit pénal, 6B_688/2014 - with English translation, p. 4 (PDF, p. 10).
121 *Id.*, p. 4, para. B.a.a (PDF, p. 10).
122 *Id.*, p. 2 (PDF, p. 8).
123 *Id.*, p. 13, para. B.b.b. (PDF p. 19).
124 *Id.*, p. 9, para. B.a.j. (PDF, p. 15).
125 *Id.*, p. 9, para. B.a.j. (PDF, p. 15).
126 *Id.*, p. 12, para. B.b.a. (PDF, p. 18).
127 *Id.*, p. 12, para. B.b.a. (PDF, p. 18).
128 *Id.*, p. 12, para. B.b.a. (PDF, p. 18).
129 *Id.*, p. 13, para. B.b.b. (PDF p. 19).
130 *Id.*, p. 13, para. B.b.b. (PDF p. 19).

the Czech state.[131] To that end, they relied on a separate group of companies, the Appian Group 2. This group of companies drew on the name and reputation of a finance company based on the United States, Appian Group 1, founded by Mr. [redacted] Sometime after April 1998, Mr. [redacted] assigned the Appian trademark to Mr [redacted] who mandated Mr. [redacted] a former director of the International Monetary Fund and then director of the Appian Group 1, to administer the Appian Group 2 ("**Appian 2**"). This homonymy was intentional so as to maintain confusion between the two groups. Appian 2, however, was nothing but "a structure of empty shells serving as instruments for its "economic successors, whose circle coincided with that of Camra and Virium. Some of them have also belonged at one time or another to either the Camra group or the Virium group."[132]

132. Indeed, according to the 2017 Swiss Supreme Court Judgment, the idea was to convince the Czech State that a foreign investor was seeking to make an investment in the Czech Republic by purchasing the remaining MUS shares owned by the State. However, that was not the case: the ultimate buyers were indeed the same individuals who had acquired an indirect minority shareholding in MUS.[133]

133. In order to succeed, Mr. [redacted] agreed "to appear publicly […] as the beneficial owner of the shares held by" the company holding all of the previously bought shares of MUS, Investenergy.[134] Investenergy is a Swiss company created in March 1997, of which Mr [redacted] is both a shareholder and the trustee for other shareholders; since October 1998, Investenergy was part of the Camra group of companies, and Mr. [redacted] agreed to act only under instructions, on behalf of and for the sole interest of Camra.[135] Acting as representative of Investenergy, Mr. [redacted] pretended to act on behalf of Appian Group 1 for the purchase of the remaining majority shareholding in MUS, so as to provide the illusion that a reputable foreign investor was acquiring the shares from the State.[136]

134. In June 1999, Mr. [redacted] indicated to the authorities that the investment group on behalf of which he was acting now owned over 50% of the MUS shares, and was thus entitled to make a mandatory offer for the purchase of the remaining shares. In July 1999, Investenergy offered to the State to purchase the remaining shares for a price 24% higher than the legal price, *i.e.* CZK 650,000,000,

131 Submission on Jurisdiction, para. 145.
132 *Id.*, p. 11, para. B.a.l. (PDF p. 17), translation provided by the Respondent (PDF, p. 184).
133 *Id.*, pp. 14-15, para. B.d. (PDF pp. 20-21).
134 Submission on Jurisdiction, paras. 147-148.
135 Exhibit R-5, [redacted] contre Ministère public de la Confédération, Arrêt du 22 décembre 2017, Cour de droit pénal, 6B_688/2014 - with English translation, p. 11, para. B.a k. (PDF p. 17).
136 *Id.*, p. 15, para. B.d.b. (PDF p. 21)

to be immediately paid.[137] On 28 July 1999, the Czech Government approved the sale of the remaining MUS shares for the offered amount of CZK 650,000,000.[138]

135. On 19 August 1999, Investenergy paid the said amount, which originated in MUS itself.[139] Indeed, through a complex mechanism, the individuals involved in the acquisition of a minority share assigned a company named Portoinvest to MUS. MUS made numerous capital increases to Portoinvest, which were then transferred to another company of which Camra was the beneficial owner, the company EERL.[140] EERL then transferred the funds to Investenergy, which in turn redistributed the amounts to Camra and other companies owned by Camra in order to pay off the loan granted by MUS to NFMG to pay for the 46,29% of MUS shares.[141]

136. To summarize, according to the 2017 Swiss Supreme Court:

> In essence, between 8th of December 1998 and 30th of April 2002, [redacted] and [redacted] managed to seize USD 150 million From MUS cash, which they used to return it to MUS in repayment of the loan of 2nd of January 1997 in favour of NFMG, pay the purchase price From 46.29% of MUS shares owned by the Czech Republic and appropriate the balance through many front companies at their sole profit.[142]

137. Eventually, between March 1999 and November 2002, EERL acquired MUS shares from Investenergy, in order to justify EERL's previous fund transfers to Investenergy.[143] EERL then sold those shares to a company indirectly owned by Mr. [redacted] and Mr. [redacted][144]

138. On 11 January 2001, the Bureau of Investigation for the Czech Republic adjourned the motion submitted in 1999 by the Securities Commission, "suggesting a suspicion that the foreign company Appian Group may have been misused in order to disguise the real investor in the purchase of shares" of MUS.[145] The Bureau of Investigation thus concluded that "the matter does not concern suspicion from a criminal offence and it is not appropriate to deal with the matter otherwise."[146]

137 *Id.*, p. 16, para. B.d.c. (PDF p. 22).
138 *Id.*, p. 16, para. B.d.d. (PDF, p. 22).
139 *Id.*, p. 16, para. B.d.d. (PDF, p. 22).
140 *Id.*, p. 17, para. B.e.b (PDF, p. 23).
141 *Id.*, p. 18, paras. B.e.c. and B.e.d. (PDF, p. 24).
142 *Id.*, p. 16, para. B.e. (PDF, p. 22), translation provided by the Respondent.
143 *Id.*, p. 18, para. B.f. (PDF, p. 24).
144 *Id.*, pp. 18-19, para. B.g. (PDF, pp. 24-25).
145 Exhibit C-31, Decision of the police of the Czech Republic, 11 January 2001, (PDF, p. 4).
146 *Id.*, (PDF, p. 4).

139. On 12 December 2002, Lezaky – a Czech company, founded in 2001, originally held by MUS and then transferred to Appian Energy AG, a daughter company of Appian 2 – acquired MUS from its mother company, notwithstanding the fact that, at that time, MUS's own equity capital was 6,200 times superior to that of Lezaky.[147] In 2003, after all of MUS's assets were transferred to Lezaky, MUS was dissolved.[148] Lezaky was then rebranded Mostecká Uhelná Společnost A.s., Pravni Nastupce ("**MUS 2**").

140. In March 2005, the indirect shareholders of MUS 2 and of the Camra, Virium and Appian 2 groups decided to go their separate ways. As such, Mr. [redacted] and Mr. [redacted] remained shareholders of the Camra, Virium and Appian 2 groups.[149] At this stage, the funds in Mr. [redacted]'s and Mr. [redacted]'s hands amounted to USD 63,563,200.[150] In May 2005, MUS 2 was dissolved and its assets were transferred to its then sole shareholder Severoceska. Like Lezaky before it, Severoceska then changed its name to become Mostecká Uhelná A.S. ("**MUS 3**").[151]

141. Between 2006 and 2007, MUS 3 sold the shares to other companies, outside the original network of companies. At this stage, "each of the persons involved in the sale of the shares had made personal profits ranging from CHF 12 million to nearly CHF 400 million."[152] The Swiss *Tribunal pénal fédéral* thus reached the conclusion that Mr. [redacted] had made a profit of CHF 207,889,183, while Mr. [redacted] made one of CHF 36,707,967.[153] According to the Respondent, Fynerdale's UBOs in particular "made a profit from these crimes [of] CHF 258,209,000."[154]

2. Fynerdale's Ties with the MUS Fraud

142. According to the Respondent, Fynerdale is closely connected with those who participated in the events that led to the embezzlement of large sums of money from MUS:

147 Exhibit R-5, [redacted] contre Ministère public de la Confédération, Arrêt du 22 décembre 2017, Cour de droit pénal, 6B_688/2014 - with English translation, p. 19, para. B h. (PDF, p. 25).
148 *Id.*, p. 19, para. B.i. (PDF p. 25).
149 *Id.*, p. 25, para. B.p. (PDF, p. 31).
150 *Id.*, p. 26, para. B.p. (PDF, p. 32).
151 *Id.*, p. 26, para. B.p. (PDF, p. 32).
152 Submission on Jurisdiction, paras. 157-159.
153 Exhibit R-5, [redacted] contre Ministère public de la Confédération, Arrêt du 22 décembre 2017, Cour de droit pénal, 6B_688/2014 - with English translation, p. 26, para. B.p (PDF, p. 32).
154 Submission on Jurisdiction, para. 161.

(a) First, the Respondent notes that Newton's representative in Ytrix, Mr. [redacted] was formerly Vice-Chair of the Board of Directors of Newton Management a.s., which was used in the first acquisition of shares in MUS.[155]

(b) Second, Mr. [redacted], one of Fynerdale's two UBOs, was himself a director of NFMG and co-owner of Newton Management until 2003.[156]

(c) Third, Fynerdale itself is held by Appian Services (Cyprus) Ltd, which is itself part of the Appian Group 2, held by those involved in the criminal activities related to the privatization of MUS.[157]

(d) Fourth, the Respondent notes that Fynerdale itself received significant amounts from Appian 2.[158] These sums, the Respondent alleges, were transferred to Fynerdale in an effort to launder the money acquired in the MUS fraud through the fictitious business of poppy seed purchase and sale.[159]

143. The Respondent further alleges that the proceeds from the embezzlement scheme for which Fynerdale's UBOs were convicted were eventually used for the loans granted by Fynerdale to Poppyseed and Ytrix.[160] The poppy seed trade scheme set up by the Claimant was part of a larger effort to launder the money illegally acquired. The scheme, according to the Respondent, functioned as follows:

(a) Fynerdale received funds acquired through the MUS fraud from its mother company and provided funds to Ytrix and Poppyseed;

(b) Ytrix and Poppyseed used the funds obtained to proceed with the purchase and sale of poppy seed; and

(c) Ytrix and Poppyseed would repay the loans to Fynerdale, thus finalizing the laundering of the money.[161]

155 *Id.*, para. 164.
156 *Id.*, para. 165.
157 *Id.*, para. 169.
158 *Id.*, paras. 170-171.
159 *Id.*, para. 172, *referring to* Exhibit C-3, Judgment of the Municipal Court in Prague, 25 January 2017, p. 37.
160 *Id.*, paras. 176-178.
161 *Id.*, paras. 186-189.

144. In particular, relying on the cross-examination of Mr. [redacted] the Respondent notes that it has been "admitted that loans could have been sourced in the MUS fraud."[162] Further to the freezing of the relevant account, the Respondent further notes that another account, which financed Loans 4 to 9, was opened. In the Respondent's view, "[t]his shows that at the time of the freezing, the funds from MUS were still in the SG account used for funding Loan 3. Because these funds were no longer available, Mr [redacted] and Mr [redacted] had to establish new channels for financing of the loans."[163]

145. The Respondent further considers that Loan 5 is likely to have been at least partially funded by the MUS fraud.[164]

146. The Claimant, for its part, considers that the Swiss Judgments inaccurately characterized the facts, having being made under inordinate political pressure from the United States and without proper evidence.[165] Thus, the Claimant contends that its UBOs were not involved in a money-laundering enterprise, but interested in a profitable investment:

> In the process of privatization after the fall of the Berlin Wall, many state-owned assets were transferred from the Czech Republic into the hands of private citizen. At that time, state-owned MUS [was] a slow moving and unprofitable coal company. To a small group of Czech entrepreneurs, among which were Mr [redacted] and Mr [redacted] it however looked like a great business opportunity. Hence, they bought a large number of MUS shares with the aim of selling those shares in a large block to a strategic investor and make a profit.
>
> Subsequently, the new management of MUS transformed the company from an old-fashioned company into a highly profitable modern enter-prise and sold the ownership in MUS to another investor with a huge profit.[166]

147. Referring to the testimony of Dr. Ing. Miroslav Grégr at the judicial hearing at the Municipal Court in Prague on 22 February 2019, the Claimant states that the Czech Republic was unconcerned with the persons to whom it was selling MUS – so long as it could be sold.[167]

148. Thus, the amounts used to fund the loans granted to Ytrix and to Poppyseed derived not from illegal activities, but from the revenue made by Claimant's UBOs through the dividends obtained thanks to their investment in Škoda Holdings, a company that they held indirectly between 2007 and 2011 through Appian Machinery (Netherlands) B.V. Between 2008 and 2010, Škoda

162 Respondent's Post-Hearing Brief, para. 101, *referring to* Hearing Transcript, Day 3, 55:10-20.
163 *Id.*, para. 101.
164 *Id.*, paras. 104-106.
165 Answer, paras. 92-93.
166 *Id.*, paras. 89-90.
167 Exhibit C-30, Protocol of the witness testimony of Dr. Ing. Miroslav Grégr at the judicial hearing at the Municipal Court in Prague, 22 February 2019 (English translation, PDF, p. 25).

Holdings issued dividends to Mr. [redacted] and Mr. [redacted] amounting to over CZK 11 billion.[168] According to the Respondent, these dividends themselves were acquired from funds derived from the MUS fraud, and are therefore "merely another layer in [Mr [redacted] Mr [redacted] and others'] money laundering schemes."[169]

G. CZECH CRIMINAL PROCEEDINGS AGAINST FYNERDALE

149. Further to the Tribunal's question on the status of criminal proceedings in the Czech Republic, the Respondent indicated that investigations regarding the funds used by the Claimant to make the alleged investment had been discontinued.[170] Over the course of these investigations, both Mr. [redacted] and Mr. [redacted] testified, providing evidence the Respondent considers to be "in full contradiction with what was conceded by Claimant in the present proceedings and the available evidence."[171] The Respondent considers that this evidence ought to be considered "as an alternative source of the information, which Claimant failed to provide in the process of document production."[172]

150. The Respondent later produced two decisions of the Czech police summarizing their findings.

151. In February 2016, further to an investigation related to the purchase of shares and debt in Škoda by various individuals, including the Fynerdale UBOs, "[t]he Czech police concluded that the evidence unambiguously shows that the flow of funds was intentionally complicated and used trust companies to conceal the true origin of the funds from MUS" and further "established the act of concealing the origin of the funds and causality, thus establishing all elements of criminal liability under Czech law" (the "**2016 Czech Decision**").[173]

152. However, the Respondent explains that "[d]espite essentially proving that a crime was committed, the Czech police ultimately discontinued the investigation" following the Swiss Supreme Court's

168 Answer, para. 104-106, *referring to* Exhibit C-36, Decision of the sole shareholder of Skoda Holding, April 2008; Exhibit C-37, Decision of the sole shareholder of Skoda Holding, June 2008; Exhibit C-38, Decision of the sole shareholder of Skoda Holding, November 2008; Exhibit C-39, Decision of the sole shareholder of Skoda Holding, May 2009; Exhibit C-40, Decision adopted by the sole shareholder of Skoda Holding, January 2010; Exhibit C-41, Decision adopted by the sole shareholder of Skoda Holding, February 2010; Exhibit C-42, Decision adopted by the sole shareholder of Skoda Investment, March 2010; Exhibit C-43, Decision adopted by the sole shareholder of Skoda Investment, April 2010; Exhibit C-44, Decision adopted by the sole shareholder of Skoda Investment, May 2010; Exhibit C-45, Instruction for payment of dividends, July 2010.

169 Respondent's Post-Hearing Brief, para. 103.

170 Respondent's Post-Hearing Brief, para. 51.

171 *Id.*, para. 55.

172 *Id.*, para. 63.

173 *Id.*, para. 59.

judgment: "the Czech police had to respect the Swiss judgment as *res iudicata* and in line with the *ne bis in idem* doctrine ruled that prosecution is impermissible."[174]

153. In December 2018, in a separate decision, the Czech police "concluded that the flow of funds from the MUS fraud to Claimant was not established and decided to discontinue the proceedings" (the "**2018 Czech Decision**").[175] The Parties characterize the significance of this conclusion differently. The Claimant highlights that, before reaching the conclusion, the Czech police undertook a variety of actions, including requesting information from the Financial Analytical Office of the Ministry of Finance, engaging experts and interrogating a number of individuals allegedly involved in the MUS fraud and in the underlying facts to these proceedings.[176] The Respondent notes that the 2018 Czech Decision "does not, in any way, equal an acquittal and does not have any *res judicata* effect."[177]

V. JURISDICTION OF THE TRIBUNAL

154. The Respondent challenges the existence of an arbitration agreement, considering that the offer to arbitrate contained in the Treaty is inapplicable as a result of EU law, as confirmed by the CJEU's *Achmea* Judgment,[178] the Declarations,[179] and the Agreement for the Termination of Intra-EU Bilateral Investment Treaties, signed on 5 May 2020 (the "**Termination Agreement**").[180]

155. Alternatively, the Respondent alleges that the Tribunal lacks jurisdiction because the investment was illegal under the laws of the Czech Republic. Finally, and in any event, the Respondent challenges the Tribunal's jurisdiction over the claims relating to the loans made through Poppyseed, a Maltese company allegedly under the control of Fynerdale.

174 *Id.*, para. 60, *referring to* Exhibit R-36, Decision of the Police of the Czech Republic dated 20 December 2018, doc. no. NCOZ-1433-471/TČ-2016-412402.

175 Respondent's Post-Hearing Brief, para. 56, *referring to* Exhibit R-36, Decision of the Police of the Czech Republic dated 20 December 2018, doc. no. NCOZ-1433-471/TČ-2016-412402, p. 69.

176 Claimant's Second Post-Hearing Brief, paras. 33-34.

177 Respondent's Post-Hearing Brief, para. 56, relying on Exhibit R-38, Vasak J. Mak, Praha Powerprint, 2010.

178 Exhibit CLA-3, CJEU, 6 March 2018, C-284/16, ECLI: EU:C:2018/158; Exhibit RLA-6, *Achmea* Judgment.

179 Exhibit R-2, Declaration of the Representatives of the Governments of the Member States, 15 January 2019: "On the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union"; Exhibit R-3, Declaration by Finland, Luxemburg, Malta, Slovenia and Sweden, 16 January 2019; Exhibit R-4, Declaration of Hungary, 16 January 2019.

180 Respondent's Post-Hearing Brief, section 2.7.

156. The Claimant disagrees with these arguments and requests the Tribunal to dismiss the Respondent's objections. In particular, the Claimant argues that:

> the CJEU did not rule in the *Achmea* case that the BIT was in violation of EU law, nor did it address this matter. As long as the BIT is in force, arbitral proceedings can be held on the basis thereof. Indeed, the CJEU ruling concerns the possible lack of competence of the an *[sic]* arbitral tribunal constituted under the BIT, not the existence of the arbitration clause under international law. The Tribunal is, therefore, still empowered to rule on its own competence, and the *Achmea* judgment cannot prevent this Arbitration from taking place.[181]

A. THE TRIBUNAL'S COMPETENCE-COMPETENCE

157. As a preliminary matter, the Tribunal must satisfy itself of the existence and extent of its jurisdiction.

158. The Claimant asserts that the Tribunal is competent to determine its own jurisdiction. In particular, according to the Claimant, "the *Achmea* judgment does not prevent the Tribunal in this Arbitration […] from ruling on its own competence nor in this Arbitration in general."[182] The Respondent does not dispute the *competence-competence* of the Tribunal. The Tribunal holds it to be an established principle in international adjudication that the court or tribunal concerned decides on the basis of the applicable law on the existence as well as the scope of its jurisdiction (competence-competence). The application of this principle is the guarantor for the independence of the court or arbitral tribunal concerned.

159. The Tribunal will now proceed to ascertain whether it has jurisdiction to decide upon the dispute before it. It will first turn to the arguments advanced by the Respondent, objected to by the Claimant that, based on EU law as well as on international law, the Treaty has ceased to constitute a valid basis for bilateral investment arbitration. In a second step, the Tribunal will turn to the arguments advanced by the Respondent, and again objected to by the Claimant, that Dutch law would prevent the Tribunal from hearing the dispute. Finally, the Tribunal will consider the arguments of the Respondent and respective counterarguments of the Claimant as to whether the Tribunal has jurisdiction *ratione materiae*.

B. THE TRIBUNAL'S JURISDICTION UNDER ARTICLE 8 OF THE TREATY

160. The Claimant has commenced the arbitration pursuant to Article 8 of the Treaty, which reads in relevant parts:

181 Statement of Claim, para. 167.
182 Statement of Claim, para. 106.

> 1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.
>
> 2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.
>
> […]
>
> 6) The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> · the law in force of the Contracting Party concerned;
>
> · the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
>
> · the provisions of special agreements relating to the investment;
>
> · the general principles of international law.

161. Relying on an interpretation of the Treaty, the Treaty on the Functioning of the European Union (the "**TFEU**") and the Treaty on the European Union (the "**TEU**") (also referred to, together, as the "**EU Treaties**"), in accordance with the Vienna Convention on the Law of Treaties (the "**VCLT**"),[183] the Respondent argues that the Tribunal lacks jurisdiction because the arbitration agreement contained in intra-EU BITs is incompatible with European law and thus invalid.[184]

162. The Kingdom of the Netherlands and the Czech Republic are both Parties to the VCLT. The VCLT is widely regarded as reflecting customary international law. Neither Party suggested that provisions of the VCLT relied upon by either of them are not applicable to the Treaty.

1. Whether the EU Treaties, as *Lex Posterior*, Preclude the Application of Article 8 of the Treaty

163. The Respondent argues that this Tribunal has no jurisdiction over the present dispute because Article 8 of the Treaty – the basis for this arbitration – has been superseded by the TFEU and is no longer applicable.

183 Exhibit RLA-16, Vienna Convention on the Law of Treaties 1969, United Nations, Treaty Series, vol. 1155.
184 Submission on Jurisdiction, para. 9.

a. *The Parties' Positions as to Whether the TFEU has Superseded Article 8 of the Treaty*

(i) The Respondent's Position

164. The incompatibility of Article 8 with European law entails that the provision itself void under Article 351 TFEU, which is the applicable conflict rule in the present circumstances. The Respondent points out in this regard that the CJEU, which has the monopoly of interpretation of EU law, considered in its *Achmea* Judgment that "in investment arbitration, the conclusion of a treaty is a deliberate legislative step of the member states of the European Union, by which they deprive the CJEU of the possibility to fully review the application of European law."[185] This, by itself, should lead the Tribunal to deny jurisdiction as Article 8 of the Treaty is "incompatible with and precluded by article 267 TFEU."[186]

165. As a subsidiary argument, the Respondent contends that the arbitration agreement in Article 8 of the Treaty is also void pursuant to Article 30(3) VCLT,[187] as the TFEU and TEU are *leges posteriori* to the Treaty. Indeed, when the Treaty entered into force in October 1992, only the Netherlands was a Member State (since 1958). It is only on 1 May 2004 that the Czech Republic became a Member State.

166. Following the Hearing, the Respondent clarified that it had "never alleged that European law *per se* has any primacy over international law"[188] and that "[t]he reason why EU law takes precedence over Article 8 of the BIT in the present case is rooted in Article 351 TFEU or – as a subsidiary rule – Article 30(3) VCLT."[189]

(a) The Conflict between the Treaty and the EU Treaties is Governed by Article 351 TFEU Primarily, and Article 30 VCLT Subsidiarily

167. The Respondent first sets out the legal context in which EU law is inscribed. EU law is first constituted by "a set of multilateral treaties concluded between or acceded to by the Member States of the European Union."[190] It is also part of each Member State's legal order.[191]

185 *Id.*, para. 27.
186 *Id.*, para. 28.
187 Submission on Jurisdiction, paras. 30-34. Article 30(3) VCLT provides that: "When all the parties to the earlier treaty are parties also the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."
188 Respondent's Post-Hearing Brief, para. 5.
189 *Id.*, para. 7.
190 Reply, para. 13.
191 *Id.*, para. 14.

168. Considering that the Tribunal is faced "with a possible conflict of several international treaties", it must proceed with an analysis and application of the appropriate conflict rules. In the Respondent's view, Article 351 TFEU is the applicable rule, whereas Article 30 VCLT should apply on a subsidiary basis.

i) Article 351(1) TFEU is the Applicable Conflict Rule

169. Article 351 TFEU reads:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
>
> To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
>
> In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

170. Invoking CJEU jurisprudence,[192] the Respondent argues that Article 351 TFEU "is an explicit conflicts clause which provides that any pre-accession treaty between member states is overridden by EU law, regardless of the subject matter of the treaty, as long as it is incompatible with community law."[193]

171. According to the Respondent, Article 351(1) TFEU is applicable to the present circumstances, as it is applicable in relations between Member States (and not only to treaties in relations to with third countries).[194] European jurisprudence "establishes clearly that article 351 TFEU also applies

192 Submission on Jurisdiction, para. 49, *referring to* Exhibit RLA-11, *Commission of the European Communities v. Austria*, ECJ, Case C-147/03, Judgment of the Court (Second Chamber), 7 July 2005.

193 Submission on Jurisdiction, para. 51.

194 Reply, paras. 28-30, *referring to* Exhibit RLA-85, Jan Klabbers, *Treaty Conflict and the European Union*, Cambridge University Press, pp. 120 et seq. *See also* Exhibit RLA-84, *Commission of the European Economic Community v. Italy*, Case 10/61, Judgment of the Court, 27 February 1962, p. 10; Exhibit RLA-15, *Exportur SA v. LOR SA and Confiserie du Tech*, Reference for a preliminary ruling, ECJ C-3/91, Judgment of the Court, 10 November 1992, para. 8; Exhibit RLA-86, *Conegate Limited v. HM Customs & Excise*, Case 121/85, Judgment of the Court (Fourth Chamber), 11 March 1986, para. 2 of the summary; Exhibit RLA-87, para. 18; Exhibit RLA-88, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities*, Joined cases C-241/91 P and C-242/91 P, Judgment of the Court, 6 April 1995, para. 84, Exhibit RLA-11, *Commission of the European Communities v. Austria*, ECJ, Case C-147/03, Judgment of the Court (Second Chamber), 7 July 2005, para. 73.

to conflicts between the TFEU and provisions of a treaty concluded between a Member State and a third state which later acceded to the EU."[195] In contrast, Article 351(2) does not apply here, as it "would apply only to situations in which there is a treaty between a member state and a third state".[196]

172. Noting the Claimant's reliance on the CJEU's decision in *Burgoa*,[197] the Respondent underscores that this case is not comparable to the one at hand.[198] Whereas "[a]ll *Burgoa* would suggest is that a treaty with a third State is unaffected due to Article 351(1) TFEU and that individuals may, therefore, still benefit from the provisions of a treaty", in the present case, the Respondent argues that Article 351(1) leads to the inapplicability of Article 8.[199]

173. The Respondent considers that Article 351(1) TFEU sets out overall the same test as Article 30 VCLT.[200] Under Article 351(1), that test is to determine "whether the provision of the earlier treaty is compatible with the TFEU/TEU."[201] For the Respondent, incompatibility is the sole issue being discussed; "there is no need for any assessment of whether the BIT deals with the same subject matter as TFEU."[202] When a provision of a previous treaty is incompatible with those of a latter treaty, the first provision is no longer inapplicable, as demonstrated by CJEU jurisprudence.[203] Article 351(1) will thus apply as soon as the treaty is incompatible with the EU Treaties. In particular, bilateral treaties between Member States cannot trump the application of EU law.[204]

174. The Respondent explains that, pursuant to Article 351(1) TFEU, the provisions of a treaty concluded with a State that became a Member State that are incompatible with EU law are automatically inapplicable.[205] This is a result of the conflict between the other treaty and the EU Treaties, without there being any requirement for the signatory States to terminate that treaty containing incompatible provisions "to prevent such provisions from being applied."[206]

195 Reply, para. 33, *referring to* Exhibit RLA-85, Jan Klabbers, *Treaty Conflict and the European Union*, Cambridge University Press, pp. 120 et seq.
196 Reply, para. 34. *See also* Respondent's Post-Hearing Brief, para. 25.
197 Rejoinder, paras. 44-45.
198 Respondent's Post-Hearing Brief, para. 23.
199 Respondent's Post-Hearing Brief, para. 23.
200 Reply, para. 16.
201 *Id.*, para. 35.
202 *Id.*, para. 40.
203 *Id.*, paras. 43-49.
204 Exhibit RLA-14, *Annunziata Matteucci v. Communauté française of Belgium*, para. 23.
205 Reply, paras. 42-54.
206 *Id.*, paras. 50-51.

175. The Respondent further argues that this interpretation of Article 351(1) TFEU, based on the CJEU's jurisprudence, is binding between the Czech Republic and the Netherlands as parties to the TFEU (even though it is not directly binding upon the Tribunal).[207] However, the Respondent contends, EU law is binding on the Tribunal as part of the domestic law of both States party to the Treaty,[208] pursuant to Article 8(6) of the Treaty which expressly provides that the Tribunal "shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned […]." Similarly, pursuant to the same provision, the Tribunal shall apply public international law, of which the EU law is a part thereof. As such, the Tribunal should take into account the interpretation of EU law provided by the CJEU.[209]

176. Last, the Respondent underscores that Article 351 TFEU, as "a part of international law and under the rule of subsidiarity enshrined in Article 30(1) VCLT", is the solution to the "undisputed conflict between Article 8 of the BIT and the TFEU/TEU".[210]

ii) Article 30 VCLT Applies as a Subsidiary Conflict Rule

177. Though the Parties agree that Article 30 VCLT is inapplicable, the Respondent contends that the reasons for this given by the Claimant are ill-founded.[211] According to the Respondent, insofar as Article 351 TFEU applies, Article 30 VCLT applies only as a subsidiary rule.

178. Article 30 VCLT provides as follows:

> *Article 30 – Application of successive treaties relating to the same subject matter*
>
> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States Parties to both treaties the same rule applies as in paragraph 3;

207 *Id.*, para. 57.
208 *Id.*, para. 59.
209 Reply, para. 65.
210 Respondent's Post-Hearing Brief, para. 20.
211 Reply, para. 67.

> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

179. In the Respondent's view, the concept of subject matter "does not mean that the assessment of two treaties can be limited to their labelling of the subject matter". To support this argument, the Respondent refers to the Report of the Study Group of the ILC on Fragmentation of International Law, which provides:

> As pointed out above, the test of whether two treaties deal with the "same subject matter" is resolved through the assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another.[212]

180. Rather, in the Respondent's view, the critical question is "if a state would, if it were to adhere to an obligation under one treaty, thereby fail to comply with another."[213] Such overlap leads to a conflict that is directly governed by Article 30 VCLT. The subject matter test asks "whether there is a normative conflict between the provisions of two treaties."[214]

181. Even if a stricter approach of the concept of subject matter were adopted, the Respondent argues that the solution would remain identical:

> The subject matter of the TFEU and the TEU is essentially to create a common market between the state parties. This entails, just as the BIT, various procedural and substantive rights for investors within this market. The procedural rights, as explained by the ECJ in *Achmea*, include the right to submit any dispute to state courts and ultimately the CJEU. The substantive rights are enshrined in the four freedoms of European law.[215]

182. In the Respondent's view, when two treaties contain clauses that cannot be reconciled, such conflict cannot be addressed – as suggested by the Claimant – by reference to the *lex specialis* rule. Indeed,

> The *lex specialis* rule would be of no help if the [two treaties] could not be simultaneously applied without breaching the provisions of one of them. The *Lex specialis* rule would

212 Submission on Jurisdiction, para. 40, *referring to* Report of the Study Group of the ILC Finalized by Martti Koskenniemi, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 13 April 2006 (**Exhibit RLA-8**), p. 130.

213 Submission on Jurisdiction, para. 38, *referring to* Exhibit RLA-9, E. W. Vierdag, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", *British Yearbook of International Law*, Vol. 59, Issue 1, 1 January 1989 and RLA-10, François Dubuisson, "Article 59" in *The Vienna Convention on the Law of Treaties II, A Commentary* (Olivier Corten, Pierre Klein eds.), Volume II, Oxford University Press, Oxford – New York, 2011.

214 Reply, para. 69.

215 Submission on Jurisdiction, para. 46.

> suggest that because one treaty is specific, adherence to its provisions will not cause a breach of the more general treaty. However, if this is not possible, the rule does not help. The reason for this is that the subject-matter test, to which Claimant suggests applying the *lex specialis* rule, in fact is a test for the compatibility of two treaties. […]
>
> If […] one provision confers exclusive jurisdiction upon one body, obviously there is incompatibility between treaty provisions. In that situation, it is simply not possible to apply the *lex specialis* rule to resolve the conflict. Hence, in cases of an existing and inevitable incompatibility, the approach to simply state that two treaties do not pertain to the same subject matter and hence insist there is no incompatibility is flawed.[216]

183. The Respondent concludes that there is a clear incompatibility between Article 8 of the Treaty on the one hand, and Articles 267 and 344 TFEU on the other. This conflict is related to the same subject matter: "the resolution of disputes arising out of foreign investment."[217] Whereas Article 8 of the Treaty submits these disputes to arbitration, Articles 267 and 344 TFEU mandatorily submit them to the jurisdiction of Member States' domestic courts, which decisions are ultimately controlled by the CJEU.[218]

184. Article 267 TFEU provides as follows:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

185. Article 344 TFEU provides, for its part, as follows:

> Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

216 Reply, paras. 76 and 78.
217 Submission on Jurisdiction, para. 45.
218 *Id.*, para. 43.

186. The Respondent challenges the approach of previous arbitral tribunals that have taken the view that the TFEU and the applicable BIT do not have the same subject matter because of alleged different objectives or overall standards of protection. Reviewing the award in *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Cyprus*,[219] the Respondent argues that the tribunal's argument that the BIT offered different protections than the TFEU "makes no sense": "[i]t reviews whether standards comparable to the FET standard or the protection from expropriation can be found in the TFEU. […] This however cannot be the right test to determine the subject-matter of a treaty. Two successive treaties on the very same subject matter could easily have different treatment standards."[220] According to the Respondent, the tribunal in that case failed to address the sole key question: "whether the Tribunal considers that there is a conflict between article 8 of the BIT and articles 267 and 344 TFEU and which weight the Tribunal will give to the CJEU's judgment."[221] Thus, the tribunal provided no solution to the issue at hand, *i.e.* "a situation in which two treaties, which apply to the same facts, not only call for the application of different legal rules, but if these rules cannot be applied simultaneously without the breach of one treaty."[222]

187. At the Hearing, the Respondent further relied upon the CJEU's judgment in *Mox Plant*, where "the CJEU held that Article 344 not only prevents states from submitting disputes on the interpretation of the European treaties to other methods of settlement, but also any third treaty to the extent that the dispute would involve obligations under the Treaties or in the scope of competence of the EU."[223] Accordingly, the Respondent notes that the CJEU has exclusive jurisdiction over disputes regarding rules forming part of the EU legal order, and, as clarified in *Achmea*, in matters relative to the fundamental freedoms such as freedom of establishment and free movement of capital.[224]

188. The Respondent argues that the fact that the EU Treaties did not grant the EU competence in respect of foreign direct investment until the 2009 Lisbon Treaty "has no effect whatsoever on the issues raised in this arbitration, *i.e.* on BITs concluded between Member States."[225] Moreover, the fact that arbitration represents a unique feature of BITs is irrelevant to the present case: "what

219 Exhibit CLA-110, *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018 ("***Marfin Investment Group v. Cyprus***").
220 Reply, para. 82.
221 *Id.*, para. 83.
222 *Id.*, para. 82.
223 Respondent's Post-Hearing Brief, para. 10, citing Exhibit RLA-4, *Commission v. Ireland*, CJEU, Case C-459/03, Judgment of the Court (Grand Chamber), 30 May 2006, paras. 120, 121, 126 and 127.
224 Respondent's Post-Hearing Brief, para. 10.
225 Reply, para. 88.

is essential is the incompatibility between the respective provisions of the two treaties, which is clearly present in the case at hand and even Claimant itself does not seem to negate this."[226]

(b) The *Achmea* Judgment Supports the Analysis that Article 8 of the Treaty is Incompatible with EU Law and thus Invalid

189. The incompatibility in the present case is further confirmed by the *Achmea* Judgment, which ruled that Articles 267 and 344 TFEU are incompatible with Article 8 of the Treaty.[227] The *Achmea* Judgment, the Respondent maintains, is "of greatest significance for this Tribunal when making a decision on incompatibility."[228] This is all more so the case given the declaratory nature of the judgment, which entails that the interpretation of the TFEU by the CJEU enjoys *ex tunc* validity.[229]

190. In its Reply on Jurisdiction, the Respondent proceeded to review in detail the chronology of events that led to and followed the *Achmea* judgment.[230] The Respondent thus highlighted that, pursuant to the German Federal Court's preliminary question on whether the arbitration agreement contained in the underlying BIT (*i.e.* the Treaty at hand in the present case) was governed by EU law, the CJEU made "clear […] that EU law invalidates the (Slovak and Czech) State's offer to arbitrate."[231] The Respondent thus concludes that "if at the moment Claimant would have allegedly accepted the offer to arbitrate under article 8 of the BIT, such offer did not exist from the perspective of EU law and, even if it did (*quod non*), it could not have been validly accepted."[232]

(c) Invalidity of Article 8 is Separate from the Issue of Termination of the Treaty

191. Finally, the Respondent argues, the invalidity of Article 8 pursuant to the Czech Republic's accession to the EU, as supported by the *Achmea* Judgment, is separate from the issue of the termination of a treaty.[233] Similarly, the Czech court practice relating to treaties signed by the Czech Republic is irrelevant:[234] it suffices that the only consequence arising from Articles 30(3)

226 *Id.*, para. 90.
227 Respondent's Opening Statement, Hearing Transcript, Day 1, 17:01-9:58.
228 Reply, para. 96; Respondent's Opening Statement, Hearing Transcript, Day 1, 12:05.
229 Reply, para. 97, *referring to* Exhibit RLA-109, *Amministrazione delle Finanze v. Srl Meridionale Industria Salumi, Fra telli Va sanelli an d Fra telli Ultro cchi*, Joined Cases 66, 127 and 128, ECR [1980] 1237, Judgment, 27 March 1980, p. 1255; Respondent's Opening Statement, Hearing Transcript, Day 1, 14:09-9:53.
230 Reply, paras. 118-132.
231 *Id.*, para. 127.
232 *Id.*, para. 131; Respondent's Opening Statement, Hearing Transcript, Day 1, 29:01.
233 Reply, para. 101, *referring to* Exhibit RLA-83, Kerstin von der Decken, "Article 30" in Oliver Dörr, Kirsten Schmalenbach, *Vienna Convention on the Law of the Treaties, A Commentary*, 2018, para. 22.
234 Reply, para. 102.

VCLT or 351 TFEU is that "article 8 of the BIT is inapplicable since 2004 and therefore cannot serve as a basis for the Tribunal's jurisdiction."[235] The remaining parts of the Treaty may yet remain valid and effective.

192. The alleged lack of direct horizontal effect has no incidence on the fact that the decision has an immediate effect not only between Contracting Parties, but also on individuals. As such, "[t]he horizontal direct effect of a Treaty provision consequently enables individuals to rely on Treaty provisions in their relations with other individuals and not only in their relations with Member States."[236]

(d) Conclusion

193. The Respondent concludes that "[t]he legal consequence of the application of either article 30(3) VCLT or article 351 TFEU is that the provisions of the treaty [in particular Article 8], which are incompatible with the latter, cease to be in force."[237]

(ii) The Claimant's Position

194. For its part, the Claimant argues that Article 8 of the Treaty remains valid and applicable, and thus entitles the Tribunal to assume jurisdiction over the present dispute. Indeed, the Treaty remains valid, as it was not terminated or suspended in accordance with Article 13 of the Treaty, nor in accordance with the provisions of Article 65 VCLT.[238]

(a) There is no Conflict between the Treaty and the EU Treaties

i) Article 351 TFEU Does not Apply as a Conflict Rule

195. The Claimant refutes the Respondent's argument that Article 351 TFEU is an explicit conflict rule, which implies Article 8 ceases to exist.[239] The Treaty is a pre-accession treaty pursuant to Article 351(1) TFEU – as such, the rights and obligations arising thereof cannot be affected by the EU treaties.[240] While Article 351(1) is indeed a conflict rule, the Claimant argues that it does not apply to intra-EU treaties, such as the Treaty.[241]

235 Reply, para. 101.
236 *Id.*, para. 109.
237 Submission on Jurisdiction, para. 55.
238 Answer, para. 8.
239 Submission on Jurisdiction, paras. 49-52 and 55.
240 Answer, para. 40.
241 Rejoinder, para. 38.

196. Indeed, as confirmed in arbitral jurisprudence,[242] Article 351 cannot be made to apply in the present case as both Contracting Parties of the Treaty are Member States.[243] The Respondent's reliance on the CJEU's jurisprudence relating to Article 351 is irrelevant for the present Tribunal: as confirmed by the award in *Nextera Energy Global Holdings v . Spain*,[244] the Tribunal is not bound by the decisions of that Court.[245]

197. Thus, the Claimant considers that it is entitled to rely on the offer to arbitrate in the Treaty, "by virtue of Article 351(1) TFEU."[246]

198. The Claimant further argues that, even if the Tribunal were to find that Article 351 TFEU is applicable in the present case, it has no bearing on the validity or applicability of Article 8 of the Treaty.

199. First, according to the Claimant, Article 351 TFEU cannot affect the rights that the investors could derive as beneficiaries of the Treaty. This is all the more so the case considering that the agreement to arbitrate was entered into on 5 November 2015, *i.e.* before the *Achmea* Judgment was issued.[247]

200. Second, while the Claimant agrees that a public international law analysis applies, it concludes from said application that EU law cannot be relied upon to free the Czech Republic from its international obligations, and in particular from its consent to arbitration.[248] Indeed, in accordance with Article 27 VCLT, the Czech Republic cannot rely on EU law to excuse its failure to comply with the Treaty's terms, because EU law qualifies as internal law of Member States.[249]

201. Finally, the Claimant argues that Article 351(2) limits the supremacy of EU law "as far as pre-accession international obligations of Member States are concerned."[250] In contrast, the provision "does not automatically render provisions of an international agreement that has been found to be

242 Exhibit CLA-37, *Vattenfall AB an d others v. Ger many*, ICSID Case No. ARB/12/12, Decision on the Achmea issue, 31 August 2018, paras. 225-226; Exhibit CLA-158, Mr. *Jürgen Wirtgen, Mr. Stefan Wirtgen, Mrs. Gisela Wirtgen, JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, Final Award, 11 October 2017, paras. 254-256 and 263; Exhibit CLA-160, *AES Summit Generation Limited AES-TISZA ERÖMÜ KFT v. Hungary*, Award, ICSID Case No. ARB/07/22, 23 September 2010, paras. 7.6.10-7.6.11.
243 Rejoinder, paras. 39-41.
244 Exhibit CLA-156, *Nextera Energy Global Holdings B.V. and Nextera Energy Spain Holdings B.V. v. Spain*, Decision on Jurisdiction, Liability and Quantum Principles, ICSID Case No. ARB/14/11, 12 March 2019, para. 354.
245 Rejoinder, para. 42.
246 Answer, para. 47.
247 Rejoinder, para. 44.
248 *Id.*, para. 45.
249 *Id.*, para. 46.
250 Answer, paras. 42-44.

incompatible invalid or inapplicable."[251] Thus, the Treaty remains applicable and its signatory States are the only ones entitled to make it compatible with EU law under Article 351(2) TFEU.[252]

ii) Article 30 VCLT is Inapplicable in the Present Case

202. Relying on the award in *Magyar Farming v. Hungary*, the Claimant argues that "the Tribunal is constituted on the basis of public international law and situated in the international legal order and, thus, should resolve any potential conflicts between the various international treaties at hand in accordance with Article 30 and Article 59 VCLT."[253] Consequently, Article 30 VCLT could potentially have a role to play. For it to apply, the TFEU and the Treaty must have the same subject matter and the TFEU must be considered a successive agreement to the Treaty.[254] However, the conditions for Article 30 VCLT to apply – the temporal condition and the subject matter condition – are not met.[255]

203. First, the Claimant contends that the Treaty and the EU Treaties do not have the same subject matter. The terms "same subject matter" should be interpreted, as originally intended by the drafters of the VCLT,[256] "strictly and should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty".[257]

204. Indeed, the TFEU is a "general treaty between all EU Member States, aimed at establishing and regulating the economic union", whereas the Treaty provides merely for specific investment protection between two States.[258] The treaties also have different objectives: the TFEU's objective is to create a common market, whereas the Treaty – and investment treaties in general – aim to provide specific investment protection.[259] Lastly, they provide different types of substantive protections: investment treaties afford protections that are not comparable to those granted under

251 Rejoinder, para. 48, *referring to* Exhibit CLA-37, *Vattenfall AB and others v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* issue, 31 August 2018, para. 228.
252 Answer, para. 43; Rejoinder, paras. 47-48.
253 Rejoinder, para. 18, *referring to* Exhibit CLA-150, *Magyar Farming Company LTD, Kintyre KFT, and Inícia ZRT v. Hungary*, Award, ICSID Case No. ARB/17/27, 13 November 2019, para. 203.
254 Answer, section 2.3; Rejoinder, para. 22.
255 Rejoinder, para. 19.
256 Answer, paras. 24-25, *referring to* Exhibit CLA-116, United Nations Conference on the Law of Treaties, Volume II, Vienna, 9 April-22 May 1969, p. 253, para. 37.
257 Exhibit CLA-116, United Nations Conference on the Law of Treaties, Volume II, Vienna, 9 April-22 May 1969, p. 247, para. 41.
258 Answer, para. 26.
259 Answer, para. 27.

EU law – thus, the arbitral tribunal in *Achmea v. Slovak Republic* "came to the conclusion that the protection under investment treaties goes far beyond EU law."[260]

205. The Claimant contends that "investment arbitration tribunals have consistently held that intra-EU BITs do not cover the same subject matter as the TFEU", referring to a number of arbitral awards to that effect.[261] Contrary to what the Respondent claims, these awards were not issued "almost exclusively" before the *Achmea* judgment was rendered – the same approach was followed in the awards in *United Utilities v. Estonia*, *Eskosol S.p.A. in liquidazione v. Italy* and in *Greentech Energy Systems A/S and others v. Italy*, all issued after the CJEU issued its judgment.[262]

206. Foreign direct investment was not originally within the competences of the EU – this only occurred after the 2009 Lisbon Treaty. This, the Claimant argues, entails that "it would be difficult to argue that the EU treaties have the same subject matter – foreign direct investment – as investment treaties."[263] The Claimant considers that its view is supported by a consistent arbitral jurisprudence. Thus, in *European American Investment Bank AG (Austria) v. Slovak Republic*, the arbitral tribunal concluded that "to accede to an economic community is simply not the same as to set up a specific investment protection regime providing for investor-State arbitration".[264] Contrary to what the Respondent has stated,[265] the Claimant argues, "[i]nvestor-State arbitration is a unique feature of investment treaties and such dispute settlement mechanism is not provided

260 Answer, para. 28, *referring to* Exhibit CLA-114, *Achmea (formerly Eureko B.V.) v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras. 260-262.

261 Exhibit CLA-110, *Marfin v. Cyprus*, paras. 585-589; Exhibit CLA-117, *Eastern Sugar v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, paras. 159-166; Exhibit CLA-114, *Achmea (formerly Eureko B.V.) v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras. 247-263; Exhibit RLA-53, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL Ad Hoc Arbitration, Decision on Jurisdiction, 30 April 2010, paras. 74-79; Exhibit RLA-56, *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, paras. 178-184.

262 Exhibit CLA-157, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Estonia*, Award, ICSID Case No. ARB/14/24, 21 June 2019, para. 543; Exhibit CLA-151, *Eskosol S.p.A. in liquidazione v. Italy,* Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to intra-EU Disputes, ICSID Case No. ARB/15/50, 7 May 2019, para. 147 ("***Eskosol v. Italy***"); Exhibit CLA-159, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy, SCC Arbitration V* (2015/095) 2019, para. 346.

263 Answer, para. 29, *referring to* Exhibit RLA-56, *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, para. 183 ("***EURAM v. Slovak Republic***").

264 Answer, para. 31, *referring to* Exhibit RLA-56, *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, para. 184.

265 Submission on Jurisdiction, para. 45.

for under EU law."[266] Both arbitral jurisprudence[267] and doctrine[268] have recognized this as a defining feature of BITs. Thus, the Treaty and the TFEU cannot be understood to relate to the same subject matter.[269]

207. Second, the Claimant contends that "the TFEU cannot be considered to be successive to the Treaty only because it entered into force later than the Treaty" – indeed, the provisions which application is sought by the Respondent have existed since 1958, in the EEC Treaty.[270] As such, even if the Treaty and the TFEU were to relate to the same subject matter, the TFEU – not the Treaty – would qualify as the earlier treaty.[271]

208. In any event, the Claimant argues that "the Czech Republic cannot invoke Article 30 VCLT to claim the invalidity of the Treaty or its Article 8, because Article 30 VCLT simply does not allow states to terminate their obligations under the previous treaty by concluding a new treaty."[272]

iii) Article 344 TFEU is Inapplicable

209. Lastly, with regard to the Respondent's reference to the *MOX Plant* decision issued by the CJEU, the Claimant argues that Article 344 TFEU does not apply to the present case, which confronts a private party with a Member State. Whereas the *MOX Plant* case opposed two Member States and was related to provisions of an international treaty whose content was also covered by EU directives, the Claimant in the present case is not relying on EU law.[273]

210. The Claimant argues that, contrary to what the Respondent attempts to say, Article 344 does not apply in disputes between a private party and a Member State. Citing Advocate General

266 Answer, para. 32.
267 Answer, paras. 33-34, *referring to* Exhibit RLA-53, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL Ad Hoc Arbitration, Decision on Jurisdiction, 30 April 2010, para. 77 and CLA-117, *Eastern Sugar v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, para. 165.
268 Exhibit CLA-118, George A Bermann, *Part II Investor-State Arbitration in the Energy Sector, 9 ECT and European Union Law* in *International Arbitration in the Energy Sector*, edited by Maxi Scherer, 22 February 2018, para. 9.14; Exhibit CLA-115, August Reinisch, '*Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*', in *Legal Issues of Economic Integration*, Volume 39, Number 2, 2012, p. 171; Exhibit CLA-119, Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, 2009, p. 402.
269 Rejoinder, para. 30.
270 *Id.*, para. 31.
271 *Id.*, para. 31.
272 Answer, para. 36.
273 Claimant's Post-Hearing Brief, para. 50.

Wathelet's opinion in *Achmea*, the Claimant argues that this provision only applies to disputes between Member States or between the EU and Member States.[274]

211. The Claimant further notes that, as shown by *Jürgen Wirtgen v. Czech Republic* and *EURAM v. Slovak Republic*, investment arbitration tribunals have ruled out that Article 344 precludes an investor from initiating an arbitration against EU Member States.[275]

(b) The *Achmea* Judgment is Irrelevant to the Tribunal's Jurisdiction

212. The Claimant contends that the CJEU's *Achmea* Judgment is irrelevant to the Tribunal's jurisdiction, because "the Tribunal must base its jurisdiction on (sources of) public international law – in this case specifically on the Treaty and the VCLT – and not on EU law",[276] whereas the *Achmea* Judgment is solely based on EU law.[277] In fact, in its Post-Hearing Brief, the Claimant notes that "up to date all the tribunals dealing with similar objections have systematically denied these objections".[278]

213. The Claimant points out that EU law, as determined by the CJEU, is a new legal order distinct from international law.[279] In the Claimant's view, "in order to determine whether Article 8 of the Treaty is indeed precluded by the EU Treaties, it does not suffice to only interpret the EU Treaties."[280] EU law also cannot set aside public international law, as found by the tribunal in *Eskosol v. Italy*.[281]

214. The Claimant further notes that, as conceded by the Respondent, and as confirmed by the tribunal in *Eskosol v. Italy*,[282] the *Achmea* Judgment is not binding on the Tribunal.[283] It is not the CJEU's

274 Claimant's Post-Hearing Brief, para. 53, citing Exhibit RLA-6, *Achmea* Judgment, paras. 15-16.
275 Claimant's Post-Hearing Brief, paras. 51-52, citing Exhibit CLA-158, *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen, JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, Final Award, 11 October 2017, para. 258 and Exhibit RLA-110, *EURAM v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, paras. 254-255.
276 Rejoinder, para. 9.
277 *Id.*, para. 10.
278 Claimant's Post-Hearing Brief, para. 44.
279 Rejoinder, para. 11, *referring to* Exhibit CLA-152, *Van Gend & Loos v. Netherlands*, CJEU 5 February 1963, C-26/62, ECLI:EU:C:1963:1 and Exhibit CLA-153, *Costa v. E.N.E.L.*, CJEU 15 July 1964, ECLI:EU:C:1964:66.
280 Rejoinder, para. 12.
281 Rejoinder, para. 13, *referring to* Exhibit CLA-151, *Eskosol S.p.A. in liquidazione v. Italy*, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to intra-EU Disputes, ICSID Case No. ARB/15/50, 7 May 2019, paras. 179-181.
282 Exhibit CLA-151, *Eskosol S.p.A. in liquidazione v. Italy*, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to intra-EU Disputes, ICSID Case No. ARB/15/50, 7 May 2019, paras. 178 and 183.
283 Rejoinder, para. 14, *referring to* Reply, para. 93.

place, nor does the CJEU have the power, to impose definitively how the potential conflict between EU law and BITs must be resolved.[284] Similarly, the Claimant notes that the tribunal in *GPF v. Poland* "confirmed that claimant's right to arbitrate disputes arising out of the BIT does not conflict with the CJEU's power to resolve disputes related to the EU Treaties."[285]

215. Furthermore, the Claimant argues that the decision of a court cannot invalidate an international treaty.[286] The Respondent has not provided any evidence as to how EU law could "have the effect of validly withdrawing its consent to arbitration with retroactive effect."[287] In any event, the Treaty protects the legitimate expectations of investors, which can also relate to the application of the Treaty's sunset clause: the expectations of investors "would be frustrated if EU law denied such rights to investors without replacing them with any meaningful protection against the Member States' actions."[288]

216. The Claimant underscores that the Respondent "confirms that in the *Achmea* decision, the CJEU did not declare Article 8 of the Treaty invalid."[289] Given that the CJEU only relied on EU law and did not address investment arbitration agreements under international law, the CJEU's decision ruling on the incompatibility of investment arbitration agreements held in an intra-EU BIT with EU law has no bearing on that arbitration agreement. Thus, citing the tribunal in *PL Holdings S.à.r.l .v. Poland*, the Claimant argues that this Tribunal should establish its jurisdiction over the present dispute on the sole basis of the Treaty, and not on the basis of EU law.[290]

217. The Claimant considers that the Respondent's explanations on the procedural history of the *Achmea* judgment have no bearing on the case at hand.[291] The Claimant thus underscores that the German Federal Court "was not at liberty to come to a different conclusion that the CJEU did in the *Achmea* Judgment."[292] As such, the Claimant concludes that "it is not relevant whether there is a valid arbitration agreement under EU law and that it is by no means certain that a Dutch court

284 Rejoinder, para. 15.
285 Claimant's Post-Hearing Brief, para. 46, citing Exhibit CLA-202, *GPF GP S.à.r.l. v. Poland*, SCC Case No. V 2014/168, Award of 29 April 2020, paras. 383-384.
286 Rejoinder, para. 16. Claimant's Opening Statement, Hearing Transcript, Day 1, 100:16.
287 Rejoinder, para. 56, *referring to* Exhibit CLA-113, *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, para. 264. Claimant's Opening Statement, Hearing Transcript, Day 1, 95:20-13:20
288 Rejoinder, para. 56.
289 Answer, para. 11.
290 Answer, para. 14, *referring to* Exhibit CLA-111, *PL Holdings S.à.r.l. v. Poland*, SCC V 2014/163, Partial Award, 28 June 2017, para. 309 ("***PL Holdings v. Poland***") and Exhibit CLA-112, Berend Jan Drijber, *Nous d'abord*: investment arbitration after Achmea, *Nederlands Juristenblad* 2019/473, 4 March 2019, p. 2.
291 Rejoinder, para. 66.
292 *Id.*, para. 66.

'would reach the same conclusion' as the [German Federal Court]" in the annulment decision issued on 31 October 2018.[293]

218. The Claimant further notes that the EU is not a party to the Treaty,[294] and that the *Achmea* Judgment is not binding upon the Tribunal, as tribunals constituted under intra-EU BITs do not qualify as jurisdictions of Member States.[295] Considering furthermore that the *Achmea* Judgment does not have horizontal effect,[296] the Claimant argues that the decision is not directed at private investors.[297]

(c) The Treaty, Including Article 8, Remains Valid until it is Terminated in Accordance with its Provisions

219. The Claimant argues that Article 13(2) of the Treaty is the sole provision that can be relied upon for the purposes of termination of the Treaty or of one of its provisions.[298]

220. The Claimant rejects the Respondent's counterargument that the termination of the Treaty is unnecessary to render Article 8 inapplicable, considering that it ceased to be in force upon the Czech Republic's accession to the EU in 2004. Even if Article 8 of the Treaty were to be considered inapplicable, this has no incidence on the existence of the Claimant's consent to arbitration, made on 19 December 2017, before the *Achmea* Judgment. This is supported by the award in *Eskosol v. Italy*, where the tribunal, referring to Article 69 VCLT, ruled as follows:

> Even if as a matter of EU law the Achmea Judgment is considered to be ex tunc, in the sense that Italy lacked consent from the inception to agree to Article 26 of the ECT, this still would not imply that Eskosol's acceptance – prior to the Achmea Judgment – of Italy's apparent offer of ECT arbitration is considered to be void. This follows from Article 69 of the VCLT regarding the consequences under international law of the invalidity of a treaty because of lack of consent. […]
>
> Under Article 69(1), the general rule is that invalidation of a treaty based on the absence of consent operates retroactively, with the effect that the provisions of that treaty are "void" and "have no legal force." Consistent with the general rule, the parties to the treaty may require each other to restore the situation that existed as between them ex ante (restitutio in integrum). However, there is an important exception to this rule stated in Article 69(2)(b), under which acts that have been performed "in good faith before the invalidity was invoked" are not considered unlawful simply because of invalidity of the treaty. In the Tribunal's view, this is the case for arbitration agreements perfected before the Achmea Judgment, in reliance on EU Member States' apparent offer of consent to investor-State arbitration under the ECT or other treaties. The conclusion that investors

293 *Id.*, para. 66, *referring to* Exhibit RLA-115, *Slovak Republic v. Achmea BV*, Federal Court of Justice, Ruling of 31 October 2018, I ZB 2/15.
294 Answer, para. 15.
295 Answer, para. 16.
296 Claimant's Opening Statement, Hearing Transcript, Day 1, 107:06-10.
297 Answer, para. 17.
298 Rejoinder, para. 51.

> accepted that apparent offer in good faith follows from the point, discussed above, that any invalidity in the offer of consent was far from "manifest" prior to the Achmea Judgment. Indeed, lack of consent was neither manifested in the text of the ECT itself; the contemporaneous conduct of the Commission and EU Member States, none of which "sought an opinion from the Court on the compatibility of that treaty with the EU and FEU Treaties"; and the subsequent shifting positions of the Commission regarding whether additional action by EU Member States would be required in order to terminate intra-EU treaties. It was not until the CJEU actually issued the Achmea Judgment that, at the very earliest, given persisting debate about whether that Judgment even reaches the ECT, it could be said that investors were placed on notice about the risks of relying on Member States' apparent consent to arbitration in Article 26 of the ECT. [299]

221. Citing the award in *Marfin v. Cyprus* , the Claimant asserts that "there can be no implied termination or invalidation of the Treaty to the detriment of investors who legitimately relied upon the Treaty's protections".[300] Contrary to what the Respondent states in its Reply, this reference supports the view that there cannot be an implied termination of the Treaty. Indeed, the tribunal found that "no termination procedures under the relevant BIT were followed, which was one of the grounds to deny the respondent's objection."[301]

222. The Claimant further contends that the Czech Republic has not demonstrated how EU law could have validly led to the Respondent's retroactive withdrawal of its consent to arbitrate.[302] Its reference to a treaty agreeing to the termination of all intra-EU BITs is premature: there is, as of today, no agreement for the termination of all intra-EU BITs.[303] In any event, this proves yet again that "there was no automatic inapplicability or termination of the arbitration clauses in all the intra-EU BITs as a result of the *Achmea* Judgment."[304]

(d) Conclusion

223. The Claimant thus concludes that Article 8 of the Treaty remains applicable and that the Tribunal should uphold jurisdiction in the present case.

299 Exhibit CLA-151, *Eskosol S.p.A. in l iquidazione v. Italy*, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to intra-EU Disputes, ICSID Case No. ARB/15/50, 7 May 2019, paras. 204-206.
300 Exhibit CLA-110, *Marfin v. Cyprus*, para. 594.
301 Rejoinder, para. 53, *referring to* Exhibit CLA-110, *Marfin v. Cyprus*, paras. 593-594.
302 Rejoinder, para. 56.
303 *Id.*, para. 55.
304 Rejoinder, para. 55.

(iii) The European Commission's Position

224. In its *amicus curiae* brief, relying on case law of the Permanent Court of International Justice,[305] the European Commission argues that "the Arbitral Tribunal is under obligation to analyse whether the EU Treaties constitute an obstacle to its jurisdiction."[306]

225. In the present case, the European Commission considers that both EU law and Czech law govern substance and jurisdiction issues. Thus, it notes that in *JSW v. Czech Republic*, the tribunal held that it had to "apply the rules of law with the closest connection with the dispute in accordance with the so-called principle of proximity" and further held that, in the words of the European Commission, "in an intra-EU investment arbitration, Union law was part of the law applicable to deciding issues related to jurisdiction."[307]

226. Should the Tribunal consider that EU law and Czech law do not govern the dispute at hand, the European Commission notes that other tribunals have assessed the existence and validity of arbitration offers under international law.[308]

227. In any event, in the European Commission's view, "the outcome is identical, the Arbitral Tribunal lacks jurisdiction."[309]

228. The European Commission further argues that EU law "takes precedence over conflicting rules of international law in the legal order of the Netherlands and the Czech Republic over the Dutch-Czech BIT since 1 May 2004."[310] According to the European Commission, the principle of primacy of EU law applies not only to each Member State's domestic law, but also to international treaties concluded between two Member States such as the Treaty.[311] When a State is party to a treaty with a Member State and later becomes itself a Member State, "EU law takes precedence as of the day of accession."[312]

305 *Oscar Chinn (U.K. v. Belg.)*, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12), para. 58; Jurisdiction of *European Commission of Danube Between Galatz and Braila*, Advisory Opinion, 1927 P.C.I.J. (ser. B) No. 14 (Dec. 8), para.45; *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30), paras. 74-75; *Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.)*, 1939 P.C.I.J. (ser. A/B) No. 77 (Apr. 4).

306 EU Commission *Amicus Curiae* Brief, para. 26.

307 *Id.*, para. 33, *referring to* Exhibit CLA-158, *JSW v. Czech Republic*, Final Award, 11 October 2017, paras. 170-178.

308 EU Commission *Amicus Curiae* Brief, para. 36.

309 *Id.*, para. 39.

310 *Id.*, para. 40.

311 *Id.*, para. 42.

312 *Id.*, para. 43.

229. Because EU law takes precedence over both national law and international commitments between Member States, it has been ruled that "private individuals 'may not rely on prior international agreements between [two Member States] in order to prevent the application of the interim regulations adopted by the Community in the event of any incompatibility between the two categories of provisions."[313] This, in turn, has been accepted in the award in *Electrabel v. Hungary*.[314]

230. The European Commission thus concludes that:

> when the Czech Republic joined the EU, it was aware of the rule of primacy, including the relevant case law, which forms part of the EU *acquis* (as were of course the Netherlands, a founding member). The will of the Netherlands and the Czech Republic, when signing the Treaty of Accession, was that, in the matters covered by EU law, their reciprocal relationships would be governed by EU law, including the rule of conflict of primacy of law.
>
> Therefor[e] the conflict between the Dutch-Czech BIT and EU law must be resolved in favour of the latter and anybody called upon to apply the former must, on the basis of primacy of EU law, set aside the arbitration clause in the Dutch-Czech BIT and decline to apply it.[315]

231. Because the primacy rule is a special conflict rule under the EU Treaties, the European Commission argues that Article 30 VCLT only sets out "residual rules, i.e. rules that apply where the Contracting Parties have not provided for special conflict rules".[316]

232. In the alternative, the European Commission considers that Article 59 VCLT – which relates to the signature of successive treaties – "provides for two scenarios in which the conclusion of a successor treaty gives rise to the implied termination of an existing treaty": when it appears the later treaty should govern a specific matter or when the later treaty is so incompatible with the earlier one that they cannot both be applied at the same time.[317] Either of these situations could apply in the present case, in the European Commission's view:

   (a) When the Netherlands and the Czech Republic signed the EU Treaties, "[t]heir intention […] was that the protection of intra-EU investments would be governed from that moment by EU law rather than by the BIT";[318]

313 *Id.*, para. 44, *citing* CJEU, Judgment in *José Cr ujeiras Tome* , 180/80 and 266/80, EU:C:1981:294, paragraph 20.
314 EU Commission, *Amicus Curiae* Brief, para. 45.
315 *Id.*, paras. 47-48.
316 *Id.*, para. 49.
317 *Id.*, para. 51.
318 *Id.*, para. 57.

(b) "BITs are entirely incompatible with EU law".[319]

233. The European Commission further notes that "according to some commentators, Art. 59 VCLT can lead to partial termination of an existing international agreement, namely in situations where only part of the successor Treaty can be regarded as giving rise to incompatibility."[320]

234. As to the requirement that the treaties concern the "same subject matter", the European Commission argues that this criterion "should not be read as imposing an additional condition" for Article 59 to apply and that, in any event, the correct test to determine this is whether the treaties "govern the same legal situation".[321]

235. Consequently, the Treaty "was implicitly terminated upon the accession of the Czech Republic to the EU on 1 May 2004."[322] It is unnecessary for the formal termination steps to be pursued: Article 59 suffices.

236. Should the Tribunal disagree with this perception of Article 59 VCLT, the European Commission considers that "the same result, namely the precedence of EU law, would ensue from the application of Art. 30(3) VCLT."[323] Indeed, taking aim at the tribunal's reasoning in the award in *Eastern Sugar v. Czech Republic*, the European Commission refers to the decision in *PL Holding v. Poland* to argue that the criteria of "conflict" and "same subject matter" are not distinct conditions, but a single condition.[324]

237. Even if the Tribunal were to adopt the same reasoning as the tribunal in *Eastern Sugar v. Czech Republic*, and if "same subject matter" and "conflict" were considered separate criteria, both would be met because "EU law prohibits both the procedural and the substantive rules of the Dutch-Czech BIT" through provisions of the TEU and of the TFEU (notably Articles 267 and 344).[325]

238. The European Commission concludes that the reasoning which led arbitral tribunals to rule that intra-EU BITs and the EU Treaties do not relate to the same subject matter is flawed because: (i)

319 *Id.*, para. 60.
320 *See* in detail Francois Dubuisson, "Article 59" in *The Vienna Convention on the Law of Treaties II, A Commentary* (Olivier Corten, Pierre Klein eds.), Volume II, Oxford University Press, Oxford – New York, 2011, pp. 2119-2122, paras. 47-50 (also exhibited as Exhibit RLA-10); similarly, *Seyed Ali Sadat-Akhavi*, footnote 12 above, p. 49 and 50.
321 EU Commission, *Amicus Curiae* Brief, paras. 63-64.
322 *Id.*, para. 53.
323 *Id.*, para. 67.
324 *Id.*, para. 71, *citing* SCC Case No. V 2014/163, Award of 28 June 2017, para. 311.
325 EU Commission *Amicus Curiae* Brief, para. 72.

"it disregards the case-law of the PCIJ, pursuant to which international courts and tribunals have to decide on questions of treaty conflict"; (ii) "Article 30 VCLT is only a residual conflict rule", such that the principle of primacy, as a special conflicts rule, should apply first; (iii) "intra-EU BIT and the EU Treaties do cover the same subject matter".[326]

239. Arbitral tribunals have similarly erred in considering that "[i]nternational law would contain a 'fundamental principle' that protects an '***acquired right***' of Claimant."[327] Referring to the ICJ jurisprudence, the European Commission argues that "there is no general principle of legitimate expectations under international law" and no basis for an investor to claim an acquired right.[328]

240. In ruling that the *Achmea* Judgment should apply only *ex nunc*, rather than *ex tunc*, the arbitral tribunals have mistakenly evaluated the role of the CJEU, which purports to interpret the law.[329] As such, "[t]he judgment in *Achmea* states the law as it always has been and, hence, as it must be applied including in pending cases."[330]

241. Finally, the European Commission considers that the sunset clause contained in the Treaty does not apply as (i) it "only regulates the legal consequence of unilateral termination of the BIT by one contracting party" and (ii) its objective is to "prolong the application in time of the offer to arbitrate", an offer which is now precluded under EU law and therefore invalid.[331]

b. *The Parties' Positions as to the Legal Effect and Implication of Subsequent Declarations by the Contracting Parties pursuant to Article 31 VCLT*

(i) The Respondent's Position

242. The Respondent contends that its position that Article 8 of the Treaty is incompatible with the TFEU (and thus inapplicable) is further confirmed by the Declarations, which "represent an authentic interpretation of the BIT between the Netherlands and the Czech Republic",[332] under Article 31(3)(a) VCLT. Indeed, these Declarations amount to a "subsequent agreement" within the meaning of Article 31(3)(a) VCLT. [333]

326 *Id.*, para. 76.
327 *Id.*, para. 77 [emphasis in original].
328 *Id.*, para. 77.
329 *Id.*, para. 79.
330 *Id.*, para. 80.
331 *Id.*, paras. 81-83 [emphasis in original].
332 Submission on Jurisdiction, para. 62.
333 *Id.*, para. 65, *citing* Exhibit RLA-16, VCLT, Article 31(3)(a).

243. Article 31(3)(a) VCLT provides that, in interpreting treaties,

> There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.[334]

244. The Declarations, in their most relevant parts, state:

> Member States are bound to draw all necessary consequences from that judgment pursuant to their obligations under Union law.
>
> Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. They do not produce effects including as regards provisions that provide for extended protection of investments made prior to termination for a further period of time (so-called sunset or grandfathering clauses). An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.
>
> Furthermore, international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied.[335]

245. The Respondent considers that, when interpreting a treaty provision, in accordance with the ICJ judgment in *Kasikili Sedudu Island (Botswana v. Namibia)*, an interpretation by the contracting parties after the conclusion of the treaty "*must be read into the treaty for purposes of its interpretation*".[336] In this case, the Respondent argues that the Declarations signed, *inter alia*, by the Czech Republic and the Netherlands, "stated their interpretation of the effects of the TFEU on the dispute resolution clauses of intra-EU BITs."[337] As such, these Declarations also qualified as "a binding authentic interpretation" not only of the TFEU, but also of the Treaty.[338]

246. According to the Respondent, the Declarations also qualify as State practice, within the meaning of Article 31(3)(b) VCLT. Such practice "may consist of any conduct of a party in the application

334 Submission on Jurisdiction, para. 65; Exhibit RLA-16, VCLT, p. 331.
335 Exhibit R-2, Declaration of the Representatives of the Governments of the Member States, 15 January 2019, pp. 1-2.
336 Submission on Jurisdiction, para. 66, *citing* Exhibit RLA-17, *Kasikili Sedudu Island (Botswana/ Namibia)*, Judgment, ICJ Report 1999, p. 1045, 13 December 1999, para. 49.
337 Submission on Jurisdiction, para. 69.
338 *Id.*, para. 70.

of a treaty, whether in the exercise of its executive, legislative, judicial or other functions."[339] In the present case, the "practice of the EU Member States in relation to the interpretation of the intra-EU BITs has been strongly in favour of denying the jurisdiction of the arbitral tribunals based on intra-EU BITs."[340]

247. Article 31(3)(b) VCLT provides that, when interpreting treaties,

> There shall be taken into account, together with the context:
>
> […]
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation […] shall be taken into account.[341]

248. Consequently, pursuant to Article 31 VCLT, the Declarations ought to be analysed as an authentic interpretation of intra-EU BITs – including the Treaty at hand. Whether or not the States had an intention to terminate the intra-EU BITs has no bearing on the fact that arbitration clauses contained therein are invalid.

249. Similarly, the behaviour of Czech courts or of the Czech Ministry of Finance does not have any significance for the validity of Article 8 of the Treaty.[342] The underlying Treaty itself remains valid and effective.

250. In its Post-Hearing Brief, the Respondent addressed for the first time the Termination Agreement.[343] In the Respondent's view, contrary to what the Claimant argues, the Termination Agreement "does not mean that the arbitration clauses in the BITs are valid until the BITs are terminated pursuant to the Termination Agreement."[344] On the contrary, it "confirms that […] intra-EU investment arbitration has not been available to investors since the accession of the respective host state to the European Union."[345]

339 *Id.*, para. 75, *citing* Exhibit RLA-24, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties 2018, adopted by the International Law Commission at its seventieth session.
340 Submission on Jurisdiction, para. 78.
341 *Id.*, para. 72, *citing* Exhibit RLA-16, VCLT, Article 31(3)(b).
342 Reply, para. 102.
343 Respondent's Post-Hearing Brief, section 2.7.
344 *Id.*, para. 40.
345 *Id.*, para. 41.

(ii) The Claimant's Position

251. For its part, the Claimant considers that the conduct of the Contracting Parties proves that the Treaty was never terminated: "both the host state (Czech Republic) and the home state (the Netherlands) in the present case showed the intention to fulfil the obligations under the Treaty (also long after 2004)" – *i.e.* long after the Czech Republic's accession to the European Union.[346] Indeed, whereas the Czech Republic terminated some intra-EU BITs, it never did so with the Treaty, following a refusal of the Netherlands to agree to such a termination in 2010.[347] In fact, the Claimant notes that the Treaty remains listed as a valid treaty on the website of the Czech Republic's Ministry of Finance.[348] Moreover, Czech courts themselves have recognized that intra-EU BITs are valid and effective.[349]

252. The Claimant further disagrees with the Respondent's qualification of the Declarations as authentic interpretation of the Treaty.[350] First, the Claimant considers that the mere existence of the Declarations serves as proof of the continued validity of arbitration agreements in intra-EU BITs.[351] Second, the Declarations are irrelevant because "states cannot circumvent the formal requirements that a state may be obligated to undertake under an international instrument, *i.e.* the formal requirements for termination under the Treaty and the VCLT."[352]

253. In the Claimant's eyes, the Declarations are "a mere political document […] and of no binding effect whatsoever."[353]

254. Third, the Claimant argues that it is not possible for the Respondent to retroactively revoke its consent to arbitrate by relying on the declarations. The Treaty being in force at the time when the Claimant accepted the offer to arbitrate on 5 November 2015, the Claimant's recourse to arbitration is valid and the Tribunal has jurisdiction.

346 Answer, para. 48.
347 *Id.*, para. 52, *referring to* Exhibit CLA-114, *Achmea (formerly Eureko B.V.) v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 163; *see also* Exhibit CLA-125, 'Chapter 5: Intra-EU International Investment Agreements', in Tom Fecak, *International Investment Agreements and EU Law*, Kluwer Law International, 2016, p. 374.
348 Answer, para. 53, *referring to* Exhibit C-26, Web-page of the Czech Ministry of Finance, accessed on 15 April 2019.
349 Answer, para. 53, *referring to* Exhibit RLA-56, *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, para. 154 and fn. 190, *referring to* Municipal Court of Prague, Resolution dated 2 July 2010, Case No. 18 Co 164/2010-183.
350 Answer, paras. 55-58.
351 Answer, para. 56.
352 *Id.*, para. 57.
353 Rejoinder, para. 54.

255. Citing the Netherlands' remarks before the CJEU,[354] the Claimant further argues that "the unilateral offer of a state to arbitrate as contained in an investment treaty cannot be revoked during the extended validity period under the so-called sunset clause […]. During such time, foreign investors should be considered to have legitimate expectations that they would remain protected under the Treaty."[355]

256. Responding to the Tribunal's questions as to the effect of the Termination Agreement on the present proceedings, the Claimant argues that the mere existence of this agreement "strengthens Fynerdale's position that there is no automatic inapplicability or termination of the arbitration clause in all intra-EU BITs as a result of the *Achmea* Judgment and the incompatibility with EU law."[356]

257. Furthermore, noting that the Termination Agreement has not been ratified by either of the signatory States of the BIT, the Claimant reiterates that the Tribunal should uphold jurisdiction under Article 8 of the BIT.[357] Even if the signatory States of the BIT were to ratify the Termination Agreement, this would have no incidence on the Tribunal's jurisdiction, considering the agreement has no retroactive effect.[358]

258. Last, the Claimant notes that its rights would be protected under the BIT only if the arbitration were to be still pending when the signatory States of the BIT ratified the Termination Agreement. In order to benefit from that protection, the Claimant argues that "in order for Fynerdale to be able to invoke the protections granted to it under the Termination Agreement, it is crucial for the Tribunal to declare that [it] has jurisdiction."[359]

(iii) The European Commission's Position

259. In the European Commission's view, the Declarations and Termination Agreement provide "important elements of context".[360] These "constitute subsequent agreement between the parties regarding the interpretation of the treaty or subsequent practice in the application of the treaty

354 Answer, para. 63, *referring to* Exhibit CLA-114, *Achmea (formerly Eureko B.V.) v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 156.
355 Answer, para. 62.
356 Claimant's Post-Hearing Brief, para. 56.
357 *Id.*, para. 57.
358 *Id.*, paras. 58-60.
359 Claimant's Post-Hearing Brief, para. 61.
360 EU Commission *Amicus Curiae* Brief, para. 9.

which establishes the agreement of the parties regarding its interpretation pursuant to Article 31(1)(3)(a) and (b) of the [VCLT] concerning the EU Treaties and concerning the [Treaty]."[361]

260. The European Commission notes that both States have signed the Termination Agreement, thereby giving an authentic interpretation of the conflict rules applicable to the Treaty.[362] Such interpretative declarations must be respected by arbitral tribunals.[363] Moreover, considering that there are no temporal restrictions in the VCLT as to the effect of a subsequent agreement, the European Commission argues that "[s]ubsequent agreements on interpretation apply *ab initio*, that is, as of the date of entry into force of the treaty".[364]

c. *The Tribunal's Analysis*

261. The Tribunal has considered carefully the arguments advanced by the Parties in respect of the possible effects of the *Achmea* Judgment. The Tribunal has reviewed subsequent awards and judgments on this issue. Further, the Tribunal has considered the Declarations and the Termination Agreement (which the Czech Republic and the Kingdom of the Netherlands, respectively, have signed but, at the time of the Hearing, not yet ratified).

262. The Tribunal is aware of the fact that it is dealing with the same bilateral investment agreement that was considered by the CJEU in the *Achmea* Judgment, although the respondents in the two arbitrations differ. The Respondent has emphasized this fact.

263. Before dealing with the arguments advanced by the Parties, it seems appropriate to address some general considerations.

264. It is important to bear in mind, as a paramount factor relating to the jurisdiction of the Tribunal, that the latter is established by, and derives its powers (if any) from, the consent of the Parties. That consent operates at two successive stages.

(a) The first stage originates from the Treaty. According to Article 8 of that Treaty, investors of one Contracting Party have a right to submit disputes with the other Contracting Party before an arbitral tribunal. Article 8(1) and (2) read as follows:

361 *Id.*, para. 10.
362 *Id.*, para. 87.
363 *Id.*, para. 88.
364 *Id.*, para. 90.

> (1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.
>
> (2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.
>
> As a matter of international law, those provisions constitute an offer of the Parties to the Treaty, which can be accepted, if certain conditions are met, by an investor. At this first stage, the Tribunal is concerned with the consent of the Netherlands and the Czech Republic as expressed in Article 8 of the Treaty, to be interpreted in accordance with international law and, in particular, the VCLT.

(b) The second stage originates from the acceptance of the offer by the Claimant, as an investor and national of the Netherlands, here effected through the commencement of arbitral proceedings under Article 8 of the Treaty. Upon such acceptance, there is consent between the investor and the Contracting Party to submit to the jurisdiction of the arbitral tribunal constituted in accordance with the Treaty, in respect of the dispute referred to it. Provided that all other conditions stipulated in the Treaty, including those relating to such matters as the nationality of the investor, the six-month cooling-off period and the investment, have been met, the arbitral tribunal established in accordance with the Treaty has at least *prima facie* jurisdiction over the dispute.

265. As the Respondent has rightly pointed out, international law alone may not be determinative for answering the question whether the Claimant has validly accepted an offer to arbitrate the present dispute before this Tribunal. Rather, this question posing itself at the second stage operates under both international law and, here, also under the laws of the Netherlands as the *lex loci arbitri* applying to UNCITRAL arbitration proceedings since the agreed place of arbitration is The Hague. Whether or not the consent was valid when expressed, whether it remained valid when The Hague was agreed as the place of arbitration, and whether the present dispute is arbitrable under the laws of the Netherlands are questions that are disputed between the Parties. The Tribunal will examine the implications of the laws of the Netherlands in Section V.B.3 below.

266. Theoretically, those consequences may operate in distinct ways. For example, EU law may affect the capacity of a State to consent to an international treaty, may affect the capacity of a private party subject to EU law to accept an offer to arbitrate under an international treaty, or may affect the performance of obligations under such treaty. EU law, further, may affect the manner in which disputes arising under such treaty are to be settled, thus affecting the jurisdiction of tribunals established outside the EU legal order. Finally, EU law, being part of the applicable national law,

may influence the scope of obligations under such treaty. These distinctions are to be borne in mind when deciding the present dispute.

267. The Tribunal deems it appropriate to add that it is necessary to distinguish between Article 8(1) and (2) of the Treaty, providing for the jurisdiction of an arbitral tribunal and the law to be applied by the tribunal as stipulated by Article 8(6) of the Treaty. Whether EU law has an impact on the jurisdiction of the Tribunal is at the centre of the dispute concerning jurisdiction.

268. By way of clarification, a final general consideration may be called for. The Tribunal will have to take into consideration that the Treaty as well as the TFEU and the TEU are part of international law, the two latter ones being of a regional nature. As to whether the latter two exclude the application of the former is a matter of disagreement between the Parties to which the Tribunal will now turn.

(i) Whether the EU Treaties Preclude the Application of the Treaty

269. The Tribunal notes that the arguments invoked by the Respondent in its Submission on Jurisdiction and its Reply, respectively, are not fully identical. Section 2.3.1 of the Respondent's Submission on Jurisdiction is headed "The TFEU and the TEU as *legis posteriori* to the BIT" and simply states that the TEU and the TFEU were concluded after the Treaty entered into force. The following Section 2.3.2 of the Submission on Jurisdiction deals with Article 30 VCLT and concentrates on the question of the "same subject matter" test. Paragraphs 49-52 of the Submission on Jurisdiction cover Article 351 TFEU. In its Reply, the order between the arguments based upon Article 351 TFEU and Article 30 VCLT is reversed.[365]

270. The Tribunal will ascertain, with a view to covering all the facets of the Respondent's arguments, first, whether the European Treaties, pursuant to Article 351 TFEU, as interpreted in the *Achmea* Judgment, have superseded the Treaty with the consequence of a direct inapplicability of the Treaty or of Article 8 of the Treaty. Second, the Tribunal will ascertain whether one of these consequences can be successfully argued by the Respondent on the basis of Articles 30 and 59 VCLT.

271. The arguments of the Respondent may be summarized as follows. Article 8 of the Treaty provides for dispute resolution by arbitration, whereas Articles 267 and 344 TFEU require the mandatory submission of disputes to national courts. The latter is relevant for the EU since national courts can involve the CJEU concerning the interpretation of EU law in relation to the application of

365 Reply, para. 66 *et seq*.

national law, which international arbitral tribunals cannot. The Respondent states that "[b]oth provisions order the exclusive resolution of the same dispute by different mutually exclusive *fora*."[366] The Claimant takes the opposite position.[367]

272. Although expressed in terms of separate heads, the Respondent's arguments essentially fall into two categories – arguments relating to the effect of EU law on the jurisdiction of the Tribunal and arguments relating to the application of principles of international law on the jurisdiction of the Tribunal. The question is whether, on either basis, the Respondent's claim that the Tribunal has no jurisdiction can be upheld.

(a) The Respondent's Arguments on the Basis of EU Law and Counter-arguments of the Claimant

273. The Respondent argues that, under EU law, a provision in a bilateral investment treaty between two Member States allowing the investors of one Member State to take judicial action against the other Member State can have no validity. The Respondent invokes Article 351 TFEU while relying on the interpretation of this norm in the *Achmea* Judgment.[368]

274. Article 351(1) and (2) TFEU reads:

> (1) The rights and obligations from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
>
> (2) To the extent that such agreements are not compatible with the EU Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to that end and shall, where appropriate, adopt a common attitude.

275. The Parties disagree whether Article 351 TFEU is a conflicts clause.[369]

276. The Tribunal, reading the two paragraphs together, shares the view of the Respondent that Article 351(1) and (2) TFEU constitutes a conflict clause covering pre-accession treaties between Member States and non-Member States, including non-Member States which later joined (or might join) the EU. However, the Tribunal disagrees with the Respondent about the consequences of such qualification of Article 351(1) and (2) TFEU. The Tribunal is not convinced by the

366 Submission on Jurisdiction, para. 44.
367 Answer, para. 9.
368 *See* paras. 169-193 above.
369 For the Respondent, *see* Submission on Jurisdiction, paras. 49 and 51; for the Claimant, *see* Answer, paras. 44-52 and 55.

Respondent's argument that Article 351(2) does not apply to agreements between States of which one or the other, after the conclusion of an investment agreement that allegedly does not conform to the EU Treaties, have acceded to the EU. The wording of Article 351(1) clearly addresses such agreements, and Article 351(2) TFEU refers to "such" agreements thus embracing both situations referred to in Article 351(1) TFEU.

277. The Tribunal further disagrees with the Respondent's argument that provisions of a treaty concluded with a State that became a Member State that are incompatible with EU law are automatically inapplicable. As the Tribunal has already stated, it is important to distinguish between the incompatibility of the Treaty, which the CJEU has authoritatively stated, and the consequences for the jurisdiction of this Tribunal.

278. In the view of the Tribunal, automatic inapplicability is not what Article 351(1) and (2) TFEU postulates. The two paragraphs of Article 351 TFEU prescribe obligations of conduct rather than of result or an automaticity in respect of non-applicability. It provides that the Member State or States shall take all appropriate steps to eliminate incompatibilities. In the view of the Tribunal, this reading of Article 351 TFEU reflects the fact that the TFEU as well as the TEU and the Treaty, although belonging to public international law, operate on different levels, as already stated above.[370] Without an explicit rule to the contrary, none takes precedence over the other.

279. The Tribunal is aware of the *Achmea* Judgment, on which the Respondent relies. The Court ruled:

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[371]

280. It is not for this Tribunal to comment upon this judgment or even to question its findings concerning EU law. This Tribunal accepts the competence of the CJEU to finally interpret EU law and to decide on the incompatibility of national law with EU law. It is in the view of this Tribunal, however, necessary to distinguish between the rulings of the CJEU on EU law, in particular on Articles 267 and 344 TFEU, and the consequences to be drawn from this judgment for the Treaty, an instrument belonging to public international law.

370 *See* paras. 266 and 268 above.
371 Exhibit RLA-6, *Achmea* Judgment, para. 62.

281. The Tribunal notes that the *Achmea* Judgment is not binding on this Tribunal, neither directly nor indirectly. On this, the Parties agree.[372] As to whether this judgment is binding on the Contracting Parties of the Treaty can be left open since the Tribunal will establish in due course that this is irrelevant.

282. Although this Tribunal is not called upon to interpret the *Achmea* Judgment, it cannot fail to notice that the Court did not specify the procedural consequences of its ruling that Articles 267 and 344 TFEU preclude a provision such as Article 8 of the Treaty. Such procedural consequences, namely the direct non-applicability of Article 8 of the Treaty, were developed and advocated by the Respondent based on its interpretation of Article 351 TFEU. This interpretation of Article 351 TFEU was addressed and refuted by the Tribunal already.

283. Contrary to the arguments advanced by the Respondent, the Tribunal holds that the preclusion of the Treaty does not lead to an automatic inapplicability of that norm.

(b) Relevance of the Post-*Achmea* Practice of EU Member States

284. The Tribunal will now turn to the post-*Achmea* practice of the Member States as reflected in the Declarations and more specifically in the Termination Agreement. The Parties disagree on the conclusions to be drawn from these Declarations as well as the Termination Agreement.

285. The Respondent argues that the Declarations "provide an authentic declaration 'that all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to the Union law and thus inapplicable.'"[373] The Respondent argues that this is "a reasonable consequence for the purpose of legal certainty".[374]

286. The Claimant takes the opposite position.[375] It states that after the enlargement of the EU with ten members in 2004, the Member States did not terminate their intra-EU bilateral investment agreements. The Claimant emphasizes that no provisions regarding the termination of intra-EU investment agreements were included in the accession agreement of 2003 regulating *inter alia* the accession of the Czech Republic to the EU. The Claimant points in this respect to the 2008 Annual Report of the Economic and Financial Committee for the Council of the European Union,[376]

372 Reply, para. 93; Rejoinder, para. 14.
373 Reply on Jurisdiction, para. 104, *referring to* Submission on Jurisdiction, para. 62.
374 *Id.*, para. 105.
375 *See* paras. 251-258 above.
376 Exhibit C-25, Annual Report of the Economic and Financial Committee for the Council of the European Union to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 21 November 2008.

which reports that the concerns of the European Commission concerning arbitration were not shared by most of the Member States.[377]

287. Further, the Claimant points out that at the beginning of 2009, the Czech Republic proposed to Member States to terminate their intra-EU BITs by mutual consent. To this, several Member States agreed, but not the Kingdom of the Netherlands. The Claimant quotes from a letter of the Government of the Netherlands, which rejected the bilateral termination of the Treaty with the Czech Republic with the view to the ongoing attempts of the European Commission to reach a comprehensive solution for intra-EU BITs.[378] The Claimant also points out that the Treaty was listed as a valid treaty on the homepage of the Czech Ministry of Finance, as well on the homepage of the Government of the Netherlands in 2019.[379] The Claimant argues that no post-*Achmea* practice rendered the Treaty between the Netherlands and the Czech Republic inapplicable.

288. Having considered the practice of Member States in respect of intra-EU BITs, this Tribunal comes to the conclusion that one cannot speak of a subsequent State practice within the meaning of Article 31(3)(b) VCLT in respect of direct inapplicability of intra-EU BITS. The practice of the Member States is not consistent, and the decision on the inapplicability of intra-EU investment agreements is still in a process, which may have reached its final stage but has not been completed yet. The Declarations only constitute political commitments of these Member States to terminate bilateral investment agreements. The Tribunal has taken note of a preambular paragraph of the Declaration of 15 January 2019 on which the Respondent relies. It reads:

> Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable […]. An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty. [380]

377 Answer, Section 2.5.

378 *Id.*, para. 52, *referring to* Exhibit CLA-114, *Achmea (formerly Eureko B.V.) v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 163; *see also*, Exhibit CLA-125, 'Chapter 5: Intra-EU International Investment Agreements', in Tom Fecak, *International Investment Agreements and EU Law*, Kluwer Law International, 2016, p. 374.

379 Answer, para. 53, *referring to* Exhibit C-26, Web-page of the Czech Ministry of Finance, accessed on 15 April 2019 and Exhibit C-27, Web-page of the Dutch Government, accessed on 26 April 2019.

380 Exhibit R-2, Declaration of the Representatives of the Governments of the Member States, 15 January 2019: "On the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union", p. 1.

289. Leaving aside whether such a declaration would have had any legal effect on a treaty of public international law, as the Respondent argues, this Tribunal is bound to refer to the operative part of this Declaration. For example, paragraph 5 of the Declaration reads:

> In light of the *Achmea* judgment, Member States will terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognized as more expedient, bilaterally.[381]

290. In the view of the Tribunal, paragraph 5 of the operative part of the Declaration indicates that the statement in the preambular paragraph quoted above is of a political and not a legally binding nature. It reflects the view of the Member States, but as indicated in paragraph 5 of that Declaration, the Member States are aware and accept the legal fact that termination of an international law-based treaty can only been achieved by a consent-based agreement amongst the parties of that treaty concerned. The Tribunal would like to emphasize that international law is formalistic in respect of the conclusion of international treaties as well as in respect of their termination. A political commitment prescribing the result of a process, not yet finalized, is not sufficient to achieve the inapplicability of the treaty in question.

291. The Respondent argues that the conclusion of bilateral treaties or of a plurilateral treaty is meant to achieve "legal certainty".[382]

292. This argument is, in the view of the Tribunal, not convincing. It has already been established that the *Achmea* Judgment is not binding on this Tribunal. The Tribunal does not intend to decide on the consequences thereof under EU law. If the ruling in the *Achmea* Judgment is binding on the Parties to the Treaty, the Parties have, so far, not undertaken the necessary steps, by either concluding and ratifying a bilateral treaty or a plurilateral treaty, to terminate the Treaty between them.

293. The Respondent also invokes the Termination Agreement, which constitutes the plurilateral treaty referred to in the Declaration of 15 January 2019. This Agreement repeats in its preambular paragraphs that bilateral intra-EU investment agreements are contrary to EU law and their arbitration clauses cannot serve as a basis for arbitration. The Respondent refers to a statement of the European Commission to this extent. The Tribunal wishes to point out that this Agreement provides for a termination procedure in Articles 2 and 4. Article 2(1) reads:

381 *Id.*, p. 4, para. 5 [emphasis added].
382 Reply, para. 105.

> Bilateral Investment Treaties listed in Annex A [383] are terminated according to the terms set out in this Agreement.

294. Article 4(2) of the Termination Agreement adds that such termination shall take effect as soon as the Agreement enters into force for the relevant Contracting Parties.

295. This, in the view of the Tribunal, confirms that the Treaty, in the eyes of the signatories to the Termination Agreement, will terminate only after the Termination Agreement has entered into force for the Kingdom of the Netherlands and the Czech Republic respectively, and not before that date as a consequence of the Declarations to which the Respondent refers or the Termination Agreement which neither the Kingdom of the Netherlands nor the Czech Republic have ratified.

296. The Tribunal will now turn to the argument of the Respondent that Article 8 has been superseded by the provisions of the TFEU pursuant to Article 30 VCLT.

(ii) Inapplicability of Article 8 of the Treaty pursuant to Article 30 VCLT

297. The Tribunal notes the Respondent's argument that the non-applicability of Article 8 of the Treaty does not require the non-applicability of the Treaty as a whole.[384]

298. However, in the view of the Tribunal, this does not alter the legal considerations the Tribunal has set out so far. Neither the *Achmea* Judgment, nor the Declarations, nor the Termination Agreement indicate that Article 8 of the Treaty lost its applicability at the moment the Czech Republic became a Member State of the EU on 1 May 2004.

299. The Tribunal will now briefly deal with the argument invoked by the Respondent that the TFEU and the TEU are *lex posterior* to the Treaty. It is correct that these two instruments were concluded after the Treaty. However, this does not mean that the earlier Treaty would automatically become inapplicable. This consequence would require that the treaties concerned cover the same subject matter and are in substance incompatible. The Tribunal will deal with this issue under the subsequent heading.

300. The Respondent argues – as a "subsidiary" [385] argument – that Article 8 of the Treaty is inapplicable because of the operation of Article 30(1) to (3) VCLT, which is concerned with situations of incompatibility between particular provisions in successive treaties. The paragraphs read as follows:

383 The Tribunal notes that the Treaty is listed in Annex A, p. 19.
384 Reply, para. 101.
385 Reply, para. 67.

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

301. Article 30(1), referring to Article 103 of the United Nations Charter, which gives obligations arising under the Charter priority over other treaty obligations, is of no relevance in this case. Article 30(2) VCLT deals with situations where there is an express provision governing relations between successive treaties. As there is no such provision in this case, Article 30(2) VCLT is equally irrelevant.

302. The Respondent argues that Article 30(3) VCLT – although considered only a subsidiary rule to Article 351 TFEU[386] – renders Article 8 of the Treaty inapplicable.[387] In fact, it argues that Article 30(3) VCLT leads to the same result, on the same grounds as Article 351 TFEU. Having recourse to the legislative history of Article 30 VCLT, the Respondent argues that Article 30 VCLT addresses rules of different treaties having the "same subject matter."[388] The Respondent in a two-step argument continues by stating that Article 8 of the Treaty is incompatible with Articles 267 and 344 TFEU as detailed in the *Achmea* Judgment, and thus Article 8 of the Treaty does not constitute a valid offer to arbitrate.[389]

303. According to the Claimant, Article 30(3) VCLT does not apply because the TEU and the TFEU do not apply to the same subject-matter. As far as Article 8 of the Treaty is concerned, the Claimant argues that an inconsistency of that provision with Articles 267 and 344 TFEU (which is being denied) would not automatically terminate the applicability of Article 8 of the Treaty.[390]

386 *Id.*, para. 66.
387 *Id.*, para. 68.
388 This qualification is part of Article 59 VCLT; the meaning of this qualification is disputed.
389 Reply, para. 92, *referring to* Submission on Jurisdiction, Section 2.3.4.
390 Answer, para. 13 and Section 2.3.

304. As far as inconsistency of Article 8 of the Treaty with EU law is concerned,[391] the Tribunal would like to refer to its reasoning concerning Article 351 TFEU above.[392] Such reference is justified by the fact that the Respondent argued that Article 351 TFEU and Article 30(3) VCLT work along the same lines. However, the Tribunal would like to add some further considerations to the interpretation and application of Article 30(3) VCLT.

305. It is, in the view of the Tribunal, essential to distinguish between the effect EU law may have on the jurisdiction of this Tribunal and on the merits of the dispute. While the Tribunal does not question that Article 30(3) VCLT may have an effect on jurisdiction as well as on the merits, it is difficult to see for the Tribunal how Article 30 VCLT could offset the applicability of Article 8 of the Treaty, considering the Parties' consent in Article 8 of the Treaty. It has to be taken into account that the alleged incompatibility does not rest in the option opened by Article 8 of the Treaty but possibly – not necessarily – in the consequences of an award issued on the basis of Article 8 of the Treaty. Any such incompatibility would be a question of the effect of EU law as part of the applicable law and, as such, a matter for the merits and not jurisdiction.

306. There is in the view of the Tribunal a theoretical exception, namely if Article 8 of the Treaty, which provides for arbitration between the investor and the State, were by itself incompatible with EU law. There is, however, no rule of EU law that prohibits investor-State arbitration in general. There is, further, no rule ordering all investor-State disputes to be brought before the CJEU, which would have no competence to decide on them anyway. The very reason for the attempts to bring to an end intra-EU investment arbitration and to direct such disputes to national courts is that the latter would have recourse to the Court of Justice in case of doubts as to whether the award in question had violated or misinterpreted – directly or indirectly – EU law. Under the UNCITRAL Rules, provided that a seat within the EU is selected, such possibility still exists in the context of set-aside proceedings.

307. The argument that Article 8 of the Treaty is incompatible with EU law and automatically inapplicable is therefore unsustainable. Accordingly, the Tribunal dismisses Respondent's

391 *See Theodoros Adamakopoulos, Ilektra Adamantidou, Vasileios Adamopoulos and others v. Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, para. 168. The tribunal in this case stated: "[...] at a certain, general, level the treaties deal with the same subject matter. But at a more specific level they deal with different subject matters. BITs deal with general obligations on states relating to foreign investment within the countries of the contracting parties but they also provide a mechanism for nationals of one party to bring a claim against another party, something that is not provided for in the EU Treaties. Under the EU regime claimants are left in the hands of domestic courts only, something that BITs do not provide for. In fact, BITs provide specifically for an alternative to determination by national courts. In that respect, the EU Treaties and the BITs do not deal with the same subject matter."

392 *See* paras. 273-283 above.

submission that the Tribunal lacks jurisdiction in consequence of the principle set out in Article 30 VCLT.

(iii) Termination of the Treaty pursuant to Article 59 VCLT

308. Both Parties have referred to Article 59 VCLT concerning the termination or suspension of the operation of a treaty implied by conclusion of a later treaty. Article 59 VCLT reads:

> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
>
> 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

309. The Tribunal is not convinced by the submission of the Respondent that the Treaty has been terminated in accordance with Article 59 VCLT. Several reasons lead to this conclusion. The first reason is that the operation of Article 59 VCLT is subject to the procedure set out in Article 65 VCLT. The here relevant paragraphs 1-3 of Article 65 read:

> 1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
>
> 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
>
> 3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.

310. In the view of the Tribunal, it is therefore clear from the text of the quoted provision that invalidity or termination of a treaty must be expressly invoked. The VCLT does not provide for the automatic termination of treaties by operation of law (with the exception of treaties that conflict with rules of *jus cogens* according to Article 64 VCLT). Neither Party has suggested that questions of *jus cogens* are engaged in this case. Thus, this possibility is irrelevant in this case.

311. The second reason for dismissing this objection to jurisdiction on the basis of Article 59 VCLT is that the application of that provision is expressly limited to situations where there are successive treaties "relating to the same subject matter." Article 45 VCLT excluding the possibility to invoke the invalidity or the possibility to terminate a treaty is not applicable in the present case.

312. As dealt with above, the Respondent has invoked Article 30 VCLT. In distinction to Article 59 VCLT, Article 30 is concerned with the priority between a particular provision of earlier and later treaties relating to the same subject matter. Article 59 VCLT deals with the situation that the entire treaty should be terminated by reason of the adoption of a later treaty relating to the same subject matter. The very fact that these situations are treated separately in the VCLT indicates, in the view of the Tribunal, that under Article 59 VCLT a broader overlap between the earlier and later treaties is needed to trigger the application of this provision. Under Article 59 VCLT, the test is whether the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. Article 59 VLCT thus clearly requires a broader incompatibility between the two treaties.

313. In any event, it is also necessary, as Article 59 VCLT expressly stipulates, that it either appear from the later treaty or is otherwise established that the parties intended the later treaty to govern the subject-matter. The alternative is that the provisions of the treaties that relate to the subject matter are so far incompatible as to preclude the concurrent application of the two treaties. One or other limb of that test must be satisfied if Article 59 VCLT is to operate. The Tribunal will concentrate on the former.

314. As far as an intention that the later treaty should "govern the matter" is concerned, it is plainly established that the Parties to the Treaty subsequently intended that EU law should apply in full between them. There is, however, no evidence of any intention that the provisions of EU law should result in the termination of the entire Treaty, as the Tribunal has established before.[393] Nothing in the text of the EU Treaties produces that result and the necessary intention is not established by extraneous evidence. The latter rather establishes the intent of the Member States to provide for the non-applicability of all intra-EU investment treaties by a plurilateral agreement. Since the subjective element of the States Parties required by Article 59 VCLT, namely the intent that EU law shall replace the Treaty, is not demonstrated, the Tribunal sees no point in elaborating whether and to what extent EU law and the Treaty are overlapping in substance.

2. Whether the Tribunal Must Uphold Jurisdiction as an Exception to the EU Law Principle of Mutual Trust and Recognition

315. In the alternative, the Claimant argues that, even if Article 8 were inapplicable given the accession of the Czech Republic to the EU, the Tribunal should uphold jurisdiction as an exception to the EU legal principle of mutual trust and recognition. Indeed, according to the Claimant, its rights

393 *See* para. 295 above.

would not be protected before the Czech courts, thus justifying that it be granted access to arbitration.

316. The Respondent considers that the Claimant's worries are ill-founded and considers that this is not an adequate ground to justify access to arbitration.

a. *The Respondent's Position*

317. The Respondent rejects the Claimant's reliance on an analogy between the current situation and the jurisprudence regarding the European arrest warrants and on European asylum as "legally and factually flawed".[394]

318. First, the Respondent argues that the principle of mutual trust only applies with regard to Member States' courts.[395] While exceptions have been granted, the two quoted by the Claimant relate to "completely unrelated fields of law which are not relevant for the question at hand."[396] There is no such exception with regard to claims for damages against states.[397] In the Respondent's view, the Claimant's argument that it cannot go before Czech courts because these allegedly do not meet certain human rights standards, thus requiring that the arbitration agreement be ruled as being still valid, "makes no sense at all."[398] In fact, this has no bearing on the actual invalidity of the arbitration clause.[399]

319. Second, the Claimant's criticism against the Czech legal system is baseless.[400] Noting that the report relied upon by the Claimant criticizes half of the EU domestic jurisdictions,[401] the Respondent underscores that the Claimant has provided no evidence to support its argument that the Czech courts show a "systemic deficiency".[402] Quite on the contrary, the Claimant's argument "somewhat backfires if one compares the seven cases in which the Czech Republic was found to have violated article 6 [of the European Convention on Human Rights ('**ECHR**')] to the numbers

394 Submission on Jurisdiction, para. 83.
395 *Id.*, para. 86.
396 *Id.*, paras. 88-93.
397 *Id.*, para. 95.
398 *Id.*, para. 96.
399 *Id.*, para. 97.
400 Submission on Jurisdiction, para. 99.
401 *Id.*, para. 102.
402 *Id.*, para. 101, *referring to* Exhibit CLA-40, 2018 EU Justice Scoreboard, COM (2018) 364 final.

regarding other states."[403] In fact, the evidence submitted by the Claimant itself shows that the system works.[404]

320. In its Reply, the Respondent further noted that the Czech Republic had only been held liable in three of thirty-eight investment cases initiated against it, showing that the Claimant's attempts to paint the Czech Republic as an unsafe jurisdiction were "pure sophistry."[405]

b. *The Claimant's Position*

321. In reviewing the legal framework that applies to this arbitration,[406] the Claimant reviews a number of European law principles, including that of mutual trust and recognition.[407] The principle of mutual trust and recognition, according to the Claimant, entails a reciprocal presumption, amongst Member States, that all Member States comply with EU law, and particularly with EU fundamental rights.[408] However, there are limits to this principle, in exceptional circumstances:[409] notably in European arrest warrants and asylum cases.[410] In such cases, Member States are expected to verify, beyond the principle of mutual trust, that fundamental human rights are respected.[411]

322. While the CJEU relied on the principle of mutual trust and recognition in the *Achmea* Judgment, the Claimant argues that in the present case "[t]here is […] a real risk that Fynerdale will suffer a breach of its fundamental right to an independent tribunal in the Czech Republic and, therefore, of the essence of its fundamental right to a fair trial and an effective remedy."[412]

323. Indeed, the Czech Republic's standing as the "third most popular respondent country in investor-state disputes […] is clear-cut evidence of backsliding the rule of law".[413] The Claimant further argues that "81% cases at the [European Court of Human Rights] resulted in decisions against the Czech Republic and the majority of those decisions are based on a violation of Article 6 of the [European Convention of Human Rights] providing for the right to a fair trial."[414] Moreover, the

403 *Id.*, para. 106.
404 *Id.*, para. 107.
405 Reply, para. 169.
406 Statement of Claim, paras. 107-142.
407 *Id.*, paras. 123-127 and paras. 137-142.
408 *Id.*, paras. 125-127.
409 *Id.*, para. 137.
410 *Id.*, para. 138.
411 *Id.*, paras. 139-142.
412 Statement of Claim, para. 164.
413 Answer, para. 69.
414 Rejoinder, para. 60, *referring to* Exhibit C-86, The ECHR and the Czech Republic, facts and figures, European Court of Human Rights, February 2020, p. 4.

Claimant highlights that "according to the European Union Agency for Fundamental Rights, the current antidiscrimination legislation does not facilitate access to justice for victims of discrimination in the Czech Republic" and that Czech proceedings are incommensurably long, leading to a number of sanctions by the European Court of Human Rights under Article 6 of the European Convention on Human Rights.[415]

324. The Claimant dismisses the Respondent's arguments that the limitations to the principle of mutual trust relates to unrelated fields of law as being inapposite, considering that the principle of mutual recognition – and hence, its exceptions – applies to "all areas of law as well, including investment disputes."[416]

325. Hence, even if the Tribunal were to consider that the Treaty's arbitration agreement is not valid, it should nonetheless uphold jurisdiction, as

> there is a clear risk that Fynerdale's right to free movement of capital will not be safeguarded in the Czech Republic's judicial system. […] It is therefore necessary to limit the principles of mutual recognition and mutual trust in this case against the Czech Republic. As a result, in this particular case, only the Tribunal can ensure that Fynerdale's (EU) rights are protected and guaranteed.[417]

c. *The Tribunal's Analysis*

326. The Tribunal has taken note of the arguments advanced by the Claimant and objected to by the Respondent. Since, however, the Tribunal holds Article 8 of the Treaty to be applicable it does not consider it necessary to deal with the arguments exchanged between the Parties as to whether it must uphold jurisdiction as an exception to the EU Law principle of mutual trust and recognition.

3. Whether Dutch Law Precludes the Tribunal from Hearing the Dispute

327. The Tribunal will further consider the Parties' arguments as to whether the laws of the Netherlands as the *lex loci arbitri* precludes the Tribunal from hearing the present dispute.

a. *The Respondent's Position*

328. In addition to the arguments above, the Respondent considers that Dutch law prevents the Tribunal from hearing this dispute because "[t]he CJEU's interpretations of the EU Treaties have

415 Rejoinder, para. 61.
416 Answer, para. 68.
417 Statement of Claim, para. 168.

effect from the moment when the EU law at issue entered into force",[418] and Dutch courts are obliged to give full effect to those decisions. The Respondent thus considers that "the *Achmea* Judgment renders the dispute both objectively and subjectively inarbitrable as a matter of Dutch law, as the *lex loci arbitri*, incorporating EU law" and that "any award assuming jurisdiction that the Tribunal would render, would be set aside by Dutch courts and otherwise [be] unenforceable".[419]

(i) There is no Valid Offer to Arbitrate

329. The Respondent notes that, in the *Achmea* case, the reference to "the law in force of the Contracting Party concerned" in the applicable law clause of Article 8(6) of the Treaty was read by the German Federal Court of Justice as meaning that the arbitration agreement was governed by EU law, which supersedes Member State laws. This is what led it to refer the issue to the CJEU. The Respondent further underscores that, when considering Article 8(6), the CJEU arrived to the conclusion that "the arbitral tribunal referred to […] may be called on to interpret or indeed to apply EU law", thus having an "adverse effect on the autonomy of EU law".[420]

330. In view of the CJEU's *Achmea* Judgment, the German Federal Court of Justice ruled on 31 October 2018 that there was no valid offer to arbitrate in the arbitration between the Dutch company Achmea and the Slovak Republic. This, in the Respondent's eyes, entails that:

> The same reasoning applies to this case. As is clear from the *Achmea* Judgment, EU law invalidates the Czech Republic's offer to arbitrate under article 8 of the BIT. Consequently, if at the moment Claimant would have allegedly accepted the offer to arbitrate under article 8 of the BIT, such offer did not exist from the perspective of EU law and, even if it did (*quod non*), it could not have been validly accepted.[421]

(ii) The Dispute is Objectively Inarbitrable

331. Even if the Tribunal were to consider the arbitration agreement to be valid, the Respondent argues that the dispute would in any event be both objectively and subjectively inarbitrable under the applicable Dutch arbitration law, and that the Tribunal would accordingly lack jurisdiction.

418 Reply, para. 115, *referring to* Exhibit RLA-113, *Commission v. Ireland*, Case-455/08, Judgment of the Court (Second Chamber), 23 December 2009, para. 39.
419 Reply, paras. 116-117.
420 Exhibit RLA-6, *Achmea* Judgment, paras. 42 and 59.
421 Reply, para. 131.

332. The dispute would be objectively inarbitrable because EU law might apply pursuant to Article 8(6) of the Treaty. Consequently, in the Respondent's view, the "subject matter is of public policy nature and may thus not be subjected to arbitration."[422]

333. Even if the Tribunal were to consider that the dispute is arbitrable, the Respondent argues that the ensuing award issued by the Tribunal would be set aside by the Dutch courts on the ground of breach of EU public policy, in accordance with Dutch jurisprudence.[423] In *Eco Swiss China Time v. Benneton International*, the Dutch Supreme Court ruled that "[a] national court must grant an application to set aside an arbitral award if that award is contrary to Article 81 EC (ex Article 85) if, in accordance with the rules of its national procedural law, it has to grant an application to set aside the award on the ground that it is contrary to national rules of public policy."[424] Thus, the arbitration agreement contained in the Treaty would be in any event in violation of EU public policy (incorporated in Dutch law) and as such objectively inarbitrable.[425]

334. The Respondent lastly claims that the judgment issued by the Svea Court of Appeals in *Poland v. PL Holdings* and relied upon by the Claimant at the Hearing "is of little value" in the present case, considering that this judgment is not final and does not in any event gravitate around the concept of arbitrability.[426]

(iii) The Dispute is Subjectively Inarbitrable

335. The Respondent further argues that the dispute would be subjectively arbitrable under Dutch law because the Czech Republic does not have the capacity to arbitrate disputes relating to intra-EU investments.[427] The Respondent thus argues that the State's capacity to arbitrate, being governed by Czech law and thus by EU law, is inexistent pursuant to the *Achmea* Judgment. Thus, at the time that the Claimants purportedly accepted the offer to arbitrate contained in Article 8, the offer no longer existed under Czech law and EU law.[428]

336. Anticipating a possible objection from the Claimant based on the so-called *Lizardi* rule,[429] which is enshrined in Article 10.167 of the Dutch Code of Civil Procedure ("**DCCP**"), the Respondent

422 *Id.*, para. 140.
423 Exhibit RLA-120, Dutch Supreme Court, *NJ 2000/340* (*Eco Swiss China Time / Benneton International*), annotation by H.J. Snijders, 25 February 2000.
424 *Id.*, para. 1.
425 Reply, para. 143.
426 Respondent's Post-Hearing Brief, para. 46.
427 Reply, paras. 144-150.
428 *Id.*, para. 149.
429 Whereby a State cannot invoke its own laws to dispute its capacity to enter into an arbitration agreement or the arbitrability of a dispute.

raises three counter-arguments. First, according to the Respondent, "the principle of supremacy of EU law prevents Claimant from relying on the *Lizardi* rule": Dutch law cannot lead to the violation of EU law.[430] Second, this rule is inapplicable, because it relates only to the application of a State's own domestic law.[431] In this case, on the contrary, the Respondent is relying exclusively on the EU law.[432] Finally, the Respondent considers that the Claimant was aware of the risks that the standing offer to arbitrate held in the Treaty might be incompatible with EU law, something that had been "questioned since the mid-2000s."[433]

(iv) Conclusion

337. Pursuant to the above, the Respondent considers that, if the Tribunal were to hold it has jurisdiction in the present dispute, the Award on Jurisdiction would likely be set aside in the Netherlands.[434] Invoking "a generally accepted principle that arbitrators must make every effort to ensure that their awards are enforceable at law", the Respondent considers that the Tribunal must deny jurisdiction in accordance with EU law and pursuant to the *Achmea* Judgment.[435]

b. *The Claimant's position*

338. The Claimant refutes the Respondent's argument that the Tribunal cannot hear the present dispute under Dutch law.

(i) There is a Valid Arbitration Agreement

339. The Claimant considers that, since the arbitration agreement in the present case is valid, there would be no reason for a court to set aside an arbitral award assuming jurisdiction on the basis of Article 1065(1)(a) DCCP.[436]

340. Article 1065 DCCP provides as follows:

> 1. A reversal of the award can take place only on one or more of the following grounds:
>
> (a) absence of a valid arbitration agreement;
>
> (b) the arbitral tribunal was constituted in violation of the rules applicable thereto;

430 Reply, para. 152.
431 *Id.*, paras. 153-157, *referring to* in particular Exhibit RLA-126, Dutch Supreme Court (Hoge Raad), 28 January 2005, ECLI:NL:HR:2005:AR3645.
432 Reply, para. 153.
433 *Id.*, paras. 158-159.
434 *Id.*, paras. 160-166.
435 *Id.*, para. 166.
436 Rejoinder, para. 65.

> (c) the arbitral tribunal has not complied with its mandate;
>
> (d) the award is not signed or does not contain reasons in accordance with the provisions of Article 1057;
>
> (e) the award, or the manner in which it was made, violates public policy or good morals.
>
> 2. The ground mentioned in paragraph (1)(a) above shall not constitute a ground for a reversal in the case mentioned in Article 1052(2).
>
> 3. The ground mentioned in paragraph (1)(b) above shall not constitute a ground for a reversal in the cases mentioned in Article 1052(3).
>
> 4. The ground mentioned in paragraph (1)(c) above shall not constitute a ground for a reversal if the party who invokes this ground has participated in the arbitral proceedings without invoking such ground, although it was known to him that the arbitral tribunal did not comply with its mandate.
>
> 5. If the arbitral tribunal has awarded in excess of, or differently from, what was claimed, the arbitral award shall be partially reversed to the extent that the part of the award which is in excess of or different from the claim can be separated from the remaining part of the award.
>
> 6. If and to the extent that the arbitral tribunal has failed to decide one or more matters submitted to it, the application for a reversal on the ground mentioned in paragraph (1)(c) above shall be admissible only if an additional award mentioned in Article 1061(1) is made, or the request for an additional award mentioned in Article 1061(1) has wholly or partially been rejected.
>
> 7. Notwithstanding the provisions of the second sentence of Article 1064(3), the time limit for making an application for a reversal mentioned in the preceding paragraph shall be three months from the date of deposit of the additional award or the copy of the notification mentioned in Article 1061(5) with the Registry of the District Court.

341. As indicated earlier, the Claimant regards the *Achmea* Judgment and any subsequent decisions related to the CJEU's decision as irrelevant to the jurisdiction of this Tribunal.[437] The Claimant thus relies on a publication from a former Advocate-General of the Dutch Supreme Court, who indicated:

> *It must be assumed that the Achmea judgment does not result in loss of the grounds for arbitration in a civil-law sense, which would lead to the arbitral tribunal having no jurisdiction or to the nullification of an arbitral award* […].[438]

342. The Claimant further underscores that the scholarly commentary cited by the Czech Republic admits that such a result is possible, as shown by the same publication.[439]

437 Rejoinder, para. 66.
438 *Id.*, para. 67, *referring to* Exhibit CLA-129, Prof. Arthur S. Hartkamp, 'Consequences of the Achmea judgment for the practice of investment arbitration within the EU' Ars Aequi, September 2018, p. 733.
439 Rejoinder, para. 68.

(ii) The Dispute is Objectively Arbitrable

343. The Claimant further argues that the dispute is in itself objectively arbitrable. Citing Article 1020(3) DCCP, which provides that "[t]he arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose", the Claimant claims that "a matter or dispute is non-arbitrable if the parties may not validly reach a settlement between them in relation to [it]".[440] Since disputes arising under the Treaty can be amicably settled between an investor and the State, such disputes remain arbitrable.[441]

344. Additionally, in the Claimant's view, the present dispute "does not have an *erga omnes* effect" and consequently is not a matter of public policy. Relying on Article 1020(3) DCCP as well as on Supreme Court jurisprudence,[442] the Claimant alleges that "a matter or dispute is of a public policy nature if the decision to be rendered in the proceedings necessarily has *erga omnes* effects".[443] Disputes relating to public international law are always arbitrable under Dutch law, including disputes under BITs.[444] The *Achmea* Judgment has no bearing on this fact: the Claimant argues that the CJEU's decision "does not form any indication that a dispute arising out of a bilateral investment treaty is non-arbitrable under Dutch law."[445] In any event, "the settlement of a matter or dispute under an intra-EU BIT is not of a public policy nature."[446] Even if public policy rules applied, the matter would remain arbitrable, and arbitrators should merely apply the rules. Should they not do so, their award could be set aside by the courts, thus safeguarding the application of those rules.[447]

345. In any event, the Claimant finds support for its position in the judgment of the Svea Court of Appeal of 22 February 2019 relating to the annulment petition for the award in *PL Holdings v. Poland*.[448] The court indeed considered that the dispute was arbitrable, considering that arbitrability is a matter of substance, and that in that case, the question was one of breach of "contract" and of the related compensation.[449] The Claimant considers that the present Tribunal,

440 Rejoinder, para. 72.
441 *Id.*, para. 72.
442 Exhibit CLA-164, DCCP (including English translation published by the Netherlands Arbitration Institute); Exhibit CLA-166, *Silver Lining Finance S.A./Perstorp Waspik B.V.* [2010] NJ 2011/55 (Supreme Court of the Netherlands (Hoge Raad)); Exhibit CLA-167, *Spee c.s. en Groenselect/Van den Boogaard* [2006] NJ 2007/561 (Supreme Court of the Netherlands (Hoge Raad)).
443 Rejoinder, para. 74.
444 *Id.*, para.75.
445 Rejoinder, para. 76.
446 *Id.*, para. 76.
447 *Id.*, para. 77.
448 *Id.*, para. 79.
449 *Id.*, para. 80.

like that in *PL Holdings v. Poland* , is asked "to rule on a state's liability for the breach of an international treaty and on the reparation/damages that follow."[450] Considering the similarities between the Swedish and the Dutch arbitration laws, the conclusion under the Dutch legal system should be the same as under the Swedish system. [451]

(iii) The Dispute is Subjectively Arbitrable

346. The Claimant also contests the Respondent's argument that the dispute is subjectively not arbitrable. Indeed, the DCCP sets out no conditions with regard to a party's capacity to enter into an arbitration agreement:[452] it suffices for a party to have legal capacity, in order to have capacity to enter in an arbitration agreement.[453] Considering that Articles 267 and 344 TFEU have no horizontal direct effect and cannot have any impact on civil rights, the Claimant argues that the *Achmea* Judgment "does not have any effect on the capacity of the Czech Republic to conclude an arbitration agreement."[454]

(iv) Conclusion

347. Considering the above, the Claimant concludes that Dutch courts are unlikely to set aside the Tribunal's award on jurisdiction if it were to accept jurisdiction over the present dispute. The Claimant argues that Article 1065 is not a proper ground for setting aside an award.

348. The Claimant further concludes, in its Post-Hearing Brief, that an award assuming jurisdiction would be enforceable because the Respondent would not be entitled to "invoke public policy as ground for refusal of enforcement (Article V(2) New York Convention) as the decision in *Achmea* Judgment is not based on the fact that the arbitral tribunal infringed a rule of substantive EU law."[455]

349. In any event, whether or not the award is enforceable is not relevant for the Tribunal to uphold jurisdiction.[456] Similarly, even if the award were not enforceable in the Netherlands, this would

450 *Id.*, para. 81.
451 *Id.*, para. 81.
452 *Id.*, para. 83.
453 *Id.*, para. 83, *referring to* Exhibit CLA-170, Vesna Lazic and Alexandra Schluep, 'Netherlands', in Frank-Bernard Weigand (ed.), *Practitioner's Handbook on International Arbitration* (2019), pp. 642-645, 642.
454 Rejoinder, para. 84, *referring to* Exhibit CLA-129, Prof. mr. Arthur S. Hartkamp, 'Consequences of the *Achmea* judgment for the practice of investment arbitration within the EU' Ars Aequi, September 2018, p. 733.
455 Claimant's Post-Hearing Brief, para. 67, *citing* Exhibit CLA-129, Arthur S. Hartkamp, 'Consequences of the *Achmea* judgment for the practice of investment arbitration within the EU' Ars Aequi September 2018; Exhibit CLA-200, Deyan Dragiev, 'A Procedural Perspective of *Achmea*: What Does *Achmea* Imply in Practice' Kluwer Arbitration Blog, 10 June 2018.
456 Claimant's Post-Hearing Brief, para. 66.

not entail that the award is unenforceable in all jurisdictions.[457] Consequently, the Tribunal should uphold jurisdiction.

c. *The Tribunal's Analysis*

350. The Tribunal emphasizes that the seat of the arbitration is The Hague, and that, accordingly the DCCP applies to the present procedure as the *lex loci arbitri* . While this is common ground between the Parties, they differ as to the consequences of the application of the provisions of the DCCP, in particular with regard to the validity of the offer to arbitrate and the arbitrability of the dispute.

351. The Respondent's argument, based upon the alleged non-arbitrability of the dispute under the laws of the Netherlands, turns on the proposition that the dispute is outside the jurisdiction of the Tribunal by virtue of EU law and that of the Netherlands as the *lex loci arbitri*, and the Tribunal must therefore treat the dispute as non-arbitrable. The Tribunal has found that EU law does not deprive it of jurisdiction,[458] and accordingly, as already indicated above, the jurisdictional objection based on the laws of the Netherlands must also fail *in limine*. However, the Tribunal considers it necessary to add several considerations.

(a) First, the Tribunal would like to emphasize that one of the first decisions taken after the establishment of the Tribunal was the decision, with the concurrence of the Parties, to select The Hague as its seat. If the Respondent were correct in stating that the Tribunal lacked jurisdiction from the outset, such decision and its consequences, namely the applicability of Dutch law, would be void. Such result would be devoid of logic.

(b) Second, the system of investment arbitration is meant to establish an independent adjudication procedure. Therefore, any reference to the *lex loci arbitri* should be interpreted in a way that does not put the independent existence of the Tribunal into jeopardy. This, however, would be the case if the jurisdiction of an investment arbitral tribunal would be made dependent upon the *lex loci arbitri*. The Tribunal is inclined to think that, while the *lex loci arbitri* may affect the arbitrability of a dispute, it will not deprive the tribunal of jurisdiction to rule on its own competence.

(c) Third, as far as the argument of the Respondent that an award would not be enforceable is concerned, the Tribunal feels bound to point out that enforceability cannot dominate

457 *Id.*, para. 68.
458 *See* para. 307 above.

> jurisdiction since this would, in violation of the independent existence of the Tribunal, render the jurisdiction of the latter dependent upon national law. Further, the Tribunal considers it appropriate to add that the Respondent has not convincingly argued why the Dutch Court of Appeal would have to reverse a decision on jurisdiction accepting jurisdiction in the present case. The reference to Article 1065 DCCP is not sufficient. Finally, it should be added that the Respondent's arguments do not take into consideration the possibility of enforcing the award in a State other than the Kingdom of the Netherlands, which means the alleged non-arbitrability would not be unlimited.

352. As far as the subjective non-arbitrability is concerned, as claimed by the Respondent, it is in the view of the Tribunal sufficient that the Claimant has the legal capacity to undertake investments, on the basis of an investment agreement. Such capacity has not been called into question.

353. On the basis of the above, the Tribunal holds that the dispute is objectively and subjectively arbitrable.

C. THE TRIBUNAL'S JURISDICTION *RATIONE MATERIAE*

354. The Respondent further challenges the Tribunal's jurisdiction *ratione materiae*, considering that the alleged investment was made illegally in the Czech Republic and is thus not protected by the Treaty. In any event, the Respondent contends that at least part of the investment allegedly made by the Claimant – that part invested "through" Poppyseed – is not protected by the Treaty. Should the Tribunal accept jurisdiction, the Respondent considers that it should then hold the Claimant's demands to be inadmissible.[459]

355. The Claimant contends that the Tribunal has jurisdiction because its investment, including that made "through" Poppyseed, was made in compliance with Czech laws and thus falls under the protection granted by the Treaty. The Claimant further notes that "the allegations of illegality presented by the Czech Republic in the case at hand relate to *a part of* Fynerdale's investment only, which is all the more reason to decide on the allegations on illegality not in this jurisdiction phase but in the merits (quantum) phase."[460]

459 Reply, paras. 170-175.
460 Claimant's Post-Hearing Brief, para. 91; Claimant's Second Post-Hearing Brief, paras. 63-64.

1. Burden of Proof

356. While the Parties agree that the party alleging particular facts has to afford *prima facie* evidence of those facts, the Parties disagree on whether the burden of proof may shift to another party in the event that one of the Parties provides *prima facie* evidence alleging illegal conduct by the other party.[461]

a. *The Respondent's Position*

357. Alleging that the Claimant's investment was a money-laundering mechanism following "one of the largest frauds in the history of the Czech Republic", the Respondent notes that "it only is required to provide prima facie evidence for the fact that the funds used for the payments originate in criminal activities", and are thus in breach of Czech law.[462]

358. The Respondent relies on *Karkey v. Pakistan* to assert that "the burden shifts to the investor once the host state has presented *prima facie* evidence on the commission of corruption or fraud."[463] In the present case, the Respondent alleges that it "will raise a number of red flags, making the conclusion inevitable that Claimant has invested the proceeds of a crime" and that "because part of this criminal behaviour was the concealment of the streams of funds, the burden to disprove the case put to the Tribunal shifts to Claimant."[464]

359. The Respondent considers that burden shifting is "the appropriate solution for dealing with the issue of the inherently elusive nature of the illegality of Claimant's 'investment'",[465] for several reasons.

360. First, the Respondent notes that there is a broad consensus that shifting the burden of proof is appropriate in cases where there is a "near impossibility to 'prove' illegal acts like corruption, fraud or money laundering".[466] The Respondent further argues that "[t]he accused party is simply

461 Reply, paras. 191-199; Rejoinder, paras. 92-97.
462 Submission on Jurisdiction, para. 122.
463 *Id.*, para. 123, *referring to* Exhibit RLA-37, *Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 ("***Karkey v. Pakistan***").
464 Submission on Jurisdiction, para. 124.
465 Reply, para. 193.
466 *Id.*, para. 194, *referring to* Exhibit RLA-133, Karen Mills, *Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto*, Paper prepared for the 16th Congress of ICCA (International Council for Commercial Arbitration): *International Commercial Arbitration: Important Contemporary Questions*, London 12-15 May, 2002, p. 9; Exhibit RLA-134, Carolyn B. Lamm, Hansel T. Pham et al, 'Fraud and Corruption in International Arbitration', in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum: Bernardo Cremades* (La Ley, 2010), p. 700.

in a better position to refute criminal allegations and prove not only its innocence, but also the legitimacy of its investment".[467] The present case is a perfect study for this reasoning, according to the Respondent, considering the "intricate web of co-dependent companies" created by the Claimant's UBOs.

361. The Respondent further asserts the idea that "international arbitration proceedings are especially susceptible to be misused as a vehicle for enforcing claims tainted with illegality".[468] Given the limited coercive powers of arbitral tribunals – as opposed to domestic State courts – the Respondent argues that it falls upon the Claimant to disprove the allegations of criminal acts that are sustained by a number of elements of proof gathered in criminal proceedings held by "courts of a completely neutral state, i.e. Switzerland."[469]

362. Second, the Respondent makes the argument that, given that neither the Treaty, nor the applicable laws to this arbitration contain specific rules on the burden of proof, "nothing prevents the Tribunal from shifting the burden of proof from the alleging party to the denying party under certain circumstances"[470] – such as those in the case at hand.[471] Thus, the Respondent interprets Article 24(1) of the UNCITRAL Rules as allowing a tribunal to shift the burden of proof "once a certain – lower – standard of proof has been met by the alleging party."[472] Such analysis is supported by a number of decisions in both treaty-based and commercial arbitrations,[473] "where there is a difficulty of obtaining direct evidence related to an alleged illegal act once the alleging party has provided *prima facie* evidence in the form of red flags."[474] In the Respondent's view:

> Such special circumstances are clearly given in the present case. Claimant's investment is connected to one of the most massive frauds committed in the Czech Republic, which

467 Reply, para. 196.
468 *Id.*, para. 198.
469 *Id.*, para. 199.
470 *Id.*, para. 202.
471 *Ibid*.
472 Reply, para. 203.
473 Exhibit RLA-150, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990 ("***AAPL v. Sri Lanka***"), para. 56; Exhibit CLA-79, *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case ARB/99/6, Award, 12 April 2002, para. 94; Exhibit RLA-151, *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 177; Exhibit RLA-152, *Alpha Projektholding v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 ("***Alpha Projektholding v. Ukraine***"), para. 236 *et seq*; Exhibit RLA-142, *Fraport AG Frankfurt Airport Services Worldwide v. Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014 ("***Fraport v. Philippines (II)***"), para. 299; *see also* Exhibit RLA-153, *Rockwell International Systems, Inc. v. Iran*, IUSCT Case No 438-430-1, Award, 5 September 1989, para. 141; Exhibit RLA-155, Christian Albanesi, Emmanuel Jolivet, 'Dealing with Corruption in Arbitration: A Review of ICC Experience' (2013) 24/Special Supplement *ICC International Court of Arbitration Bulletin*, p. 33; Exhibit RLA-156, *Consultant v. Contractor*, ICC Case No. 6497, Final Award, 1994.
474 Reply, para. 218.

> raises bright red flags clearly suggesting Claimant's subsequent participation in a grand money laundering operation.[475]

363. In response to the Claimant's counterarguments, the Respondent underscores that, if the tribunal in *Karkey v. Pakistan* did indeed disregard the State's arguments on the illegality of the investment, this was "because Pakistan had only made these allegations 'last minute' and that they were 'based on manoeuvres by persons […] which were more probably aimed at extorting money from Pakistan or at derailing the arbitration proceedings than at genuinely allowing corruption to be established'."[476] The Respondent further notes that the Claimant's counter-example of *Hamester v. Ghana* is that of a "rare exception to a general trend that investment tribunals draw conclusions on the basis of adverse inference if the alleging party meets a *prima facie* standard of proof".[477]

364. The existence of red flags, in the Respondent's view, allows arbitrators to "make a procedural presumption that a party's transaction or investment is unlawful and shift the burden of proof to the accused party to present the counter-evidence."[478] Citing the ICJ Judgment in *Corfu Channel*,[479] as well as two treaty-based investment arbitration cases,[480] the Respondent argues that indirect and circumstantial evidence should be taken into account by the Tribunal in making its award on jurisdiction.[481]

365. In conclusion, the Respondent considers that "shifting the burden of proof is the obvious and appropriate solution to the problem that acts of corruption fraud and money laundering are intrinsically designed to be unprovable, which is why Respondent is not in a position to provide direct evidence concerning the illegality of Claimant's investment."[482]

475 *Id.*, para. 221; *see also* Respondent's Second Post-Hearing Brief, para. 29.
476 *Id.*, para. 222, *citing* Exhibit RLA-37, *Karkey v. Pakistan*, para. 543.
477 Reply, para. 223.
478 *Id.*, para. 226, *referring to* Exhibit RLA-132, Vladimir Khvalei, 'Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption' (2013) 24/Special Supplement *ICC International Court of Arbitration Bulletin*, pp. 15, 23-24; and Exhibit RLA-157, Aloysius Llamzon, *Corruption in International Investment Arbitration*, Oxford University Press, 2014, para. 9.11. *See also* Respondent's Second Post-Hearing Brief, para. 29.
479 Exhibit RLA-159, *Corfu Channel case*, Judgment of 9 April 1949, ICJ Reports 1949, p. 4.
480 Exhibit RLA-160, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 ("***Rumeli Telekom v. Kazakhstan***"); Exhibit RLA-131, Emmanuel Gaillard, 'The emergence of transnational responses to corruption in international arbitration' (2019) 35 *Arbitration International*.
481 Reply, para. 225.
482 *Id.*, para. 259.

b. *The Claimant's Position*

366. The Claimant asserts that "the full burden of proving the alleged illegality is on the Czech Republic."[483] In support of this assertion, the Claimant first relies on Article 24(1) of the UNCITRAL Rules,[484] which is in its view "the reflection of the long established practice of international courts and tribunals that 'the party that asserts must prove'."[485]

367. The Claimant contends that this principle, also set out in a number of other legal instruments,[486] has mainly a procedural function, with a consequence with regard to evidence: "if a party fails to provide evidential support for its allegations without a satisfactory explanation, the allegations will be unproved and therefore dismissed."[487] According to the Respondent, both UNCITRAL and ICSID Tribunals "have adopted a general assumption that *prima facie* evidence submitted by the claimant is generally insufficient to shift the burden of proof to respondent."[488]

368. The Claimant cites in this regard the award in *Gavrilovic v. Croatia*,[489] another *Achmea* case. In this case, the tribunal relied on previous jurisprudence to hold "that the proposition that the investor would have to somehow prove it has complied with the myriad laws and regulations of

483 Answer, para. 74.

484 Article 24(1), UNCITRAL Rules: "Each party shall have the burden of proving the facts relied on to support his claim or defence."

485 Answer, para. 75, *referring to* Exhibit CLA-74, *Jan Ostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL Ad Hoc Arbitration, Final Award, 23 April 2012, para. 146; Exhibit CLA-131, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentina,* ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 324; Exhibit CLA-133, *Gustav F. W. Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paras. 97-112, 132-133; Claimant's Second Post-Hearing Brief, para. 30.

486 Exhibit CLA-173, Thomas H. Webster, *Handbook on UNCITRAL Arbitration*, 3rd edition, London, Sweet & Maxwell 2019, paras. 27-40.

487 Exhibit CLA-175, 'UNCITRAL Arbitration Rules, Section III, Article 27 [Evidence]', in Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, Kluwer Law International, 2017, p. 238.

488 Rejoinder, paras. 93-94, *referring to* Exhibit CLA-176, David D. Caron, Lee M. Caplan, Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, 2006, p. 570; Exhibit CLA-74, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL Ad Hoc Arbitration, Final Award, 23 April 2012, para. 148; Exhibit RLA-144, *The Rompetrol Group N.V. v. Romania,* ICSID Case No. ARB/06/3, Award, 6 May 2013 ("***Rompetrol v. Romania***"), para. 178; Exhibit CLA-177, *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 317; Exhibit RLA-63, *Gavrilovic and Gavrilovic d.o.o. v. Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 ("***Gavrilovic v. Croatia***"), para. 230; Exhibit RLA-150, *AAPL v. Sri Lanka*, para. 56.

489 Exhibit RLA-73, Tobias Zuberbühler, Dieter Hofmann, Christian Oetiker, Thomas Rohner, *IBA Rules of Evidence – Commentary on the IBA Rules*, Schulthess, 2012.

the host state is unrealistic and the burden of proof must therefore naturally rest with the party alleging a breach of the legality requirement (the host state)."[490]

369. The Claimant further states that "[i]t would also be inconsistent with the object and purpose of a BIT if host states would be able to invoke the legality requirement as an excuse to avoid its international responsibility."[491] Consequently, it argues, "when investor wrongdoing is raised as a defence, the burden of proof of such illegality is on the host state" – in this case, the Czech Republic.[492]

370. In the case at hand, the Claimant argues that the Czech Republic failed to meet the threshold set out by the tribunal in *Karkey v. Pakistan* for a shift in the burden of proof, *i.e.* that of "unequivocal (or unambiguous)"[493] *prima facie* evidence.[494] The Claimant alleges that, quite to the contrary, the Respondent has failed to produce substantive evidence of the alleged illegal or criminal actions, which is "even more striking as the Czech Republic has a number of tools for tracking down and securing proceeds of a crime."[495]

371. The Claimant thus considers that, even though the Respondent had the ability to confirm its allegations, "it failed to prove any causal link between the alleged illegality and Fynerdale's investment in the present arbitration" and "neither the UBO's of Fynerdale, nor Fynerdale itself have been found guilty for the alleged illegal activities in the Czech Republic."[496] According to the Claimant, the Respondent's argument that it would be close to impossible to prove the Claimant's illegal acts should fail, as the Respondent has access to a number of means that should enable it to acquire the required elements of proof to support its claims, including specialized investigative forces and access to international legal assistance in tracing financial information.[497]

372. The Claimant therefore rejects the Respondent's arguments on the shifting of the burden of proof as baseless and considers that the Respondent's argument with respect to the shifting of the burden of proof should be dismissed.

490 Rejoinder, para. 94, *referring to* Exhibit RLA-63, *Gavrilovic v. Croatia*, para. 230, itself *referring to* Exhibit RLA-49, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ("***Quiborax v. Bolivia***"), para. 259.
491 Answer, para. 75, *referring* to Exhibit RLA-49, *Quiborax v. Bolivia*, para. 247.
492 Answer, para. 75.
493 Exhibit RLA-37, *Karkey v. Pakistan*, para. 497.
494 Answer, para. 79.
495 Answer, para. 81.
496 *Id.*, para. 82.
497 Rejoinder, para. 96.

373. However, in the alternative that the Tribunal decides to shift the burden of proof to Fynerdale, the Claimant, relying on *Karkey v. Paki stan*,[498] argues that the Respondent has not provided "sufficient ground for a reasonable belief that the funds used by Fynerdale to provide loans were obtained by criminal activities as it did not provide *unequivocal (or unambiguous) prima facie* evidence of the illegality of the investment."[499]

374. The Claimant affirms that it fully complied with the Tribunal's order relating to document production,[500] as detailed in the reports submitted with its document production, which showed Fynerdale's best efforts to obtain the required documents.[501] Thus, Fynerdale notes that it produced a total of 302 files in response to the Czech Republic's 11 document requests,[502] which were obtained thanks to the collaboration of a number of persons and entities.[503] Where it could not produce responsive documents, the Claimant provided an explanation for that absence. The Claimant further explains that the documents the Claimant had intended to produce in August 2020 were identified following Mr. [redacted]'s requests upon his engagement in March 2020 and retrieved once the location where the hard copies of the documents were held became accessible again.[504]

375. In any event, the Claimant argues, "a failure to produce documents does not shift the burden of proof on to the defaulting party and any resulting adverse inference is likely to carry less weight than other direct evidence."[505]

2. Legality of Fynerdale's Investment under Article 2 of the Treaty

376. Article 2 of the Treaty provides as follows:

> Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and shall admit such investments in accordance with its provisions of law.

498 Exhibit RLA-37, *Karkey v. Pakistan*, para. 497.
499 Rejoinder, para. 113.
500 *Id.*, para. 124.
501 *Id.*, para. 125.
502 *Id.*, para. 126.
503 *Id.*, para. 127.
504 Claimant's Second Post-Hearing Brief, para. 61.
505 Rejoinder, para. 133 [emphasis in original], *referring to* Exhibit CLA-184, Roman Khodykin, & Carol Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Oxford University 2019, paras. 12.375-12.376.

377. The Parties agree that the above provision requires that investments must comply with the host state's domestic law.[506] In particular, the Claimant does not contest the Respondent's argument that the Tribunal would lack jurisdiction if it found that the alleged investment had been made in breach of Czech law. The Claimant denies, however, that any such wrongdoing has occurred.[507]

378. More generally, the Parties disagree on the facts that led to the Claimant's alleged investment in the Czech Republic.[508]

a. *The Respondent's Position*

379. Relying on the *Fraport* awards,[509] as well as on other cases,[510] the Respondent argues that an investment made in violation of the law is not protected by the Treaty and that such violation entails a lack of jurisdiction *ratione materiae*.[511] That is particularly the case where the breach of law is of a criminal nature, as set out in *Mamidoil v. Albania*.[512]

380. Indeed,

> a state that expressly excludes investments that were not made in accordance with its law from the protective scope of the BIT clearly does not consent to arbitrating disputes that involve such illegal investments. An investor who has incurred in illegal practices when making the investment cannot enjoy protection under the relevant investment treaty […].[513]

381. The Respondent further quotes *Metal Tech v. Uzbekistan*, where the tribunal held that it lacked jurisdiction as a result of the claimant's corrupt acts, noting that in cases of corruption, "[t]he idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of

506 Submission on Jurisdiction, paras. 111-121; Answer, paras. 72-73 and 111.
507 Answer, para. 73; Claimant's Second Post-Hearing Brief, para. 67.
508 Submission on Jurisdiction, paras. 126-194; Answer, paras. 85-110.
509 Exhibit RLA-30, *Fraport A G Frankfurt A irport Services W orldwide v . P hilippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, and Exhibit RLA-31, *Fraport v. Philippines (II)*, para. 334.
510 Exhibit RLA-32, *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 ("***Saba Fakes v. Tur key***"), para. 115; Exhibit RLA-33, *Hochtief Aktien gesellschaft v. Arg entina*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014 ("***Hochtief v. Arg entina***"), para. 199 and Exhibit RLA-34, *Inceysa Va llisoletana S.L. v. El Salva dor*, ICSID Case No. ARB/03/26, Award, 2 August 2006 ("***Inceysa v. El Salvador***"), para. 157.
511 Submission on Jurisdiction, para. 121.
512 *Id.*, para. 119, *referring to* Exhibit RLA-36, *Mamidoil Jetoil Greek Petro leum Products Societe Anonyme S.A. v. Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, para. 378.
513 Reply, para. 279.

the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act."[514]

382. This reasoning applies to the present case, the Respondent argues, since the State "was not in any way involved in Claimant's illegal acts but – to the complete opposite – was the victim of the fraud underlying the money laundering operation in which Claimant plays a vital part."[515]

383. In the present case, the Respondent states:

> the Claimant cannot invoke the protection of the BIT because […] it is linked in a plethora of ways to a fraud and money laundering case committed in the context of the privatization of a large Czech company. The persons and companies involved in the commission of the crime are also the persons who provided the funds invested in the present case. Funds were then transferred by corporate vehicles used by those criminals to Claimant, which then "*invested*" them in the Czech Republic. The investments violated fundamental rules of Czech Criminal law when being made.[516]

384. Responding to the Claimant's arguments at the hearing based on the decision in *OKO v. Estonia*, where "the tribunal ruled that illegality of part of the investment does not render the entire investment illegal",[517] the Respondent notes that, in that case, the issue at hand was related to the invalidity of ancillary contracts, not a violation of the host State's law further to a criminal act.[518] In the case at hand, the issue is quite distinct, as it is "a 'taint' that spreads across the entire transaction."[519]

385. The Respondent compares the Claimant's argument with that made in the case of *World Duty Free v. Kenya* in which the claimant admitted making a bribe in connection with the investment but argued that the bribe was only a small separate part of the investment, which should be addressed separately in respect of jurisdictional considerations.[520] The tribunal in that matter disagreed with the claimant's proposition and ruled that, considering that the bribe and the

514 *Id.*, para. 284, *referring to* Exhibit RLA-140, *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 389.
515 Reply, para. 285.
516 Submission on Jurisdiction, para. 120.
517 Respondent's Post-Hearing Brief, para. 69, *referring to* Exhibit RLA-182, *Oko Pankki Oyj et al. v. Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007 ("***OKO v. Estonia***").
518 Respondent's Second Post-Hearing Brief, para. 24.
519 Respondent's Post-Hearing Brief, para. 69; Respondent's Second Post-Hearing Brief, paras.23-24.
520 Respondent's Post-Hearing Brief, para. 67, *referring to* Exhibit RLA-181, *World Duty Free Comp any Limited v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 ("***World Duty Free v. Kenya***"), para. 174; *see also* Respondent's Second Post-Hearing Brief, para. 25.

investment were one transaction, the investment had been made in violation of the host state's law.[521]

386. The Respondent argues that the 2017 Swiss Supreme Court Judgment, by which Fynerdale's UBOs were convicted for money-laundering and fraud,[522] "raise[s] numerous very obvious red flags indicating clearly that the funds used by Claimant in the present case were proceeds from his [sic] criminal activities, which were supposed to be laundered in the Czech Republic by Claimant's 'investments'."[523] The Respondent underscores that sections 216 and 217 of the Czech Criminal Code specifically sanction money laundering.[524]

387. The Respondent alleges that Fynerdale granted large loans to Ytrix and Poppyseed, without there being any explanation as to the provenance of the money.[525] As previously mentioned, the Respondent considers that the purpose of the poppy seed trade and related loans from Fynerdale was to launder money from the alleged MUS Fraud. Fynerdale would thus lend the funds received from the MUS Fraud to Ytrix and Poppyseed. Then, in due course, Ytrix and Poppyseed would reimburse the loans – thus completing the money laundering scheme.[526]

388. The transaction chain had originally been concealed,[527] and was only revealed further to the forensic investigations of the Respondent's Expert. The Respondent argues that the missing evidence of central documents, such as credit agreements for the loans, suggests that the Claimant is "unable or unwilling to establish the source of the funds used in the alleged investment".[528]

389. In the Respondent's view, the illegality of Fynerdale's activity is also evident from the lack of interest shown by Fynerdale in the poppy seed business: had there been any real interest in the business, then Fynerdale would have been aware that it was unrealistic to buy 123.9 tons of poppy seed between 2007 and 2010.[529] This is further buttressed, the Respondent says, by the absence of evidence showing the commercial rationale of the purchase of the entire harvest of poppy seed

521 Respondent's Second Post-Hearing Brief, para. 25.
522 Submission on Jurisdiction, para. 126.
523 *Id.*, para. 129; *see also* Reply, paras. 231-257.
524 *Id.*, paras. 180-185; Respondent's Second Post-Hearing Brief, para. 26.
525 *Id.*, para. 186.
526 *See* above, para. 143.
527 Reply, para. 178.
528 Respondent's Post-Hearing Brief, para.88; Respondent's Second Post-Hearing Brief, para. 5.
529 Submission on Jurisdiction, para. 191.

and of any form of security for the loans.[530] Indeed, the very structure of the investment mechanism appears to be "highly suspicious":

> The scheme shows quite clearly that the middle part of the diagram from Ytrix until Tadorna is redundant and does not serve any economic purpose. All poppy seed purchased from the farmers would be processed and stored in the warehouses of Mr. [redacted] until its sale to the end-purchasers regardless of which of the companies in the chain was the owner at a given moment. If the scheme operated as described, Mr. [redacted] would be essentially selling the poppy seed from himself to himself while also performing the economic activity (soring, cleaning, mixing and packaging) himself. The involvement of Ytrix, Poppyseed and Tadorna served no purpose whatsoever because Mr. [redacted] with Ms. [redacted] had all the means necessary to operate the scheme alone.[531]

390. The Respondent contends that "[i]f the purpose of Claimant's involvement was to provide the necessary capital for the trade, almost any other method would be cheaper and safer for the investor." Consequently, the Respondent considers that "the poppy seed trading scheme lacked any commercial sense from the very beginning" and that "[s]imilarly senseless were also all subsequent decisions that Claimant and its UBOs made in reaction to the supposed developments on the market."[532]

391. The Respondent asserts that a "[r]easonable businessman would never agree to invest CZK 3 billion in unsecured loans to a scheme where all control is allocated to independent third parties and all the risk stays with the investor."[533]

392. Reviewing the evidence at hand, the Respondent argues that the alleged fraud could and should have been discovered sooner by the Claimant's representatives[534] and that, in any event, the Claimant never argued nor produced evidence proving that it had pursued an economic analysis of the poppy seed market or performed due diligence in respect of the Poppy Seed Merchants or of their companies.[535] Consequently:

> Mr. [redacted]'s assertion that earlier discovery of the fraud was impossible is simply incorrect. Claimant had numerous opportunities to adopt a minimum standard of business vigilance, which would be expected of a company making investments in the range of billions. However, Claimant did no such thing and allowed the fraud to continue.[536]

530 Respondent's Second Post-Hearing Brief, para. 7.
531 *Id.*, para. 14.
532 *Id.*, para. 16.
533 *Id.*, para. 20.
534 *Id.*, para. 19.
535 *Id.*, para. 20.
536 *Id.*, para. 21.

393. Because certain loans were never paid back, the Claimant was unable to recover the money which it was attempting to launder. Thus, the "Claimant is now asking for damages from the Czech state as reparation for a failed money laundering transaction."[537]

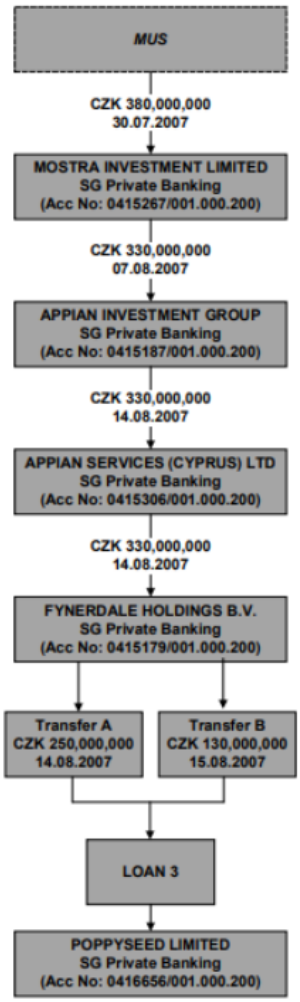
394. The illegality of the investment is evident when one considers the provenance of the funds, as established in the [redacted] Expert Report based on the documents produced during the document production phase. The Respondent thus asserts that the [redacted] Expert Report shows that the Claimant's funds for Loan 3 were derived from the MUS Fraud, transferred to Fynerdale through an intricate series of operations and through the conduit of various companies.[538] The conclusions of the [redacted] Expert Report also support the view that other loans issued by Fynerdale were also derived from the MUS Fraud.

(i) Loan 3

395. At the issue of the Hearing, the Respondent notes that the Claimant's expert "using additional documents received from Claimant (but not disclosed to Respondent or the Tribunal) managed to establish with certainty that the funds used for Loan 3 were proceeds of the MUS fraud."[539] It thus considers that it is "an undisputed fact" that part of Loan 3 was funded with funds derived from a criminal operation.[540]

396. Thus, relying on Exhibit VEC-17 (issued from the Claimant's document production), the Respondent's Expert established that there was a direct flow of funds from MUS to the company Mostra, which eventually funded the issuance of Loan 3:[541]

537 Submission on Jurisdiction, para. 194.
538 Reply, para. 190.
539 Respondent's Post-Hearing Brief, para. 74; Respondent's Second Post-Hearing Brief, para. 28.
540 Respondent's Second Post-Hearing Brief, para. 28.
541 Respondent's Post-Hearing Brief, paras. 75-76.



397. The Claimant's argument that Loan 3 should be distinguished from the other loans and only forms part of the investment is, in the Respondent's view, inapposite and contradictory with previous assertions.[542]

398. The Respondent concludes that:

> [I]t is irrelevant whether only a part of the funds used in Claimant's alleged investment was sourced in a crime, because the result is no jurisdiction over the entire investment scheme. Firstly, because under the BIT, in cases of fraud, corruption or money laundering the one illegal part taints the entire investment with illegality. Secondly, because concealment of origin of criminal proceeds in a form of mixing with legitimate funds renders the entire transaction a crime under Czech law.[543]

542 Respondent's Post-Hearing Brief, para. 80.
543 Respondent's Second Post-Hearing Brief, para. 27; *see also* Respondent's Post-Hearing Brief, para. 83.

(ii) Loans 1-2 and 4-9

399. The Respondent considers that the existence of the first two loans is unproven: "Loan 1 and Loan 2 were the only ones where Claimant was unable to present a single relevant document showing that these transactions have ever taken place. […] Claimant was not even able to show account statements showing the transfer of the funds from its account to the account of Aida and Ytrix."[544]

400. At the Hearing, Mr. [redacted] explained that the accounts from which Loan 3 had been paid had been frozen due to the Swiss proceedings. At a later stage, Loans 4 to 9 were paid through another bank account, after said freezing of the account. The Respondent thus concludes:

> The freezing of accounts thus served as a certain turning point when the sources of funding switched. If Loan 1 and Loan 2 ever existed, they were provided prior to this turning point and, therefore, likely used the same financing channel as Loan 3, which was sourced in the MUS fraud. This would also provide a background for Claimant's otherwise inexplicable failure to present a single piece of evidence pertaining to Loans 1 and 2.[545]

401. Considering that Loan 4 was funded through Škoda dividends, the Respondent considers that it was indirectly funded by the proceedings from the MUS fraud.[546] Loan 5, however, is in the Respondent's view "likely at least partially sourced in the MUS fraud".[547]

402. Loans 6 to 9 were transferred through the company Appian Services (Cyprus) Ltd., which was an active participant in the MUS Fraud.[548] However, only the flow of funds is proven, and sometimes only partially; the source of these loans is unknown.[549]

403. According to the Respondent,

> Claimant has not provided sufficient information to enable Respondent and the experts to trace back most of the funds to their very origins, despite having been granted several extensions of the document production deadlines. Claimant, instead of producing evidence to rebut Respondent's submissions and thereby establishing that the invested funds were obtained legally, simply sticks its head in the sand. This of course makes sense as it has become evident that Claimant's investment is indeed part of a grand money laundering scheme.[550]

544 Respondent's Post-Hearing Brief, paras. 98-99.
545 *Id.*, para. 101.
546 *Id.*, para. 103.
547 *Id.*, para. 104.
548 Reply, paras. 237-245.
549 Respondent's Post-Hearing Brief, paras. 107-120.
550 Reply, para. 246.

404. In the Respondent's view, "if Claimant committed money laundering even with regard to one of the loans forming its investment, the entire investment is tainted and will not be protected under the BIT":[551]

> [I]n cases of bribery, the illegality does not only concern the funds used for the illicit purpose alone but the entire investment connected to such behaviour is illegal. Applied to the present case, it is not relevant whether the proceeds of a crime form 1% or 100% of the transactions involved in the granting of the Loans. Regardless of the percentage, the entire investment is illegal because it is all part of one criminal transaction.[552]

405. The Respondent asserts that the explanations provided by the Claimant with regard to the origin of the funds – *i.e.* dividends paid out by Škoda Holding – are unsupported by any evidence:[553] thus, only one loan can be traced back to the Škoda group, although the origins of the funds are unclear even in that case.[554] The Respondent notes that Fynerdale's UBOs have in the past repeatedly relied on the Škoda brand, left untainted, to cover for their transactions.[555]

406. While it may not be possible to trace back of the origin of the funds to the MUS Fraud with full certainty, the above elements all represent red flags. While these may not be direct proof of the illegality of the Claimant's investment, they provide sufficient evidence, under a *prima facie* standard of proof, to determine that there is a connection between the criminal activities of Fynerdale's UBOs and the sums granted as loans to Ytrix and Poppyseed.[556]

(iii) Request for Adverse Inferences in Respect of the Legality of the Loans

407. The Respondent further requests the Tribunal to draw adverse inferences on account of what the Respondent perceives to be an incomplete document production by the Claimant, noting that:

> Where at least some documents were provided, they were delayed, did not relate to Respondent's requests and showed signs of tampering. Emails were copied into word documents to hide metadata, which would allow Respondent to verify the timing and the identities of the senders and the addressees. Account statements suspiciously started after or ended before the relevant transfers took place. Almost all contractual documentation between the funding entities was allegedly lost or was inaccessible.[557]

408. At the Hearing, the Respondent notes that a number of elements were brought to light: the Claimant's Expert was provided with documents that were not handed over to the Respondent's Expert and the Claimant further admitted that it had tardily requested documents for the document

551 Respondent's Post-Hearing Brief, para. 66.
552 *Id.*, para. 68.
553 Reply, para. 251.
554 *Id.*, para. 253.
555 *Id.*, para. 254.
556 *Id.*, para. 256; Respondent's Post-Hearing Brief, paras. 85-87.
557 Respondent's Post-Hearing Brief, para. 88.

production phase from a third party and that, upon receiving a new trove of documents in June 2020, had waited to assess and select "a small amount of documents" until August 2020, eleven days before the hearing, before submitting them to the Tribunal and the Respondent.[558]

409. The Respondent notes that the Tribunal is empowered to draw adverse inferences further to the applicable UNCITRAL Rules and paragraphs 5.3.7 and 6.1 of its Procedural Order No. 1.[559] In particular, the Respondent submits:

> Since Claimant failed to comply with the majority of the granted document re-quests relating to the illegality of Claimant's investment, the Tribunal should draw the following adverse inferences:
>
> - The loans provided by Claimant forming the alleged investment in the present case derived from crimes for which Messrs [redacted] and [redacted] have been found guilty by the Swiss Supreme Court (Document Requests No 1-5).
>
> - Claimant has not taken an informed business decision when making its "investment" based on advice from Mr [redacted] Mr [redacted] and Ms [redacted] (Document Request No 6).[560]

410. The Respondent contends that, as a result of the incomplete and tardy documentation submitted by the Claimant, "it has been extremely difficult to ascertain all the details of Claimant's alleged investment".[561] It further alleges that the Claimant failed to provide "missing evidence and demonstrate that the investment was more than a money laundering attempt gone wrong"[562] even after the Tribunal posed questions after the Hearing.

411. The Respondent thus alleges that "[a]fter a purposefully and repeatedly delayed document production phase, Claimant has hardly any documents that dismiss the concerns raised in connection with the illegal nature of its investment."[563] Some documents, to the contrary, have proven the Respondent's assertion that Fynerdale's alleged investment was derived from illegally-acquired funds.[564] Overall, while there may be insufficient hard evidence to prove that the totality of Fynerdale's alleged investment was derived from funds arising from the MUS Fraud, the Respondent underscores that "criminal proceeds in an amount strikingly close [to] the

558 Respondent's Post-Hearing Brief, paras. 90-91.
559 Reply, paras. 272-274.
560 *Id.*, para. 276.
561 Respondent's Second Post-Hearing Brief, para. 7.
562 *Id.*, para. 7.
563 Reply, para. 265.
564 *Id.*, para. 266.

amount of the alleged investment have disappeared at around the same time the investment was made."[565]

412. The Respondent thus asks the Tribunal "to draw adverse inferences that the funds used in the alleged investment were sourced in the proceeds of crimes committed by Mr [redacted] and Mr [redacted]"[566] and thus to infer that the funds for Loans 1, 2, 6, 7, 8, and 9 all derived from the MUS fraud.[567]

(iv) Conclusion

413. The Respondent considers that "Claimant's alleged investment is merely one of many criminal schemes of its ultimate beneficiary owners Mr [redacted] and Mr [redacted] "[568] In this regard, the Respondent refers to the lack of evidence provided by the Claimant to substantiate its claims and the fact that "Mr [redacted] and Mr [redacted] have repeatedly lied to the Czech police about their relationship with Claimant and that the poppy seed investment scheme does not make any economic senses as was pointed out in the [2018 Czech Decision]."[569]

414. Based on the above-mentioned references, the Respondent considers that the "prevailing line of jurisprudence" is that a tribunal lacks jurisdiction over claims relating to an illegal investment.[570] As such, the illegality of the investment made by Fynerdale in the present case necessarily entails that the Tribunal lacks jurisdiction over the Claimant's case.[571]

415. Alternatively, the Respondent argues that the Tribunal should dismiss the Claimant's claims as inadmissible, similar to what the tribunal in *Malicorp v. Egypt* did.[572] In accordance with the "clean-hands principle", the Claimant, in introducing this arbitration, "can only rely on its substantive legal rights if it has not engaged in […] significant misconduct".[573] Other tribunals have thus concluded that this principle can be applied whether or not the underlying treaty – be it a BIT or the Energy Charter Treaty – includes a requirement that the investor act in accordance

565 Reply, para. 268.
566 Respondent's Post-Hearing Brief, para. 92.
567 *Id.*, paras. 102, 109, 112, 117, 120.
568 *Id.*, para. 124.
569 *Id.*, para. 81.
570 Reply, para. 288; Respondent's Post-Hearing Brief, para. 70.
571 Submission on Jurisdiction, paras. 195-197.
572 *Id.*, paras. 118 and 121, *referring to* Exhibit RLA-35, *Malicorp Ltd v. Egypt*, ICSID Case No. ARB/08/18, Award, 31 January 2011, paras. 117-118.
573 Reply, para. 289.

with domestic law.[574] Because the Claimant has come to this arbitration with 'unclean hands', its claims should be held inadmissible, even if the Tribunal were to uphold jurisdiction.

416. In the present case, the Treaty contains "an express compliance clause, requiring investors to adhere to the law of the host state".[575] In such cases, the Tribunal should find – as other tribunals before it – that it lacks jurisdiction. Alternatively, should the Tribunal find it has jurisdiction, it should dismiss the Claimant's claims as inadmissible.[576]

b. *The Claimant's Position*

417. The Claimant denies that it violated Czech law when it made its investment in the Czech Republic.[577] Not only is the evidence submitted by the Czech Republic to support its allegations very limited,[578] but in addition, the findings of the Swiss Supreme Court, on which the Respondent relies, are "highly controversial."[579]

418. The Claimant contends that judgment is the result of Swiss proceedings that took place amidst "extreme political pressure" from the United States. The Swiss prosecutor's office and the judges' behaviour in this case were the source of criticism – in particular, the Claimant points out that one of the three Swiss judges ruling on the case publicly stated his concerns with regard to the respect of due process.[580] Moreover, important evidence was either dismissed or improperly administered.[581] In light of all of these reasons, the Claimant considers that "the judgment of the Federal Supreme Court of Switzerland cannot be used as evidence that the funding of Loan 3 derives from proceedings from the MUS transaction."[582]

419. Currently, analogous proceedings are pending before the Czech courts, where evidence left unheard in Switzerland is being taken into account.[583]

574 Reply, paras. 290-292, *referring to* Exhibit RLA-167, *SAUR International SA v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (French), 6 June 2012, para. 308; Exhibit CLA-66, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 ("***Plama v. Bulgaria***"), paras. 139-143; Exhibit RLA-168, *World Duty Free v. Kenya*, para. 157.
575 Reply, para. 293.
576 *Id.*, paras. 293-294.
577 Answer, paras. 85-110.
578 *Id.*, para. 80.
579 *Id.*, para. 88 [emphasis in the original].
580 *Id.*, para. 92.
581 *Id.*, para. 93.
582 Claimant's Post-Hearing Brief, para. 100.
583 Answer, para. 95.

420. The Claimant argues, furthermore, that the Respondent is precluded from relying on the defence of illegality on the basis that it was itself involved in the alleged illegality through the conduct of its government representatives.[584] Relying on the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission and the award in *EDF v. Romania*, the Claimant contends that "a public official's solicitation of a bribe is, as the *EDF* tribunal stated, a 'fundamental breach of transparency and legitimate expectations' and, hence, a violation of the FET standard included in Article 3(1) of the Treaty.[585]

421. The Claimant contends that the 2016 Czech Decision, submitted into evidence by the Respondent, "expressly proves" that the alleged crimes regarding the MUS purchase involved wrongdoings of the representatives of the Czech Government. According to the decision, the sale of the MUS Shares by the Czech Government was made at a low price on the basis of erroneous information and "interventions" from the Deputy Minister of Industry and Trade.[586]

422. In any case, the Claimant argues that the Respondent fails to meet the applicable heightened standard of proof, "as it fails to provide any unequivocal direct evidence that the investments made by Fynerdale are in violation of Czech law."[587] This question of the standard of proof, which is not governed by Article 24 of the UNCITRAL Rules, is important in cases such as the one at hand, "where the host state makes (serious) allegations of wrongdoing such as criminal acts, fraud, corruption and other similar acts, international courts and tribunals have required a heightened standard of proof."[588] The appropriate standards in these cases were those of "clear and convincing evidence" or "beyond reasonable doubt".[589]

423. Indeed, the Claimant argues that the illegal origin of the funds has never been proven and is in fact highly implausible.[590] In 2011, the Claimant points out, Fynerdale's accounts in the Czech Republic were examined by the Department of Financial Analysis of the Ministry of Finance: the

584 Claimant's Second Post-Hearing Brief, paras. 50-53.
585 *Id.*, paras. 51-52, *referring to* Exhibit CLA-86, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 2009, para. 221.
586 Claimant's Second Post-Hearing Brief, para. 51, *referring to* Exhibit R-37, 2016 Decision.
587 Rejoinder, para. 102.
588 *Id.*, para. 98.
589 *Id.*, para. 98, *referring to* Exhibit CLA-176, David D. Caron, Lee M. Caplan, Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, 2006, p. 569; Exhibit CLA-178, Gary B. Born, *International Commercial Arbitration*, Kluwer Law International, 2014, section 15.09(b); Exhibit CLA-185, Andrea Menaker, 'Chapter 5: Proving Corruption in International Arbitration', in Domitille Baizeau and Richard Kreindler (eds.), *Addressing issues of Corruption in Commercial and Investment Arbitration* (Dossiers of the ICC, Institute of Word Business Law, Volume 13, 2015), pp. 82-87; Exhibit CLA-179, Sam Luttrell, 'Fall of the Phoenix: A New Approach to Illegality Objections in Investment Treaty Arbitration' 44(2):1, *University of Western Australia Law Review*, p. 130.
590 Answer, para. 97.

examination did not reveal any mishandlings by the Claimant, but contributed to the identification of the Ponzi scheme developed by the Poppy Seed Merchants.[591] It is in this context that the Claimant was awarded damages further to the judgment of the Prague Municipal Court.[592]

424. As for the Respondent's observation that Fynerdale provided its loans without security, the Claimant considers that this is of no relevance:

> [T]here were no reasons for Fynerdale to secure the Loans as Fynerdale always had control over Poppyseed and all the financial transactions made by Poppyseed via, for example, the credit agreements. Furthermore, Poppyseed was a special purpose vehicle with no assets that could not be the object of a pledge. For that reason, it is standard practice that an investor does not secure funds provided to its special purpose vehicle.[593]

425. Similarly, the Respondent's questioning of the commercial rationale of the Claimant's investment and investment structure is inapposite. Not only was the interest for such a structure acknowledged by the Municipal Court of Prague,[594] but it was moreover confirmed by both experts in the proceedings as a common structure that could be "used in legitimate businesses and in legitimate practices."[595]

426. In the Claimant's view, the Respondent's reliance on the 2013 Swiss Federal Court Judgment and on the 2016 and 2018 Decisions is similarly inapposite, as none of them supply the relevant evidence to show that Fynerdale's investments were made contrary to Czech law:

(a) The 2013 Swiss Federal Court Judgment did not find that the funds used to acquire the Škoda shares originated in criminal proceedings.[596]

(b) The 2016 Czech Decision "does not establish that proceeds of MUS were used to obtain any Skoda assets or that any other crime was committed with respect to the sale of Skoda assets."[597] Thus, this decision did not establish that there was bribery or money laundering.

591 *Id.*, para. 98.
592 *Id.*, para. 100.
593 Claimant's Second Post-Hearing Brief, para. 83; *see also* Claimant's Post-Hearing Brief, para. 14.
594 Claimant's Second Post-Hearing Brief, para. 56.
595 Claimant's Second Post-Hearing Brief, para. 57, *referring to* Hearing Transcript, Day 2, 57:13-18 and 64:11-25.
596 Claimant's Second Post-Hearing Brief, para. 45, *referring to* Exhibit CLA-135, Swiss Federal Court Judgment, para. 4.2.11.
597 Claimant's Second Post-Hearing Brief, paras. 38-42, *referring to* Exhibit R-37, 2016 Decision, pp. 108-109.

(c) In the 2018 Czech Decision, which does not concern Loans 1, 2, 3, 7, 8, or 9,[598] the Czech police reached the conclusion that (i) "there was no crime of legalizing the proceeds of crime committed" and (ii) "there was no suspicion of a criminal offense of evasion of taxes and similar mandatory payments."[599]

427. In any event, the Claimant argues that the 2016 and 2018 Czech Decisions are not binding on the Tribunal and should not lead it to deny jurisdiction.[600]

428. The Claimant notes that Ms. [redacted] s testimony at the Hearing made it "obvious […] that her instructions were not aimed at establishing the facts but at trying to establish whether certain allegations of the Czech Republic 'cannot be excluded'."[601]

429. Relying on the [redacted] Expert Report, the Claimant alleges that the Respondent has failed to provide any evidence supporting its allegations:

> For eight of the nine loans the Czech Republic expert report fails to provide any evidence that might serve its objective. Only loan 3 is challenged, based on Exhibit VEC-17 to the K2 report. I was able to confirm all flows of funds as stated on Exhibit VEC-17 with bank statements [.] Therefore I concur with the conclusion of the Czech Republic expert on loan 3 being funded by 'MUS' proceedings. However, the assumption of the Czech Republic expert that she "cannot exclude the possibility that" funds of all other loans have derived from the 'MUS' proceedings, based on her findings to loan 3, is simply invalid, while there is no indication that loan 3 is in anyway interconnected to other loans. On the contrary, I identified legitimate sources of funds following from Škoda Group dividends.[602]

430. In any event, the Claimant argues that the allegations of illegality should not have any incidence on the Tribunal's jurisdiction *ratione materiae*. Referring to the 1963 decision issued by Judge Gunnar Lagergren in *Argentine Engineer v. British Company* , cited by the Tribunal during the course of the hearing,[603] the Claimant considers that the sole arbitrator's decision in that case to rule that he lacked jurisdiction over the dispute represents an outdated reasoning.[604]

598 Claimant's Second Post-Hearing Brief, para. 31.
599 *Id.*, para. 34. *See also* Exhibit R-36, 2018 Decision, p. 69.
600 Claimant's Second Post-Hearing Brief, paras. 46-49, *referring to* Exhibit RLA-37, *Karkey v. P akistan*, para. 544; Exhibit RLA-34, *Inceysa v. El Salvador*, para. 212; *Glencore International A.G. and C.I. Prodeco S.A. v. Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 673; Exhibit CLA-208, *Croatia v. MO L Hungarian Oil and Gas Company Plc*, PCA Case No. 2014-15, Final Award, 23 December 2016, paras. 332-333.
601 Claimant's Post-Hearing Brief, para. 98.
602 [redacted] Expert Report, p. 34.
603 Hearing Transcript Day 1, 139:19-25 and 140:1-9.
604 Claimant's Post-Hearing Brief, paras. 90-91.

(i) Loan 3

431. The Claimant notes that this was a single loan, "granted under a separate loan agreement and in a separate timeframe distinguished from other loans."[605] It further underscores that the Respondent's expert herself was able to link only this one loan – out of the nine loans granted by Fynerdale – to the MUS privatization. During the course of her examination, Ms. [redacted] "recognized […] that she was able to identify only part of Loan 3 as being funded by MUS funds (only CZK 330 million out of CZK 667,5 million)."[606] However, the Claimant notes, this is only part of the investment made by Fynerdale in the Czech Republic.[607]

432. The Claimant refutes that Loan 3 was funded by funds originating in the MUS privatization.[608] Disputing that the notion of legality of the investment should be interwoven with the definition of investment,[609] the Claimant further argues that

> even if the Tribunal finds that Loan 3 is contrary to the host law in the meaning of the Treaty, this does not mean that the whole investment of Fynerdale is illegal under the Treaty. To withdraw the protection of the Treaty on this basis would be inconsistent with the object and purpose of the Treaty. Denying protection under the Treaty to all Fynerdale's Loans based on a potential finding of illegality with respect to Loan 3 would be a disproportionate response under the circumstances and would be factually wrong.[610]

433. The Claimant thus concludes that the Tribunal should review the separate origins of the various loans in order to assess the potential impact of the alleged illegality of Loan 3. In any event, the Claimant considers that the Respondent ought to be precluded from relying on this defense considering that the Czech Republic "did not convict Fynerdale for any of the alleged wrongdoing it now puts forward in its defence", contrary to a Czech official currently charged with bribery.[611]

(ii) Loans 1-2 and 4-9

434. While the Respondent alleges that the Claimant only received funds from Appian Services (Cyprus) Limited, the Claimant underscores that it received funds from a number of other entities, such as Škoda Holding.[612] Far from being unsupported, as claimed by the Respondent, this is in fact supported by the [redacted] Expert Report, which confirmed that "Loan 4 originated from

605 Claimant's Second Post-Hearing Brief, para. 64.
606 Claimant's Post-Hearing Brief, para. 99.
607 Rejoinder, para. 105; Claimant's Second Post-Hearing Brief, para. 59.
608 Claimant's Second Post-Hearing Brief, para. 59.
609 *Id.*, para. 65, *referring to* Exhibit CLA-139, *Salini Costruttori S.p.A. and Italstrade v. Morocco (I), ICSID Case No. ARB/00/4*, Decision on Jurisdiction, 31 July 2001 ("***Salini v. Morocco (I)***"), para. 46.
610 Claimant's Second Post-Hearing Brief, para. 63.
611 *Id.*, para. 69.
612 Answer, paras. 101-107.

the dividend payment from Skoda Holding S.A."[613] and, which "identified legitimate sources of funds following from Skoda Group dividends."[614] Indeed, between April 2008 and July 2010, Škoda Group paid out dividends to a company of the Appian Group, Appian Machinery,[615] which then transferred the sums to Fynerdale. Indeed, the [redacted] Expert Report concludes that "a total amount of CZK 14.044.000.000 was paid by Skoda Holding a.s. / Skoda Investment a.s. in the period 2007-2011 to Appian Machinery Netherlands B.V. This total amount is sufficient to fund the sum of the loans granted by Fynerdale to the poppy seed business."[616]

435. Further to the Hearing, the Claimant notes that:

> Regarding Loan 4, it is not in dispute between the experts that this loan was funded by the Skoda dividends and, thus, derived from the legitimate sources. Regarding Loans 6 and 7, Mr. [redacted] could trace back the funds to Chorus Investment Fund, which is part of the Skoda structure. Regarding Loan 8, Mr [redacted] confirmed that he could trace back the funds to Appian Services (Cyprus) Limited. […] Regarding Loan 9, Mr [redacted] could trace the funds back to Appian Investment Group. Regarding both Loans 8 and 9, Mr [redacted] states that there is circumstantial evidence on the record that their funding also originates from the Skoda dividends.[617]

436. The Claimant further contends that, as shown by the [redacted] Statement, the Škoda group's funding and cash flow was unrelated to MUS.[618] At the Hearing, Mr. [redacted] further testified that, following the freezing of the group's accounts in view of the Swiss criminal proceedings, he had ensured that any loans would only be funded from Škoda Group.[619]

437. After the Swiss judicial authorities' investigation of the ownership share in the Škoda Group, the Swiss courts dismissed the charges that had been brought against Fynerdale's UBOs related to

613 Rejoinder, para. 106.
614 *Id.*, para. 116, [redacted] Expert Report, p. 34.
615 Answer, paras. 104-105, *referring to* Exhibit C-36, Decision of the sole shareholder of Skoda Holding, April 2008; Exhibit C-37, Decision of the sole shareholder of Skoda Holding, June 2008; Exhibit C-38, Decision of the sole shareholder of Skoda Holding, November 2008; Exhibit C-39, Decision of the sole shareholder of Skoda Holding, May 2009; Exhibit C-40, Decision adopted by the sole shareholder of Skoda Holding, January 2010; Exhibit C-41, Decision adopted by the sole shareholder of Skoda Holding, February 2010; Exhibit C-42, Decision adopted by the sole shareholder of Skoda Investment, March 2010; Exhibit C-43, Decision adopted by the sole shareholder of Skoda Investment, April 2010; Exhibit C-44, Decision adopted by the sole shareholder of Skoda Investment, May 2010; Exhibit C-45, Instruction for payment of dividends, July 2010.
616 Rejoinder, para. 119, *referring to* [redacted] Expert Report, p. 18.
617 Claimant's Post-Hearing Brief, para. 111.
618 Rejoinder, para. 121, *referring to* CWS-3.
619 Claimant's Post-Hearing Brief, paras. 113-114.

Škoda's involvement in the MUS privatization.[620] This part of the decision, unchallenged by the public prosecutor,[621] has now entered into force and has become final.[622]

438. The conclusions of the Respondent's expert that she "cannot exclude" that the funds used for other loans derived from the alleged MUS fraud "can obviously not lead to the conclusion that the Czech Republic met any standard of proof in this respect."[623] The [redacted] Expert Report's conclusions with regard to Loans 5 to 9 are unsubstantiated and solely based on inferences.[624]

439. In the Claimant's view, if one were to follow this logic, "one could argue that the fact that it is not in dispute between the Parties that Loan 4 and Loan 5 are funded legitimately entails that it cannot be excluded that also the other Loans derive from legitimate sources."[625]

440. In view of the above, the Claimant submits that its investments were made in accordance with Czech law and requests that the Tribunal accept jurisdiction over the present case. In any event, referring to the case of *OKO v. Estonia*, the Claimant considers that "[t]he alleged illegality of only a minor part of the investment does not render the whole investment illegal."[626]

(iii) Available Documentary Evidence and the Respondent's Request for Adverse Inferences

441. Prior to the Hearing, the Claimant indicated that it had been provided new documents that were relevant to identify the source of funds for the loans. These documents were eventually provided to the Claimant's Expert, who was able to reach certain conclusions on these loans. In particular, with regard to Loan 4, the Claimant contends that its Expert "was also able to trace back the funds again to Chorus Investors Fund and, thus, close the chain of payments from Skoda Investments up to Fynerdale. However, the admission of the relevant documents to prove this closure of the chain of payments has been denied by the Tribunal."[627]

442. The Claimant considers there is no need or justification for the Tribunal to draw adverse inferences based on an alleged refusal from the Claimant to comply with a part of the document

620 Rejoinder, para. 121, *referring to* Exhibit CLA-135, Swiss Federal Court Judgment, paras. 4.11.2.5 and 4.23.
621 Exhibit C-46, Statement of CMS, 9 February 2017.
622 Rejoinder, para. 121.
623 *Id.*, para. 107.
624 *Id.*, paras. 107-111.
625 Claimant's Post-Hearing Brief, para. 102.
626 *Id.*, para. 103, *referring to* Exhibit CLA-205, *OKO v. Estonia*, paras. 189-190; Claimant's Second Post-Hearing Brief, para. 66.
627 Claimant's Post-Hearing Brief, para. 111.

production. The condition set out in the IBA Rules on Evidence regarding the drawing of adverse inferences – "that there is no satisfactory explanation for the failure to produce a document by the concerned party" – is not met: the Claimant "provided a detailed explanation of the reasons why not all documents can be produced."[628]

(iv) Conclusion

443. In conclusion, the Claimant contends that the Respondent, which bears the burden of proof regarding the alleged illegality, did not provide *prima facie* evidence with regard to the alleged illegality of the investments of Fynerdale nor meet the applicable heightened standard of proof or any other standard of proof. In any case, the Claimant contends that the [redacted] Expert Opinion proves that the vast majority of the loans were funded by the Škoda dividends, which were in no way related to MUS.[629]

3. Qualification of the Loans as Investments under the BIT

444. The Parties disagree as to whether the Loans granted by Fynerdale are of such a nature as to qualify as investments under the Treaty.

a. *The Respondent's Position*

445. Responding to a question from the Tribunal posed at the hearing, the Respondent notes that the intent of the BIT is "to support the flow of investments that should, on its part, stimulate the economic development of the contracting states or, in other words, contribute to their economy."[630] The need for such contribution has been confirmed by the tribunal in *Nova Scotia Power Incorporated v. Venezuela*, where the tribunal referred to the *Salini* criteria.[631]

446. Although the Respondent concedes that the *Salini* criteria, set out by a tribunal acting under the aegis of the ICSID Convention, may not be directly applicable to the present case, it points out that "the *Salini* criteria may be helpful in determination of the contracting states' intention when concluding the present BIT."[632] The Respondent thus rejects the awards cited by the Claimant as being "not instructive" and "unhelpful".[633]

628 Rejoinder, para. 131.
629 Claimant's Post-Hearing Brief, paras. 117-118.
630 Respondent's Post-Hearing Brief, para. 130.
631 *Id.*, para. 131, *referring to* Exhibit RLA-183, *Nova Scotia Power Incorporated (Canada) v. Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014 ("***Nova Scotia Power v. Venezuela (II)***"), para. 80.
632 Respondent's Second Post-Hearing Brief, para. 59.
633 *Id.*, paras. 58-60.

447. While the Respondent does not deny that loans could be investments,[634] it considers that, in the present case, the Loans do not represent protected investments under the Treaty because they "were not made to the sovereign state or at least to a project benefitting the state", but were "simply loans to finance a private commercial transaction that was carefully designed to yield the maximum profit for a small group of private Czech individuals".[635] Moreover, the Respondent notes that the Loans were made "with a very short duration and a very high interest."[636]

448. The Respondent thus argues that "[t]he ordinary meaning of the term "economic value" suggests that the contracting states intended to distinguish the protected investments from titles to money, which have a mere financial value" and "shows the intent to protect such investments which stimulate the economic development".[637]

449. In the Respondent's view, the "Claimant is incorrect in suggesting that any transfer of money to a private entity is a 'self-explanatory' contribution to the economy of the state in which the entity is located."[638] According to the Respondent:

> The opposite is true because one must analyze numerous elements of the transfer before reaching a conclusion on whether and how the transfer impacted the state's economy. The timing of some of the transfers to the period of the global economic crisis is not relevant because their basic attributes prevent their qualification as an economic contribution even if at the time the Czech economy would be in dire need of liquidity.[639]

450. The Respondent further considers that the investment in and of itself cannot be qualified as a "foreign investment": "[a]lthough the entities making the transfers were legally foreign, the transferred funds were sourced in the economic activity of MUS or Skoda occurring in the Czech Republic. Therefore, the loans cannot be considered a foreign contribution to the Czech economy because the funds used were never actually foreign."[640]

451. As for the Claimant's argument that its Loans participated to the Czech economy by providing jobs to Czech farmers, the Respondent notes that this assertion is exclusively based on Mr. [redacted]'s testimony, itself based on facts relayed to him by Ms. [redacted] – leading the Respondent to conclude that "the story is most likely a fabrication."[641] In any event, even if this story were to "hold water," the Respondent considers that "the investments could not have saved

634 Respondent's Post-Hearing Brief, para. 135; Respondent's Second Post-Hearing Brief, para. 54.
635 Respondent's Post-Hearing Brief, para. 136.
636 Respondent's Second Post-Hearing Brief, para. 62.
637 *Id.*, para. 52.
638 *Id.*, para. 64.
639 *Id.*, para. 64.
640 *Id.*, para. 64.
641 *Id.*, para. 65.

any of [the farmers] as the transactions with Czech farmers were fictional and never really occurred."[642]

452. According to the Respondent, Loans 1, 2, 4 and 5, regarding which the underlying contractual agreements were not produced in these proceeds, "must be carved out of the alleged investment" because "Claimant's approach to withhold the contractual agreements underlying some of its alleged investment […] would deprive Respondent of its most fundamental procedural right to be heard."[643]

453. Regarding Loans 4 and 5 in particular, the Respondent argues that the Claimant's constant representation that these were issued to the Maltese company Poppyseed – and not the Czech entity Ytrix – implies that those loans do not qualify as indirect investments. In particular, the Respondent argues that the Claimant's "*volte-face*" is late and is therefore inadmissible.[644] In any event, the Respondent argues that such argument is misguided: "[a] transfer of funds on its own cannot qualify as an investment, since that is merely an implementation step, which does not say anything about the underlying legal transaction – its contribution, duration or risk involved."[645]

454. The Respondent notes that the underlying credit agreements indicated Poppyseed and Fynerdale as Parties and did not involve Ytrix.[646] Consequently, the risk undertaken by the Claimant was that the Maltese entity would not reimburse the loan.[647] In the absence of any credit agreements supporting the factual allegations of the Claimant on the record, the Respondent asks that the Tribunal make an adverse inference as to their content.[648]

455. Loans 3, 6, 7, 8 and 9, the Respondent contends, do not qualify as investments considering their characteristics: a very high interest rate, a very short duration, Mr. [redacted] s admission that these were "*highly speculative* ",[649] and the lack of any investment risk.[650] Indeed, in the Respondent's view, "[t]he default risk – being the only risk present for Fynerdale – is not an

642 *Id.*, para. 65.
643 Respondent's Post-Hearing Brief, para. 139.
644 Respondent's Post-Hearing Brief, paras. 165-168; Respondent's Second Post-Hearing Brief, para. 64.
645 Respondent's Post-Hearing Brief, para. 170.
646 *Id.*, para. 171; Respondent's Second Post-Hearing Brief, para. 69.
647 Respondent's Post-Hearing Brief, para. 172.
648 Respondent's Second Post-Hearing Brief, para. 69.
649 Respondent's Post-Hearing Brief, para. 143, *referring to* Hearing Transcript, Day 3, 141:18-21.
650 Respondent's Post-Hearing Brief, paras. 141-144.

investment risk inherent in investment activity, but an ordinary commercial risk inherent in any ordinary loan agreement."[651]

456. The Respondent thus concludes that the Claimant's Loans fail to qualify as an investment and "invites the Tribunal to interpret the term ['investment'] in line with the contracting states' intention, *i.e.* requiring that an investment must contribute to the economic development of the host state."[652]

b. *The Claimant's Position*

457. The Claimant notes that Article 1(a) is clear and "contains a broad definition of investment comprising 'every kind of asset', specifically mentioning a title to money in the non-exclusive list of what qualifies as an investment."[653] The Claimant further notes another provision of the Treaty to support its argument:

> [I]n addition to Article 1 of the Treaty defining the notion of 'investment', Article 4 of the Treaty provides that a contracting state should ensure that the payments related to an investment are transferrable without any delay and undue restriction. The Treaty specifies that such transfer includes interests and profits. Moreover, Article 4(c) explicitly states that the payments relating to the investment include '*funds in repayment of loans*'. Therefore, the express language of the Treaty proves the intention of the Contracting States to cover loan agreements as protected investments.[654]

458. The Claimant further argues that whether its investment contributed – or not – to the Czech economy is irrelevant to its qualification as a protected investment under the Treaty because this condition (i) is not present in the Treaty's definition of an investment in Article 1(a)[655] and (ii) is borne by the *Salini* award issued by an ICSID tribunal and is thus an inadequate reference given that the present case is brought under the UNCITRAL Rules.[656]

459. In any event, even if the *Salini* criteria were to be applied in this case, it is the Claimant's case that "the loans provided by Fynerdale comply with these criteria."[657] Thus, the Claimant notes that it has provided a capital contribution by investing over CZK 3 billion "in the form of purpose-bound loans into the Czech Republic, which were intended to be used for the trade in poppy seed produced in the Czech Republic."[658] The Claimant further considers that, as for the duration of its

651 *Id.*, para. 144.
652 Respondent's Second Post-Hearing Brief, para. 61.
653 Claimant's Post-Hearing Brief, para. 74; *see also* Claimant's Second Post-Hearing Brief, paras. 8-11.
654 Claimant's Post-Hearing Brief, para. 75.
655 *Id.*, paras. 77-79.
656 Claimant's Post-Hearing Brief, paras. 80-85; *see also* Claimant's Second Post-Hearing Brief, paras. 13-17.
657 Claimant's Second Post-Hearing Brief, para. 17.
658 *Id.*, para. 18.

investment, "each Loan should not be considered separately, but as a whole and that the repayment period of each Loan is not a relevant issue under the Treaty in determining the duration of the investment as a whole."[659] Regarding risk, the Claimant considers that it "took a substantial risk that the principal amount of the Loans and the interest would not be repaid under the credit agreements (which risk actually materialised)."[660]

460. In the event that the Tribunal were to consider that the criterion of contribution to the State's economy applied, the Claimant considers that it "is self-explanatory":

> Fynerdale has invested CZK 3,076,000,000 in total in the form of loans into the Czech Republic in the period 2007-2011, *i.e.* including the years of the economic crisis in the Czech Republic. […] Fynerdale invested in the poppy seed market while farmers in the Czech Republic had been facing difficulties to obtain funding from banks to finance their business, which prevented them from becoming insolvent.[661]

461. The Claimant, taking aim with the Respondent's allegation that Loans 4 and 5 were provided through Poppyseed, asserts that these were granted directly to Ytrix: "only Loans 3, 7 and 8 were provided to Ytrix via Poppyseed" – leading to limit the Czech Republic's jurisdictional objection to these three loans.[662] Contrary to the Respondent's argument, the Claimant's indication that Loans 4 and 5 were provided to Ytrix is not belated.[663]

462. Thus, the Claimant concludes that its loans qualify as an investment pursuant to Article 1(a) of the Treaty.

4. Qualification of the Loans Made "Through" Poppyseed as a Protected Investment Under the Treaty

463. Ownership and control by Fynerdale of Poppyseed is a matter of contention amongst the Parties, who accordingly disagree on the Tribunal's jurisdiction *ratione materiae* over the alleged investment made "through" Poppyseed, pursuant to Articles 1(a) and 8 of the BIT.

464. Article 1(a) of the Treaty provides as follows:

> the term 'investments' shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively:
>
> i. movable and immovable property and all related property rights;

659 *Id.*, para. 19.
660 *Id.*, para. 20.
661 Claimant's Post-Hearing Brief, para. 86, *referring to* Transcript Hearing Day 3, 75:11-22.
662 Claimant's Second Post-Hearing Brief, para. 77.
663 *Id.*, paras. 74 and 78.

> ii. shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom;
>
> iii. title to money and other assets and to any performance having an economic value;
>
> iv. rights in the field of intellectual property, also including technical processes, goodwill and know-how;
>
> v. concessions conferred by law or under contract, including concessions to prospect, explore, extract and win natural resources.

465. Article 8(1) and (2) of the Treaty provides as follows:

> 1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.
>
> 2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.

466. As previously indicated, the loans made to Poppyseed were, according to the Parties' initial submissions, Loans 3, 4, 5, 7 and 8.[664] At the hearing, the Claimant argued that both Loans 4 and 5 were in fact granted to Ytrix.[665] The Respondent argues that it relied on the Claimant's presentation of the facts and that its belated "change of heart" ought to be declared inadmissible.[666]

a. *Whether Article 1(a) Requires an Active Relationship between the Investor and the Investment*

(i) The Respondent's Position

467. The Respondent argues that, in Article 1(a) of the Treaty, the verb "to invest" requires an active involvement of the investor. This is firstly demonstrated by an analysis of the Treaty's terms, leading the Respondent to conclude that "the ordinary meaning of the verb 'to invest' in Article 1(a) indicates the necessity of an active role of the Claimant-investor in bringing about the investment and an active relationship of the Claimant-investor with 'its' investment."[667] The Respondent considers that this interpretation is supported by arbitral jurisprudence.[668]

664 Respondent's Post-Hearing Brief, para. 162.
665 Respondent's Post-Hearing Brief, para. 164, *referring to* Transcript Day 1, 125:21-22.
666 Respondent's Post-Hearing Brief, paras. 127, 166-168; Respondent's Second Post-Hearing Brief, paras. 67-68.
667 Submission on Jurisdiction, para. 211; Respondent's Second Post-Hearing Brief, para. 70.
668 Submission on Jurisdiction, paras. 212-216, *referring to* Exhibit RLA-51, *Tokios Tokelés v. Ukraine,* ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 ("***Tokios Tokelés v. Ukraine***") and Exhibit RLA-52, *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 ("***SCB v. Tanzania***").

468. Article 1(a) provides for two alternative ways through which an investment can be made: either directly, or through an investor of a third state.[669] In any event, the Respondent argues

> [t]he intermediation or interposition of the third party must be such as not affect the character of the investment being *made by the (Dutch) investor* itself. Consequently, although funds may pass foreign bank accounts on their way to the host state […], the investor must retain **full control of the investment process**. The Dutch investor must always remain the **de-facto investor**.[670]

469. Relying on *Jan Oostergetel v. Slovak Republic*,[671] *Franz Sedelmayer v. Russia*,[672] and *EURAM v. Slovak Republic*,[673] the Respondent argues that

> [f]ull control of the investment vehicle is also imperative because any other interpretation would lead to the absurd result of elevating all Dutch banks which extend loans to foreign entities to BIT-protected investors, if only their foreign borrowers ultimately use the credited funds for investments in the Czech Republic.[674]

470. In this case, "Claimant must demonstrate that it itself has invested this loan in the host state".[675] The loans effected through Poppyseed, a vehicle that is not controlled by the investor, are not covered by the BIT. Thus, the Claimant has to prove that it either owns or controls Poppyseed:[676] the mere transfer of funds to Poppyseed is insufficient.

471. Responding to the Tribunal's comments regarding the award in *Sedelmayer*, the Respondent further submits that:

> It is control exercised by Claimant (*i.e.*, the entity Fynerdale) – and not by its UBOs – that is relevant in the present factual matrix. Messrs [redacted] and [redacted] cannot have the cake and eat it. They cannot couple their control (if any) with Fynerdale's Dutch nationality. Indeed, Fynerdale is undisputedly their investment vehicle – a vehicle under the control of Czech ultimate beneficiaries that claims to invest via Maltese and Czech companies. It may even be the case that the Claimant's UBOs have somehow exercised some control over Poppyseed. However, Poppyseed is demonstrably not *Fynerdale's* investment vehicle. And this is the crucial point.[677]

472. In the same vein, the Respondent asserts in its Reply that:

669 Submission on Jurisdiction, para. 219.
670 *Id.*, para. 221[emphasis in the original].
671 Exhibit RLA-53, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL Ad Hoc Arbitration, Decision on Jurisdiction, 30 April 2010.
672 Exhibit RLA-54, *Mr. Franz Sedelmayer v. Russia*, SCC, Award, 7 July 1998 ("***Sedelmayer***"), pp. 57 and 59.
673 Exhibit RLA-56, *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012.
674 Submission on Jurisdiction, para. 231.
675 *Id.*, para. 217.
676 Submission on Jurisdiction, para. 234.
677 Respondent's Post-Hearing Brief, para. 156.

> What Claimant chooses to disregard is that Claimant itself must have made the investment: the present BIT says "through" an investor of a third state, not "by" an investor of a third state, so that the *subject* of the investment needs to remain at all times the Claimant-investor; the *means* or *vehicle* for making the investment may be a third-state entity.[678] […]
>
> It would be unreasonable to read the BIT as expanding this protection so that a Dutch bank might grant loans to third entities around the world and that, where any such third entity would invest the loaned funds in the Czech Republic, the Dutch-third country loan would be elevated to a protected investment of the Dutch entity in the territory of the Czech Republic.[679]

473. In the Respondent's view, the Claimant fails to explain what the terms "through *an investor of a third state*" in Article 1(a) of the Treaty could mean and fails to give any meaning to this phrase.[680]

(ii) The Claimant's Position

474. The Claimant alleges that it has "invested CZK 3,076,000,000 in the form of assets (loans) into the Czech Republic, both directly to Ytrix and indirectly though Poppyseed".[681] The totality of this investment is protected under the Treaty, as both direct and indirect investments are protected under it.[682] There is no requirement for an active relationship between an investor and its indirect investment: that is an additional requirement imposed by the Respondent.[683]

475. The Claimant argues that the Respondent has taken a restrictive interpretation of the Treaty, incompatible with its object and purpose.[684] In the Claimant's eyes, "the terms 'to invest' and 'through the investor' in Article 1(a) of the Treaty do not impose any additional requirements upon the investor".[685]

476. With reference to *Tokios Tokeles v. Ukraine* and *Saluka v. Czech Republic*,[686] the Claimant argues that there is no support for a restrictive interpretation of the terms of the Treaty: indeed, "the term 'to invest' does not require that such asset must be 'invested' in the sense of an activity."[687] This

678 Reply, para. 309.
679 *Id.*, para. 311.
680 *Id.*, para. 312 [emphasis in the original].
681 Statement of Claim, para. 100.
682 Rejoinder, para. 138.
683 *Id.*, para. 139.
684 Answer, para. 121.
685 *Id.*, para. 120.
686 Exhibit RLA-51, *Tokios Tokelés v. Ukraine*, para. 75; Exhibit CLA-53, *Saluka Investments (Netherlands) B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 211.
687 Answer, para. 132.

position was also followed by a number of other tribunals,[688] including the one ruling in *Invesmart v. Czech Republic*, which was based on the same treaty as the one in the case at hand.[689]

477. The Claimant argues that to demand ownership or control by the investor of the entity through which the investment is made (here, Poppyseed) is equivalent to adding a requirement to those already contained in the Treaty.[690] How the investor chooses to channel its investment is irrelevant to the protection of the Claimant under the Treaty.[691] The Tribunal should not deny jurisdiction based on this criterion – quite on the contrary, "[i]n none of the cases [referred to by the Respondent[692]] did the tribunal formulate such strict criteria, *i.e.*, that the entity must be a 'mere vehicle' or that the investment must be made through the foreign company which the claimant-investor wholly owned and fully controlled."[693]

478. Indeed, when arguing that the third entity must only be a vehicle channelling the investment, the Respondent only ever cites phrases that "describe the factual circumstances that led to the tribunal's conclusion that in that specific case and under those specific circumstances" the investment was protected."[694]

479. However, even if the Tribunal were to implement the additional requirements set out by the Respondent, the investments made by the Claimant "through" Poppyseed qualify as protected investments under Article 1(a) of the Treaty. Indeed, the requirement for an "active contribution" has in any event been complied with in the case at hand.[695]

480. The Claimant thus argues that it "de facto controlled the investments made through Poppyseed as it concluded credit agreements with Poppyseed in which the parties agreed that the credit should exclusively be used for the making of investments in the Czech Republic towards the purchase of poppy seed."[696] The Claimant thus relies on Article 2 of the credit agreements concluded between

688 Exhibit CLA-140, *Mytilineos Holdings SA v. S erbia & Montenegro*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, paras. 126-127 and 129-130.
689 Exhibit CLA-73, *Invesmart, B.V. v. Czech Republic*, Award, 26 June 2009, paras.181-189.
690 Answer, para. 135.
691 *Id.*, paras. 136-140.
692 *See* above, para. 438.
693 Answer, para. 142 [emphasis in the original].
694 Rejoinder, paras. 140-142.
695 Claimant's Post-Hearing Brief, para. 126; Claimant's Second Post-Hearing Brief, para. 71.
696 Rejoinder, para. 149.

Fynerdale and Poppyseed to argue that it was "crystal clear that Fynerdale did have influence on when and how exactly Poppyseed would use the credited funds."[697]

481. Such *de facto* control is evidenced by a number of documents produced in the course of these proceedings. Thus, a number of documents support Mr. [redacted]'s statement that he "was entrusted to fulfil all investor's instructions including the setting up [of] Poppyseed Limited".[698] The fact that Fynerdale had the bank account statements of Poppyseed readily available is yet another proof that Fynerdale *de facto* controlled Poppyseed.[699]

482. Thus, the terms "through an investor of a third state" in Article 1(a) does not entail that the Claimant should prove that it owns and/or controls Poppyseed.[700]

483. Responding to the Tribunal's question on whether a difference existed between the *Sedelmayer* case and the one at hand, the Claimant argues that there is a factual difference between the two. In *Sedelmayer*, the investor had "sought protection under the German-Russian BIT as a natural person for the investments he had made through his wholly owned US company".[701] In the present case, the Claimant asserts that "Fynerdale, a legal entity incorporated in the Netherlands, and not – as the Czech Republic now seemed to put forward during the Hearing – its Czech UBO's, made direct investments and indirect investments via the Maltese company Poppyseed in the Czech Republic."[702]

b. *Whether Article 8 Similarly Requires an Active Relationship between the Investor and the Investment*

(i) The Respondent's Position

484. According to the Respondent, the Tribunal's jurisdiction is limited only to those investments that are "actively controlled by the investor […] regardless of whether protection is granted to such investments according to Article 1(a)".[703] Indeed, the Tribunal's jurisdiction exists only with regard to those disputes relating to investments "of" an investor – a term that implies that there

697 *Id.*, paras. 149-150, *referring to* Exhibit C-10, Credit Agreement from Fynerdale to Poppyseed, 11 August 2007.

698 Rejoinder, para. 155, *citing* [redacted] Statement, para. 9; *referring to* Exhibit R-33, E-Mail from Mr. [redacted] to Mr. [redacted] (re schedule), undated; Exhibit C-88, E-mail of [redacted] to [redacted] 8 June 2007.

699 Rejoinder, para. 159; Respondent's Second Post-Hearing Brief, para. 70.

700 Answer, para. 145.

701 Claimant's Post-Hearing Brief, para. 126.

702 Claimant's Post-Hearing Brief, para. 126.

703 Submission on Jurisdiction, para. 235.

must be "a relationship of a certain quality between the investor and its investment."[704] In accordance with the ordinary meaning of the terms, as required by Article 31 VCLT, this article must be read as requiring "an active and contributory relation, as opposed to a mere passive or possessive relation."[705]

485. Relying on *SCB v. Tanzania*,[706] the Respondent argues that "[n]othing in the Netherlands-Czech BIT suggests that the BIT would differentiate throughout these provisions as regards the meaning it accords to the underlying investor-investment relation"[707] and that "[w]here the investor channels its investment through a third-state entity, that entity would need to act under the control of the alleged investor".[708] This analysis was reconfirmed by the tribunal in *Garanti Koza LLP v. Turkmenistan*,[709] which applied the test developed by the tribunal in *SCB v. Tanzania*,[710] and by *Blue Bank v. Venezuela*, which considered that, for an investment to be "of" the Claimant, it ought to be made by the *de fa cto* investor.[711] Thus, "it is crystal clear that the investor – the 'entrepreneur'- needs to be in the driving seat of the investment activity".[712] The reasoning in *SCB v. Tanzania* was further "followed or referred to" by other tribunals.[713]

486. In response to the Claimant's explanation of the test in *SCB v. Tanzania* in its first Post-Hearing Brief, the Respondent argues that "the word 'or' at the end of the sentence was not used as an alternative conjunction but as a cumulative conjunction because the sentence was construed as negative. Therefore, Claimant must demonstrate all these requirements in order to establish active relationship with the investment."[714]

487. In conclusion, the Respondent argues that the "Claimant needs to show that it (and not the Maltese company Poppyseed) actively made the investment in the Czech Republic. Importantly, the Claimant investor must show that Poppyseed acted under its control and that it (the Claimant

704 *Id.*, para. 237.
705 *Id.*, para. 238.
706 Exhibit RLA-52, *SCB v. Tanzania*, para. 219.
707 Submission on Jurisdiction, para. 242.
708 *Id.*, para. 246.
709 Exhibit RLA-58, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016 ("***Garanti Koza v. Turkmenistan***").
710 Submission on Jurisdiction, para. 247.
711 *Id.*, para. 248, *referring to* Exhibit RLA-59, *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 ("***Blue Bank v. Venezuela***").
712 Submission on Jurisdiction, paras. 251 and 252, *referring to* Exhibit RLA-60, *Alapli Elektrik B.V. v. Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012 ("***Alapli v. Turkey***").
713 Reply, para. 306, *referring to* Exhibit RLA-171, *Anglo American PLC v. Venez uela* ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019 ("***Anglo American PLC v. Venezuela***"), para. 200, and Exhibit RLA-172, *Flemingo DutyFree Shop Private Limited v. Poland,* PCA, Award, 12 August 2016, para. 355.
714 Respondent's Second Post-Hearing Brief, para. 77.

investor) retained control of the investment process."[715] Otherwise, the Tribunal has no jurisdiction *ratione materiae*.

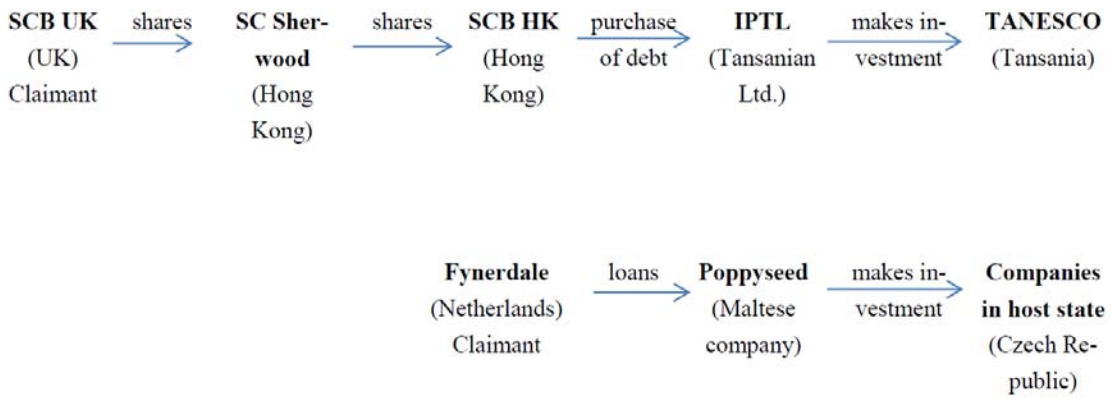
(ii) The Claimant's Position

488. The Claimant considers that the Tribunal has jurisdiction *ratione materiae* over the present claims, as Article 8(2) contains a broad definition of "investment" and does not require any "active and contributory relation." Indeed, the arbitration agreement only contains four criteria: (i) the existence of a dispute between (ii) a State and (iii) an investor, (iv) relating to an investment of the latter.

489. The Claimant argues that the Respondent's position that an "active and contributory relation" on the basis of the award in *SCB v. Tanzania* is ill-guided. Indeed, it is the first tribunal to consider such a requirement – and the only one.[716] The Respondent has not provided any response to this representation.[717] Moreover, the Claimant underscores that the tribunal had found, in that case, "that the claimant must demonstrate one of the following criteria: (i) that the investment was made at the claimant's directions; (ii) that the claimant funded the investment; or (iii) that the claimant controlled the investment in an active and direct manner."[718]

490. The Claimant also considers that *SCB v. Tanzania* should be distinguished from the case at hand, given that the underlying treaty in that case referred to investments "made", not "invested", in the host State.[719] The investment made by Fynerdale through Poppyseed should be regarded as protected under the Treaty as Fynerdale provided loans directly to Poppyseed without any other intermediate companies,[720] as shown in the below graphic representation:[721]

715 Submission on Jurisdiction, para. 253.
716 Answer, para. 150.
717 Rejoinder, para. 144.
718 Rejoinder, para. 143 [emphasis in the original], *referring to* Exhibit RLA-52, *SCB v. Tanzania*, para. 230.
719 Answer, paras. 159-162.
720 *Id.*, paras. 162-163.
721 Claimant's Post-Hearing Brief, para. 129.



(Claimant's Post-Hearing Brief, para. 129)

491. In any event, the Claimant underscores that the requirement of an active and contributory relation has been consistently rejected, in particular by *Garanti Koza LLP v. Turkmenistan* previously referred to by the Respondent.[722] Thus, the Respondent's description of *SCB v. Tanzania* as being a "yardstick"[723] in the award in *Garanti Koza LLP v. Turkmenistan* is "wrong and misleading."[724] The same goes for the Respondent's references to *Anglo American PLC v. Venezuela*[725] and *Flemingo Duty Free Shop Private Limited v. Poland*:[726] neither applied the test set out by the tribunal in *SCB v. Tanzania*. Indeed, the first noted that the tribunal in *SCB v. Tanzania* had denied jurisdiction "not due to the indirect nature of the investment but the claimant's lack of investment in Tanzania",[727] while the second highlighted that that tribunal had "only decided whether the claimant in [*SCB v. Tanzania*] actually made and/or managed the initial investment".[728]

492. Similarly, the Respondent also improperly relies on *Blue Bank v. Venezuela*, as in that case, "[t]he tribunal was only dealing with the question whether the claimant (Blue Bank) could bring a claim in its capacity of trustee on behalf of the Qatar Trust" – a situation particularly different from the one at hand.[729]

722 Answer, paras. 151-152, *referring to* Exhibit RLA-58, *Garanti Koza v. Turkmenistan*, para. 231.
723 Reply, para. 308.
724 Rejoinder, para. 144, *referring to* Submission on Jurisdiction, para. 247; Reply, para. 308.
725 Exhibit RLA-171, *Anglo American PLC v. Venezuela*.
726 Exhibit RLA-172, *Flemingo DutyFree Shop Private Limited v. Poland*, PCA Case, Award, 12 August 2016.
727 Exhibit RLA-171, *Anglo American PLC v. Venezuela*, para. 200.
728 Exhibit RLA-172, *Flemingo DutyFree Shop Private Limited v. Poland,* PCA, Award, 12 August 2016, para. 355.
729 Answer, para. 155.

c. *Interpretation in the Light of the Object and Purpose of the Treaty*

(i) The Respondent's Position

493. The Respondent, for its part, considers that its interpretation of Articles 1(a), 8(1) and 8(2) of the Treaty is confirmed by the object and purpose of the Treaty.

494. First, the principle of reciprocity enshrined in the BIT does not encompass the protection, under a Dutch BIT, of investments made by a company of a third State – even if said company "effectively uses funds which it has prior acquired from a Dutch creditor".[730] Indeed, according to the Respondent, it would be unreasonable to consider that loans granted by Dutch banks would be protected if the loaned funds were used for an investment in the Czech Republic.[731] Moreover, "it is much more plausible that the Czech Republic agreed to arbitrate with Dutch entities that had actually made investments in the Czech Republic (directly or indirectly)."[732]

495. Second, the Treaty's preamble is "premised on a cause-and-effect relation between the treaty protection offered and the investment decision made."[733] As such, Fynerdale must have actively made the investment in the Czech Republic for it to be protected.[734]

(ii) The Claimant's Position

496. The Claimant disagrees with the Respondent's analysis, considering that the object and purpose of the Treaty do not support the interpretation suggested by the Respondent. Indeed, "neither Article 1(a) of the Treaty sets additional requirements to the terms 'to invest' and 'through the investor' nor does Article 8(2) of the Treaty contain an additional 'active relation' requirement."[735] The Tribunal has jurisdiction *ratione materiae* as the Treaty expressly provides protection to indirect investments made "through a third state".[736]

730 Submission on Jurisdiction, para. 257.
731 *Id.*, para. 258.
732 *Id.*, para. 259.
733 *Id.*, para. 260.
734 *Id.*, para. 260.
735 Answer, para. 168.
736 *Id.*, para. 169.

d. *Evidence of Ownership in, and Control over, Poppyseed*

(i) The Respondent's Position

497. The Respondent considers the Claimant's account of its alleged ownership of Poppyseed to be "strikingly vague and incoherent"[737] and that "Poppyseed was not owned (wholly or even in part) by the Dutch Claimant-company Fynerdale (which for itself would suffice to exclude the Tribunal's jurisdiction). […] Poppyseed was not controlled – neither generally nor specifically with regard to the loaned funds -, by the Dutch Claimant-company Fynerdale."[738]

498. The Respondent contends that, during document production, the Claimant was unable to provide any document indicating that it exercised control over Poppyseed, as it alleged,[739] notwithstanding the fact that this was expressly requested in the Respondent's Document Request no. 9.[740] In breach of the Tribunal's order, the Respondent argues, the Claimant has further failed to produce any document relating to the communication between the Claimant and Poppyseed.[741]

499. According to the Respondent, the evidence put forth by the Claimant in support of the proposition that it had control over Poppyseed – Mr. [redacted]'s statement – points in the opposite direction: the planned division of Poppyseed's shares between Newton and Fynerdale never occurred.[742] Only once, in 2015, *i.e.* after the investment was made, did Fynerdale give instructions to Poppyseed.[743] This limited example shows that, in fact, during the entire period of the investment (2007-2010), Fynerdale did not control Poppyseed. The Respondent further notes that Mr. [redacted] admitted that "he did not communicate with Mr. [redacted] [Fynerdale's director at the time of the alleged investment] during the relevant period and as such could not have received any instructions from the only authorized representative of Claimant."[744]

500. As such, the Respondent considers that "[t]here is, conversely, no indication whatsoever that Poppyseed would have been acting under the control of the Dutch Claimant-company Fynerdale."[745] In fact, Fynerdale's role was simply that of a bank: it concluded a number of credit agreements with Poppyseed, had no control over the loaned funds, nor any contractual right to

737 Submission on Jurisdiction, para. 263.
738 *Id.*, para. 264.
739 See *supra*, paras. 263, 279.
740 Reply, paras. 317-319.
741 Reply, para. 320.
742 *Id,* [redacted] Statement, para. 9.
743 Reply, paras. 345-350.
744 Respondent's Second Post-Hearing Brief, para. 83; *see also*, Respondent's Post-Hearing brief, paras. 183-190.
745 Submission on Jurisdiction, para. 269.

direct how those funds should be used.[746] As such, "Fynerdale simply extended regular loans to the Maltese company Poppyseed, based on a standard loan agreement."[747] When Poppyseed chose to invest funds in a certain manner, this was done independently of Fynerdale.[748]

501. The Claimant's argument that its control is proven by the fact that it directed Poppyseed to use the funds loaned to the purchase of poppy seed through the credit agreements, according to the Respondent, is "absurd".[749] The Respondent considers that the particular clause inserted in the contract that stipulates the purpose for which the loan is requested is not equivalent to a direction being given by the lender,[750] but rather, it is a means to entitle the lender to retrieve the funds if they are used for another purpose.[751] In effect, that clause "does not suffice to establish *de facto* control."[752]

502. The Respondent thus concludes in its Post-Hearing Brief that "[c]ontrol via mere contractual default, however, is no control at all. If Claimant were right, each person would be under full control of any and all entities to which she owes contractual obligations, such as banks, phone operators, landlords, tenants, heat providers etc."[753]

503. Similarly, the fact that the Claimant attempts to rely on the judgment of the Prague Municipal Court, the Respondent argues, merely shows the lack of evidence supporting the Claimant's argument that it controlled or owned Poppyseed.[754]

504. Nor was Poppyseed owned by Fynerdale, whether directly or indirectly.[755] The Respondent contends that the Claimant has even admitted as much, when it explained during the document production phase that it "*does not argue that it was a shar eholder of Poppyseed*"[756] – notwithstanding contradictory statements in the Claimant's submissions, where it stated that it

746 *Id.*, paras. 277-279.
747 *Id.*, para. 280.
748 *Id.*, para. 281. *See also,* Reply, paras. 352-354.
749 Reply, para. 356.
750 *Id.*, para. 357.
751 *Id.*, para. 359.
752 Respondent's Second Post-Hearing Brief, para. 82.
753 Respondent's Post-Hearing Brief, para. 180.
754 Exhibit C-3, Judgment of the Municipal Court in Prague, 25 January 2017; Exhibit C-10, Credit Agreement from Fynerdale to Poppyseed, 11 August 2007.
755 Reply, para. 321.
756 *Id.*, para. 323.

had been agreed that Fynerdale was to acquire shares in Poppyseed.[757] At this stage, "[m]ost of the ownership structure in Poppyseed is […] left in the dark."[758]

505. In the Respondent's view, the Claimant has failed to demonstrate that Fynerdale was anything more than a conduit, a "pass-through of funds on their way from the Netherlands to the Czech Republic".[759] In fact, the Claimant's failure to provide the bank statements requested during the Document Production phase leads to "serious concerns as to whether there had indeed been a "channeling of funds' 'through' Poppyseed". The Respondent thus concludes that "[t]he Claimant company was not the only source of funds for Poppyseed some funds may have vanished in Poppyseed and not 'passed on' to the Czech Republic and, importantly, at times funds were granted to Ytrix which had not been prior received from Fynerdale".[760]

506. This was further confirmed by Mr. [redacted]'s testimony at the Hearing that "[t]he business was carried out by Poppyseed".[761] Mr. [redacted] further testified at the Hearing that Fynerdale was chosen as the "funding entity", one amongst multiple choices.[762]

507. Lastly, the Respondent addresses the Claimant's reliance on the allegation that its UBOs controlled Poppyseed. Following the document production phase and Claimant's response to the document request no. 10, it appears that "neither Mr [redacted] nor Mr [redacted] have instructed Poppyseed or Poppyseed's Czech shareholders with regard to the operation of Poppyseed."[763] In any event, the Respondent argues that whether or not Fynerdale's UBOs controlled Poppyseed via Fynerdale is irrelevant: firstly, because in any event, they did not do so through Fynerdale;[764] secondly, because if they directly control Poppyseed, then the investments made through Poppyseed are not made for an investor under the Treaty.[765] Indeed, Fynerdale is not to be confused with or regarded as equivalent to its UBOs.[766]

508. Mr. [redacted], in any event, was not acting under instructions from Fynerdale – directed by Mr. [redacted] – but under directions of Mr. [redacted] and Mr. [redacted] Fynerdale's UBOs but not its

757 *Id.*, para. 324, *referring to* Answer, para. 181, *referring to* [redacted] Statement, para. 9.
758 Reply, para. 329.
759 Submission on Jurisdiction, para. 294.
760 Reply, para. 382.
761 Respondent's Post-Hearing Brief, para. 150, *referring to* Hearing Transcript Day 3, 137:23.
762 Respondent's Post-Hearing Brief, para. 188, *referring to* Hearing Transcript Day 3, 95:5-9 and 95:18-20.
763 Reply, para. 385.
764 Submission on Jurisdiction, para. 300.
765 *Id.*, paras. 302-305.
766 Reply, paras. 386-391.

representatives.[767] This shows that "Messrs [redacted] and [redacted] were setting up the investment structure on their own behalf (not on behalf of the Dutch entity)".[768] Mr. [redacted] s confusion of Fynerdale with its UBOs is irrelevant from a legal standpoint.[769] Relying on elements that came to light after the Hearing, the Respondent further notes that, in the course of the Czech criminal proceedings, both Mr. [redacted] and Mr. [redacted] "explicitly denied that they would be associated with Claimant."[770]

509. Therefore, and in conclusion, the Respondent considers that "Poppyseed was certainly not Fynerdale's investment vehicle and Fynerdale certainly did not qualify as the '*de-facto* investor' with regard to the funds which were ultimately transferred from Poppyseed to the Czech Republic. Claimant's extension of loans to the Maltese company Poppyseed, therefore, constitutes no investment 'of' Claimant in the Czech Republic 'through Poppyseed' (or otherwise)."[771] The Claimant, in the Respondent's view, was "a mere postbox company without independent will" that "failed to establish an active relationship with the investment and cannot qualify as an indirect investor."[772]

(ii) The Claimant's Position

510. In the Claimant's view,

> It follows from the *SCB v. Tanzania* case that in order to benefit from Article 8(1) of the investment treaty of the investment treaty, a claimant must demonstrate <u>one</u> of the following criteria:
>
> i. that the investment was made at the claimant's direction;
>
> ii. that the claimant funded the investment; <u>or</u>
>
> iii. that the claimant controlled the investment in an active and direct manner.[773]

511. The Claimant, for its part, points out that the Loans granted by Fynerdale had to be used exclusively for the purchase of poppy seed: any other purchase would require written approval from Fynerdale.[774] In fact, Fynerdale has been recognized as an injured party in legal proceedings in the Czech Republic, in which it sought damages in relation to the Ponzi scheme set up by the

767 Respondent's Post-Hearing Brief, paras. 183-186.
768 *Id.*, para. 187.
769 *Id.*, paras. 191-193.
770 Respondent's Second Post-Hearing Brief, para. 83, *referring to* Exhibit R-36, 2018 Decision, pp. 60-62.
771 Submission on Jurisdiction, para. 313.
772 Respondent's Second Post-Hearing Brief, paras. 87-88.
773 Claimant's Post-Hearing Brief, para. 135 [emphasis in original].
774 Answer, para. 186; Claimant's Post-Hearing Brief, para. 139.

Poppy Seed Merchants for those funds invested in the Czech Republic by Poppyseed.[775] This is proof enough to show recognition of Fynerdale's investment "through" Poppyseed and how it endured damages because of Poppyseed's losses.

512. The Claimant takes issue with the Respondent's qualification of Fynerdale as a "bank". Fynerdale merely realized an indirect investment through Poppyseed, and such investments are protected by the Treaty.[776] In the Claimant's view, it suffices to say that "there is a nexus between incoming funds from Fynerdale and outgoing payments to the Czech entities [and that] Poppyseed was also dependent on such funds to start and continue to maintain its poppy seed business."[777]

513. Established as an investment vehicle for Fynerdale, Poppyseed was *de facto* controlled by Fynerdale, which funded all of Poppyseed's investments and directed them.[778] The Claimant argues that this is evident from the [redacted] Statement and the directions Fynerdale gave to Poppyseed to its shareholders for the daily operation of that company.[779] At all times, Mr. [redacted] had to report to Mr. [redacted] and "was entrusted to execute all instructions of the investor Fynerdale".[780]

514. In light of all the above, the Claimant considers that it is evident that Fynerdale *de facto* controlled Poppyseed.

5. The Tribunal's Analysis

a. *Arguments Voiced at the Hearing and in the Post-Hearing Briefs as Well as Objections Thereto*

515. Before entering into a review on its jurisdiction, the Tribunal must deal with the Parties' defenses put forward during the Hearing and in the Post-Hearing Briefs.

516. The Respondent argued that the disputed investments were not in substance made by Fynerdale but by the UBOs of the latter, including Mr. [redacted] and Mr. [redacted] both being of Czech nationality. In this context, the Tribunal notes that Mr. [redacted] was Fynerdale's representative

775 Answer, paras. 189-190, *referring to* Exhibit C-3, Judgment of the Municipal Court in Prague, 25 January 2017.
776 Answer, para. 191.
777 *Id.*, para. 196.
778 *Id.*, para. 197.
779 *Id.*, paras. 181-184, *referring to* [redacted] Statement, paras. 9-11 and Exhibit C-49, Instruction of Fynerdale to Mr. Mgr. [redacted] 25 September 2015.
780 Claimant's Post-Hearing Brief, para. 140, *referring to* Hearing Transcript, Day 3, 108:06-10.

when entering into the trade of poppy seed. Mr. [redacted]'s role was confirmed by the witness statement of Mr. [redacted] In this context, the Tribunal will also deal with the Respondent's argument that the funds used by the Claimant had originated in the Czech Republic and thus could not be qualified as foreign investment,[781] an argument which the Claimant considers to be belated.

517. The Tribunal notes that Article 1(b) of the Treaty defines the term "investors" either as "natural persons" having the nationality of one of the Contracting Parties in accordance with its law or as legal persons constituted under the law of one of the Contracting Parties. It is undisputed that Fynerdale is a legal entity incorporated in in the Netherlands and therefore meets the formal qualification under Article 1(b) of the Agreement. That Mr. [redacted], when acting as Fynerdale's representative, is of Czech nationality does not put into doubt the nationality of Fynerdale.

518. The Tribunal will now turn to the assertion of the Respondent that the funds used by Fynerdale originated in the Czech Republic and thus were not foreign investments. It is undisputed that the funds were received by Fynerdale, an entity incorporated in the Netherlands, and then transferred, in a form still to be discussed, into the Czech Republic. This meets, in the view of the Tribunal, the formal requirements of the Treaty for an investment. Under these circumstances, the Tribunal considers it unnecessary to deal with the argument of the Claimant that the respective objections of the Respondent were belated.

519. As indicated above, the Claimant contends that the 2016 Czech Decision, submitted into evidence by the Respondent, proves that the alleged crimes regarding the MUS purchase involved wrongdoings of representatives of the Czech Government while arguing that the Respondent ought to be precluded from relying on this defence considering that the Czech Republic "did not convict Fynerdale for any of the alleged wrongdoing it now puts forward in its defence", contrary to a Czech official currently charged with bribery.[782] The Respondent considers such argument to be belated.

520. The Tribunal has already indicated that it is necessary to distinguish between facts and conclusions drawn from such facts.[783] The facts to which the Claimant refers were known.

521. Apart from that, the Tribunal does not consider this argument raised by the Claimant in its Second Post-Hearing Brief to be convincing. It would mean that a State whose representatives were involved in fraud or corruption could not invoke fraud or corruption against the validity of the

781 Respondent's Second Post-Hearing Brief, para. 64.
782 Claimant's Second Post-Hearing Brief, para. 69.
783 *See* para. 64 above.

ensuing State action, such as a contract or a license. This would be to the detriment of all attempts to eradicate fraud or corruption. The Claimant's argument is moreover not supported by *Mabco v. Kosovo.* [784] In the case at hand, the Czech Republic acted against the alleged fraud once it became aware of the alleged fraud in respect of the MUS transactions whereas, in the case *Mabco v. Kosovo*, Kosovo was aware of the illegality and undertook no action.

522. Equally the discontinuation of the local Czech proceedings against the Claimant's UBOs[785] are not new facts; they are open for interpretation by the Tribunal.

523. Taking account of these considerations the Tribunal considers it unnecessary to further consider whether the objection of the Claimant was belated.

b. *Jurisdiction of the Tribunal* ratione materiae

524. The Tribunal will now consider its jurisdiction *ratione materiae* in light of the views expressed by the Parties.

525. Under the heading as to whether the Tribunal has jurisdiction to decide the dispute *ratione materiae*, the Parties have argued several issues that are controversial between them.

526. The Tribunal will turn to each in the following sequence. First, it will ascertain as to whether the disagreement among the Parties about the existence of investments may be decided in the jurisdictional phase of the proceedings or whether should be decided in the merits phase, as the Claimant argued in its Post-Hearing Brief.[786] Second, the Tribunal will consider the arguments exchanged by the Parties as to whether the loans may constitute investments. Third, the Tribunal will consider the arguments the Parties concerning the legality of the investments. This point will embrace two issues namely whether the question concerning legality may be decided in the jurisdictional phase or should be reserved to the merits phase and whether the loans were legal under the law of the Respondent.

c. *Existence of an Investment as a Jurisdictional Issue*

527. The Tribunal notes that, as a matter of principle, investor-State arbitral tribunals are mandated to hear only disputes relating to investments within the meaning of the concerned BIT. From that, it has been deduced in literature as well as in jurisprudence, that such tribunals only have

784 *Mabco Construtions v. Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction, 30 October 2020 ("***Mabco v. Kosovo***"), paras. 409-410.
785 Claimant's Second Post-Hearing Brief, para. 69.
786 Claimant's Post-Hearing Brief, para. 91.

jurisdiction to hear disputes relating to an investment. However, the Tribunal notes that neither the jurisprudence, nor the academic writings are uniform on what this means procedurally. Investment arbitral tribunals disagree as to whether the existence of an investment can be decided in proceedings on jurisdiction, or whether such decision is to be left to the merits phase. For example, in the dispute *Salini v. Morocco*[787], the tribunal stated that "…its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention…" More recently, the tribunal in *Alps Finance v. Slovak Republic* followed the same approach concluding that it lacked jurisdiction because the claimant had not made an investment.[788] Conversely, in *Oostergetel v. Slovak Republic* , the tribunal confirmed that an investment had been made and held that "[w]hile the extent and effect of Claimant's activities will have to be examined in further detail at the merits stage, at this juncture the Tribunal is satisfied that the Claimants have made a contribution to the Slovak Republic's development as mandated by the *Salini* test."[789]

528. The Tribunal is aware that the *Salini* test is being discussed controversially in the jurisprudence as well as in literature. In particular, *Redfern and Hunter on International Arbitration* proclaimed the *Salini* test to be outdated. They stated:

> The modern approach – based on the concept of separability, which has now received widespread acceptance both nationally and internationally - is that an allegation of illegality does not in itself deprive the arbitral tribunal of jurisdiction. On the contrary, it is generally held that the arbitral tribunal is entitled to hear the arguments and receive evidence, and to determine for itself the question of illegality. Thus, in Switzerland in a case involving a consultancy agreement, the Swiss Federal Tribunal decided that even if a consultancy agreement were, in effect an agreement to pay a bribe (and this was not alleged, still less proven) the arbitration agreement would survive.[790]

529. The Tribunal takes the view that, as to whether the legality of investments is to be decided in the phase on jurisdiction or in the one on the merits should be determined on the basis of the applicable law. The Tribunal would like to emphasize that the jurisdiction of international investment tribunals reflects the consent of States on which disputes may be submitted to international arbitral tribunals. The jurisdiction of national courts has a different basis and therefore the reference to the practice of national courts is not necessarily conducive in this context.

787 Exhibit CLA-139, *Salini v. Morocco (I)*, para. 44.
788 *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award, 5 March 2011, paras. 241-246.
789 Exhibit RLA-53, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL Ad Hoc Arbitration, Decision on Jurisdiction, 30 April 2010, paras. 156-172, spec. para. 171.
790 *Redfern and Hunter on International Arbitration*, 6th ed. Oxford University Press, Oxford, 2015, para. 2.151.

530. As indicated in paragraph 526, the Tribunal will now deal with the question as to whether object and purpose of the Treaty require of the Tribunal to ascertain in the phase on jurisdiction that loans may constitute investments within the meaning of Article 8 of the Treaty.

531. The here relevant Article 8, paragraphs 1 and 2 of the Treaty reads:

> (1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.
>
> (2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.

532. It is the clear meaning of Article 8 of the Treaty that the mandate of the arbitral tribunal is limited to disputes concerning investments as referred to in Article 8 and as defined in Article 1 of the Treaty, and that this describes the scope of the Tribunals' jurisdiction. There is no disagreement amongst the Parties on this fundamental issue.

533. Whether this means that the question of legality of investments has to be decided in jurisdictional or in the merits phase is an issue still to be approached by the Tribunal in subsection (d) below.

534. As indicated above the Tribunal will now consider the arguments of the Parties whether loans constitute investments. This has to be dealt with on two levels namely as to whether loans may qualify as investments in general and whether they qualified as such in the case at hand.

d. *Loans as Investments*

535. The Tribunal notes that it has occasionally been discussed controversially whether loans qualify as investment.

536. In the view of the Tribunal, this depends upon the definition of the notion of 'investment' as provided in the BIT concerned. The here relevant agreement provides in Article 1 of the Treaty for a wide, but not exhaustive, list of activities which qualify as potential investments. The Tribunal would like to emphasize that, before providing the non-exhaustive list if types of assets, Article 1 (a) of the Treaty first notes that the term investment comprises of "every kind of asset". There can thus be little doubt that the Contracting Parties to the Treaty had intended the definition of the notion of investment to be a broad one. If there were meant to be limits to such broad definition, they should have been set out in Article 1 of the Treaty. Therefore, the Tribunal has

no doubt that the loans made by the Claimant may, at least in principle, qualify as investments under Article 1 of the Treaty.

537. On that basis and referring to the objective of the Treaty, the Respondent argues that for a loan to qualify as investment, such a loan should stimulate the economic development of the contracting States or contribute to their economy. In this respect, the Respondent quotes particularly the award in the case *Nova Scotia v. Venezuela*:

> The Tribunal considers that an investment can be said to be present when a contribution has been made for a sufficient duration with the hope of receiving a benefit (including the inherent risk that one will not result). Or, to put it into more traditional terms, an investment requires contribution, duration and risk. These well-established features have been recognized by many an investment arbitration tribunal as the triad representing the minimum requirement s for an investment.[791]

538. The Claimant's main argument is that, given that these conditions were originally developed in the *Salini* award in interpreting Article 25 of the ICSID Convention, they are of no significance for Article 1(a) of the Treaty and hence cannot be used as a reference to the present case brought under UNCITRAL Rules.[792] To support this argument, the Claimant refers to paragraph 211 of *Saluka v. Czech Republic*.[793]

539. This exchange of arguments between the Parties requires the Tribunal to briefly deal with the so-called *Salini* test already referred to. The arbitral tribunal in *Salini v. Morocco* held that the notion of investment presupposes a certain contribution to the host State's economy, a certain duration over which the project is implemented, an element of risk, and, a contribution to the host State's development; being understood that these elements may be closely interrelated and should be examined in their totality, and will normally depend upon the circumstances of each case.[794]

540. The Tribunal has already noted that this test has come under scrutiny in subsequent ICSID jurisprudence. For example, in *Biwater v. Tanzania*, the tribunal noted that "there is no basis for a role of overly strict application of the five Salini criteria in every case."[795]

541. Taking into consideration that this Tribunal is working under the UNCITRAL Rules, whereas the '*Salini* test' has been developed under the ICSID regime, the Tribunal does not consider it necessary to deal with the arguments exchanged between the Parties as to whether this test is

791 Exhibit RLA-183, *Nova Scotia Power v. Venezuela (II)*, para. 84.
792 Claimant's Post-Hearing Brief, paras. 80-85.
793 Exhibit CLA-53, *Saluka Investment BV (Netherlands) v. Czech Republic*, Partial Award, 17 March 2006, para. 211.
794 Exhibit CLA-139, *Salini v. Morocco (I)*, para. 50 *et seq*.
795 Exhibit CLA-65, *Biwater Gauff Ltd. v. Tanzania*, ICSID case No. ARB/05/22, Award of 24 July 2008, para. 312 *et seq*.

appropriate, directly or in a modified format, for deciding this dispute. Instead, the Tribunal will develop its views on what constitutes an investment on the basis of the Treaty having recourse to the Treaty interpreted according to Article 31(1) and (2) VCLT. The standard format of interpretation is relying on the "ordinary meaning to be given to the terms of the treaty in the light of its object and purpose". Paragraph 2 of Article 31 provides some guidance as far as object and purpose are concerned. Most relevant in the context here is the preamble of the Treaty to be interpreted. The Tribunal notes that references to the preamble of an international agreement are common standard when interpreting such agreement. The Preamble of the here relevant Treaty establishes clearly which purposes the Treaty intends to achieve, namely the intensification of the "economic relations between the Kingdom of the Netherlands and the Czech Republic". The Preamble further adds: "Recognising that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology as economic development of the Contracting Parties".[796]

542. Therefore, the Tribunal is not convinced by the Claimant's reasoning that the contribution to the economic development of the host country is of no relevance for the qualification as to whether a transfer of funds as an investment. Contrary to the approach advocated by the Claimant, Article 1 of the Treaty has to be read in connection with the Preamble of the Treaty. This means, according to Article 1(a) of the Treaty ("every kind of asset invested either directly or through an investor of a third State"), it is the purpose of an investment to serve the economy of the Czech Republic.

543. On the other hand, the Tribunal disagrees with the Respondent that the investments undertaken were "simply loans to finance a private commercial transaction that was carefully designed to yield the maximum profit for a small group of private Czech individuals."[797] The Tribunal considers the loans not as being isolated economic activities but constituting a program – in spite of the fact that when considering their legality individually[798] - and finds the objective of the investment, as described by the Claimant namely to gain the dominance in the poppy seed market and through this, providing the poppy seed farmers with some financial security, to be convincing.[799] The Tribunal is aware that this objective was not achieved and was perhaps not achievable. However, it is impossible to deny, at least theoretically, that the transfer of assets by

796 Emphasis added.
797 Respondent's Post-Hearing Brief, para. 136.
798 *See* Subsection e below.
799 Hearing Transcript Hearing, Day 3, 75:11-22.

the Claimant was meant to have an impact upon the economy of the Czech Republic, if one does not consider the individual loans individually, but the program in its entirety.

544. Therefore, the Tribunal holds that the loans, as planned by the Claimant, were meant to serve the agricultural economy of the Czech Republic and thus qualify as investments under the Treaty.

545. However, the Tribunal wants to emphasize that Loans 1, 2, 4 and 5 were paid back in full already (*see* paragraph 92 above). These loans may have constituted investments at the moment of their payment, but since they have been paid back, the Claimant cannot have experienced any injury in their respect. Accordingly, the Tribunal will not consider these loans any further nor any lack of documentary evidence pertaining to them.

e. *Legality of an Investment as a Jurisdictional Issue*

546. The Tribunal will now proceed to assess whether Loans 3, 6, 7, 8 and 9 are legal investments. However, before doing so the Tribunal has to establish first whether the question of the legality of the investments can be dealt with as a jurisdictional issue or whether such question belongs to the merits phase.

547. It is controversially discussed in international jurisprudence on investments whether only legal investments under the laws of the host State qualify as investments under an investment agreement and thus constitute the basis for the jurisdiction of the respective Tribunal. In *Phoenix v. Czech Republic*, the arbitral tribunal denied jurisdiction on the basis that there was no legal investment.[800] It stated: "[t]here is no doubt that the requirement of the conformity with the law is important in respect of the access of the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction."[801] However, the jurisprudence is not uniform. In *Plama v. Bulgaria*, the legality of the investment was decided at the merits phase.[802]

800 Exhibit RLA-163, *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB /06/5, Award, 15 April 2009 ("***Phoenix v. Czech Republic***"), para. 104.

801 *See also* Exhibit RLA-142, *Fraport v. Philippines (II)*, paras. 467-468, and *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017 ("***Infinito Gold v. Costa Rica***"), para. 137.

802 Exhibit CLA-66, *Plama v. Bulgaria*, paras. 138-139.

548. At this point, a clarifying word upon the meaning and scope of the notion of jurisdiction is called for.[803] According to Professor Reinisch, jurisdiction is an attribute of a tribunal and an objection to jurisdiction goes to the ability of a tribunal to hear a case.[804] Whether an international court or tribunal has jurisdiction is a central question in international adjudication. Whereas under national law, governed by the rule of law, a dispute between private persons or a private person and the State can be decided by a national judicial body, the situation is different for international adjudication. In international law, access to an international adjudicative system depends upon the consent of the parties to the dispute concerned. The Permanent Court of International Justice, followed by its successor the International Court of Justice (ICJ) has strictly upheld this requirement of consent to their jurisdiction.[805] This will guide the following considerations of the Tribunal. To put it concretely it is now for the Tribunal to ascertain whether the consent of the Parties also covered disputes concerning investments, which were illegal or violating international public policy.

549. The Tribunal notes that several cases referred to by the Claimant have been decided under the ICSID regime. Some have decided on the question of legality of the investment in the merits phase others on the phase of jurisdiction. The reasoning in the respect varied. Some have argued that there is an implicit legality requirement under Article 25 of the ICSID Convention while others invoked general principles of international law and public policy.[806] An example to this extent is *World Duty Free v. Kenya*. [807] The Tribunal stated the objective of its considerations as follows:

> 129. The Tribunal will consider first whether a bribe has been paid by ...to... in the present case, and whether the 1989 Agreement has been procured as a result of such a payment. If so, the Tribunal will have to examine the consequences of the bribe on the enforceability and the validity of the Agreement, both under ordre public international and the applicable laws. [808]

803 See in some detail August Reinisch, 'Jurisdiction and Admissibility in International Investment Law' (2017) 16 The Law and Practice of International Courts and Tribunals, pp. 21-43.

804 *Ibidem*, p. 24 *referring to Hochtief v. Argentina*, Decision on Jurisdiction, 24 October 2011, para. 90; *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 ("***Micula v. Romania (I)***"), para. 63.

805 *See* for example *Factory of Chorzòw (Germany v. Poland), Claim for Indemnity (Merits*), PCIJ Series A No. 17, pp. 37-38 and *Case of Monetary Gold removed from Rome in 1943 (Italy v. France, the United Kingdom of Great Britain and Northern Ireland and the United States of America) (Preliminary Question), Judgment* 1954, ICJ Reports 19, p. 32.

806 For further details *see* Hiroyuki Tezuka, Chapter 3, 'Corruption Issues in the Jurisdictional Phase of Investment Arbitrations', in Domitille Baizeau and Richard Kreindler (eds.), *Addressing Issues of Corruption in Commercial and Investment Arbitration*, (Dossiers of the ICC Institute of World Business Law, vol. 13, Kluwer Law International, International Chamber of Commerce (ICC), 2015), pp. 51-68.

807 *World Duty Free v. Kenya*.

808 *World Duty Free v. Kenya*, para. 129.

550. After a lengthy assessment of the then existing jurisprudence the arbitral tribunal came to the conclusion that:

> In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal. [809]

551. On this basis, the tribunal denied jurisdiction. The Tribunal takes note of this award, although having been decided under the ICSID rules, since the factual situation has some similarities with the one under consideration here.

552. Based upon what has been established in paragraph 548 above, it is the view of the Tribunal that whether an issue is to be considered in the phase on jurisdiction or under the one on the merits cannot be decided on an abstract level balancing certain considerations such as jurisprudential efficiency and the protection of the rights of the parties to the dispute but that the wording of the relevant BIT has to be determinative. It is the BIT, which reflects the consent of the Parties on what is the mandate of the tribunal concerned or formulated in concrete terms which investment disputes can be accepted by the relevant arbitral tribunal and which have to be dismissed without entering into the merits phase.

553. The wording of the various BITs differs in respect of whether the legality of the investments is referred to. Article 2 of the Treaty which is relevant in respect of the case at hand states:

> Each Contracting Party shall in its territory promote investments of the other Contracting Party and shall admit such investments in accordance with its provisions of law.

554. In the view of the Tribunal, this clearly establishes that the conformity of investments with the national law of the host State of the investment is part of the notion of investment. Accordingly, the jurisdiction of this Tribunal only covers disputes concerning legal investments. Article 2 of the Treaty cannot be ignored or set aside by having recourse to the traditionally perception on what is to be dealt within the merits phase and what under jurisdiction. [810]

[809] *World Duty Free v. Kenya*, para. 157.

[810] Exhibit RLA-142, *Fraport v. Philippines (II)*, comes to the same conclusion although not being able to rely on an equivalent to Article 2 of the Treaty. It ruled: "The Tribunal finds that Fraport violated the ADL when making its Initial Investment, the latter being consequently excluded as investment protected by the BIT because of its illegality. The illegality of the investment at the time it is made goes to the root of the host State's offer of arbitration under the treaty. As it has been held, 'States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their own law.' Lack of

555. It is the considered view of the Tribunal that dealing with the legality of the loans under jurisdiction does not curtail the procedural rights of the parties to the dispute. At least that is not the case at hand. Both Parties had agreed that the Tribunal should deal with its jurisdiction in a separate procedure and they both have argued the nature of the loans as well as their legality profoundly. Both Parties made efforts to produce the necessary documents to enlighten the Tribunal concerning the object of such loans as well as concerning their legality. Nothing would be gained to repeat this process again in a merits phase. Therefore, considerations of judicial efficiency also call for a decision on the legality of the loans at the present phase – the phase on jurisdiction. However, the Tribunal would like to point out that it considers Article 2 of the Treaty as the dominant argument in favour of dealing with the legality of the loans in the phase on jurisdiction.

556. Since both parties have presented to the Tribunal facts, which were controversial it was evident that the Tribunal had to have recourse to the standard of proof.

(i) Loan 3

557. It is for the above reasons that the Tribunal will ascertain the legality of Loan 3 in the context of the decision on jurisdiction. The Respondent argues that the money for Loan 3 was derived from the so-called MUS Fraud. Concerning the latter, the Respondent relied on the 2017 Swiss Supreme Court Judgment, by which Fynerdale's UBO were convicted for money laundering and fraud.[811] As mentioned above, it was concluded in separate investigations by the Czech authorities that the "flow of funds from the MUS fraud to Claimant was not established", leading to the discontinuation of the Czech proceedings.[812] The Respondent underscores that this decision, which was reached without some of the evidence submitted in those proceedings and placed before this Tribunal, is not equivalent to an acquittal.[813]

jurisdiction is founded in this case on the absence of consent to arbitration by the State for failure to satisfy an essential condition of its offer of this method of dispute settlement. The Tribunal therefore considers that there is no legal dispute arising out of, or a divergence concerning, an 'investment' and, moreover, that Respondent has not consented to the arbitration of Claimant's claims with respect to its investment. Accordingly, the Tribunal holds that it lacks jurisdiction over Claimant's claims pursuant Article 25(1) of the ICSID Convention and Article 9 of the BIT. It also follows that the Tribunal lacks jurisdiction over Respondent's counterclaims in view of their necessary connection with the subject matter of the dispute pursuant to Article 46 of the ICSID Convention."

811 *See* paras. 123-148 above.

812 Respondent's Post-Hearing Brief, para. 56.

813 *Id.*, para. 56.

558. The counter-argument of the Claimant is that the findings of the Swiss Federal Supreme Court were "highly controversial" and due to political pressure.[814] The Claimant criticizes the 2017 Swiss Supreme Court Judgment in general terms and states that the judgment cannot be used as evidence that the funding of Loan 3 derived from MUS transactions. The Claimant further alleges that "the Czech authorities have investigated for several years whether the funds obtained in relation to the acquisition of MUS could have been the source of funding for the trade in poppy seed and explicitly concluded that there was no wrongdoing".[815]

559. These general arguments are, in the view of the Tribunal, not sufficient to rebut the assessment of the Respondent that Loan 3 was illegal. The Claimant further argues that the illegal origin of the funds was never proven. This view of the Claimant, however, has become irrelevant due to subsequent developments. On the basis of the [redacted] Expert Report,[816] the Claimant concedes that part of Loan 3 had been funded by MUS funds, namely CZK 330 million out of CZK 667.5 million.[817] The Tribunal further notes that, contrary to what the Claimant alleges, the Czech authorities have not ruled that there was wrongdoing on its part, but have rather concluded that, based on the evidence provided to them (which is not the same evidence that has been placed before this Tribunal), it was not possible for them to press criminal charges.

560. On the basis of this information and on the Claimant's concession regarding Loan 3, the Tribunal does not consider it necessary to deal with the question whether it had been sufficiently proven that Loan 3 was based on funds derived from a fraudulent activity. At this point, it is equally unnecessary to address the question of which party had the burden of proof, and what level of proof was required in respect of the transaction concerning Loan 3.

561. In view of the Tribunal, the fact that nearly 50 per cent of Loan 3 was generated by a fraudulent activity renders this loan contrary to international public policy and illegal under the national law of the Czech Republic, and thus, not falling within the protection of the Treaty.

814 *See* para. 418 above.
815 Claimant's Post-Hearing Brief, para. 100.
816 [redacted] Expert Report, p. 15, para. 2.6 ("From my analysis, I have identified that the funds used by Fynerdale to provide one of the nine Loans, Loan 3, ultimately derived from the Proceeds of the MUS transaction and thus the fraud perpetrated against MUS." [redacted] agreed to this finding explicitly) and pp. 37-38, paras. 8.29-8.30. *See* [redacted] Expert Report, p. 21. The result of the expert [redacted] has had an improved documentary basis since Claimant had furnished him with additional documents.
817 Claimant's Post-Hearing Brief, para. 99.

(ii) Loans 6, 7, 8 and 9

562. In consequence of the decision that the Tribunal will ascertain the legality of the loans in the jurisdictional phase, it will now turn to loans 6, 7, 8 and 9.

563. It is not contested by the Parties that Loans 6, 7, 8 and 9 were transferred through the company Appian Service (Cyprus Ltd.).

564. The sources of these four loans were discussed by the two experts. Ms. [redacted] stated in her summary that she was unable to identify the ultimate source of funds used to provide the loans 5 to 9. She further stated that "… funds originating from a bank account belonging to Mostra Investment Limited provided the monies for Loan 6 to 8" and Mostra Investment Limited, "which was connected to MUS fraud and used as a conduit for Loan 3 transaction, have also been utilized in providing monies to Fynerdale for Loans 6 to 8."[818] In section 2.11 of her report, she summarized: "[g]iven that the ultimate source of funds has not been identified, I cannot exclude the possibility that the funds used for loans 5 to 9 derived from the fraud perpetrated against MUS, particularly, given that, in my opinion, funds used for Loans 3 have derived from MUS fraud."[819] Mr. [redacted] stated in response to Ms. [redacted] s findings that he did not "find […] any factual evidence that substantiates the possibility that the funds for loan 6 derive from the alleged MUS fraud."[820] An identical statement was made concerning Loans 7, 8 and 9.[821]

565. The Tribunal sees the factual situation concerning the sources of Loans 6 to 9 as follows: whereas Ms. [redacted] does not exclude that the funds for the four loans were derived fully or in part from the MUS fraud, Mr. [redacted] – on the basis of an improved document situation, thanks to the submission of new documents by Mr. [redacted] between March and June 2020 – cannot identify any factual evidence that substantiates the findings of Ms. [redacted] In the view of the Tribunal, these two expert opinions do not fully match due to the different objectives both pursued. At the end, they both do not achieve a result on which the Tribunal may base its decision. Whereas Ms. [redacted] assumes that the investments may have been derived from fraudulent monies – which does not mean that they have, - Mr. [redacted] states that there was no factual evidence to that extent – which does not mean that there might not exist such evidence-. Accordingly, the Tribunal is bound to resort to the rules concerning the burden of proof in

818 [redacted] Expert Report, p.15, paras. 2.10 and 2.11.
819 [redacted] Expert Report, para. 2.11.
820 [redacted] Expert Report, p. 27.
821 *Id.*, pp. 29, 31, 33.

international adjudication. The question concerning the burden of proof as well as the standard of proof to be applied has been discussed by the Parties intensively.

566. As a matter of principle, it is generally accepted that the party alleging relevant facts bears the burden of proof. Reference may be made in this respect to Article 24(1) of the UNCITRAL Rules. This principle is also reflected in the rules of other international adjudicative bodies. This principle has not been disputed by either Party; they disagree, however, as to whether in the case at hand a reversal of the burden of proof is called for.

567. The Claimant asserts that the full burden of proving the alleged illegality rests with the Respondent. The Respondent disagrees, arguing that, due to the particularity of this case, it is sufficient that it provides *prima facie* evidence for the illegality of the investments undertaken by the Claimant, and it is for the latter to prove that the investment was legal.

568. The Respondent invokes basically two reasons which, in its view, justify shifting the burden of proof, namely that (i) this case is one where there is a near impossibility to prove illegal acts like corruption or money laundering,[822] and that (ii) the Tribunal has the right to shift the burden of proof.[823] The Claimant takes the opposite position, relying on the basic rule that the party alleging relevant facts has the burden of proof. Both Parties support their positions by referring to decisions of international arbitral tribunals disagreeing on whether the factual particularities of each case make it appropriate or rather inappropriate to refer to this case as a precedent. A perusal of the existing jurisprudence clearly indicates that a shift of the burden of proof depends upon the particularity of each case and that the tribunal in question has a certain discretion in assessing the relevant facts.[824] This discretionary power the Tribunal will use.

569. As indicated above, the Respondent was not able to prove that Loans 6 to 9 were made by using monies generated by fraudulent activities, and it does not claim it did. The Respondent consistently emphasized that it only was able to raise red flags.[825] The Tribunal will now reconsider the expert opinions, on the basis of what has been stated in respect of the burden of proof.

822 Reply, para. 194.
823 *Id.*, paras. 202-203.
824 *See* for example Exhibit RLA-152, *Alpha Projektholding v. Ukraine*, para. 236 *et seq*. (referred to by the Respondent) and Exhibit RLA-144, *Rompetrol v. Romania*, paras. 178 -180 (referred to by the Claimant).
825 *See* paras. 399-406 above.

(a) **Loan 6**: Mr. [redacted] could not fully trace the origin of the funding of that Loan granted by Fynerdale to Ytrix in light of a missing link concerning the payment of Appian Machinery to Chorus Investors Fund I SPC.[826] Therefore, it remains unclear whether the payment of CZK 449,999,062 was taken from the sum paid by Škoda Investment to Appian Machinery as claimed.

(b) **Loan 7**: According to Mr. [redacted] the same missing link exists in respect of Loan 7.[827] Additionally, it is to be noted that Škoda Investment paid CZK 1,500,000,000 to Appian Machinery while Chorus Investors paid only 249,999,059 to Mostra Investment Ltd. In the [redacted] Expert Report, the expert mentions that the missing link, "means that the Chorus Investors Fund I SPC might be funded by other sources, to ultimately fund loan 7 to Fynerdale as shown in Exhibit GT-10".[828]

(c) **Loan 8**: Mr. [redacted] stated that "[t]here are strong indications that ultimately Skoda Holding dividend is the source of funds for loan 8, but I was not able to verify one bank payment transaction between Chorus Investors Fund I SPC and Appian Services Cyprus Ltd., by lack of information on the bank statement of Appian Services Ltd".[829]

(d) **Loan 9**: Mr. [redacted] referring to the missing documentation between the various stages of the flow of funds, stated that he "was not able to confirm the funding of Investhold Ltd. and as a consequence, was not able to confirm that loan 9 was funded by Skoda dividend."[830]

570. The Tribunal has no doubt concerning the accuracy of the findings of Mr. [redacted].

571. The Tribunal interprets these findings in the sense that, in respect of Loans 6 to 9, it has not been established with certainty that these were funded from the dividend paid by Škoda Investment a.s. This uncertainty concerning the origin of the funds for the Loans 6 to 9 is due to the incomplete documentation and the complexity of the system for the channelling the funds.

572. It is the view of the Tribunal that it was in the responsibility of the Claimant to establish the source of the funds in the first place. The burden of proving that Loans 6 to 9 were funded from the dividend paid by Škoda Investment a.s., or other legal sources, was thus on the Claimant. Only

826 [redacted] Expert Report, pp. 26-27.
827 *Id.*, pp. 28-29.
828 *Id.*, p. 29.
829 *Id.*, p. 31.
830 *Id.*, p. 33.

after these facts are established would it have fallen upon the Respondent to prove that the origin of the funds was different and came from fraudulent sources. The Claimant has not provided such proof to the satisfaction of the Tribunal.

573. In this context, the Tribunal takes note of the elements raised by the Respondent as red flags, casting doubt on the legality of the funds used to finance the investments, including its reference to the conclusions of the 2017 Swiss Supreme Court Judgment. Following the Respondent's arguments based on alleged red flags, the Claimant would have been expected to convince the Tribunal of its good standing. However, the Claimant did not provide supplementary evidence to support its statements and further substantiate its expert's conclusions.

574. Considering the doubts due to the paucity of evidence provided by the Claimant, the Tribunal concludes that there is insufficient evidence for it to presume the legality of the origin of the funds for the loans. In consequence thereof, these loans cannot be qualified as investments protected under the Treaty in accordance with its Article 2.

575. In light of the above, the Tribunal denies jurisdiction on the basis that the origin and the legality of the investment has not been established. The Tribunal accordingly considers it unnecessary to entertain the arguments exchanged between the Parties as to whether the Claimant was in control of the investments allegedly made in the Czech Republic.

VI. DISPOSITIF

For the reasons set out above, the Tribunal,

1. **Unanimously, *rejects* the Respondent's objection that that the Tribunal lacks jurisdiction over the present dispute on the basis that the arbitration agreement contained in Treaty is incompatible with European law and thus invalid;**

2. **By majority, *finds* that the Tribunal does not have jurisdiction over the present dispute on the basis that the legality of the investment is not established;**

3. **Unanimously, *reserves* its decision on costs for an award on costs, to be issued after the receipt of costs submissions from the Parties.**

Place of Arbitration: The Hague, the Netherlands

Date of Award: 29 April 2021

Dr. Wolfgang Kühn

Professor Laurence Boisson de Chazournes

Professor Dr. Dr. h.c. Rüdiger Wolfrum
Presiding Arbitrator

Dr. Wolfgang Kühn appends a separate opinion to the Award.